

the existing legal profession. This is perhaps to foreclose the possibility that law schools will ever accomplish anything more. Unable to fully embody any ideal of what the law should be, law schools will have difficulty attracting a critical mass of inspired students or teachers. In turn, the law will lose a crucial source of impetus for change. Given universities' continuing and massive dependence upon federal funds,⁷¹ as well as the Court's failure to delineate the bounds of protected expression, only the future will show whether law schools and the law will become even more beholden to the status quo.

F. Freedom of Speech and Expression

1. *Application to Incarcerated Persons — Inmate Access to Print Media.* — The Supreme Court's steady retreat over the years from the high-water mark of protecting prisoners' constitutional rights has been well documented.¹ In *Turner v. Safley*,² the Court directed federal courts to take a deferential stance toward prison practices, ostensibly in recognition of prison officials' expertise and the courts' relative inability to understand the problems of prison administration.³ Yet less than two years ago, the Court suggested that lower courts should defer to prison officials on policies that infringe on constitutional rights only after determining, as a threshold matter, that the asserted right is inconsistent with proper prison administration.⁴ This move potentially signaled to lower courts that they should more vigorously protect prisoners' constitutional rights.⁵ Last Term, in *Beard v. Banks*,⁶ the Court rejected the Third Circuit's attempt to do so, reinstating summary judgment for Pennsylvania's prison system in a challenge to its practice of denying the worst prisoners access to nearly all books, newspapers, magazines, and photographs.⁷ Though not an express doctrinal shift, the Court's reasoning reduced the protections offered prisoners and failed to resolve a tension in the doctrine on judicial review of prison practices. Developing a justification for judicial intervention to

⁷¹ See AAUP Amicus Brief, *supra* note 62, at 23–24 (noting that in fiscal year 2003, post-secondary institutions received an estimated \$57.5 billion in federal funds, accounting for 19.2% of their expenditures).

¹ See, e.g., 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 1:7, at 25 (3d ed. 2002) (“Perhaps most telling is the complaint that the Court has been inching the law back to the now thoroughly discredited hands-off doctrine.”); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 699–700 (1993) (“The Supreme Court has dramatically narrowed the scope of judicial intervention in First Amendment . . . cases [involving prisoners].”).

² 482 U.S. 78 (1987) (striking down a prison regulation requiring superintendent approval for all inmate marriages as not reasonably related to legitimate penological interests).

³ See *id.* at 84–85.

⁴ See *Johnson v. California*, 125 S. Ct. 1141, 1148–49 (2005).

⁵ See *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 169, 229 (2005).

⁶ 126 S. Ct. 2572 (2006).

⁷ *Id.* at 2575–76 (plurality opinion).

promote prison accountability is both desirable and necessary for future judicial enforcement of prisoners' constitutional rights.

Ronald Banks, serving a life sentence in Pennsylvania state prison, filed a class action lawsuit challenging the constitutionality of the conditions in the prison's highest-security unit.⁸ The Long Term Segregation Unit Level 2 (LTSU-2) houses a population of about forty of the prison's most difficult inmates⁹ — those who are “too disruptive, violent or problematic” to be placed elsewhere.¹⁰ Prisoners in the LTSU-2 are kept in solitary confinement for twenty-three hours a day and are limited to one family visit per month.¹¹ Regulations for the LTSU-2 also provide that prisoners cannot possess any magazines, newspapers, or books, except two paperbacks from the prison library and books of a legal or religious nature; cannot possess photographs of friends or family members; cannot access radio or television broadcasts; and cannot make telephone calls except in emergencies or when related to legal representation.¹² Prisoners in the LTSU-2 have the opportunity to “graduate” to a higher level of privilege and eventually to rejoin the general prison population but may stay in the LTSU-2 indefinitely at the discretion of prison personnel.¹³

Banks sued the Secretary of the Department of Corrections for declaratory and equitable relief, arguing that the denial of nearly all print media in the LTSU-2 violated the prisoners' First Amendment rights.¹⁴ The district court granted the Secretary summary judgment, finding that the practice reasonably related to the legitimate penological interests of rehabilitation and security by encouraging compliance with prison rules and depriving prisoners of material from which to fashion weapons.¹⁵

A divided panel of the Third Circuit reversed and remanded. Writing for the majority, Judge Fuentes¹⁶ held that, even under the deferential standard established in *Turner*,¹⁷ the connection between

⁸ See *Banks v. Beard*, 399 F.3d 134, 136 (3d Cir. 2005).

