Checkmate: Why the First Amendment Protects Prison Inmates' Right to Play Correspondence Chess Using Algebraic Notation

Eric T. Kasper
ARTICLES

CHECKMATE: WHY THE FIRST AMENDMENT PROTECTS PRISON INMATES’ RIGHT TO PLAY CORRESPONDENCE CHESS USING ALGEBRAIC NOTATION

ERIC T. KASPER*

I. OPENING THEORY: CHESS, INMATES, AND THE FIRST AMENDMENT

Chess is an ancient game, with a scholarly consensus long concluding that it originated in India in the sixth century1 (although an alternative theory alleges the game was invented in China).2 Regardless of the game’s exact birthplace, historical evidence indicates that early versions of the game spread during the Middle Ages to the west through Persia and the Middle East to Africa and then to Europe.3 Most modern rules for piece movement in chess were standardized by the end of the fifteenth century.4 The rules of the game today are governed by the International Chess Federation (FIDE), which was founded in 1924.5 According to the United Nations, chess is now played around the world regularly by hundreds of millions of people.6

* Eric T. Kasper is a professor of political science at the University of Wisconsin-Eau Claire, where he serves as the director of the Menard Center for Constitutional Studies. He also serves as the municipal judge for the City of Rice Lake, Wisconsin. Kasper holds a J.D. from the University of Wisconsin Law School and a Ph.D. from the University of Wisconsin-Madison. His next book, to be released in 2024 and co-authored with Troy A. Kozma, will be titled THE SUPREME COURT AND THE PHILOSOPHER: HOW JOHN STUART MILL SHAPED U.S. FREE SPEECH PROTECTIONS. Special thanks to Scott Ingram, Philip Petrov, and David Carlson for their helpful feedback on earlier drafts of this article.

4 Murray, supra note 1, at 776-78.
Indeed, although this game is approximately 1,500 years old, it has remained popular in modern times. In the United States, chess was fashionable among members of the founding generation, played by Benjamin Franklin, George Washington, John Adams, Thomas Jefferson, James Madison, and James Monroe, among other leaders. During the twentieth century, game play was particularly widespread in the Soviet Union, where chess received significant state support as a way to try to claim communist superiority. During the Cold War the game experienced a surge in popularity in the United States, particularly in 1972 when American Bobby Fischer played for, and won, the World Chess Championship against Soviet grandmaster Boris Spassky. The game is experiencing another resurgence of popularity in the 2020s, with Danny Rensch, the chief chess officer of the world’s most utilized online chess website, Chess.com, reporting twenty million active monthly users and more than five million daily active users in 2022. Continued recent proliferation in user traffic led to more than ten million people playing on Chess.com on a single day in January 2023, causing the platform’s servers to crash. By April 2023, Chess.com was averaging twelve million users per day. Some of this renewed interest in chess may have been driven by the COVID-19 pandemic leaving many people to find an outlet for recreation at home, as well as by the success of the 2020 chess-themed Netflix series, The Queen’s Gambit, which was watched by sixty-two million households. Even among players in the National Football League, chess has become a favored pastime, and in recent years

7 SUNIL WEERAMANTRY ET AL., GREAT MOVES: LEARNING CHESS THROUGH HISTORY 134-35, 139-40 (2017); SHENK, supra note 3, at 92.
8 SHENK, supra note 3, at 168-69.
there is evidence of tremendous growth in the popularity of chess among middle school and high school students.\textsuperscript{15}

Certainly, the development and availability of online gaming options and chess players promoting the game on social media have helped to grow chess in recent years.\textsuperscript{16} This predates the COVID-19 pandemic, as the ability to play chess against others on cellular telephones extends back to at least the first decade of the twenty-first century.\textsuperscript{17} Nevertheless, over-the-board games continue to be played, including in tournament play,\textsuperscript{18} and traditional correspondence chess remains popular.\textsuperscript{19}

Within prisons, in recent years FIDE has launched the “Chess for Freedom” program, which promotes inmates playing chess in several counties, including the United States.\textsuperscript{20} With this program FIDE has established and begun sponsoring an intercontinental chess championship for prison inmates.\textsuperscript{21} An organization called “The Gift of Chess” has a prison outreach initiative with the goal of distributing chess sets to inmates.\textsuperscript{22}

Jevon Jackson, an inmate at the Green Bay Correctional Institution in Green Bay, Wisconsin, played correspondence chess while incarcerated.\textsuperscript{23} However, prison authorities denied Jackson access to certain types of incoming mail addressed to him, including postcards containing chess moves written in algebraic notation.\textsuperscript{24} As explained by Chess.com, “algebraic notation shows you . . . the name of the piece that is moved and then the square where the piece moves. Each piece has an abbreviation . . . , while every square on the

\textsuperscript{15} Natanson, \textit{supra} note 12.

\textsuperscript{16} See id. (To explain the rise of chess popularity “among tweens and teens . . . [s]tudents and chess spectators point to the influence of chess stars and social media personalities such as Levy Rozman, whose YouTube channel GothamChess has more than 3.5 million subscribers; Hikaru Nakamura, an American grandmaster with 1.9 million YouTube subscribers; and the Botez sisters, elite American Canadian players who boast a combined following of close to two million on YouTube and Twitch.”).


\textsuperscript{18} Alexey Root, \textit{Chess Boom: Will the U.S. Produce Another Bobby Fischer?}, \textit{BIG THINK} (Jan. 21, 2022), https://bigthink.com/high-culture/chess-us-another-bobby-fischer/.


\textsuperscript{20} \textit{About the Chess for Freedom Programme}, \textit{INT’L CHESS FED’N}, https://chessforfreedom.fide.com/about/ (last visited Dec. 4, 2023).

\textsuperscript{21} Id.

\textsuperscript{22} Id. at *2.

\textsuperscript{23} Id. at *2.
chessboard has its own name."\textsuperscript{25} Jackson filed inmate complaints over the
denial of this mail delivery, but these complaints were dismissed by an
examiner.\textsuperscript{26} Jackson later raised in federal court a First Amendment claim over
this mail censorship.\textsuperscript{27} U.S. District Judge John C. Shabaz upheld this restriction
on Jackson’s mail in \textit{Jackson v. Pollard},\textsuperscript{28} ruling that “[t]he regulation has a
valid, rational connection to the legitimate interest of institution security,”\textsuperscript{29}
because “[c]ommunications in code are difficult to decipher and could be used
to further drug trafficking, convey escape plans, relay gang messages, plan
disturbances, order attacks on staff and other inmates and engage in other
criminal conspiracies.”\textsuperscript{30} According to Judge Shabaz, Jackson could “play chess
by mail by writing out his moves in words rather than in code. There has been
no showing that there is another alternative to this regulation which would guard
against the dangers of inmates communicating in code.”\textsuperscript{31} Prison bans on
inmates playing correspondence chess were also assumed to be constitutional
by the U.S. Court of Appeals for the Third Circuit in \textit{Nasir v. Morgan}, where
that court explained, “[m]ost prisons . . . forbid inmates from playing
correspondence chess with either inmates in other institutions or with outsiders.
The symbols used to convey the next move may conceal a code being used for
nefarious purposes.”\textsuperscript{32}

What may seem like a relatively minor matter to some observers—inmates’
ability to plan correspondence chess—raises profound questions about the First
Amendment and the constitutional protection of the freedom of expression.
There is no question that prison officials face difficulties in keeping order in
penitentiaries and in providing safety to inmates, staff, and the outside public,
and prison officials need the tools to achieve those important goals;\textsuperscript{33} indeed, as
explored below, actual threats to safety and individualized suspicion of criminal

more detailed description of chess notation will be provided in Part IV below.
\textsuperscript{26} \textit{Jackson,} 2007 WL 1556867, at *2.
\textsuperscript{27} \textit{Id.} at *1.
\textsuperscript{28} \textit{Id.} at *4.
\textsuperscript{29} \textit{Id.} at *3.
\textsuperscript{30} \textit{Id.} at *2.
\textsuperscript{31} \textit{Id.} at *4.
\textsuperscript{32} \textit{Nasir v. Morgan,} 350 F.3d 366, 374 n.7 (3d Cir. 2003).
\textsuperscript{33} \textit{See, e.g.,} Procunier v. Martinez, 416 U.S. 396, 412 (1974), overruled by \textit{Thornburgh v. Abbott,} 490 U.S.
401 (1989).

One of the primary functions of government is the preservation of societal order through
enforcement of the criminal law, and the maintenance of penal institutions is an essential
part of that task. The identifiable governmental interests at stake in this task are the
preservation of internal order and discipline, the maintenance of institutional security
against escape or unauthorized entry, and the rehabilitation of the prisoners.
activity can justify restrictions on inmate expression. However, more balance is needed in ensuring that inmates’ First Amendment free expression rights are properly protected in the process. Although, as this article will demonstrate, prison inmate expression rights can be curtailed to a greater degree than is the case for the general public, they cannot be abolished altogether consistent with the U.S. Constitution. Yet, the relevant constitutional test to measure if prison regulations violate inmates’ rights—from Turner v. Safley (1987)—has been weakened in recent decades to make it completely toothless. How these inmate correspondence rights are protected has implications for the First Amendment rights of the general public, especially those who communicate with inmates. Bans on correspondence chess—internally between inmates and in games between inmates and persons outside of prisons—provide an excellent example of why the U.S. Supreme Court’s current test for inmates’ free expression rights needs revisiting and revitalizing.

This article will proceed as follows. Part II will explore the evolution of the Supreme Court’s test for restrictions on inmates’ expression over the last several decades. Part III will demonstrate how those rights have been diminished by the Court in recent years, examining the problems with the Court’s overly deferential approach to prison officials when it comes to restricting inmate expression. Part IV will apply a more vigorous approach to the Turner test—a Turner test “with teeth”—to bans on correspondence chess. As will be detailed below, chess has numerous significantly positive benefits for those who play the game. Prohibitions on inmates’ ability to play correspondence chess constitute a form of content discrimination that has consequences for communication relating to other games and many other subjects. As Part IV will conclude, the current overbreadth of speech suppression harms public safety by reducing opportunities for inmates to be rehabilitated, it has negative effects that disproportionately fall on marginalized communities, and it has repercussions for the robustness of the First Amendment’s protections for everyone in the United States.

II. OPEN GAME V. CLOSED GAME: THE EVOLUTION OF SUPREME COURT DECISIONS ON INMATE EXPRESSION RIGHTS

As explained by G. Edward White, “the First Amendment and freedom of speech ‘came of age,’ that is, came to occupy the status of constitutional and cultural lodestars, in twentieth-century America.” In this regard, the U.S. Supreme Court held in Police Dept. of Chicago v. Mosley (1972) that “the First Amendment and freedom of speech ‘came of age.’”

Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.\(^{36}\) When reaffirming this principle in \textit{R.A.V. v. City of St. Paul} (1992), the Court succinctly declared that, under the First Amendment, “[c]ontent-based regulations are presumptively invalid.”\(^{37}\) As explained by the Court in \textit{Reed v. Town of Gilbert} (2015), “[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”\(^{38}\) Accordingly, in public forums, content-based restrictions on speech must meet the requirements of strict scrutiny.\(^{39}\) As the Court made clear in \textit{Arizona Free Enterprise Club v. Bennett} (2011), strict scrutiny requires “the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”\(^{40}\) For content neutral regulations of speech in public forums, restrictions must meet an intermediate level of scrutiny, by being “narrowly tailored to serve a significant governmental interest, and . . . leave[ing] open ample alternative channels for communication of the information.”\(^{41}\) Furthermore, the Court’s First Amendment overbreadth doctrine proclaims that a law “is facially invalid if it prohibits a substantial amount of protected speech”\(^{42}\) because “the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas.”\(^{43}\)

The Court likewise has a long history of protecting expression delivered through the postal service.\(^{44}\) As explained by Justice Oliver Wendell Holmes Jr. in dissent in \textit{U.S. ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson} (1921),

\begin{quote}
The United States may give up the post office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues and it would
\end{quote}

\(^{36}\) Police Dep’t of City of Chi. v. Mosley, 408 U.S. 92, 95 (1972).


\(^{39}\) Id. at 164.


\(^{43}\) Id.

\(^{44}\) This was not always the case, as “Supreme Court rulings between the 1880s and 1920s had rendered the Post Office Department a largely First Amendment-free zone.” Samantha Barbas, \textit{The Esquire Case: A Lost Free Speech Landmark}, 27 WM. & MARY BILL RTS. J. 287, 289 (2018). That began to change in the 1930s, with the Court finding that the First Amendment explicitly limited the post office’s ability “to restrict and censor the mail” in the 1940s. Id. at 288-89.
take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man.\textsuperscript{45}

This emphasis on the importance of the mail service to free expression, and the harm that one official could do by restricting that right, was understood by a majority of the Court in \textit{Hannegan v. Esquire, Inc.} (1946).\textsuperscript{46} In that case, the Court reversed the postmaster general’s decision to revoke a second-class mailing permit for \textit{Esquire} magazine\textsuperscript{47} (a revocation imposed due to sexual-themed content in the magazine),\textsuperscript{48} with the Court reasoning, “[t]o uphold the order of revocation would . . . grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred.”\textsuperscript{49} In \textit{One, Inc. v. Olesen} (1958), the Court summarily reversed the City of Los Angeles Postmaster’s decision to refuse to deliver through the mails an openly LGBTQ-focused magazine.\textsuperscript{50} \textit{Bolger v. Youngs Drug Products} (1983) overturned a federal ban on mailing unsolicited commercial advertisements for contraceptives.\textsuperscript{51} The \textit{Bolger} Court reasoned that the government’s justification of shielding children from such reading material was insufficient to ban it from the mail, with the Court colorfully declaring that “[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.”\textsuperscript{52} In another commercial speech case, \textit{Shapero v. Kentucky Bar Association} (1988), the Court overturned a state ban on attorney direct-mail solicitation of clients.\textsuperscript{53} The Court protected mail delivery in \textit{Bolger} and \textit{Shapero} even though the First Amendment test for commercial speech permits more government regulation of expression than is the case for non-commercial expression.\textsuperscript{54}

With this host of precedents protecting against government restrictions of mail correspondence and against government control over speech because of its subject matter, why could Jevon Jackson’s mail be censored, based on content, by administrative officials, for use in an environment that does not include


\textsuperscript{46} Hannegan v. Esquire, Inc., 327 U.S. 146, 158-59 (1946).

