NOTES

Restricting the Right of Correspondence in the Prison Context: *Thornburgh v. Abbott* and its Progeny

INTRODUCTION

In the 1974 landmark decision, *Procunier v. Martinez*,[1] the United States Supreme Court held that certain prison regulations on inmates' personal correspondence,[2] under an intermediate scrutiny standard of review, violated the First Amendment to the United States Constitution.[3] In recent years, however, the Supreme Court has employed an increasingly deferential approach when evaluating restrictions on First Amendment rights in the prison context.[4] One result of the Court's more deferential approach has been the acceptance of increasingly restrictive limitations on the rights of prison inmates.[5] Yet, the restrictions upheld by the Court often affect not only the rights of the prisoners but those of free citizens as well.

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1. 416 U.S. 396 (1974), *overruled in part by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

2. The regulations prohibited inmates from writing letters in which they "unduly complain" or "magnify grievances," defined as contraband writings "expressing inflammatory political, racial, religious or other views or beliefs," and stated that inmates "may not send or receive letters that pertain to criminal activity; are lewd, obscene or defamatory; contain foreign matter, or are otherwise inappropriate." 416 U.S. at 399-400 (quotations omitted).

3. 416 U.S. 396.

4. *Compare id.* at 413 (applying the intermediate scrutiny standard) *with* Turner v. Safley, 482 U.S. 78, 89 (1987) (holding it sufficient that restrictions on inmate-to-inmate correspondence and inmate marriages be only "reasonably related to legitimate penological interests") *and* Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989) (upholding prison restrictions on incoming publications under a reasonableness test and limiting the intermediate scrutiny standard to outgoing mail only).

5. *See, e.g., Abbott*, 490 U.S. at 404-05 (upholding prison regulations authorizing prison officials to intercept publications sent to prisoners which threaten the institution's "security, good order, or discipline"); *Turner*, 482 U.S. at 91 (upholding prison restrictions on inmate-to-inmate correspondence).

For example, limitations on correspondence between prisoners and nonprisoners also restrict the free speech of those outside of the prisons.[6]

In *Thornburgh v. Abbott*,[7] the Supreme Court upheld the constitutionality of regulations that allowed prison officials to reject certain publications sent by publishers to prisoners.[8] Finding the regulations reasonably related to legitimate penological interests,[9] the Court for the first time applied a reasonableness standard to restrictions that directly affected the First Amendment rights of nonprisoners.[10]

In *Abbott*, the Court justified the application of a reasonableness standard by noting a number of potential security problems that may arise when certain publications are sent into the prisons.[11] However, by limiting the applicability of the *Martinez* intermediate scrutiny standard to only outgoing personal correspondence from prisoners, the Court opened the door to evaluating restrictions on incoming personal correspondence under a mere reasonableness standard.[12] Notably, the Court's holding in *Abbott* did not distinguish between incoming publications and other incoming mail.[13] As a result, lower and intermediate courts have subsequently applied a reasonableness standard to restrictions on all categories of incoming prison mail, including both publications and personal letters.[14]

More recently, the United States Courts of Appeals for the Fifth[15] and Eighth[16] Circuits have both held that, under *Abbott*, the

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6. *See Martinez*, 416 U.S. at 408 (restrictions on inmate personal mail affect the First Amendment rights of inmates' nonprisoner correspondents); *see also Abbott*, 490 U.S. at 407 (restrictions on incoming publications affect the First Amendment rights of publishers).

7. 490 U.S. 401 (1989).

8. *Id.* at 404.

9. *Id.*

10. *Cf. Martinez*, 416 U.S. at 408-14 (applying the intermediate scrutiny standard to restrictions affecting the First Amendment rights of nonprisoners).

11. *Abbott*, 490 U.S. at 411-13.

12. *See id.* at 413-14.

13. *See id.*; *see also infra* notes 86-87 and accompanying text.

14. *See* discussion *infra* part II.B.1.

15. *See* Brewer v. Wilkinson, 3 F.3d 816 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1081 (1994).