⁹ *Id.* at 137 n. 1.

¹⁰ *Id.* at 137.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 137–38.

¹⁴ *Id.* at 138.

¹⁵ *Id.*

¹⁶ Judge Fuentes's opinion was joined by Judge Rosenn.

¹⁷ Under the standard announced in *Turner*, courts must evaluate four factors when reviewing a prison policy that infringes on a prisoner's constitutionally protected right: (1) the existence of a rational connection between the prison regulations and the penological interests they purport to serve; (2) the availability of alternative ways for the prisoner to exercise the relevant right; (3) the impact of accommodating the right on other prisoners, prison officials, and prison resources generally; and (4) the availability of less restrictive ways of achieving prison policy. See *Turner v. Safley*, 482 U.S. 78, 89–90 (1987).

the challenged policies and the asserted penological interests was too attenuated.¹⁸ The court found that the Secretary's justification did not satisfy *Turner's* first factor; although both security and rehabilitation are valid objectives, Judge Fuentes opined, the Secretary had produced no evidence showing a rational connection between the long duration and selective nature of the LTSU-2's deprivations and those objectives.¹⁹ Next, the court found that with respect to *Turner's* second factor, there was no reason to believe that the LTSU-2 inmates had alternative means of exercising the burdened right.²⁰ Lastly, the court rejected the district court's conclusion that, with respect to the third and fourth factors, there was no evidence that accommodating the prisoners' rights would lead to other disruptions in the prison.²¹ In dissent, then-Judge Alito suggested that although *Turner* supplied the appropriate framework, the majority's application erred in not "extend[ing] considerable deference to [the] judgments of correctional officials."²² Specifically, he argued that *Turner* requires merely a "logical connection between the regulation and the asserted goal,"²³ not "empirical evidence that the regulation in fact serves that goal."²⁴

The Supreme Court reversed and remanded. Writing for the plurality, Justice Breyer²⁵ observed that Banks failed to produce either "fact-based or expert-based refutation" of the State's factual assertions and judgments, which he noted were due greater deference under *Turner* than that given by the court below.²⁶ Applying *Turner's* "well-established" four-factor standard for evaluating prisoners' constitutional claims,²⁷ Justice Breyer determined that the deprivation was reasonably related to legitimate penological interests rather than an "exaggerated response" to those interests.²⁸

With respect to *Turner's* first factor, the plurality found sufficient evidence that the deprivation policy was rationally related to the Secretary's stated purpose of "providing increased incentives for better prison behavior."²⁹ The plurality found this evidence in the deposition

¹⁸ *Banks*, 399 F.3d at 140–48.

¹⁹ *See id.* at 140–44.

²⁰ *See id.* at 144–46.

²¹ *See id.* at 146–48.

²² *Id.* at 148 (Alito, J., dissenting).

²³ *Id.* at 149 (quoting *Turner v. Safley*, 482 U.S. 89 (1987)) (internal quotation marks omitted).

²⁴ *Id.*

²⁵ Justice Breyer's opinion was joined by Chief Justice Roberts and Justices Kennedy and Souter. Justice Alito did not participate.

²⁶ *See Banks*, 126 S. Ct. at 2580–81 (plurality opinion).

²⁷ *Id.* at 2578.

²⁸ *Id.* at 2578–79 (quoting *Turner*, 482 U.S. at 87) (internal quotation marks omitted).

²⁹ *Id.* at 2578. The other two justifications were (1) minimizing the amount of property the prisoners had in their control in which they could conceal contraband and (2) minimizing the

of the Deputy Prison Superintendent, who stated that the regulations served their purpose.³⁰ To the plurality, the “rational connection” was almost self-evident given that the newspapers and magazines had been “virtually the last privilege left to an inmate.”³¹

Candidly, Justice Breyer acknowledged that the remaining three factors “add[ed] little, one way or another, to the first factor’s basic logical rationale” and proceeded to the “real task” of determining if a reasonable, and not merely logical, relationship existed between the policy and the penological interest.³² Such a relationship indeed existed, concluded the plurality, because some twenty-five percent of LTSU-2 prisoners eventually “graduate” to less restrictive confines, presumably in part induced by the prospect of better conditions.³³