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Id.} at 151.

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} One, Inc. v. Olesen, 241 F.2d 772 (9th Cir. 1957), rev’d, 355 U.S. 371 (1958).


\textsuperscript{52} \textit{Id.} at 74.


\textsuperscript{54} Sorrell v. IMS Health Inc., 564 U.S. 552, 582 (2011) (Breyer, J., dissenting)
children? The answer, in short, is that the Court does not require strict scrutiny, or now even intermediate scrutiny, on restrictions of First Amendment expressive activities for prison inmates.

The U.S. Supreme Court’s first case examining First Amendment free expression rights at a place of incarceration, Adderley v. Florida (1966), dealt with constitutional liberties for civilian protestors, not inmates. Nevertheless, the case forecasted what paragraphs below will detail as a trend of severely circumscribing protections for free speech at places of incarceration. Adderley arose due to the arrest and conviction for criminal trespass of Florida A&M University students protesting at the Leon County jail in Tallahassee, Florida. These students were protesting the arrest of other college student demonstrators, and they were protesting against racial segregation in Florida, including racial segregation at the Leon County jail. Their protest took place near a jail entrance and on a driveway not typically used by the general public, but instead used primarily by the sheriff’s department for inmate transport to and from court and used by commercial vendors doing business with the jail. The U.S. Supreme Court affirmed these convictions. The Court concluded that the arrests were undertaken due to the protestors’ “presence on that part of the jail grounds reserved for jail uses,” not because “the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest.”

Placing emphasis on the protest activities taking place on “what amounted to the curtilage of the jailhouse,” the Court held that “[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”

Justice William Douglas dissented in Adderley, arguing that there was no reason to treat places of incarceration as fundamentally different for First Amendment rights than other government properties: “The jailhouse, like an executive mansion, a legislative chamber, a courthouse, or the statehouse itself

56 Id. at 40.
57 Id.
58 Id. at 45.
59 Id. at 48.
60 Id. at 47.
61 Id.
63 Adderley, 385 U.S. at 47.
64 Id.
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. . . is one of the seats of governments . . . . And when it houses political prisoners or those who many think are unjustly held, it is an obvious center for protest." 65 As argued by Justice Douglas, for protestors at places of incarceration, “[t]heir methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable, as these were.” 66 Douglas believed that the majority was committing a fundamental error in its interpretation of the First Amendment by giving the sheriff unilateral discretion over what expression could occur at the jail:

[T]o place such discretion in any public official, be he the “custodian” of the public property or the local police commissioner, is to place those who assert their First Amendment rights at his mercy. It gives him the awesome power to decide whose ideas may be expressed and who shall be denied a place to air their claims and petition their government. Such power is out of step with all our decisions prior to today where we have insisted that before a First Amendment right may be curtailed under the guise of a criminal law, any evil that may be collateral to the exercise of the right, must be isolated and defined in a “narrowly drawn” statute lest the power to control excesses of conduct be used to suppress the constitutional right itself. 67

These arguments failed to convince a majority of the Court though. As later cases directly involving the First Amendment rights of inmates will reveal, Douglas’s concerns with the level of scrutiny the Court would apply to the discretionary decisions of one prison official to silence peaceful expression would be at issue in numerous cases.

The sentiment of the Court majority in Adderley that permitted wider government restrictions over expressive rights at places of incarceration lied dormant when the Court first heard a case about prison inmates’ rights in Johnson v. Avery (1969). The Court reviewed a Tennessee statute that prohibited inmates from helping other inmates prepare legal writs. 68 Tennessee justified this ban “as a part of the State’s disciplinary administration of the prisons.” 69 In striking down this restriction, 70 the Court explained how Tennessee’s law effectively forbade illiterate and uneducated inmates from

65 Id. at 49 (Douglas, J., dissenting).
66 Id. at 51.
67 Id. at 54-55 (internal citations omitted).
69 Id. at 486.
70 Id. at 490.
filing habeas corpus petitions. Although the Court rested its decision on the right to habeas corpus, Justice Douglas in his Johnson concurrence alluded to the First Amendment concerns at issue in the case: “even in cases where [the legal claim] fails, it may provide a necessary medium of expression. . . . ‘Prisoners, having real or imagined grievances, cannot demonstrate in protest against them. The right peaceably to assemble is denied to them. The only avenue open to prisoners is taking their case to court.’”

Following Johnson, the Court’s foundational inmate mail censorship case, Procunier v. Martinez (1974), demonstrated a complex grasp of the constitutional rights of incarcerated persons. Martinez reviewed prison mail restrictions in California, which prohibited inmates from writing letters where they “unduly complain,” “magnify grievances,” or express “inflammatory political, racial, religious or other views or beliefs.” The California rule further prohibited inmates from sending or receiving “letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate.” Prison authorities screened both incoming and outgoing inmate mail for possible violations, with no additional criteria to determine if mail delivery should be refused or if inmates should be disciplined. The Court struck down these regulations. Justice Lewis Powell began his reasoning mindful of the “Herculean obstacles” facing prison administrators, including responsibilities “for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating . . . the inmates placed in their custody.” Still, the Court proclaimed that “[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.”

After detailing how lower federal courts had adopted a variety of approaches to analyzing questions about censorship of prison inmate mail in the absence of any U.S. Supreme Court decisions directly on point at the time, the

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71 Id. at 487.
72 Id.
73 Id. at 497 (Douglas, J., concurring) (referencing Paul A. Freund, Symposium Remarks, Habeas Corpus—Proposals for Reform, 9 UTAH L. REV. 18, 30 (1964)).
75 Id. at 399-400.
76 Id. at 400.
77 Id. at 421-22.
78 Id. at 404.
79 Id.
80 Id. at 405-06.
81 Id. at 406-07.
Court reasoned, “[i]n the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them, mail censorship implicates more than the right of prisoners.” Mail communication involves both a writer/sender and a reader/receiver, and “censorship of the communication between them necessarily impinges on the interest of each.” Regardless of who, for any given piece of mail, is the sender and who is the receiver, First Amendment free speech rights are implicated. Justice Powell provided the following example:

The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him. In either event, censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners. Thus, since censorship of inmate mail implicates “the First Amendment liberties of free citizens,” such censorship cannot be justified solely based on “the legal status of prisoners.” Even so, the Court reasoned that the “context of prisons” matters in this analysis, as the government has interests in preserving internal prison order and discipline, maintaining institutional security against escape or unauthorized entry, and the rehabilitation of inmates in furtherance of “the preservation of societal order through enforcement of the criminal law.” This includes ensuring that inmate correspondence detailing escape plans or proposed criminal activity is not delivered.

With these prison concerns and First Amendment rights both at stake, the Martinez Court, after reviewing institutional concerns raised over free expression rights in public educational institutions and for symbolic speech, devised the following test for prison restrictions on inmate correspondence:

First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the

82 Id. at 408.
83 Id.
84 Id. at 408-09.
85 Id. at 409.
86 Id.
87 Id.
88 Id. at 412.
89 Id.
90 Id. at 413.
91 Id. at 409-11
suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.92

Martinez required courts to use a type of intermediate scrutiny to restrictions on inmate communications.93 Applying this standard to the facts of the case, the Court found that the regulations in California “invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship.”94 The state failed to show how censoring letters that were disrespectful, derogatory, or even defamatory would promote California’s purported goals of preventing “flash riots” or hindering “inmate rehabilitation.”95 Even if those goals were at issue, the complete ban imposed by prison officials was “not narrowly drawn to reach only material that might be thought to encourage violence.”96

Martinez’s intermediate scrutiny ensured that prison officials needed to pursue substantial goals and use narrowly drawn means to accomplish those goals to constitutionally censor incoming and outgoing communications.97 This balanced approach recognized both the difficult tasks faced by prison officials and the First Amendment concerns in communications between inmates and the outside world.98 It ensured that prison officials did not have unfettered discretion to engage in censorship, as was the case in earlier eras.99 It considered numerous relevant concerns. As later described by Justice John Paul Stevens,

92 Id. at 413-14.
94 Martinez, 416 U.S. at 415.
95 Id. at 415-16.
96 Id. at 416.
97 Levine, supra note 93, at 896.
98 Daniel M. Donovan, Jr., Constitutionality of Regulations Restricting Prisoner Correspondence with the Media, 56 FORDHAM L. REV. 1151, 1167 (1988).
the Martinez test took a middle approach that “rejected both extremes” of strict scrutiny and ignoring free expression rights for inmates altogether. But the Court began to back away from this understanding of First Amendment rights almost immediately. As will be detailed below, the Martinez decision from a half century ago was the last time that the Court struck down a prison regulation for violating the First Amendment’s Free Speech Clause.

After Procunier v. Martinez was decided in April 1974, the Court’s next two cases involving inmate free expression rights came just two months later in Pell v. Procunier (1974) and Saxbe v. Washington Post Co. (1974). The first of these two cases, Pell, narrowed the promise of Martinez, including as it related to inmate communications with non-inmates. Pell reviewed a California prison regulation that banned inmates from being interviewed by members of the media. After professional journalists were denied permission to interview specific inmates, those inmates filed a lawsuit claiming a First Amendment freedom of speech violation, and the journalists joined, claiming a First Amendment freedom of the press violation. The opinion of the Court in Pell began with the premise that “under some circumstances the right of free speech includes a right to communicate a person’s views to any willing listener, including a willing representative of the press.” However, the Court’s focus then quickly became the state’s ability to restrict inmates’ expression: “[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” Accordingly, the Court proclaimed, “[i]n the First Amendment context a corollary of this principle is 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 corrections system.”

Unlike the Court’s focus on rehabilitation in Martinez, in Pell the Court explained that “[a]n important function of the corrections system is the deterrence of crime,” which is facilitated “by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most

102 Id.
103 Id. at 817-819 (1974).
104 Id. at 819-21.
105 Id. at 822.
106 Id. (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)).
107 Id.
108 Id.
people presumably find undesirable.”

Although the Pell Court then briefly referenced the goal of rehabilitation, that was quickly followed by focusing on the institutional goal of internal security.

With these stated goals, the Court in Pell proceeded to downplay the relevant First Amendment concerns. Admitting that the California penal rule “restricts one manner of communication between prison inmates and members of the general public,” the Court explained that “this is merely to state the problem, not to resolve it.” In this regard, the Court posed a hypothetical: “the same could be said of a refusal by corrections authorities to permit an inmate temporarily to leave the prison in order to communicate with persons outside. Yet no one could sensibly contend that the Constitution requires the authorities to give even individualized consideration to such requests.” If a method of communication is censored, the appropriate question to ask, for the Court, is whether there are “available alternative means of communication.” Citing Martinez’s protection of inmate mail communications, the Court proclaimed in Pell that “the medium of written correspondence affords inmates an open and substantially unimpeded channel for communication with persons outside the prison, including representatives of the news media.” To this point, the Court clarified how, compared to mail communications, “the entry of people into the prisons for face-to-face communication with inmates” raises other “institutional considerations, such as security and related administrative problems.” Similarly, the Pell Court found that since California permitted inmates “limited visits from members of their families, the clergy, their attorneys, and friends of prior acquaintance,” members of the press could visit if they fell into one of those categories of persons, who have “a personal or professional relationship to the inmate.”

The Court next held that “reasonable ‘time, place and manner regulations’ (of communicative activity) may be necessary to further significant

\begin{itemize}
\item \textbf{Id.}
\item Id. at 826.
\item Id. at 824.
\item Id. at 825.
\item Id. at 827.
\end{itemize}
governmental interests, and are permitted.\textsuperscript{121} The \textit{Pell} Court upheld California’s restrictions, finding “the involuntary confinement and isolation of large numbers of people, some of whom have demonstrated a capacity for violence—necessarily requires that considerable attention be devoted to the maintenance of security.”\textsuperscript{122} Particularly since there were “alternative channels of communication . . . open to prison inmates,”\textsuperscript{123} the Court held the prohibition on media interviews of inmates to be constitutional.\textsuperscript{124}

On the freedom of the press question, the \textit{Pell} Court held that while “[t]he First and Fourteenth Amendments bar government from interfering in any way with a free press,”\textsuperscript{125} “[t]he Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally.”\textsuperscript{126} The Court found no First Amendment violation in the California policy as applied to journalists.\textsuperscript{127} The Court upheld the restrictions on inmates by a 6-3 vote, while the restrictions on members of the press was upheld by a 5-4 vote.\textsuperscript{128}

\textit{Pell}’s companion case was \textit{Saxbe}, which upheld by a 5-4 vote a prohibition on press interviews in federal prisons.\textsuperscript{129} The Court found in \textit{Saxbe} that the case was “constitutionally indistinguishable from \textit{Pell} v. \textit{Procunier}, and thus fully controlled by the holding in that case.”\textsuperscript{130} \textit{Pell} and \textit{Saxbe} elicited dissenting opinions from Justices Powell and Douglas, joined by Justices William Brennan and Thurgood Marshall.\textsuperscript{131} The Court majority in \textit{Pell} and \textit{Saxbe} made clear that there is a fundamental difference between face-to-face meetings and non-face-to-face communications like correspondence through the mail.\textsuperscript{132} \textit{Pell} and \textit{Saxbe}’s upholding of communicative restrictions on members of the press also has implications for the ability of members of the public to communicate with inmates.\textsuperscript{133} What effect this would have on inmate correspondence rights with the public or other inmates remained to be seen. But the Court in \textit{Pell} and \textit{Saxbe}

\begin{footnotesize}
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\item Id. at 826 (internal quotations omitted).
\item Id. at 826-27.
\item Id. at 827.
\item Id. at 828.
\item Id. at 834.
\item Id.
\item Id. at 835.
\item See id. at 835-36 (Powell, J., concurring in part and dissenting in part); Id. at 836 (Douglas, J., dissenting).
\item Id. at 850 (internal citation omitted).
\item Id. (Powell, J., dissenting); \textit{Pell}, 417 U.S. at 836 (Douglas, J., dissenting).
\item Id.
\end{enumerate}
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was exhibiting a growing level of deference to prison officials, perhaps best encapsulated by Pell’s proclamation that “in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [prison] considerations, courts should ordinarily defer to their expert judgment in such matters.”

