SUPREME COURT OF THE UNITED STATES

No. 04–1739

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* RONALD BANKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 28, 2006]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

Judicial scrutiny of prison regulations is an endeavor fraught with peril. Just last Term, this Court invalidated California's policy of racially segregating prisoners in its reception centers, notwithstanding that State's warning that its policy was necessary to prevent prison violence. See *Johnson* v. *California,* 543 U. S. 499 (2005). California subsequently experienced several instances of severe race-based prison violence, including a riot that resulted in 2 fatalities and more than 100 injuries, and significant fighting along racial lines between newly arrived inmates, the very inmates that were subject to the policy invalidated by the Court in *Johnson*. See Winton & Bernstein, More Violence Erupts at Pitchess; Black and Latino inmates clash at the north county jail, leaving 13 injured, Los Angeles Times, Mar. 1, 2006, Metro Desk, p. B1. This powerful reminder of the grave dangers inherent in prison administration confirms my view that the framework I set forth in *Overton* v. *Bazzetta,* 539 U. S. 126, 138 (2003) (opinion concurring in judgment), is the least perilous approach for resolving challenges to prison regulations, as well as the approach that is most faithful to the Constitution. Accordingly, I concur only

in the judgment of the Court.

I

Both the plurality and the dissent evaluate the regulations challenged in this case pursuant to the approach set forth in *Turner* v. *Safley,* 482 U. S. 78 (1987), which permits prison regulations that "imping[e] on inmates' constitutional rights" if the regulations are "reasonably related to legitimate penological interests." *Id*., at 89. But as I explained in *Overton*, *Turner* and its progeny "rest on the unstated (and erroneous) presumption that the Constitution contains an implicit definition of incarceration." *Overton*, 539 U. S., at 139 (opinion concurring in judgment). Because the Constitution contains no such definition, "States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—*provided only that those deprivations are consistent with the Eighth Amendment*." *Ibid.* (emphasis in original). Respondent has not challenged Pennsylvania's prison policy as a violation of the Eighth Amendment, and thus the sole inquiry in this case is whether respondent's sentence deprived him of the rights he now seeks to exercise. *Id*., at 140.

"Whether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State's prerogative to determine how it will punish violations of its law." *Ibid.*[1] Although the question of whether Pennsylvania intended to confer upon respon-

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[1]As in *Overton*, respondent has not asked this Court to abstain from resolving his constitutional challenge under *Railroad Comm'n of Tex.* v. *Pullman Co.,* 312 U. S. 496 (1941) (holding that federal courts should ordinarily abstain where the resolution of a federal constitutional issue may be rendered irrelevant by the determination of a predicate state-law question), and the issue of *Pullman* abstention was not considered below. As a result, respondent has "submitted to the sort of guesswork about the meaning of prison sentences that is the hallmark of the *Turner* inquiry." *Overton*, 539 U. S., at 141 (THOMAS, J., concurring in judgment).

dent and other inmates a right to have unfettered access to newspapers, magazines, and photographs is thus "ultimately for the State itself to answer," in the absence of a resolution of that question by the Pennsylvania Supreme Court, we must resolve it in the instant case. *Id.*, at 141. Fortunately, the answer is straightforward.

In *Overton*, I explained:

> "[s]entencing a criminal to a term of imprisonment may, under state law, carry with it the implied delegation to prison officials to discipline and otherwise supervise the criminal while he is incarcerated. Thus, restrictions imposed by prison officials may also be a part of the sentence, provided that those officials are not acting ultra vires with respect to the discretion given them, by implication, in the sentence." *Id.*, at 140, n. *

A term of imprisonment in Pennsylvania includes such an implied delegation. Pennsylvania inmates are subject to the rules and disciplinary measures set forth by the Pennsylvania Department of Corrections. See, *e.g.,* Bulletin Inmate Discipline, Policy No. DC–ADM 801 (2004), http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_801_Inmate_Discipline.pdf (as visited June 12, 2006, and available in Clerk of Court's case file). And no one disputes that the regulations challenged in the instant litigation fall within the discretion given to the Department of Corrections. As in *Overton*, the conclusion that these regulations are included in the prison sentence is strongly supported by the plurality's *Turner* analysis. A prison policy that has a "valid rational connection [to] the . . . legitimate penological objectives" of improving prison security and discouraging inmate misbehavior, *ante,* at 8 (internal quotation marks omitted), "that [is] designed to avoid adverse impacts on guards, inmates, or prison resources, [and] that cannot be replaced by 'ready alterna-

tives,' [is] presumptively included within a sentence of imprisonment." *Overton*, 539 U. S., at 141–142 (THOMAS, J., concurring in judgment).