Justice Thomas concurred in the judgment.³⁴ Arguing that this case “reveal[ed] the shortcomings of the *Turner* framework,”³⁵ Justice Thomas proceeded to analyze the issue using an alternative framework he had laid out in *Overton v. Bazzetta*.³⁶ Under this approach, the Eighth Amendment is the only federal constitutional limit on the states’ chosen methods of punishment.³⁷ Above that minimum, states may specify in their constitutions and statutes, or (more likely) delegate to prison officials to determine, the appropriate way to “discipline and otherwise supervise the criminal while he is incarcerated.”³⁸

Justice Stevens dissented,³⁹ arguing that neither logic nor the evidence in the record supported a connection between the asserted penological interests and the deprivation methods. First, Justice Stevens questioned whether the policy added any marginal security benefit, given the availability of a host of other materials with which a prisoner could fashion weapons.⁴⁰ Second, he questioned the unique rehabilitative value of such extreme deprivation, given the presence of

amount of material with which prisoners could attack guards — for example, by “catapult[ing] feces . . . without the necessity of soiling one’s own hands” or by starting fires. *Id.* at 2579.

³⁰ *Id.* at 2579.

³¹ *Id.*

³² *Id.* at 2580.

³³ *Id.* at 2581. The plurality noted that against this evidence of success Banks presented no factual or expert response. The plurality agreed with the State’s claim that a twenty-five percent success rate was “acceptably high.” *Id.*

³⁴ Justice Thomas’s opinion was joined by Justice Scalia.

³⁵ *Banks*, 126 S. Ct. at 2584 (Thomas, J., concurring in the judgment). Like the plurality, Justice Thomas thought that the latter three *Turner* factors carried little independent weight. *Id.* at 2584–85.

³⁶ 539 U.S. 126, 139–40 (2003) (Thomas, J., concurring in the judgment).

³⁷ *Banks*, 126 S. Ct. at 2582–83 (Thomas, J., concurring in the judgment).

³⁸ *Id.* at 2583 (quoting *Overton*, 539 U.S. at 140 (Thomas, J., concurring in the judgment)). Justice Thomas also noted that “unfettered right[s] to magazines, newspapers, and photographs” have not traditionally been granted to prisoners. *Id.* at 2583–84.

³⁹ Justice Stevens’s opinion was joined by Justice Ginsburg.

⁴⁰ *Banks*, 126 S. Ct. at 2586–87 (Stevens, J., dissenting).

other means of creating incentives and the long duration of stays in the LTSU-2.⁴¹ In doing so, Justice Stevens also warned that the plurality's deference to "the strong form of the deprivation theory of rehabilitation" could obliterate the constitutional protections under the *Turner* standard so long as prison officials claim that increasingly recalcitrant prisoners require ever harsher inducements.⁴² Finally, Justice Stevens reminded the plurality of the regulation's severity and of its threat to an individual's sense of identity and freedom of conscience.⁴³

Justice Ginsburg also dissented and joined issue with the plurality's "apparent misapprehension of the office of summary judgment."⁴⁴ First, Justice Ginsburg argued that the "slim" support produced by the Secretary⁴⁵ left room for reasonable disagreement on the issue of whether the deprivation was "so remote" from penological objectives as to be "arbitrary or irrational."⁴⁶ Second, Justice Ginsburg criticized the plurality's handling of the tension between the procedural requirement that the court, upon a motion for summary judgment for the prison, make "all justifiable inferences in Banks'[s] favor," and the substantive *Turner* requirement that they defer to prison officials' judgment.⁴⁷ In Justice Ginsburg's view, it is illogical to view disputed facts in the light most favorable to the nonmoving prisoner only *after* deferring to the prison officials' judgment as to those very disputed facts;⁴⁸ the plurality condemned prisoners to face a daunting burden in disproving prison officials' "reflexive, rote assertions."⁴⁹

By accepting that extreme deprivation of First Amendment rights can lead to rehabilitation and is therefore related to a legitimate penological interest, the plurality subtly but surely took a large step toward the approach adopted by Justice Thomas — that the Constitution, except for the rock-bottom Eighth Amendment limits, does not apply in prisons. This doctrinal development is not surprising given that after thirty years of attempts, the Court has yet to develop a satisfying foundation for judicial review of prison policies.⁵⁰ This absence is, in turn, attributable to the Court's lack of a theory of proper incar-

⁴¹ *Id.* at 2588–91.