Although Martinez’s intermediate scrutiny test appeared to remain in place, Pell and Saxbe applied it in a way that was more deferential to prison officials’ claims. This deference to prison authorities on First Amendment free expression questions continued through the remainder of the 1970s and extended to jail settings. The more deferential reading of Martinez used in Pell/Saxbe was evident in Jones v. North Carolina Prisoner’s Labor Union (1977), which reviewed a North Carolina ban on inmates soliciting other inmates to join a prison labor union. This included a refusal by prison officials to deliver mailings from the union to inmates, even though prison officials delivered bulk mailings for other organizations, including the Jaycees, Alcoholics Anonymous, and the Boy Scouts. A three-judge district court overturned the restrictions on the union, declaring it was “unable to perceive why it is necessary or essential to security and order in the prisons to forbid solicitation of membership in a union permitted by the authorities,” as “[t]his is not a case of riot. There is not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions.”

The U.S. Supreme Court upheld the union solicitation and bulk mailing bans at issue in Jones. The Court’s analysis opened by reasoning that the district court, “got off on the wrong foot in this case by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement.”

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134 Id. at 169.
135 Pell, 417 U.S. at 827.
136 Frank D. LoMonte & Jessica Terkovich, Orange Is the News Blackout: The First Amendment and Media Access to Jails, 104 Marq. L. Rev. 1093, 1111 (2021). (“Though the Court focused on the availability of alternative channels of communication—normally a feature of ‘intermediate scrutiny’—other elements of the Pell/Saxbe analysis were more deferential than that.”).
137 See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978) (finding the media do not have “a First Amendment right to government information regarding the conditions of jails and their inmates.”).
139 Id. at 124.
141 Id.
142 Jones, 433 U.S. at 136.
143 Id. at 125.
higher degree of deference, promoted in *Pell* and *Saxbe*, led the Supreme Court in *Jones* to emphasize how “[s]tate correctional officials uniformly testified that the concept of a prisoners’ labor union was itself fraught with potential dangers,”\(^{144}\) including, according to the North Carolina Commissioner of the Department of Correction, “increasing the existing friction between inmates and prison personnel” and potentially “creat[ing] friction between union inmates and non-union inmates.”\(^{145}\) The North Carolina Secretary of the Department of Correction alleged that union leaders “would be in a position to misuse their influence,”\(^{146}\) meaning “[w]ork stoppages and mutinies are easily foreseeable. Riots and chaos would almost inevitably result.”\(^{147}\) Although the district court found that the state’s bans on inmate union membership solicitation “border[ed] on the irrational,”\(^{148}\) the Supreme Court found that “[i]t is clearly not irrational to conclude that individuals may believe what they want, but that concerted group activity, or solicitation therefor, would pose additional and unwarranted problems and frictions in the operation of the State’s penal institutions.”\(^{149}\)

Instead of asking questions posed in *Martinez*—whether the state’s goals were substantial and whether the restrictions were greater than necessary to accomplish those goals\(^{150}\)—the Supreme Court in *Jones* stated that North Carolina’s restrictions were “reasonable, and are consistent with the inmates’ status as prisoners and with the legitimate operational considerations of the institution.”\(^{151}\) The Court concluded that “[s]ince other avenues of outside informational flow by the Union remain available, the prohibition of bulk mailing . . . remains reasonable.”\(^{152}\) Likewise, the Court found that direct solicitation among inmates could be banned consistent with the First Amendment because “prison officials are . . . entitled to control organized union activity within the prison walls.”\(^{153}\) These holdings—and their deference to prison officials—rested on the Court’s understanding that “[p]rison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and

\(^{144}\) *Id.* at 126.

\(^{145}\) *Id.* at 127.

\(^{146}\) *Id.*

\(^{147}\) *Id.*


\(^{149}\) *Jones*, 433 U.S. at 129.


\(^{151}\) *Jones*, 433 U.S. at 130.

\(^{152}\) *Id.* at 131.

\(^{153}\) *Id.* at 132.
conflagration.”\textsuperscript{154} Finding that “a prison is most emphatically not a ‘public forum,’”\textsuperscript{155} prison officials could constitutionally permit the bulk mailings of some groups and not others “to avoid an imminent threat of institutional disruption or violence.”\textsuperscript{156} The Jones decision was divided, with Justice Stevens partially dissenting and Justices Marshall and Brennan fully dissenting.\textsuperscript{157}

More deference to officials’ mail restrictions at places of incarceration was demonstrated by the Court in Bell v. Wolfish (1979), which reviewed a Federal Bureau of Prisons ban on inmate receipt of hardcover books, unless the publication was sent directly by a publisher, bookstore, or book club.\textsuperscript{158} The case arose as a lawsuit challenging application of the ban at the Metropolitan Correctional Center (MCC), which was operated primarily as a custodial facility for pretrial detainees.\textsuperscript{159} The Court by a vote of 6-3 upheld this prohibition, finding it to be “a rational response by prison officials to an obvious security problem”\textsuperscript{160} because “hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings.”\textsuperscript{161} The Bell Court reasoned that such books are “difficult to search effectively.”\textsuperscript{162} Citing Jones and Pell, the Court affirmed it would continue to defer to prison administrators on First Amendment inmate expressive questions: “the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here.”\textsuperscript{163} Important for the Court was that the rule was content neutral\textsuperscript{164} (as hardback books of all subject were restricted), and that there were “alternative means of obtaining reading material,”\textsuperscript{165} including hardbacks sent directly “from publishers, bookstores, and book clubs;”\textsuperscript{166} softcover books sent from any source;\textsuperscript{167} and books available at the prison library.\textsuperscript{168} This was characterized

\textsuperscript{154} Id.
\textsuperscript{155} Id. at 136.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 139 (Stevens, J., concurring in part and dissenting in part); Id. at 139 (Marshall, J., dissenting).
\textsuperscript{159} Id. at 523.
\textsuperscript{160} Id. at 550.
\textsuperscript{161} Id. at 551.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
by Justice Marshall in dissent as “relaxing” the requirement of considering less restrictive alternatives to expressive regulations for “presumptively innocent detainees.” Indeed, even when substantial governmental interests are at stake, the Procunier v. Martinez test required a showing that the restrictions on expression “must be no greater than is necessary or essential” to achieve that interest.

As problematic as the Court’s weakening of Martinez was in the 1970s, at least in theory it was still an intermediate scrutiny test that held the prospect of providing robust protection of the First Amendment rights of inmates and those communicating with them. However, the Court’s deference to prison authorities increased in Turner v. Safley (1987) by formally redefining the constitutional test for free speech rights related to inmates. The regulation challenged in Turner was a ban on inmate-to-inmate correspondence in the Missouri prison system. The only exceptions to this ban were if (1) the inmates were immediate family members, (2) the inmates’ correspondence concerned legal matters, or (3) the correspondence was deemed to be in the best interest of the inmates. The Court’s opinion in Turner clarified any conflicts between Martinez and latter inmate free expression cases: “If Pell, Jones, and Bell have not already resolved the question posed in Martinez, we resolve it now: when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”

Turner reduced the level of scrutiny on restrictions over inmates’ speech to the lowest level of constitutional scrutiny: a type of rational basis test. The Turner Court then explained that “several factors are relevant in determining the reasonableness of the regulation at issue.” First, to be reasonable, “there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it,” meaning that

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169 Id. (Marshall, J., dissenting).
170 Id.
172 See Levine, supra note 93, at 891 n.4.
174 Id. at 81-82.
175 Id. at 89.
177 Turner, 482 U.S. at 89.
178 Id. (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).
regulations cannot be “arbitrary or irrational,”\textsuperscript{179} but must instead be “neutral . . . without regard to the content of the expression.”\textsuperscript{180} Second, it is relevant if there are “alternative means of exercising the right that remain open to prison inmates,”\textsuperscript{181} and if “other avenues’ remain available for the exercise of the asserted right, courts should be particularly conscious of the measure of judicial deference owed to corrections officials.”\textsuperscript{182} Third, to determine reasonableness, courts must consider “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.”\textsuperscript{183} Fourth, “the absence of ready alternatives is evidence of the reasonableness of a prison regulation,”\textsuperscript{184} while “the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable,”\textsuperscript{185} if they can be implemented “at de minimis cost to valid penological interests.”\textsuperscript{186}

Applying this four-factor test to the facts of \textit{Turner}, the Court by a vote of 5-4 ruled that the inmate-to-inmate correspondence ban was reasonably related to legitimate interests.\textsuperscript{187} First, the Court found the ban was logically connected to a legitimate interest in prison security, as “mail between institutions can be used to communicate escape plans and to arrange assaults and other violent acts,”\textsuperscript{188} particularly among gang members who have been intentionally separated and isolated at different prisons.\textsuperscript{189} Second, the Court found the ban was properly limited, in that it did “not deprive prisoners of all means of expression,” as it merely restricted one form of communication with a limited class of other inmates.\textsuperscript{190} Third, the Court found that protecting inmate-to-inmate correspondence would negatively impact “other inmates and prison personnel,”\textsuperscript{191} because “correspondence between prison institutions facilitates the development of informal organizations that threaten the core functions of prison administration, maintaining safety and internal security.”\textsuperscript{192} Citing \textit{Jones}, the Court reasoned that interinstitutional inmate correspondence “can be

\textsuperscript{179} Id. at 90.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 90 (internal citations and quotations omitted).
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 91.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 91-92.
\textsuperscript{190} Id. at 92.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike” at multiple prisons.193 Finally, the Turner Court reasoned that the inmates’ proposed alternative—monitoring inmate correspondence—would impose too great of an institutional cost while reducing safety, as “it would be impossible to read every piece of inmate-to-inmate correspondence,”194 and “there would be an appreciable risk of missing dangerous messages,”195 including when inmates “write in jargon or codes to prevent detection of their real messages.”196

With Turner’s more deferential rational basis test, the Court continued to uphold restrictions on communication to and from inmates. In Thornburgh v. Abbott (1989), the Court reviewed Federal Bureau of Prisons regulations that permitted a warden to reject publications mailed to inmates if they were “determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.”197 A 6-3 majority demonstrated the stark decline of the Court’s First Amendment jurisprudence in prisons since Martinez, opining how “[t]here is little doubt that the kind of censorship [at issue in the case] would raise grave First Amendment concerns outside the prison context.”198 Nevertheless, the Court reasoned that it has “been sensitive to the delicate balance that prison administrators must strike between the order and security of the internal prison environment and the legitimate demands of those on the ‘outside’ who seek to enter that environment, in person or through the written word.”199 Unlike Turner, Abbott directly involved the free expression rights of non-inmates: “there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners.”200 However, since the regulations at issue were being imposed in a prison environment, the Court applied the Turner test.201

Using Turner’s four-part analysis in Abbott, the Court concluded that the regulations were neutral and rationally related to a legitimate safety objective,202 because one inmate observing a publication in the possession of

193 Id.
194 Id. at 93.
195 Id.
196 Id.
198 Id. at 407.
199 Id.
200 Id. at 408.
201 Id. at 409.
202 Id. at 414.
another inmate may “draw inferences about their fellow’s beliefs, sexual orientation, or gang affiliations from that material, and cause disorder by acting accordingly.” Second, the Court found that alternative means of exercising expressive rights remained open, since “the regulations at issue . . . permit a broad range of publications to be sent, received, and read.” Third, since excludable publications are “potentially detrimental to order and security,” they have a “ripple effect” on guards and inmates. Finally, the Court summarily concluded that there was “no obvious, easy alternative” to the warden’s power to review individual publications. Although the Court in Abbott explained that it had “confidence” that the Turner test’s “reasonableness standard is not toothless,” the test was again applied very deferentially. Abbott made clear that the Turner reasonableness test was cemented into First Amendment jurisprudence, repudiating the use of Martinez, even for communications to and from outside members of the public.

The Court’s next free speech inmate case was Shaw v. Murphy (2001), where the justices reviewed disciplinary proceedings against Kevin Murphy, an inmate at Montana State Prison. Upon learning that a fellow inmate, Pat Tracy, was charged with assaulting a correctional officer, Murphy wrote Tracy a letter offering legal advice. The letter advised Tracy not to plead guilty, claiming there were numerous complaints for harassment of inmates against the corrections officer in question. Prison officials intercepted the letter and punished Murphy for violating inmate rules against engaging in insolence, interfering with due process hearings, and impeding institutional security and orderly operations. Murphy claimed this punishment violated his First Amendment rights.