16. *See, e.g.*, Smith v. Delo, 995 F.2d 827 (8th Cir. 1993), *cert. denied*, 114 S. Ct.

reasonableness standard should be applied to correspondence sent by inmates as well.[17] A number of other courts, however, including the United States Courts of Appeals for the First[18] and Sixth[19] Circuits, have cited *Abbott* to hold that the intermediate scrutiny standard articulated in *Procunier v. Martinez* remains valid for restrictions on outgoing correspondence.[20]

This Note argues that the reasoning of the courts that continue to follow the *Martinez* intermediate scrutiny standard for outgoing mail is sound because the facts and holding in *Abbott* involved exclusively incoming mail.[21] The approach of the Fifth and Eighth Circuits, applying the mere reasonableness standard, represents yet another stage of increased and undesirable deference that a number of courts have accorded prison officials in enacting regulations that implicate the constitutional rights of both prisoners and free citizens.

Part I of this Note briefly reviews the instrumental Supreme Court decisions addressing First Amendment rights in the prison context. This Part traces the development of the standard of review for prison regulations that restrict First Amendment freedoms for both prisoners and nonprisoners. It concludes with a general discussion of *Thornburgh v. Abbott*. Part II critiques the *Abbott* decision and analyzes the problems inherent in the Court's reasoning. Further, this Part discusses subsequent decisions of the lower courts that have applied *Abbott* to a variety of prison mail regulations and examines the split between the circuits regarding which standard of review should apply to restrictions on outgoing prisoner mail. This Note concludes with a call for courts to more carefully scrutinize prison regulations which affect the First Amendment rights of free citizens and, specifically, to adhere to the intermediate scrutiny standard of review for restrictions on outgoing prisoner mail.

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710 (1994).

17. *See* discussion *infra* part II.B.2.a.

18. *See* Stow v. Grimaldi, 993 F.2d 1002 (1st Cir. 1993).

19. *See* Burton v. Nault, 902 F.2d 4 (6th Cir.), *cert. denied*, 498 U.S. 873 (1990).

20. *See* discussion *infra* part II.B.2.b.

21. *See* discussion *infra* part II.B.3.

I. BACKGROUND—SUPREME COURT CASES RELATING TO FIRST AMENDMENT RIGHTS IN THE PRISON CONTEXT

A. Procunier v. Martinez—*Setting the Intermediate Scrutiny Standard*

Commentators agree that, prior to the 1974 decision in *Procunier v. Martinez*,[22] courts deciding the constitutionality of prison regulations generally used a "hands-off" approach to prisoners' claims, which resulted in "absolute deference to prison officials."[23] In *Martinez*, prisoners challenged the constitutionality of prisoner mail regulations issued by the Director of the California Department of Corrections.[24] Among the many restrictions were rules that inmates should not write letters in which they "unduly complain" or "magnify grievances."[25] In addition, writings were considered contraband if they were found to be "expressing inflammatory political, racial, religious or other views or beliefs."[26] Finally, the rules stated that inmates "may not send or receive letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate."[27]

In *Martinez*, the United States District Court for the Northern District of California held that these regulations violated the First Amendment because they allowed censorship of protected expres-

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22. 416 U.S. 396 (1974).

23. *See* Lorijean Golichowski Oei, Note, *The New Standard of Review for Prisoners' Rights: A "Turner" for the Worse?* Turner v. Safley, 33 VILL. L. REV. 393, 399-401 & nn.29-30 (1988); *see also* Barry R. Bell, Note, *Prisoners' Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161, 161-62 (1986) (stating that before the 1960s, "[m]ost judges assumed that prisoners, by the fact of conviction, had lost their constitutional rights" and that "[e]ven in the face of barbarous and arbitrary mistreatment of prisoners, most judges deferred to prison administrators"); Megan M. McDonald, Note, Thornburgh v. Abbott: *Slamming the Prison Gates on Constitutional Rights*, 17 PEPP. L. REV. 1011, 1013 & nn.17-18 (1990) (stating that federal courts' "broad hands-off attitude" prior to *Martinez* "[e]ssentially . . . functioned as a jurisdictional bar to prisoners' constitutional complaints brought to the federal courts, as the courts effectively declared that prisoners had no constitutional rights").

24. *Martinez*, 416 U.S. at 398.

25. *Id.* at 399 (quotation omitted).