⁴² *Id.* at 2588.

⁴³ *Id.* at 2591.

⁴⁴ *Id.* at 2592 (Ginsburg, J., dissenting).

⁴⁵ This support amounted largely to rote assertions and speculative statements about the LTSU-2's effectiveness. *See id.*

⁴⁶ *Id.* at 2593 (quoting *Turner v. Safley*, 482 U.S. 78, 89–90 (1987)).

⁴⁷ *Id.* at 2592–93 (alteration in original) (quoting *id.* at 2578 (plurality opinion)) (internal quotation marks omitted).

⁴⁸ *See id.*

⁴⁹ *Id.* at 2592 (quoting *Shimer v. Washington*, 100 F.3d 506, 510 (7th Cir. 1996)) (internal quotation mark omitted).

⁵⁰ The Court has written that it need not "determine the extent to which [First Amendment rights] survive[] incarceration." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

ceration, without which there is no coherent way to determine which constitutional rights can be denied to achieve the aims of punishment. Accordingly, Justice Thomas's view becomes an increasingly attractive theory to occupy the void. However, a justification for scrutinizing prison policies exists that does not require courts to rely on a theory of incarceration: courts can and should promote accountability and efficacy for prison policies because other mechanisms fail to do so. This justification could both provide a stronger foundation for judicial scrutiny of prisons and reinvigorate the *Turner* standard.

The plurality opinion and Justice Thomas's concurrence are far more similar than meets the eye. For the first time, the Supreme Court has blessed rehabilitation through the deprivation of constitutional rights as a legitimate means to further a penological interest.⁵¹ In light of this degree of deference, it is difficult to see what practice would not survive *Turner*'s now-toothless reasonableness test⁵²: every act or policy of the prison that abridges a constitutionally protected interest could be justified as "rehabilitative" because prisoners would want to reform in order to regain that right. To be sure, there is a formal difference between the approaches: for Justice Thomas, only the Eighth Amendment applies in prisons; for the plurality, the entire Constitution applies but permits rehabilitative practices that undermine the rights protected by it. This difference disappears beneath the surface of form. In effect, state prison officials from now on will be able to abridge constitutionally protected rights "merely by reciting talismanic incantations" of rehabilitation.⁵³

That the Court's review of prison practices would deteriorate to near-total deference is not surprising given the lack of a coherent justification for non-Eighth Amendment constitutional review. The Court has always been troubled by the idea of intervening in prisons — institutions with problems so "complex and intractable" that solutions "require expertise, comprehensive planning, and the commitment of re-

⁵¹ The Court foreshadowed this move in *Overton* by siding with prison officials' view that "[w]ithdrawing visitation privileges is a proper and even necessary management technique to induce compliance . . . , especially for high-security prisoners who have few other privileges to lose." *Overton*, 539 U.S. at 134. The prisoners in *Overton* were denied the visitation rights because they had violated substance abuse rules and smuggled drugs into prison during visits. *See id.* In contrast, the LTSU-2 uses deprivation as a general deterrent and does not limit it to prisoners who have previously used books or newspapers to cause harm.

⁵² Justice Thomas recognized this result of the plurality's conclusion, noting that it "would entitle prison officials to summary judgment against challenges to their inmate prison deprivation policies in *virtually every case.*" *Banks*, 126 S. Ct. at 2584 n.2 (Thomas, J., concurring in the judgment) (emphasis added); *cf.* *Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228, 240 (D.C. Cir. 2003) (Tatel, J., concurring in part and dissenting in part) (noting that "regulations that deprive prisoners of their constitutional rights will *always* be rationally related to the goal of making prison more miserable").

⁵³ *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 137, 245 (1989).

sources . . . [from] the legislative and executive branches of government.”⁵⁴ Despite these misgivings, federal courts have been intervening for the past thirty years, including last year’s Supreme Court decision in *Johnson v. California*,⁵⁵ which held that strict scrutiny rather than *Turner* deference was appropriate for reviewing prison regulations that temporarily separate inmates by race and national origin.⁵⁶ The decision to apply strict scrutiny turned on the finding that the right guaranteed by the Equal Protection Clause is not “inconsistent with proper incarceration.”⁵⁷ This conclusion naturally raises the question of how courts can determine which rights are consistent with proper incarceration.⁵⁸ The *Johnson* Court did not, however, provide an account of what proper incarceration entails or forbids.⁵⁹ By failing to do so, the *Johnson* holding ultimately collapsed back into *Turner* because “proper incarceration” can refer only to the *means* — assessments of which *Turner* commands deference. Given this circularity, the Court faced a choice either to develop an independent theory about what “proper prison administration” entails and which rights are inconsistent with it, or essentially to abandon meaningful judicial review altogether. The Court in *Banks* chose the latter, the plurality implicitly and Justice Thomas expressly.