In Shaw, the Court unanimously upheld Murphy’s punishment. The Court concluded that inmate-to-inmate correspondence providing legal assistance was to be accorded no more legal protection than other forms of

\[203\] Id. at 412.
\[204\] Id. at 418.
\[205\] Id.
\[206\] Id.
\[207\] Id. at 414.
\[210\] Id. at 225.
\[211\] Id. at 226.
\[212\] Id.
\[213\] Id. at 227.
\[214\] Id. at 232.
inmate-to-inmate correspondence," as even legal correspondence can be used "as a means for passing contraband and communicating instructions on how to manufacture drugs or weapons," or as "an excuse for making clearly inappropriate comments." The Shaw Court minimized any First Amendment rights at stake, reasoning—with language that is striking in its disregard for the constitutional rights of inmates—that "for much of this country’s history, the prevailing view was that a prisoner was a mere ‘slave of the State,’ who not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him." Although the Court explained that decisions in the mid- to late twentieth century "determined that incarceration does not divest prisoners of all constitutional protections," the Court in Shaw nevertheless concluded that "in Turner we adopted a unitary, deferential standard for reviewing prisoners’ constitutional claims: [W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Since the Court granted certiorari in the case solely to determine if inmates have a special First Amendment right to give legal assistance to fellow inmates, it remanded the case rather than working through the elements of the Turner test. Justice Ruth Bader Ginsburg concurred in Shaw, noting that on remand Murphy should be permitted to assert his claim that the rules against inmates corresponding in ways deemed insolent or that interfere with due process hearings are vague and overboard as applied to him. That ability to challenge prison regulations as vague and overboard is something that will have relevance to prohibitions on inmates playing correspondence chess, discussed in Part IV below.

Other twenty-first century Supreme Court rulings on inmates’ First Amendment rights reflect a continued overly deferential reasonableness analysis. In Overton v. Bazzetta (2003), a unanimous Court upheld restrictions in Michigan on the number and types of prison visitors during noncontact visits (where the inmates and visitors communicate from opposite

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215 Id. at 228.
216 Id. at 231.
217 Id.
218 Id. at 228 (internal quotations omitted).
219 Id.
220 Id. at 229 (internal quotations omitted).
221 Id. at 232.
222 Id. at 232-33 (Ginsburg, J., concurring).
223 See Alicia Bianco, Prisoners’ Fundamental Right to Read: Courts Should Ensure That Rational Basis Is Truly Rational, 21 ROGER WILLIAMS U. L. REV. 1, 41 (2016) (“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.”).
sides of a glass panel) against a freedom of association claim.\textsuperscript{224} These regulations prohibited visits (1) from children unaccompanied by an adult family member or legal guardian, (2) from minor nieces and nephews, (3) from an inmate’s children if parental rights have been terminated, (4) from former inmates, or (5) from anyone except attorneys or clergy members if the inmate committed two substance-abuse violations.\textsuperscript{225} The Overton Court applied the Turner test to these restrictions,\textsuperscript{226} finding a rational relation between the rules and relevant interests in protecting children’s safety, minimizing disruptions, preventing future crimes, and deterring use of drugs and alcohol in prison.\textsuperscript{227} Second, the Court found alternative means existed to communicate with those prohibited from visiting, “by sending messages through those who are allowed to visit,”\textsuperscript{228} or “by letter and telephone.”\textsuperscript{229} The Court found these alternatives adequate even though some inmates may be illiterate, and opportunities for phone calls are brief and expensive, because “[a]lternatives to visitation need not be ideal . . . they need only be available.”\textsuperscript{230} Third, the Court found that the impact on other inmates and guards if these visits were permitted was too much to bear, as it “would cause a significant reallocation of the prison system’s financial resources and would impair the ability of corrections officers to protect all who are inside a prison’s walls.”\textsuperscript{231} Fourth, the Court reasoned that there were no reasonable alternatives to these visitor restrictions, rejecting the idea that simply admitting visitors, including with time limits, was a reason to invalidate Michigan’s policy.\textsuperscript{232} In upholding these restrictions, the Overton Court reasoned that not just deference but “substantial deference”\textsuperscript{233} must be accorded to the “professional judgment of prison administrators.”\textsuperscript{234}

The Court’s most recent case on free expression rights involving inmates is Beard v. Banks (2006). The case reviewed a Pennsylvania rule banning newspapers, magazines, and photographs from being accessed by inmates in the state’s prison segregation unit.\textsuperscript{235} The opinion of the Court admitted that “imprisonment does not automatically deprive a prisoner of certain important

\textsuperscript{225} Id. at 129-30.
\textsuperscript{226} Id. at 132.
\textsuperscript{227} Id. at 133-34.
\textsuperscript{228} Id. at 135.
\textsuperscript{229} Id. at 135.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id. at 136.
\textsuperscript{233} Id. at 132 (emphasis added).
\textsuperscript{234} Id. at 132.
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constitutional protections, including those of the First Amendment. 236 Like other more recent relevant Court rulings, the Beard Court found the Turner test to be controlling in the case. 237 Applying the four parts of that test, the Court began first by finding that denying reading materials and photographs to inmates in administrative segregation serves the function of providing “a significant incentive to improve behavior.” 238 Second, the Court found that although no alternative means to exercise this right existed while one was in a segregation unit, that fact was not dispositive under Turner, as “[i]n the absence of any alternative thus provides ‘some evidence that the regulations [a]re unreasonable,’ but is not ‘conclusive’ of the reasonableness of the Policy.” 239 Furthermore, the Court reasoned that the deprivation here is only temporary, as an inmate with good behavior can graduate out of the segregation unit. 240 Third, the Court reasoned that if the restriction was imposed to produce better behavior, then removing it would produce worse behavior, thereby requiring the expenditure of more resources. 241 Fourth, the Court found that there was no identifiable alternative that would accommodate inmates at a de minimus cost. 242 Even though the Court admitted that “the deprivations at issue . . . have an important constitutional dimension,” 243 the Court upheld Pennsylvania’s regulations by a vote of 6-2. 244 In doing so, the Beard Court continued the approach from Overton that “courts owe ‘substantial deference to the professional judgment of prison administrators.’” 245

III. MIDDEGAME: THE FIRST AMENDMENT PROBLEMS WITH TURNER AND HOW THE COURT CAN REINTERPRET IT TO NOT BE “TOOTHLESS”

As the Court explained in Martinez, there are “Herculean obstacles” facing prison administrators. 246 This includes duties “for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating . . . the inmates placed in their custody.” 247 These

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236 Id. at 528.
237 Id. at 529.
238 Id. at 531-32.
239 Id. at 532 (quoting Overton, 539 U.S. at 135).
240 Id. at 532.
241 Id.
242 Id.
243 Id. at 533.
244 Id. at 536.
245 Id. at 528 (quoting Overton v. Bazzetta, 539 U.S. 126, 132 (2003)) (emphasis added).
247 Id.
factors are not to be dismissed or trivialized, and they help justify why the Court has never considered expression to, from, and among inmates to be within its traditional forum doctrine. However, the Court in recent years has moved to what Justice Stevens once described as one extreme of maintaining “a hands-off posture” toward prison officials’ decisions, something that indiscriminately deprives inmates of their First Amendment rights, making protection of those rights “toothless.”

Indeed, as the Court made clear in Martinez, “mail censorship implicates more than the right of prisoners if it deals with mail sent to and from non-inmates. This was reflected in Pell, where the Court proclaimed that “the medium of written correspondence affords inmates an open and substantially unimpeded channel for communication with persons outside the prison.” As the Court put it in Martinez, restricting this right can frustrate rehabilitation goals, ultimately making society less safe: “the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation.” As prison programs have documented, learning how to effectively communicate one’s feelings, and being able to engage in that communication, can help inmates’ rehabilitation by giving them ways to express themselves without resorting to violence. Justice Stevens, dissenting in Bell, argued that overly harsh restrictions on inmate correspondence with outsiders have negative consequences and attack human dignity itself: “To prohibit detainees from receiving books or packages communicates to the detainee that he, his friends, and his family cannot be trusted. And in the process, it eliminates one of his few remaining contacts with the outside world,” which is “a clear affront to the dignity of the detainee as a human being.” According to Stevens in Turner, when regulating “the exchange of mail” one must consider “the satisfaction, solace, and support it affords to a confined inmate.” Such a statement could be applied not just to

250 Bianco, supra note 223, at 41.
251 Martinez, 416 U.S. at 408.
253 Martinez, 416 U.S. at 412.
256 Id. at 592.
258 Id.
inmate correspondence with non-inmates but also correspondence with fellow inmates in the same prison or in other prisons.

As the Court began deferring more and more to prison authorities on questions of inmate censorship, it began rationalizing in its decisions, thus moving to what Justice Stevens called a hands-off posture on these questions.\(^{259}\) Optimally, the Court should return to the intermediate scrutiny approach from \textit{Martinez}, although, for reasons discussed below, that seems quite unlikely to happen, making a proper reading of the \textit{Turner} test a more likely correction to rectify these problems of extreme deference to prison officials.

For an example of the problems with extreme deference to prison authorities, in \textit{Jones} the Court upheld bans on bulk mailings among inmates seeking to unionize because it would increase friction among inmates, and between inmates and prison staff, leading to what was recounted by the Court in the case as probable work stoppages, mutinies, riots, and chaos.\(^{260}\) This is a hypothetical parade of horribles, not a rational analysis of the constitutionality of restrictions on expressive correspondence. In fact, it ignores evidence that recognizing and supporting inmate groups can promote stability and safety in the prison environment.\(^{261}\) Of course, to the Court’s point in \textit{Jones} that a prison is not a “public forum,”\(^{262}\) this is certainly true. This explains why content restrictions on inmates are not subject to strict scrutiny and why content-neutral regulations are not even subject to intermediate scrutiny beginning with \textit{Turner}. However, as explained by Justice Marshall’s \textit{Jones} dissent (joined by Justice Brennan), concerns about threats of imminent violence are “irrational[]” when applied to solicitations to join a labor union.\(^{263}\) Reasonably, Justice Marshall admitted that the context of the prison environment permits more restrictions on expression than are constitutionally protected outside of prison.\(^{264}\) Justice Marshall also conceded that prisons deal with serious problems and that prison officials have expertise in running such institutions,\(^{265}\) and their views should not “be cavalierly disregarded by [the] courts.”\(^{266}\) However, Marshall maintained that “courts cannot blindly defer to the judgment of prison administrators or any other officials” because such officials “inevitably will err


\(^{262}\) Jones, 433 U.S. at 136.

\(^{263}\) Id. at 144 (Marshall, J., dissenting).

\(^{264}\) Id. at 140.

\(^{265}\) Id. at 141.

\(^{266}\) Id. at 142.
on the side of too little freedom.” Marshall argued that if joining a union was permitted, soliciting someone to join that union cannot be prohibited. Likewise, if one could solicit union membership individually, it is “plainly unconstitutional” to ban bulk mailings from the union if other inmate groups may do so. For these reasons, Justice Marshall emphasized the elements of intermediate scrutiny from *Martinez* rather than reasonableness and deference.

For another example of the problems of extreme deference to prison officials, in *Bell* the Court upheld restrictions on hardback books being mailed into the prison because they could be vessels for “money, drugs, and weapons.” However, as explained by Justice Marshall in dissent in *Bell*, “[t]he warden offered no reasons why the institution could not place reasonable limitations on the number of books inmates could receive or use electronic devices and fluoroscopes to detect contraband rather than requiring inmates to purchase hardback books directly from publishers or stores.” In fact, the MCC correction center at issue in the case was already using electronic equipment like this to search packages brought into the facility by visitors. Justice Stevens (joined by Justice Brennan) also dissented in *Bell*, arguing against the constitutionality of the ban, because “in many prisons housing criminals convicted of serious crimes . . . packages of various sorts are routinely admitted subject to inspection.” It was not clear in *Bell* why x-ray machines, metal detectors, ion scanning, or other searching techniques could not have been employed. Put another way, based on procedures used at other facilities, there are less restrictive means to ensure prison safety and security than what was being done at the MCC. Higher restrictions on inmate communications were particularly problematic for the MCC, which as a pretrial detention facility was housing detainees who had not been convicted of any crime.

267 Id. at 141-42.
268 Id. at 144.
269 Id. at 145.
270 Id. at 139-40.
272 Id. at 574 (Marshall, J., dissenting).
273 Id. at 574 n.15.
274 Id. at 594 (Stevens, J., dissenting).
275 For descriptions of the type of technology that can be used to search for drugs, weapons, and other contraband in prisons in the United States today, see M.O. Dix et al., *Contraband Detection Technology in Correctional Facilities*, NAT’L INST. OF JUST. (Mar. 2021), https://www.ojp.gov/pdffiles1/nij/grants/300856.pdf.
276 *Bell*, 441 U.S. at 595 (Stevens, J., dissenting).
The concerns with using anything less than intermediate scrutiny for restrictions on inmate expression are evident in *Turner*, where the Court first devised its four-part rational basis test and used it to uphold a ban on all inmate-to-inmate correspondence.277 The Court’s overt deference was evident when it worked through each element of the test. The Court found the ban was logically connected to the legitimate concern of prison security because inter-prison inmate-to-inmate mail “can be used to communicate escape plans and to arrange assaults and other violent acts,”278 especially among gang members placed in separate prisons.279 Although communication among gang members and other dangerous prisoners is a real concern, a better approach would be to generally protect inmate-to-inmate correspondence unless those inmates fall into one of these groups or otherwise individually demonstrated that their correspondence was a cause for security or safety concerns. Similarly, to the second element of the test, the Court found that it did “not deprive prisoners of all means of expression.”280 But that is a rationalization that, taken to its logical extreme, could lead to upholding bans on all correspondence as long as one other form of communication was still protected.281 Third, the Court in *Turner* found that correspondence would negatively affect other inmates and prison employees because it could be used to develop “informal organizations that threaten . . . safety and internal security.”282 However, this reasoning legitimizes taking away all inmates’ free expression rights under the guise that any inmate expression could have some possible negative effect on other inmates. Finally, the Court reasoned that monitoring inmate correspondence would be impractical because of concerns about “missing dangerous messages,”283 especially if inmates wrote “in jargon or codes.”284 However, this could be another reason to ban all forms of communication to and from inmates, particularly if they were written in something other than standard English, a topic explored in Part IV below.