26. *Id.* (quotation omitted).

27. *Id.* at 399-400 (quotation omitted).

sion without adequate justification.[28] For this and other reasons, the court enjoined further enforcement of the regulations.[29]

On appeal, the United States Supreme Court considered, as a matter of first impression, the appropriate standard of review for prison regulations which restricted freedom of speech.[30] District and circuit courts had previously adopted a wide range of inconsistent approaches due to the tension between the traditional policy of judicial restraint regarding prison regulations and the importance of protecting constitutional rights.[31] The Court noted that this lack of an accepted standard caused not only inconsistent and incomplete protection of prisoners' rights, but also unnecessary litigation and federal court involvement in prison administration.[32]

Before suggesting a standard for review, the Court stated that its analysis would be different from that of the federal courts which had previously discussed prisoners' First Amendment rights.[33] The Court noted that because correspondence includes at least two parties, the analysis did not have to address the question of what rights are retained by incarcerated prisoners.[34] Instead, the Court's discussion focused on the broader rights of the nonprisoner, whose freedom of speech is affected by restrictions on the prisoner's correspondence with that nonprisoner.[35]

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28. *Martinez v. Procunier*, 354 F. Supp. 1092, 1095-97 (N.D. Cal. 1973).

29. *Id.* at 1099. For a detailed description of the procedural history of *Martinez*, see Oei, *supra* note 23, at 403-06 & nn.45-59.

30. *Martinez*, 416 U.S. at 406.

31. *Id.* at 406-07. The Court observed that some courts had adopted a "hands-off posture," *id.* at 406 (citing McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964)), or required that censorship of personal prison correspondence find support "in any rational and constitutionally acceptable concept of a prison system," *id.* (quoting Sostre v. McGinnis, 442 F.2d 178, 199 (2d Cir. 1971), *cert. denied sub nom.* Oswald v. Sostre, 405 U.S. 978 (1972)). Other courts required a compelling state interest, *id.* at 406-07 (citing Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968)), or a "clear and present danger," *id.* at 407 (quoting Wilkinson v. Skinner, 462 F.2d 670, 672-73 (2d Cir. 1972)). Finally, some courts adopted intermediate positions, such as requiring regulations to "be related both reasonably and necessarily to the advancement of some justifiable purpose," *id.* (quoting Carothers v. Follette, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970)).

32. *Id.* at 407.

33. *Id.* at 407-08.

34. *Id.* at 408.

35. *Id.* at 408-09.

Turning then to what standard should be used for a restriction on free citizens' First Amendment rights in the prison context, the *Martinez* Court posited an intermediate scrutiny standard. This standard is to be applied through a two-pronged test: (1) the regulation must "further an important or substantial governmental interest" (in the instant case, the interests of security, order and rehabilitation); and (2) "the limitation of First Amendment freedoms must be no greater than necessary or essential to the protection of the particular governmental interest."[36] Referring to the second criterion, the Court elaborated that the restriction on inmate correspondence, even if it furthers an important or substantial interest, is invalid if unconstitutionally broad.[37]

Applying this intermediate scrutiny standard, the Court affirmed the district court's decision and held that the broad restrictions on prisoners' correspondence were not shown to be necessary to further a governmental interest.[38] The Court rejected the suggestion that the restrictions were necessary to prevent dangers to prison security.[39] It noted that the regulations were not narrow enough to restrict only material that could lead to violence.[40]

In a concurring opinion, Justice Marshall expressed the view that prisoners retain all First Amendment rights "except those expressly, or by necessary implication, taken from [them] by law."[41] The concurring opinion found that the blanket authority granted to prison officials to read all prison correspondence, without reason to believe that a specific letter poses security concerns, seriously infringed upon prisoners' rights to free expression.[42] Justice Marshall argued that it was important for prisoners to be able to express their views to nonprisoners without the fear that their jailers

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36. *Id.* at 413.

37. *Id.* at 413-14.

38. *Id.* at 415.

39. *Id.* at 416.

40. *Id.*

41. *Id.* at 422-23 (Marshall, J., concurring) (quoting Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944)).

42. *Id.* at 423 (Marshall, J., concurring).