Developing a theory of proper incarceration and its relation to constitutional rights would likely prove difficult. First, the Court would need to create the theory out of whole cloth. Doctrines implementing the Eighth Amendment’s prohibition on “cruel and unusual punishment”⁶⁰ in the context of incarceration focus on whether prison officials have subjective intent to punish and on whether the objective

⁵⁴ *Procunier v. Martinez*, 416 U.S. 396, 405 (1974).

⁵⁵ 125 S. Ct. 1141 (2005).

⁵⁶ *See id.* at 1152. Curiously, in his dissent in that case, Justice Thomas argued that the Court should have applied the *Turner* standard instead of strict scrutiny to evaluate *Johnson*’s equal protection challenge. *Id.* at 1160. There is no mention in the dissenting opinion of the approach that Justice Thomas had mapped out in *Overton* just two Terms earlier.

⁵⁷ *Id.* at 1149 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)).

⁵⁸ As one commentator has noted, “it is doubtful” that the *Johnson* test “will be more than a staging ground for diverging judicial opinions on the character of fair punishment.” *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 169, 236 (2005); *see also* *Amatel v. Reno*, 156 F.3d 192, 209 (D.C. Cir. 1998) (Wald, J., dissenting) (noting that “the contours of the government’s interest in rehabilitation are quite amorphous and ill-defined”).

⁵⁹ The Court offered two reasons for its approach that in turn begged and side-stepped the question. First, it asserted that the ban on racial discrimination was “inconsistent with proper prison administration.” *Johnson*, 125 S. Ct. at 1149. Second, the Court reasoned that because government power is “at its apex” in prisons, “searching judicial review of racial classifications is necessary to guard against invidious discrimination.” *Id.* at 1150. But neither reason explains why proper prison administration cannot require some use of racial classification, and neither explains why other constitutional rights are not similarly in danger of abuse when government power is at its apex.

⁶⁰ U.S. CONST. amend. VIII. *See generally* MUSHLIN, *supra* note 1, §§ 2:2–2:3.

conditions of the prison meet “contemporary standards of decency”⁶¹ and do not lead to “the unnecessary and wanton infliction of pain.”⁶² These doctrines have evolved to guard against only the worst abuses and do not place many restrictions or requirements on prisons.⁶³ As such, they provide scant foundation for building a more positive theory of incarceration through which to evaluate the asserted penological aims of prison officials when constitutional rights are at stake.

Second, even with a theory of incarceration in place, the Court would need to develop an operative rule for First Amendment challenges to prison practices that would be judicially manageable. Concerns about judicial manageability may, as Professor Richard Fallon has argued, be driven by underlying “calculations of costs and benefits” of judicial intervention.⁶⁴ The costs of repeated litigation over the precise boundaries of “proper incarceration” are likely to be high for challenges under the First Amendment given the breadth of activities it protects.⁶⁵ As a result, implementing a theory might be prohibitively costly.⁶⁶

If the ambivalence toward judicializing incarceration reflected in *Johnson* and *Banks* is any indication, future courts are likely to intervene sporadically (if at all), protecting some constitutional rights and not others, all the while claiming that “proper prison administration” explains the difference. However, the absence of a theory of proper incarceration does not mean that courts should cease to review prison

⁶¹ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

⁶² *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

⁶³ The Constitution, the Court has written, “‘does not mandate comfortable prisons,’ but neither does it permit inhumane ones.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citation omitted) (quoting *Rhodes*, 452 U.S. at 349). But it is unclear what prisons must do to avoid being “inhumane.” See MUSHLIN, *supra* note 1, § 2:2, at 70–71 (listing physical health and safety as among the basic requirements for prisons to meet the “minimal civilized measure(s) of life’s necessities” (quoting *Hudson v. McMillian*, 503 U.S. 1, 20 (1992) (Thomas, J., dissenting))). A prisoner’s psychological health is arguably also protected under the Eighth Amendment, because “in a prison setting, where prison officials have such total control over inmates, the potential for the infliction of severe psychological harm is quite real.” *Id.* § 2.2, at 74; see also *Hudson*, 503 U.S. at 16–17 (Blackmun, J., concurring in the judgment).