To this point, Justice Stevens argued in dissent in *Turner* that, “if the standard can be satisfied by nothing more than a ‘logical connection’ between the regulation and any legitimate penological concern perceived by a cautious
warden, it is virtually meaningless.” 285 As put by Stevens, Turner’s 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.” 286 Stevens then produced a hypothetical that could conceivably pass constitutional muster under the Court’s application of Turner: “security is logically furthered by a total ban on inmate communication, not only with other inmates but also with outsiders who conceivably might be interested in arranging an attack within the prison or an escape from it.” 287 Stevens then argued that it was speculative for correspondence restrictions to solve “gang problems” or prevent escapes, and how it was not shown why it would be “impossible” to read mail sent or received by inmates. 288

Thus, Martinez, properly applied, is a more sensible standard to ensure protection of inmates’ free expression rights and the rights of the public to communicate with inmates. 289 But the Court is unlikely to revert to using Martinez or something similar anytime in the near future. 290 Even when Martinez was in force, the Court often applied it in a way deferential to prison authorities. 291 In any event, Turner made it clear that the reasonableness standard will be used when evaluating free expression rights in the prison context, regardless of whether the communication at issue is inmate-to-inmate correspondence or mail between inmates and outside speakers/audiences. 292 This is the standard that we must expect the Court will continue to use. However, even the Court’s use of the Turner test has become more and more deferential to prison regulations in recent years.

For instance, in Abbott, the Court upheld a regulation allowing a warden to censor a publication mailed to an inmate if it was deemed “detrimental to the

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285 Id. at 100 (Stevens, J., concurring in part and dissenting in part) (emphasis in original) (internal citation omitted).
286 Id. at 100-01.
287 Id. at 101.
288 Id. at 105-12.
289 Miness, supra note 208, at 1730-32.

The [Turner v.] Safley test is imperial: courts have applied it to a wide variety of constitutional claims; courts have cited the case over 12,000 times . . . the case exerts a sort of gravitational pull over the field and embodies an approach to judicial review in which the constitutional right implicated by a prison practice matters less than the fact that the right belongs to prisoners.
291 LoMonte & Terkovich, supra note 136, at 1111.
292 Turner, 482 U.S. at 89.
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While there is a clear connection to an objective of safety, the problem with such a regulation is the discretion placed in the hands of one administrator to censor publications based on content. And as explained in Justice Stevens’s partial dissent in *Abbott* (writing also for Justices Brennan and Marshall), this power was abused. Stevens detailed how the regulation was used to ban dozens of publications, including an issue of *Labyrinth* (published by the Committee for Prisoner Humanity and Justice) that contained an article detailing how inadequate medical treatment by prison officials caused an inmate’s death. According to Stevens, “provisions allowing prison officials to reject a publication if they find its contents are ‘detrimental’ to ‘security, good order, or discipline’ or ‘might facilitate criminal activity’ are impermissibly ambiguous.” Thus, Stevens characterized the “reasonableness” standard as understood and applied by the Court in *Turner* as providing “feeble protection” to free expression rights.

Nevertheless, Stevens conducted his own application of the *Turner* test to the facts of *Abbott*, finding that, like the issue of *Labyrinth*, many of the rejected publications “criticized prison conditions or otherwise presented viewpoints that prison administrators likely would not welcome . . . suggest[ing] that rejections were based on personal prejudices or categorical assumptions rather than individual assessments of risk.” Thus, the regulations could not be content-neutral, violating the first requirement of *Turner* that prison regulations must be “neutral . . . without regard to the content of the expression.” Second, Stevens argued that there were not alternative means of exercising this First Amendment right, as “[s]ome of the rejected publications may represent the sole medium for conveying and receiving a particular unconventional message,” making delivery of different publications “irrelevant.” Third, there was no evidence to support the assumption that “these publications will circulate within the prison and cause ripples of

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294 Id.
295 Id. at 420-22 (Stevens, J., concurring in part and dissenting in part).
296 Id. at 428.
297 Id. at 429.
298 Id. at 429-30.
299 Id. at 430.
301 Abbott, 490 U.S. at 430 (Stevens, J., concurring in part and dissenting in part).
302 Id.
disruption.”

Fourth, Stevens averred that “some of the rejected publications were delivered to inmates in other prisons without incident.” Relatively, instead of rejecting an entire publication, an alternative to the regulation could be one that omitted just the objectional material and delivered the remainder of the publication to the inmate. Thus, Stevens proclaimed that “under either the Martinez standard or the more deferential ‘reasonableness’ standard these regulations are an impermissibly exaggerated response to security concerns.”

Stevens’s analysis in Abbott shows us an alternative way to apply Turner that provides more balance to free expression questions, rather than nearly total deference to prison regulations.

As noted above, twenty-first century Court decisions on inmate free expression rights have become increasingly deferential to prison officials’ regulations. In Shaw, the Court found no additional First Amendment protection for inmates to write letters containing legal advice to other inmates. After noting how “for much of this country’s history, the prevailing view was that a prisoner was a mere ‘slave of the State’,” the Court concluded that inmates “must overcome the presumption that the prison officials acted within their ‘broad discretion,’” which is a “heavy burden” for inmates to meet. In Overton, the Court upheld visitor restrictions for inmates, reasoning that alternative communication means existed because one could send “messages through those who are allowed to visit,” or “by letter and telephone.” But that reasoning rings hollow from a Court that has repeatedly allowed prison officials to censor and completely ban mail to and from inmates, such as in Jones, Bell, Turner, Abbott, and Shaw.

The Court’s most recent case on these matters, Beard, demonstrates how the Court has weakened the Turner test to the point that it is merely a rationalization for prison officials’ decisions. In affirming the constitutionality of a periodical ban for inmates in a segregation unit, the Court

303 Id.
304 Id.
305 Id. at 431.
306 Id. at 430-31.
308 Shaw v. Murphy, 532 U.S. 223, 228 (2001).
309 Id. at 228 (internal quotations omitted).
310 Id. at 232.
311 Id.
313 Id.
worked through the elements of the Turner test. In a dissent joined by Justice Ginsburg, Justice Stevens in Beard explained that “[i]t is indisputable that this prohibition on the possession of newspapers . . . infringes upon respondent’s First Amendment rights,” because “[t]he 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, the right to read and freedom of inquiry, freedom of thought.”

Examining the state’s rationales, Stevens found no proof provided that banning newspapers or magazines could protect security, when inmates are permitted to possess numerous other items, including those that are flammable, such as toilet paper, a copy of the prison handbook, ten sheets of writing paper, several envelopes, carbon paper, religious newspapers, legal periodicals, a prison library book, and Bibles. In fact, the deputy superintendent who testified in the case could not identify any dangerous behavior that would be encouraged by allowing inmates access to periodicals. Furthermore, even the Court admitted that there were no alternative means for inmates in the segregation unite to exercise their right, with Stevens explaining that these inmates “face 23 hours a day in solitary confinement, are allowed only one visitor per month, may not make phone calls except in cases of emergency, lack any access to radio or television, may not use the prison commissary, [and] are not permitted General Educational Development (GED) or special education study.” Similarly, Stevens found evidence lacking that limited access to newspapers and magazines would result in “unduly burdensome expenditure of resources on the part of prison officials.” Stevens argued that the rationale used by prison officials—that temporarily depriving misbehaving inmates of periodicals to help deter bad behavior and rehabilitate those inmates—was unconvincing: “This justification has no limiting principle; if sufficient, it would provide a ‘rational basis’ for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior.”

For Stevens, Courts must carefully review claims by prison authorities that deprivation of

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315 Id.
316 Id. at 543 (Stevens, J., dissenting).
317 Id. (internal quotations and citations omitted).
318 Id. at 543-44.
319 Id. at 545 (Stevens, J., dissenting).
320 Id. at 532.
321 Id. at 548-49 (Stevens, J., dissenting).
322 Id. at 546 (Stevens, J., dissenting).
323 Id.
First Amendment rights is necessary to promote rehabilitation.\textsuperscript{324} This is especially relevant for segregation unit policies, as there is strong evidence that solitary confinement fails to produce rehabilitative outcomes,\textsuperscript{325} with a 2016 report from the U.S. Department of Justice’s National Institute of Justice revealing that “there is little evidence that administrative segregation has had effects on overall levels of violence within individual institutions or across correctional systems.”\textsuperscript{326}

Overall, Stevens argued in \textit{Beard} that the restriction in that case could not withstand constitutional scrutiny, as a “complete prohibition on secular, nonlegal newspapers, newsletters, and magazines prevents prisoners from ‘receiv[ing] suitable access to social, political, esthetic, moral, and other ideas,’ which are central to the development and preservation of individual identity, and are clearly protected by the First Amendment.”\textsuperscript{327} As Stevens’s opinion revealed, the restriction operated by discriminating on the basis of content (a violation of the first prong of the \textit{Turner} test), as it permitted religious periodicals but not others.\textsuperscript{328}

In her \textit{Beard} dissent, Justice Ginsburg, even after admitting how “\textit{Turner} deference can and should be incorporated into the evaluation” in the case,\textsuperscript{329} found that the connections between the regulation and the asserted goals provided by Pennsylvania (providing security and rehabilitation) were insufficient.\textsuperscript{330} As Ginsburg explained, under the rule, inmates in this segregation unit were denied \textit{The Christian Science Monitor}, but they had access to the religious publication, \textit{The Jewish Daily Forward}.\textsuperscript{331} Similarly, inmates could read Harlequin romance novels, but they were denied access to periodicals where they could learn about current events at the time, such as the war in Iraq or Hurricane Katrina.\textsuperscript{332} Such distinctions, Justice Ginsburg found, were best characterized as arbitrary or irrational.\textsuperscript{333}

Thus, the application of the \textit{Turner} test has become highly problematic. As admitted by Justice Breyer when working through the test in \textit{Beard} in the

\textsuperscript{324} Id. at 548 (Stevens, J., dissenting).
\textsuperscript{327} \textit{Beard}, 548 U.S. at 552 (Stevens, J., dissenting) (internal quotation and citations omitted).
\textsuperscript{328} Id. at 544.
\textsuperscript{329} Id. at 555 (Ginsburg, J., dissenting).
\textsuperscript{330} Id.
\textsuperscript{331} Id.
\textsuperscript{332} Id.
\textsuperscript{333} Id.
opinion of the Court, “the second, third, and fourth factors . . . [currently] add little, one way or another, to the first factor’s basic logical rationale.” 334 The additional qualifier from Overton and Beard that not just deference but substantial deference should be given to prison authorities has made the Turner test an impossible one for prison administrators and regulations to fail. The Court has not struck down a prison policy for violating inmate free expression rights since devising its current test in Turner in 1987. 336 There have probably been no new inmate First Amendment free expression cases decided by the Court since Beard in 2006 (even though many inmate constitutional claims are litigated in the lower courts) 337 because inmates fail to appeal many cases to the Court due to the futile chances of succeeding under the Court’s current application of the Turner test. A course correction is needed. A return to Martinez would be best, but the Court majority appears unlikely to do that. At the very least, the Court must reaffirm the core requirements in Turner and its commitment from Abbott that “a reasonableness standard is not toothless.” 338

After decades of such deference, it may seem unrealistic to expect the Court to change course, but the Court’s First Amendment decisions in another institutional context—students’ free expression rights in public schools—is instructive in this regard. Tinker v. Des Moines Independent Community School District 339 (1969) boldly proclaimed that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Tinker created the modern test for measuring if student free expression rights were violated in public schools, holding that students’ speech is protected unless it “would materially and substantially disrupt the work and discipline of the school.” 340 However, for the next half century, the Court found reasons not to apply the Tinker test, upholding restrictions on student expression in every case it decided, including when the speech was deemed “vulgar and offensive,” 341 was on “on potentially sensitive topics” when bearing the imprimatur of the school, 342 or when displaying a comical banner that stated, “BONG HIts 4 JESUS.” 343 Put another way, after

334 Id. at 532.
335 Id. at 528; Overton v. Bazzetta, 539 U.S. 126, 132 (2003).
337 See Driver & Kaufman, supra note 290, at 538 (detailing the extensive use of Turner in lower courts).
340 Id. at 513.
343 Morse v. Frederick, 551 U.S. 393, 397 (2007).
Tinker the Court decided a series of cases permitting schools more and more power to limit student speech by creating new categories of unprotected student expression. This dilution of student speech rights looked similar to the Court’s trend on inmate free expression rights after Martinez and especially after Turner. But in Mahanoy Area School District v. B.L. (2021) the Court, for the first time since Tinker, found in favor of a student in a school free expression case, overturning a student’s suspension from the cheer team for stating on social media, “FUCK SCHOOL F*CK SOFTBALL F*CK CHEER F*CK EVERYTHING.” The Court reversed the course it was on before Mahanoy, reaffirming its commitment to the Tinker standard, clarifying that public schools have “an interest in protecting a student’s unpopular expression.” The Court did this even with the profane speech at issue in Mahanoy, as “sometimes it is necessary to protect the superfluous in order to preserve the necessary.” Thus, after decades of dampening protections for public school students, the Court in Mahanoy restored its more robust level of protection for student speech rights that was articulated in Tinker.