The "history of incarceration as punishment [also] supports the view that the sentenc[e] imposed on responden[t] terminated" his unfettered right to magazines, newspapers, and photographs. *Id.*, at 142. As I explained in *Overton*, imprisonment as punishment "became standardized in the period between 1780 and 1865," *id.*, at 143 (citing McGowen, The Well-Ordered Prison: England, 1780–1865, in The Oxford History of the Prison: The Practice of Punishment in Western Society 79 (N. Morris & D. Rothman eds. 1995)), and was distinguished by the prisoner's isolation from the outside world. 539 U. S., at 143. Indeed, both the Pennsylvania and Auburn prison models, which formed the basis for prison systems throughout the Nation in the early 1800's, imposed this isolation specifically by denying prisoners access to reading materials and contact with their families. Rothman, Perfecting the Prison: United States, 1789–1865, in The Oxford History of the Prison 117; see also *id.,* at 118 (explaining that in the Pennsylvania system, inmates were "given nothing to read except the Bible and were prevented from corresponding with friends and family"); S. Christianson, With Liberty for Some: 500 Years of Imprisonment in America 145 (1998) (explaining that in Sing Sing, the standard bearer for the Auburn model, no reading materials of any kind, except the Bible, were allowed inside). Even as the advent of prison libraries increased prisoners' access to reading materials, that access was universally "subject to some form of censorship," such that "inmates of correctional institutions are denied access to books which are freely available to the rest of the community." G. Bramley, Outreach: Library Services for the Institutionalized, the Elderly, and the Physically Handicapped 91, 93 (1978).

Although Pennsylvania "is free to alter its definition of incarceration to include the retention" of unfettered access to magazines, newspapers, and photographs, it appears that the Commonwealth instead sentenced respondent against the backdrop of its traditional conception of imprisonment, which affords no such privileges. *Overton*, *supra*, at 144–145 (THOMAS, J., concurring in judgment). Accordingly, respondent's challenge to Pennsylvania's prison regulations must fail.

II

This case reveals the shortcomings of the *Turner* framework, at least insofar as that framework is applied to prison regulations that seek to modify inmate behavior through privilege deprivation. In applying the first *Turner* factor, the plurality correctly observes that Pennsylvania's policy of depriving its most incorrigible inmates of their last few remaining privileges bears a "valid rational connection" to the "legitimate penological objectiv[e]" of "encourag[ing] progress and discourag[ing] backsliding" of inmate compliance with prison rules. *Ante,* at 8, 9 (internal quotation marks omitted). Indeed, this Court has previously determined that "[w]ithdrawing . . . privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners." *Overton, supra*, at 134.[2]

Although policies, such as Pennsylvania's, that seek to promote compliance with prison rules by withdrawing

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[2] In my view, this legal conclusion, combined with the deference to the judgment of prison officials required under *Turner*, see *ante,* at 8–15, would entitle prison officials to summary judgment against challenges to their inmate prison deprivation policies in virtually every case. In this context, it is highly unlikely a prisoner could establish that the "connection between the regulation and the asserted goal is arbitrary or irrational." *Shaw* v. *Murphy*, 532 U. S. 223, 229 (2001) (internal quotation marks omitted).

various privileges may always satisfy *Turner*'s first factor, they necessarily fail its second factor. Such policies, by design, do not provide an "alternative means" for inmates to exercise the rights they have been deprived. 482 U. S., at 90. The "legitimate penological objectiv[e]" of encouraging compliance with prison rules by depriving misbehaving inmates of various privileges simply cannot be accomplished if prison officials are required to provide prisoners with an alternative and equivalent set of privileges. Thus, the plurality's observation that respondent's privileges may be restored in response to continued, improved behavior, is simply irrelevant to the second factor of *Turner*, which asks only "whether . . . alternative means of exercising the right . . . remain open to prison inmates." *Ibid.* The answer in the context of privilege deprivation policies is always no, thus demonstrating the difficulty of analyzing such policies under the *Turner* framework.

The third and fourth *Turner* factors are likewise poorly suited to determining the validity of inmate privilege deprivation policies. When the "valid penological objectiv[e]" of a prison policy is encouraging compliance with prison rules, it makes little sense to inquire into "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," or into the availability of "ready alternatives." *Ibid.* At best, such inquiries merely collapse the third and fourth factors into the first, because accommodating the exercise of the deprived right will undermine the incentive effects of the prison policy and because the unavailability of "ready alternatives" is typically (as in this case) one of the underlying rationales for the adoption of inmate privilege deprivation policies.

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Because the prison regulations at issue today are permissible under the approach I explained in *Overton*, I concur in the judgment of the Court.