⁶⁴ Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1302 (2006).

⁶⁵ See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (upholding censorship of publications delivered to prisoners); *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977) (upholding restriction on inmate labor union solicitations); *Kimberlin v. U.S. Dep’t of Justice*, 318 F.3d 228 (D.C. Cir. 2003) (upholding restriction on prisoner use of electric musical instruments); *Waterman v. Farmer*, 183 F.3d 208 (3d Cir. 1999) (upholding restriction on prisoner access to pornography).

⁶⁶ Cf. Fallon, *supra* note 62, at 1300 (noting that the “Court may believe that prisoners’ suits are likely to be vexatious and trivial and that the costs of full judicial enforcement of constitutional norms would therefore outweigh the benefits”). Under the *Johnson* approach, a determination that a right is *consistent* with incarceration would entail the same level of scrutiny that would be applicable to nonprisoners, which, in the First Amendment context, would be quite high even if the regulation were content neutral. See *United States v. O’Brien*, 391 U.S. 367 (1968).

policies⁶⁷ because there are serious worries about arbitrariness in the exercise of power in prisons, an arbitrariness made possible by the near-total lack of accountability for prison practices.

More so than in any other context, the State's power in prisons largely goes unchecked by the political process.⁶⁸ Judicial abdication represents the withdrawal of a crucial source of accountability for prison officials. In contrast, other instances of judicial underenforcement are less troubling because robust political mechanisms exist to check abuse and enforce constitutional principles. For example, the Court's recent decision to defer to local government interpretations of what is "public use"⁶⁹ arguably underenforces the Takings Clause, but it is reasonable to believe that "the political process [of state governments] reliably checks invidious policies . . . [and] abuses of the eminent domain power."⁷⁰ Other institutions in which individuals receive reduced judicial protections — such as schools and the military⁷¹ — are also likely more susceptible to political pressure from those individuals or their representatives than are prisons.⁷² Without similar

⁶⁷ Justice Thomas's view is also doctrinally more radical because, even under *Banks*'s high degree of deference, the Court still formally claims that *Turner* is not toothless and requires more than just a logical link between means and ends. See *Banks*, 126 S. Ct. at 2580.

⁶⁸ See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 804 (2006) (noting that convicts are "politically unattractive" and unlikely to receive the attention and care of legislators); *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1844 (2002) (noting that prisons "historically have had poor accountability").

⁶⁹ *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

⁷⁰ *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 169, 295 (2005). The nondelegation doctrine is another notorious example of an underenforced, "entirely toothless" constitutional rule. Fallon, *supra* note 62, at 1302 & n.123. But the executive branch's political accountability provides a plausibly reliable check on agency lawmaking. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–39 (2001) (arguing that agency action coordinated through and directed by the President enhances political accountability); *cf.* *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").

⁷¹ See, e.g., *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685–86 (1986) (upholding sanction of student for using lewd language in school); *Brown v. Glines*, 444 U.S. 348 (1980) (upholding regulations on circulating petitions on an Air Force base).

⁷² First, both soldiers and students have, either directly or through sympathizers, significant political influence, which can check arbitrariness and abuse. Second, neither a school nor the military constitutes the entirety of an individual's life, and whatever rights are reduced inside the institutional setting can be exercised outside. Third, even the standard articulated in school and military First Amendment cases is more protective than that applied in prisoners' cases. See *Glines*, 444 U.S. at 355 (citing *Procunier v. Martinez*, 416 U.S. 396 (1974)) (upholding Air Force regulations that "restrict speech no more than is reasonably necessary to protect the substantial governmental interest"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (requiring a school to show that the restricted speech would otherwise "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted)).

checks, the potential for arbitrariness and abuse in prisons warrants greater judicial scrutiny than post-*Banks* courts are likely to afford.