Like the Court’s course correction for Tinker’s free speech protection in Mahanoy, Turner does not need to be interpreted as deferentially to prison authorities as it has been in recent years. Even Turner struck down a prison regulation as unconstitutional, although that regulation did not relate directly to a First Amendment right. Justice Stevens’s dissents in Abbott and Beard are models for this approach, as they methodically work through each of the elements of the Turner test, rather than providing rationalizations as the opinions of the Court did in these cases. Properly testing the claims of prison

346 Id. at 2045.
347 Id. at 2046.
348 Id. at 2048.
349 See Mary-Rose Papandrea, The Future of the First Amendment Foretold, 57 WAKE FOREST L. REV. 897, 908–09 (2022) (Mahanoy is “a victory for students because it reaffirms the importance of protecting their speech rights to prepare them to be active citizens in a democracy. Between Tinker and Mahanoy, the Court gave lip service to this sentiment but ultimately gave much more deference to the interests of school officials.”).
351 Turner v. Safley, 482 U.S. 78, 96-98 (1987) (The Turner Court struck down a Missouri regulation prohibiting inmates from marrying, unless there were compelling reasons for doing so, as the Court found this rule violated the constitutional right to marry).
officials should also include those officials developing a record to show that their claims are real, and not merely speculative.\textsuperscript{352}

IV. \textbf{ENDGAME: THE BENEFITS OF CHESS AND WHY CORRESPONDENCE CHESS BANS FOR INMATES ARE PROBLEMATIC ACCORDING TO A PROPER READING OF TURNER}

With this understanding of a \textit{Turner} test “with teeth,” one can return to \textit{Jackson} and the constitutionality of banning correspondence chess in algebraic notation. This approach applies the \textit{Turner} test to both inmate-to-outsider correspondence chess bans (the type at issue in \textit{Jackson})\textsuperscript{353} and inmate-to-inmate correspondence chess bans. Specifically, Judge Shabaz ruled on the constitutionality of this action as it related to a Wisconsin Department of Corrections administrative code that prohibits the state’s department of corrections from “deliver[ing] incoming or outgoing mail [that] [i]s in code.”\textsuperscript{354} Department of corrections policies in more than half of the states today have a prohibition like this on correspondence written in code.\textsuperscript{355} Working through the elements of \textit{Turner} demonstrates that applying this administrative rule to ban correspondence chess in algebraic notation to and from inmates is not “reasonably related to legitimate penological interests.”\textsuperscript{356} This is particularly the case if one holds an originalist interpretation of the First Amendment, given that key members of the founding generation, including several members of the 1787 Constitutional Convention, were avid chess players themselves.\textsuperscript{357}

First, \textit{Turner} commands that for a restriction on inmate correspondence to be reasonable, there must be a “‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.”\textsuperscript{358} This means the regulation cannot be “arbitrary or irrational,”\textsuperscript{359} but, rather,

\begin{footnotesize}
\begin{itemize}
\item[352] Sitterly, \textit{supra} note 176, at 340-45.
\item[354] Id.; Wis. Admin. Code DOC § 309.04(4)(c)(6).
\item[356] \textit{Turner}, 482 U.S. at 89 (internal quotation omitted).
\item[358] \textit{Turner}, 482 U.S. at 89.
\item[359] \textit{Id.} at 90.
\end{itemize}
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needs to be “neutral . . . without regard to the content of the expression.”

When Judge Shabaz reviewed this ban in Jackson, he concluded that the “regulation has a valid, rational connection to the legitimate interest of institution security. Communications in code are difficult to decipher and could be used to further drug trafficking, convey escape plans, relay gang messages, plan disturbances, order attacks on staff and other inmates and engage in other criminal conspiracies.”

This concern was also reflected by the Third Circuit in *Nasir v. Morgan*, where that court explained regarding correspondence chess bans, “[t]he symbols used to convey the next move may conceal a code being used for nefarious purposes.”

Before proceeding with an analysis of *Turner’s* first prong, some background is in order regarding the process for delivering mail to and from inmates, as well as relevant changes to that process since Jackson was decided in 2007. Generally, until recent years the original physical mailing sent to an inmate was delivered to that inmate, and a number of jurisdictions continue that practice today. For example, the Federal Bureau of Prisons still physically delivers an original mailing sent to an inmate, although it is opened by prison staff to search for “contraband and content that might threaten the security or good order of the institution.” Depending on the circumstances, prison staff may open mail in—or outside of—the presence of the inmate.

Before 2021, Wisconsin prisons like the one where Jackson was housed delivered original physical mailings to and from inmates, although (like the Federal Bureau of Prisons) correspondence could “be opened and inspected for contraband” and “to ensure the safety of the institution, institution staff, inmates and the general public.” Exceptions existed (restricting staff review of mail) for privileged communications, including with lawyers or certain other inmates. However,

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360 *Id.*
363 See Leah Wang, *Mail Scanning: A Harsh and Exploitive New Trend in Prisons*, PRISON POL’Y INITIATIVE (Nov. 17, 2022), https://www.prisonpolicy.org/blog/2022/11/17/mail-scanning/ (“In recent years, many prison systems have either tried or fully implemented a policy that interferes with incarcerated people’s mail . . . [p]risons are increasingly taking incoming letters, greeting cards, and artwork, making photocopies or digital scans of them, and delivering those inferior versions to recipients.”).
365 *Id.*
367 *Id.* § 309.04(4)(b).
368 *Id.*; Wis. Admin. Code DOC § 309.04(3)(a).
in 2021 Wisconsin joined a growing minority of states in not delivering original physical mailings sent to inmates but instead now have that mail opened, scanned, and copies printed for distribution to inmates. Those copies of mail are then delivered to inmates. Original physical mailings are still delivered in Wisconsin (and other states) if they are privileged communications between an inmate and their attorney.

Returning to Turner’s first prong, the connection between the regulation and the government interest could be analyzed in two ways: by looking at the general administrative code at issue in the case and by looking at the expression to which it was specifically applied. On both levels, the regulation is unreasonable.

Regarding the general regulation—banning correspondence written in code—there are problems with vagueness and overbreadth. There are many ways to use what one could characterize as “coded” language with standard English, as words and phrases may have multiple definitions which may vary by community. Banning certain words as possible “code” could be done as a way to restrict expression of ideas, as put by the Court in Cohen v. California (1971), where the Court overturned a disturbing the peace conviction for using the word “fuck” in public: “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.” This is true, according to Cohen, because a great deal of “expression serves a dual communicative function.” Furthermore, as explained by the Court in Texas v. Johnson (1989), all sorts of symbols may be “sufficiently imbued with elements of communication,’ to

369 Wang, supra note 363 (Noting that other states that now no longer deliver original physical correspondence to inmates, instead scanning or photocopying mail and providing copies to inmates, include Arkansas, West Virginia, Virginia, Pennsylvania, Indiana, Michigan, North Dakota, North Carolina, Nebraska, Ohio, New Mexico, Missouri, and New York.).
371 Id.
372 Id.
373 For a variety of examples regarding how slang words in English can vary and change, see URBAN DICTIONARY, https://www.urbandictionary.com/ (last visited Nov. 14, 2023).
375 Id. at 26.
376 Id.
implicate the First Amendment,\textsuperscript{377} including flags or peace signs,\textsuperscript{378} which could be drawn on inmate correspondence. Similarly, correspondence written in a language other than English, especially if prison employees reviewing the correspondence are not fluent in that language, could be used to communicate messages; but if non-English correspondence were deemed to be communicating in “code,” that would also run afoul of the First Amendment. As the Court noted in \textit{Griswold v. Connecticut} (1965), “the First Amendment has been construed”\textsuperscript{379} to protect “the right to study . . . any foreign language,”\textsuperscript{380} because “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”\textsuperscript{381} Thus, without clarifying what is meant by “code” in the administrative regulation at issue in \textit{Jackson}, the correspondence that could be banned is potentially so large that there is no rational connection to the state’s goals of security, thus failing to meet the requirements of \textit{Turner}. Even if there are other ways to communicate about chess through writing out moves in words or using descriptive notation (explored below), if alternatives to algebraic notation—including through the use of English words—could be a form of code, then the banning of code is too vague to put one on notice of what can be communicated. According to \textit{United States v. Williams} (2008), the Constitution is violated when the law “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”\textsuperscript{382} Prohibiting one from speaking in “code” is so overbroad as to potentially ban all expression on all subjects, and is thus unconstitutional.

If, on the other hand, symbolic speech and non-English language communications are not considered illegal “code” according to the regulation, there remain First Amendment problems in the application of this regulation. If correspondence chess—and other communication through game playing—is singled out to be banned when various other forms of “coded” language are not, this is a form of content discrimination. Whether played via correspondence or in person, the movement of chess pieces can be thought of as creative artistic

\textsuperscript{378} Id. at 404-05.
\textsuperscript{379} Griswold v. Connecticut, 381 U.S. 479, 482 (1965).
\textsuperscript{380} Id.
\textsuperscript{381} Id.
expression. The legacy of chess is also a political one of “bloodless war,” raising questions about how the playing of it may even relate to political expression, which receives a high level of First Amendment protection. Even if chess is not specifically considered political or artistic speech, at least one federal court has explained how “innocent game playing” can have First Amendment protection in its own right. Furthermore, the Court in Brown v. Entertainment Merchants Association (2011), in overturning a statewide ban on selling violent video games to minors, reasoned that “[t]he Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.”

Regarding content discrimination, Reno v. ACLU (1997) is instructive. In that case, the Supreme Court rejected the government’s argument that the Communications Decency Act was constitutional even though it “censor[ed] discourse on many of the Internet’s modalities—such as chat groups, newsgroups, and mail exploders . . . because it provide[d] a ‘reasonable opportunity’ for speakers to engage in the restricted speech on the World Wide Web” on alternative modalities. According to the Court in Reno,

The Government’s position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books. In invalidating a number of laws that banned leafletting on the streets regardless of their content, we explained that “one is not to have the exercise of

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383 See Blitz, supra note 17, at 810 (“it is hard to see why the First Amendment should protect only creative expression of, or elaboration of, our thoughts when they take the form of a conventional artistic project like a painting and not a set of cryptic pen marks, computer graphics, or rule-based manipulations of cards and chess pieces.”).

384 SHenk, supra note 3, at 116.

385 See id. at 50-51 (Discussing the significance of the king and development of the chess pieces, including the emergence of the bishop and queen, in Europe during the Middle Ages).


387 Weigand v. Vill. of Tinley Park, 114 F. Supp. 2d 734, 737 (N.D. Ill. 2000) (“A game might be part of a political protest, to take the clearest case (‘Bean the “capitalist” with a cream pie!’). Moreover, expressive game playing need not be political to be protected. If ‘nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so,’ Barnes v. Glen Theatre, 501 U.S. 560, 566, 111 S. Ct. 2456, 115 L.Ed.2d 504 (1991), surely innocent game playing may be protectable expressive conduct as well.”).


389 Id. at 790.

his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.\textsuperscript{391} Similar to \textit{Reno}, holding that one cannot communicate messages about chess through algebraic notation—when one can communicate other messages and even messages about chess through other means—is a form of content discrimination if content about the game is lost by communicating it in other ways. Following \textit{Cohen}, there is content in algebraic notation because what is communicated cannot be fully and precisely expressed through different means. As explored below, other forms of describing chess moves are inefficient. This is similar to \textit{Cohen}'s notion that banning certain words can suppress ideas,\textsuperscript{392} as chess ideas can be most accurately expressed through algebraic notation.\textsuperscript{393} In this sense, algebraic chess notation is a type of language.\textsuperscript{394} Banning communicating in an entire language violates the First Amendment.\textsuperscript{395} Laws are content based if they “require[] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.”\textsuperscript{396} That type of examination is exactly what occurs when prison authorities review inmate communications to see if their mail contains algebraic chess notation. Thus, banning correspondence chess through algebraic notation is a form of content discrimination, failing the first prong of \textit{Turner}, which requires content neutrality.\textsuperscript{397} If there is a content restriction on expression, the Court has made clear that “[a] ‘time, place, and manner’ analysis is . . . inapplicable.”\textsuperscript{398}

Additionally, even if one were to assume that this type of regulation is content-neutral as applied to algebraic chess notation, such a ban raises the specter of being irrational according to \textit{Turner}\textsuperscript{399} because it frustrates another important state goal regarding inmates: rehabilitation. Indeed, chess provides well documented mental and emotional benefits for players, particularly young

\textsuperscript{391} Id. at 880 (quoting Schneider v. State of N.J., 308 U.S. 147, 163 (1939)).
\textsuperscript{392} Cohen v. California, 403 U.S. 15, 26 (1971).
\textsuperscript{393} As explored below, algebraic chess notation is the standard used to communicate game playing today because it is easy to learn and effective. See \textit{Graham Burgess, The Mammoth Book of Chess} 553 (3d ed. 2009).
\textsuperscript{395} Griswold v. Connecticut, 381 U.S. 479, 482 (1965).
\textsuperscript{396} MCCullen v. Coakley, 573 U.S. 464, 479 (2014) (internal quotations omitted).
\textsuperscript{397} Turner v. Safley, 482 U.S. 78, 90 (1987).
\textsuperscript{399} Turner, 482 U.S. at 90.
people, and it helps rehabilitate inmate players by helping them remain connected to friends, family, and community.

Banning correspondence chess can have detrimental effects on inmates interested in the game and the benefits it can provide to them. Chess is a “famously cerebral game.” As explained by Grandmaster Lev Alburt and co-author Al Lawrence, studies show that “[c]hess improves a host of important skills, among them: concentration, logical and critical thinking, memory, patience, persistence, self-confidence, self-control, sportsmanship, and respect for others.” It has also long been used to teach self-discipline. It can help improve self-esteem among those who play it. As explained by the United Nations, “[c]hess is a global game, which promotes fairness, inclusion and mutual respect, and noting in this regard that it can contribute to an atmosphere of tolerance and understanding among peoples and nations.”

These benefits apply to people of all ages, but there are especially positive benefits for young people, including improving strategic planning, deductive reasoning, and critical thinking. Due to these benefits, chess has become an important part of curricular studies and extra-curricular activities in educational institutions in the United States.

Concerning an originalist interpretation of the First Amendment, the ability of chess players to learn and communicate (through their moves) important life lessons was known to the founding generation. The best illustrative example of this is Benjamin Franklin, who published an essay, “The Morals of Chess,” in Columbian Magazine in December 1786, less than six months before he began serving as a delegate to the 1787 Constitutional Convention. According to Franklin, “[t]he game of Chess is not merely an idle amusement.

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400 Lucinda Robb, Seven Games that Challenge the Human Brain—and Teach Computers to Think, WASH. POST (Mar. 4, 2022, 8:00 AM), https://www.washingtonpost.com/outlook/2022/03/04/seven-games-that-challenge-human-brain-teach-computers-think/.
401 LEV ALBURT & AL LAWRENCE, CHESS FOR THE GIFTED AND BUSY: A SHORT BUT COMPREHENSIVE COURSE—FROM BEGINNER TO EXPERT 9 (2d ed. 2015).
404 World Chess Day: 20 July, supra note 6.
405 ALBURT & LAWRENCE, supra note 401, at 9.
406 WEERAMANTRI, ET AL., supra note 7, at 3.
407 SHENK, supra note 3, at 227-38.
409 MADISON, supra note 357, at 24 (Franklin arrived at the Constitutional Convention on May 28, 1787).
Several very valuable qualities of the mind, useful in the course of human life, are to be acquired or strengthened by it." Franklin explained that chess teaches one, first, “Foresight,” by looking “into futurity, and consider[ing] the consequences that may attend an action: for it is continually occurring to the player, ‘If I move this piece, what will be the advantages of my new situation? What use can my adversary make of it to annoy me?’” Second, from the game one can learn “Circumspection,” including “survey[ing] the whole chess-board, or scene of action, the relations of the several pieces and situations, [and] the dangers they are respectively exposed to[.]” Third, Franklin told his readers that they could learn from chess “Caution, not to make our moves too hastily. This habit is best acquired by observing strictly the laws of the game[.]” Finally, Franklin remarked that “we learn by chess the habit of not being discouraged by present bad appearances in the state of our affairs, the habit of hoping for a favorable change, and that of persevering in the search of resources.”

These benefits of communicating with other players while making moves in chess are also quite relevant to inmate rehabilitation in prison today. FIDE explains the following regarding its Chess for Freedom program for inmates: “Chess . . . drastically improves the decision-making capabilities of a group of people that, very often due to the lack of opportunities and access to proper education, has ended up in jail after making a wrong choice in life.” Additionally, FIDE notes that chess “positively impacts the inmates’ overall health, fighting depression, stress and anxiety, and motivating them to change for the better.” Likewise, The Gift of Chess program for inmates expounds on why it distributes chess sets to prisons: “Playing chess provides prisoners a positive way to spend their free time, the chance to improve their decision-making skills, and ultimately an aid in rehabilitating and reintegrating back into society.” Even artistic depictions like Hollywood films understand the usefulness of chess in prisons, with fictional Shawshank Prison inmate Andy Dufresne (played by Tim Robbins) uttering the following line in Shawshank Redemption: “Chess. Now there’s a game of kings . . . [c]ivilized. Strategic.”


411 Id. (emphasis in original).

412 Id. (emphasis in original).

413 Id. at 16-17 (emphasis in original).

414 Id. at 17.

415 About the Chess for Freedom Programme, supra note 20.

416 Id.

417 Initiatives, supra note 22.

418 Shawshank Redemption (Columbia Pictures 1994).
Finally, these rehabilitative benefits are not just for inmates playing chess against each other. Chess can serve an important rehabilitative function by keeping inmates connected to the larger community outside of prisons. Attorney Jon M. Sands explains how, “[t]hroughout the nation, penal institutions house players (including one of my own clients) who are of championship caliber. If they want to test their mettle outside of prison, they can do so by playing the game by mail.” While chess between inmates and others in the community can generally have positive effects, the greatest rehabilitative benefits for chess can occur when there are connections made between incarcerated parents and their children, as the following illustrative example demonstrates:

Fathers have a crucial role to play in their children’s development . . . In a clinical study of six lower-middle-class Caucasian families, twelve of the twenty-four children studied showed behavioral problems shortly after their father’s incarceration. In one instance, soon after a father was sent to prison for auto theft, his son stole a stereo and regularly began skipping school. Following weekly therapy sessions, his behavior improved. After his father sent him a chess set from prison, he became the chess champion of his summer camp.

In a case like this, chess had a very positive impact on the child of an inmate when it was used to establish a connection between a parent and child, and, for the reasons listed above, it can also have positive effects on incarcerated parents. Given chess’s rising popularity among youth today, it is a growing way for parents—including those who are incarcerated—to bond with their children. Therefore, restricting inmates from playing correspondence chess can be counterproductive to their rehabilitation, and it fails to meet the first prong of the Turner test. Of course, if there were specific evidence shown that an inmate is communicating in code to commit or coordinate illegal acts, that would raise different issues and could be prohibited (as discussed below); but it is arbitrary and irrational to simply assume that playing chess through algebraic notation is a form of communication that can be banned in the name of protecting safety and promoting prison integrity.

The second prong of Turner requires considering if “alternative means of exercising the right that remain open to prison inmates.” In Jackson, Judge

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419 Sands, supra note 402, at 65.
421 See Natanson, supra note 12.
Shabaz found this requirement to be met: “Plaintiff has an easy alternative to communicating in code. He can play chess by mail by writing out his moves in words rather than in code.” The “code” of which Judge Shabaz wrote was algebraic chess notation.

As explained by Chess.com, “[c]hess notation is the act of recording or writing down the moves of a chess game. Over the years various methods and ways have been used to record the moves, but they have all disappeared except for the current standard for chess notation: algebraic notation.” Algebraic notation involves identifying each playing piece by a letter or symbol: “K” for king, “Q” for queen, “R” for rook, “B” for bishop, and “N” for knight. Each of these pieces is identified by the first letter of the name of the piece, except for the knight, since “K” identifies the king. Pawns have no abbreviation, as they are identified solely by the name of the square from which they moved. On an 8x8 chessboard, each of the 64 squares has a name or “address” that is identified with a letter and a number. Each of the eight vertical columns are called “files” and lettered a-h. Each of the eight horizontal rows are named “ranks” and are numbered 1-8. Thus, from the perspective of a player with the white pieces, the square in the lower left corner of the board is identified as a1, and the square in the upper right corner is identified as h8. This configuration on a chess board can be seen in the figure below.

424 Id. at *3.
425 Chess Notation, supra note 25.
426 Id.
427 BURGESS, supra note 393, at 553.
428 Chess Notation, supra note 25.
429 Id.
430 Id.
431 ALBURT & LAWRENCE, supra note 401, at 26.
432 Id.
433 Id.
Other symbols used in algebraic notation include an “x” when one piece captures another, a “+” when a move puts the opposing player in check, and a “#” when a checkmate ends the game.\textsuperscript{434}

Why have other methods of chess notations “disappeared” as described by Chess.com?\textsuperscript{435} As FIDE Master Graham Burgess has explained, “it is very easy to learn algebraic notation,”\textsuperscript{436} which is the standard form of chess notation.

\textsuperscript{434} Burgess, supra note 393, at 553-54.
\textsuperscript{435} Chess Notation, supra note 25.
\textsuperscript{436} Burgess, supra note 393, at 553.
today in newspapers, books, and computer games.\textsuperscript{437} Before algebraic notation, the most prevalent form of chess notation was descriptive notation.\textsuperscript{438} With descriptive notation, piece names could have more than one letter, files had longer designations than one letter, and the name of the file varied depending on whether one was describing the move for the player with the white or black pieces.\textsuperscript{439} According to Burgess, descriptive notation creates confusions, including that “there are often several equally valid ways in which a move can be written,”\textsuperscript{440} so “it is very easy to forget to give enough clarifications.”\textsuperscript{441} To see how much more efficient of a communication system algebraic notation is compared to descriptive notation, the move Nf4 represents a knight moving to the f4 square in algebraic notation.\textsuperscript{442} In descriptive notation, QN-KB4 represents either White’s queenside knight moving to the f4 square or it represents Black’s queenside knight moving to the f5 square.\textsuperscript{443} As this example demonstrates, algebraic notation is significantly clearer and more efficient than descriptive notation.

Of course, Judge Shabaz did not compare algebraic notation to descriptive notation, as he explained an alternative to algebraic notation could be Jackson “writing out his moves in words rather than in code.”\textsuperscript{444} However, writing out moves in words would be even less efficient than descriptive notation. It is also more confusing. If one cannot identify the square by its letter-number coordinates (as that would be the “code” to which Judge Shabaz was referring), one is left identifying a square using words, raising some of the same problems as descriptive notation. Imagine if in a correspondence game a player wrote something like, “I move my queenside knight to the square that is on the sixth file from the left and the fourth rank from the bottom.” If that player is playing with the White pieces, then the player receiving that message (who is playing Black) has to interpret that message from their perspective, which from their side of the board would be the square on the third file from the left and the fifth rank from the bottom. Thus, one can easily see how writing out a move in words is an even more confusing way to communicate than descriptive notation. Both are much more confusing than simply writing “Nf4.” Confusion could easily

\textsuperscript{437}Id.
\textsuperscript{438}Id. at 555.
\textsuperscript{439}Id.
\textsuperscript{440}Id.
\textsuperscript{441}Id.
\textsuperscript{442}See id. at 553 for a similar example.
\textsuperscript{443}Id. at 555.
lead to miscommunication and misinterpretation in a correspondence game, making it impossible to continue playing and fully exercising one’s First Amendment right. For this reason, banning algebraic chess notation means there is no alternative way to play, as it makes it extremely more difficult to effectively communicate ideas about the game.

Beside confusion, writing out moves in words is very inefficient in terms of space. Particularly in a case like Jackson’s where the moves were written on postcards, there is relatively little space on which to describe moves. This is especially the case if one has other information not related to the game that one also wants to convey on a postcard. And if these moves are being sent by postcard because this is cheaper to mail than sending a letter in an envelope, requiring longer descriptions of moves written out in words that would necessitate sending a letter instead of a postcard puts an additional tax on the exercise of one’s First Amendment right.

Furthermore, if chess algebraic notation is considered a form of code that could communicate improper information, what about writing out words in English as Judge Shabaz suggested? If two letter writers (at least one of whom is an inmate) are able to devise a secret code related to an a-h and 1-8 letter-number configuration, they could just as easily create secret meanings for English words. Basic words in English are given new meanings within communities on a regular basis, meaning those words could easily be coded to communicate illegality. For this reason, as explored above, a ban on “coded” communication suffers the defects of vagueness and overbreadth, as well as content discrimination. Similar to Justice Stevens’ criticism of the Turner majority’s logic because it could be used to erroneously conclude that “security is logically furthered by a total ban on inmate communication,” Judge Shabaz’s reasoning in Jackson could be used to ban all inmate correspondence. Such a position is untenable under a proper reading of the Turner test.

Perhaps the most important characteristic of algebraic chess notation is that it can be understood by two people who are native speakers of different languages. As explained by the United Nations, chess “can be exercised anywhere and played by all, across the barriers of language.” Similarly, The Gift of Chess organization describes chess as “a shared universal language.” This ability to communicate through algebraic notation and play a game with all of the benefits identified above applies across people of different native

445 Id. at *3.
446 See URBAN DICTIONARY, supra note 373.
448 World Chess Day: 20 July, supra note 6.
languages both when the correspondence is inmate-to-inmate and inmate-to-outsider.

Since *Jackson* was decided in 2007, there has been substantial expansion of chess playing via computer programming and the internet. Correspondence chess online could be a reasonable alternative to correspondence games through the mail using algebraic notation. However, inmates may not have access to computers or software loaded on any available computers to play games while incarcerated. Furthermore, online games typically record moves on the screen using algebraic notation. Thus, if one uses Judge Shabaz’s logic from *Jackson*, playing chess online would still be communicating in “code”: either by the algebraic notation being displayed on a computer screen during a game or by one player simply moving a piece to a square on the screen, that could be used to communicate messages about illegal activity. Consider “shill” moves of pieces online that, according to Judge Shabaz’s logic, could be used to communicate messages in code. Additionally, if physical mail to and from inmates is being inspected, it raises questions about how much officials may be able to monitor chess games played by inmates online to prevent communicating in code. Overall, these considerations show the absurdity of restricting correspondence chess in algebraic notation, whether it is through the mail or online. Thus, if playing chess via computer were protected, playing it by traditional correspondence means via the mail would also need to be protected.

This shows again why Judge Shabaz’s logic on this point is untenable, and it explains why both correspondence chess via the mail and correspondence chess online should receive First Amendment protection for inmates. As reasoned by the Court in *Winters v. New York* (1948), “[w]hat is one man’s amusement, teaches another’s doctrine.” Whether played via moving wooden or plastic pieces over a board in response to a communication by the mail, or played by movements of electronically produced images on a computer screen, both methods of communicating chess moves deserve First Amendment protection. There are clear messages being expressed—though moving pieces in person, mailing moves, or making moves online through the use of a

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450 See Ringer & Chakrabarti, supra note 10.
451 *About the Chess for Freedom Programme*, supra note 20.
452 *Burgess*, supra note 393, at 553; *Chess Notation*, supra note 25 (“Physically writing down the moves of a game is required in many over the board tournaments, but on Chess.com the moves are recorded for you! When playing a game on Chess.com, the moves of the game are displayed live as you and your opponent make them.”).
454 *Blitz*, supra note 17, at 809.
computer—regarding how one is playing against an opponent. Even if there are no broader discernable political or social messages communicated through chess moves, the Court has held that “a narrow, succinctly articulable message is not a condition of constitutional protection.”\textsuperscript{455} Furthermore, even the Federal Bureau of Prisons encourages communicating via the mail between inmates and their family, friends, and other community contacts to maintain ties during incarceration.\textsuperscript{456} For all of these reasons, bans on mailing chess moves in algebraic notation fail \textit{Turner’s} prong requiring considerations of alternatives for inmates to exercise their rights.