An alternative to the plurality's approach would be to conduct a more searching inquiry into the connection between the ends and means, requiring evidence — not mere assertions — from prison officials supporting the claim that certain policies are necessary for security or rehabilitation. This approach recognizes the inadequacy of political mechanisms for promoting accountability and the efficacy of prison policies, and supports continued court intervention. Judicial review would continue to defer to prison administration determinations of proper penological interests that could, if reasonably implemented, infringe on constitutional rights, but increasing the prison's burden of production would hopefully lead to better-supported policies and help eliminate hunch-based regulations that are injudiciously conceived and arbitrarily applied.⁷³ In invalidating the ban on inmate marriages, the *Turner* Court did not defer unquestioningly to the prison administration's determination of the rehabilitative benefits.⁷⁴ A return even to that level of scrutiny would improve accountability in prisons when fundamental constitutional rights are at stake.

Such a shift in doctrine may further embroil lower federal courts in the management of state prisons. Yet now is a time when heightened judicial involvement may be especially necessary.⁷⁵ The rise of the "supermax" prison in the last two decades threatens to make the kind of treatment in *Banks* a reality for many more of the 1.25 million persons currently incarcerated in state prisons.⁷⁶ Judicial oversight will

⁷³ Increased judicial involvement may have both direct and indirect impacts. Directly, litigation and judicial mandates during the 1960s produced dramatic results in improving the conditions of prisons and could continue to do so. See Sturm, *supra* note 1, at 652. Indirectly, outside scrutiny would force officials to reexamine the factual support behind their policies, leading to more principled decisionmaking not unlike what is required of administrative agencies under the doctrine of "hard look review." See Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 238–39 (1984); see also Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 596–97 (2002) (noting that external "examination can counteract the overconfidence and tunnel vision of expertise without displacing the primary role of experts in policy formulation").

⁷⁴ See *Turner v. Safley*, 482 U.S. 78, 98 (1987). The Court implicitly shifted the burden onto the prison to argue that a less restrictive marriage regulation would not serve its interests. *Id.*

⁷⁵ As Justice White once wrote, the Court's doctrine "is not graven in stone. As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court." *Wolff v. McDonnell*, 418 U.S. 539, 571–72 (1974).

⁷⁶ For statistics on the current prison population, see PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2005 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjimo5.pdf>. One report estimates that there are currently 25,000 inmates in state prisons kept in supermax facilities. See DANIEL P. MEARS, URBAN INSTITUTE, EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS 4 (2006), available at http://www.urban.org/UploadedPDF/411326_supermax_prisons.pdf. For a general discussion of supermax prisons, see

become increasingly necessary not only to vindicate constitutionally protected rights, but also to increase accountability in light of the spread of extreme deprivation as an ordinary tool of incarceration. Federal courts first need to resolve the tension within the framework of *Turner* and *Johnson* by moving beyond the dichotomy that hinges on the meaning of proper incarceration. They then should focus on promoting accountability for increasingly severe restrictions on constitutionally protected rights. Unfortunately, *Banks* accomplished neither goal and represents the further retreat of constitutional protections from prisons.

2. *Public Employee Speech*. — Management of speech within government institutions has historically supplied abundant material for a “first amendment nightmare.”¹ The Supreme Court initially afforded no constitutional protection to public employees dismissed for speaking in an unwelcome fashion,² later forbade the government from conditioning employment on the surrender of constitutional rights that it could not abridge directly,³ and then announced in 1968 that the “problem in any case” is to balance the employee’s interest in commenting upon matters of public concern against the state’s interest in providing efficient public service.⁴ Last Term, in *Garcetti v. Ceballos*,⁵ the Supreme Court held that when public employees make statements pursuant to their duties, they receive no First Amendment protection from discipline at the hands of their employers.⁶ This decision may allay employers’ fears of judicial interference, yet the Court’s per se rule departs from precedent in ways that fail to advance — and may even harm — the important interests at stake. Rather than eradicate First Amendment protection for speech uttered in the course of official duties, the Court should have preserved the traditional balancing of interests in those limited circumstances in which employee speech is mandated by constitutional canons or professional codes of ethics. Recognizing that an individual may be compelled to speak in such

Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385 (2001).

¹ Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1768 (1987).

² From the end of the nineteenth century to the middle of the twentieth century, the Court considered government employment not a right but a privilege, a distinction Oliver Wendell Holmes captured in *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892). According to Holmes, a policeman fired for political activity “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *Id.* at 517. For a Supreme Court case echoing this reasoning, see *Adler v. Board of Education*, 342 U.S. 485 (1952).

³ See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967).

⁴ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

⁵ 126 S. Ct. 1951 (2006).

⁶ *Id.* at 1960.