\textit{Turner’s} third requirement asks courts to consider “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.”\textsuperscript{457} The Court here is concerned with whether there will be a “significant ripple effect” on others in the prison environment.\textsuperscript{458} On this question, Judge Shabaz in \textit{Jackson} stated the following: “Allowing plaintiff to communicate in code would have an adverse effect on security as well as on the allocation of resources in the prisons.”\textsuperscript{459}

This summary analysis by Judge Shabaz was unsubstantiated by facts, and it is inapplicable to chess as a correspondence activity, either in inmate-to-inmate chess or chess between inmates and persons outside of prisons. If letters are permitted to be sent and received, there is already a process for scanning that mail for dangerous contraband and messages. Concerns about dangerous contraband being sent to inmates have greatly lessened in the years since \textit{Jackson}, as many states now provide inmates with reviewed copies of that correspondence, not the original physical mailings.\textsuperscript{460} Thus, no additional prison resources need to be allocated for this purpose, particularly if one accepts the premise that all forms of communication could be coded, serving what \textit{Cohen} described as multiple communicative functions.\textsuperscript{461}

Rather than making the prison environment less safe, protecting the right to communicate as it relates to chess enhances prison safety. As the United Nations explains, chess is an “inclusive activity,”\textsuperscript{462} making it a game that draws people

\begin{footnotes}
\footnote{456}{\textit{Stay in Touch}, supra note 364.}
\footnote{457}{Turner v. Safley, 482 U.S. 78, 90 (1987).}
\footnote{458}{Id.}
\footnote{459}{Jackson v. Pollard, No. 07-C-028-S, 2007 WL 1556867, at *9 (W.D. Wis. May 25, 2007), aff’d sub nom. Jackson v. Frank, 509 F.3d 389 (7th Cir. 2007).}
\footnote{460}{See Wang, supra note 363.}
\footnote{461}{See Cohen v. California, 403 U.S. 15, 26 (1971).}
\footnote{462}{\textit{World Chess Day}: 20 July, supra note 6.}
\end{footnotes}
together, rather than driving them apart. Chess can have a very positive effect on the prison environment, making life easier on both non-chess playing inmates and guards. As proclaimed by “The Gift of Chess” founder Russell Makofsky, within the prison environment, chess “helps with strategy, planning and critical thinking, it develops soft skills, but it also connects people to a shared idea . . . . I see people of all ages, races and backgrounds celebrate with each other this idea that they are a chess team, they can do something together, and be good at it.”

According to FIDE, in prisons “chess improves behavior, helping to reduce inmate violence and developing communication skills, while promoting positive use of leisure time.” Similarly, chess promoter Leontxo Garcia has illuminated how chess can promote more peace and civility in prisons: “chess makes us think about the consequences of what we are going to do before doing it. And . . . chess is a very good way to take out our tendency to violence. Every human being has some tendency to violence—bigger or smaller. Chess is a war with no blood.”

Chess being a peaceful alternative to war is deeply understood culturally, particularly how it was famously proclaimed in the film WarGames, where a supercomputer during the Cold War ran mutually assured destruction nuclear war simulations. The computer found that nuclear war is a “strange game,” and that “[t]he only winning move is not to play.” Instead, the supercomputer asked, “How about a nice game of chess?”

Correspondence chess is safer for the prison environment than face-to-face games, as it allows inmates to play without being in physical proximity to each other or persons from outside of the prison. Thus, it avoids what Pell described as concerns with “face-to-face communication with inmates . . . such as security and related administrative problems.” In addition to possible physical security concerns of placing inmates next to each other and giving them objects (i.e., the chess pieces) that could potentially be used as weapons, there are also fewer dangerous messages that could be passed between inmates, or from inmate to outsider, in correspondence games than would be the case if they were seated across from each other over a chess board. Granted, inmates playing
chess in person is already a safe recreational activity, certainly safer than recreational alternatives like the contact sports of football or boxing.\(^{471}\) Even heavier tournament-weighted chess sets weigh just a few pounds for an entire 32–34-piece set (the variation in pieces depends on if there are extra queens included),\(^{472}\) and the game can be played on a lightweight roll-up vinyl mat (rather than wood or stone boards),\(^{473}\) making them relatively safe objects when used in person. But regardless of how safe playing chess in person is, playing correspondence chess is clearly even less dangerous to guards and other inmates.

Furthermore, regarding the effects on non-chess playing inmates, if correspondence chess via algebraic notation can be denied, similar rationales are invoked by prison authorities to deny inmates the ability to play, and read about, other games that can have positive effects. For instance, Dungeons and Dragons and other role-playing games have been banned in some states’ prison systems.\(^{474}\) In one federal appellate decision, *Singer v. Raemisch*, the court upheld such a ban because there were alternatives available, in that inmates could play other games like Risk, Stratego, and chess!\(^{475}\) Clearly, federal court rulings on these matters are inconsistent. Furthermore, this is more evidence that such bans are a form of content discrimination, as the messages communicated in one type of game are different than those communicated in another type of game.\(^{476}\) Similarly, Wisconsin prisons ban inmates from accessing books on some games, including Magic the Gathering and Dungeons and Dragons.\(^{477}\) Wisconsin prisons also ban books on playing card games.\(^{478}\) Various other state prison systems have implemented bans on books and periodicals related to chess and role-playing games, as well as other boardgames, video games, card games,

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471 Blitz, *supra* note 17, at 809-10.


473 Id.


475 Id. at 136; Singer v. Raemisch, 593 F.3d 529, 539 (7th Cir. 2010).


478 See wpr_wisconsin_department_of_corrections_reviewed_publications, WIS. PUB. RADIO, https://docs.google.com/spreadsheets/d/1e3dfC56HMZiwzrNk0OTLBcTpyzDDHgmyh}5OQxsO/edit#gid=1505097632 (last visited Dec. 6, 2023) (examples of banned books include Sid Jackson’s Card Games Around the World and Albert H. Morehead’s Play According to Hoyle: Hoyle’s Rules of Games).
word puzzles, and sudoku. Lower federal court decisions like *Jackson* (chess) and *Singer* (Dungeons and Dragons) appear to have emboldened state prison authorities to ban the playing of many types of games and ban possession or receipt through the mail of publications about those games. The U.S. Supreme Court should clarify the protections in this regard. Otherwise, the negative effects of these regulations are felt by all inmates. Even if one is not a chess player, or a Dungeons and Dragons player, as these state bans demonstrate, banning First Amendment activity related to one game can easily be the basis to ban other games and other subjects. Soon, one approaches the situation in Florida, where more than 20,000 publications on various subjects have been banned in the state’s prisons. These much broader, negative effects can be corrected if *Turner* is reinterpreted the way it was originally contemplated, so as not to be “toothless” as described in *Abbott*.

These bans, including on correspondence chess and other games and subjects, are likely to disproportionately affect members of marginalized communities. Prison populations are skewed racially, so that the percentage of inmates of color is significantly higher than the percentage of persons of color in the United States overall. For instance, according to the U.S. Census Bureau, 13.6% of the United States population is Black after the 2020 census; 32% of inmates in state and federal prisons in 2021 were Black. Similarly, the U.S. Census Bureau reports that 19.1% of the United States population is Hispanic, but 24% of federal and state prison inmates are Hispanic. The real world impact of these types of bans, and who is affected by them, should factor into this prong of *Turner*, as more extensive bans will fall harder on

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484 *Quick Facts: United States*, supra note 482.

485 Carson, supra note 483, at 10.
communities of color, compounding effects of institutional racism in the criminal justice system.\textsuperscript{486}

Considering all of the relevant factors for protecting correspondence chess, any negative impacts on other inmates and on prison personnel are minimal, and there are some noted significant positive effects that attach to protecting the right to play correspondence chess. Negative effects are certainly more widespread when bans on this expression are enforced than when this expression is protected. Thus, a correspondence chess ban fails this prong on Turner.

Fourth, and finally, Turner instructs that “the absence of ready [regulatory] alternatives is evidence of the reasonableness of a prison regulation,”\textsuperscript{487} while “the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable,”\textsuperscript{488} if they can be implemented “at \textit{de minimis} cost to valid penological interests.”\textsuperscript{489} On this point, Judge Shabaz in Jackson concluded the following: “There has been no showing that there is another alternative to this regulation which would guard against the dangers of inmates communicating in code.”\textsuperscript{490}

In this vein, though, Judge Shabaz failed to account for the alternatives in Wisconsin’s administrative code, which already provide ready substitute restrictions if there were no bans on correspondence chess specifically or “coded” correspondence more generally. That same regulation bans incoming or outgoing mail if it threatens criminal activity or harm, threatens blackmail or extortion, concerns plans to escape, concerns activity that would violate state or federal laws or administrative rules, is pornographic, poses a threat to safety, or poses a threat to the prison’s security, orderly operation, discipline, or safety.\textsuperscript{491} Restrictions like these are common in departments of corrections across the 50 states.\textsuperscript{492} What is addressed in these restrictions are precisely the types of concerns Judge Shabaz had with Jackson’s correspondence, as he reasoned that “coded” language could “be used to further drug trafficking, convey escape plans, relay gang messages, plan disturbances, order attacks on staff and other

\textsuperscript{486} See, e.g., Rasheena Latham, \textit{Who Really Murdered Trayvon? A Critical Analysis of the Relationship Between Institutional Racism in the Criminal Justice System and Trayvon Martin’s Death}, 8 S.J. POL’Y & JUST. 80, 83 (2014) (“Nowhere is institutional racism more apparent than in the criminal justice system. The blatant racial disparities in the criminal justice system are a sobering reality.”).


\textsuperscript{488} Id.

\textsuperscript{489} Id. at 91.


\textsuperscript{491} Wis. Admin. Code DOC § 309.04(4)(c).

\textsuperscript{492} See Pokornowski, et al., supra note 355.
inmates and engage in other criminal conspiracies."\footnote{Jackson v. Pollard, No. 07-C-028-S, 2007 WL 1556867, at *3 (W.D. Wis. May 25, 2007), aff'd sub nom. Jackson v. Frank, 509 F.3d 389 (7th Cir. 2007).} Banning true threats, actual prison escape plans, and communication of this variety would certainly pass the \textit{Turner} test, as examples of expression related to criminal activity like this were offered in \textsc{Martinez} as communication that would fall outside of First Amendment protection for inmates even under an intermediate scrutiny standard.\footnote{Procunier v. Martinez, 416 U.S. 396, 413 (1974), \textit{overruled by} Thornburgh v. Abbott, 490 U.S. 401 (1989).} If inmate mail is already being read to restrict these types of communications, then there is no reason to systematically exclude correspondence chess moves. Indeed, with more specific restrictions on illegal correspondence, not every state has a general prohibition on communicating in "code,"\footnote{See Pokornowski, et al., \textit{supra} note 35.} meaning that there are obvious, easy alternative regulations that states employ. If all communication could be coded according to Judge Shabaz’s understanding (as discussed above), prison officials need to carefully read all incoming and outgoing inmate mail anyway. If they find evidence of criminal activity, threats to safety and security, and the like, they are certainly justified in censoring that mail, and staff training to detect those types of violations would certainly be in order. However, what a proper \textit{Turner} analysis should do is prohibit prison authorities from deeming all communication about correspondence chess to be censorable, unless there is some specific evidence to the contrary.

As Justice Douglas succinctly stated in his \textsc{Martinez} concurrence, “[p]risoners are still ‘persons’ entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirement of due process . . . . Free speech and press within the meaning of the First Amendment are . . . among the pre-eminent privileges and immunities of all citizens.”\footnote{\textit{Martinez}, 416 U.S. 396 at 428-29 (Douglas, J., concurring) \textit{overruled by} Thornburgh v. Abbott, 490 U.S. 401 (1989).} In that same case, Justice Marshall concurred, explaining (with a reference to \textit{Tinker}) that “[a] prisoner does not shed . . . basic First Amendment rights at the prison gate.”\footnote{\textit{Id.} at 422 (Marshall, J., concurring).} Certainly, an inmate might abuse those rights, and then reasonably lose them, but not all chess playing inmates and the members of the general public they play against should be restricted in their communicative activity because of mere speculation, especially when other alternative policies are readily available. In recent years, prison officials have been extended too much deference by courts, leading us to what Justice Marshall warned, “err[ing] on the side of too little freedom.”\footnote{Jones v. N.C. Prisoners’ Lab. Union, Inc., 433 U.S. 119, 142 (1977) (Marshall, J., dissenting).}
Ultimately, it was the Turner Court that concluded the following: “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” More recent Court decisions seem to be repudiating that understanding of the First Amendment. Such failures affect not just prison and jail inmates, but also the general public. This is true not just because censorship of correspondence to and from inmates inevitably will limit the expression of those non-inmates sending and receiving mail. It is also the case that if First Amendment rights are protected for the most politically unpopular populations like prison and jail inmates, they are certainly protected for everyone else. Finally, it is important that the Constitution is properly observed in places of incarceration because, in a quote that has been attributed to Fyodor Dostoevsky, “[t]he degree of civilization in a society can be judged by entering its prisons.” The Court should correct its recent slide toward total deference to prison officials on these questions. A case raising a First Amendment claim on a blanket ban on algebraic notation correspondence chess would be the perfect vehicle to right these wrongs. It is a gambit the Court should play.

500 Martinez, 416 U.S. at 408-09.
501 As the U.S. Supreme Court has made clear, “a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (emphasis in original).