CALLING THE SUPREME COURT: PRISONERS' CONSTITUTIONAL RIGHT TO TELEPHONE USE

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INTRODUCTION

Winston Holloway is seventy years old and lives in Arkansas.[1] Each month, he can afford to make about two telephone calls.[2] The first is to his son, who is

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[1] Affidavit of Winston Holloway at 1, Holloway v. Magness, No. 5:07CV00088 JLH-BD, 2011 WL 204891 (E.D. Ark. Jan. 21, 2011).

[2] *Id.* at 2.

in the U.S. Army and is stationed in Arizona.[3] If his son is overseas, Holloway calls his daughter-in-law and his grandchildren in Arizona.[4] The second telephone call is to one of his two sisters, both of whom live in Lufkin, Texas.[5] Each fifteen-minute call that Holloway makes to his son, grandchildren, or sisters costs $10.70 plus taxes and any governmental charges.[6] One of Holloway's sisters visits him in Arkansas about once a year, and his son's family visits every few years.[7] Holloway has never seen his youngest grandchild, and he has seen another grandchild only once.[8] His grandchildren are too young to write to him, and letters from other family members are infrequent.[9] The telephone calls and the rare visits are the only occasions in which Holloway hears his family members' voices.[10] Holloway is unable to use email or visit his family members.[11] For Holloway, the telephone is a "unique and essential way" to communicate with others.[12] Holloway has been in prison for thirty-eight years, and he will remain in prison for the rest of his life.[13]

If the telephone calls were less expensive, Holloway would make calls more frequently.[14] Holloway's situation is not unique. The telephone is an essential way for many prisoners to communicate with the outside world, yet prisoner telephone calls cost much more than telephone calls between two nonprisoners.[15] For instance, an Alabama, Alaska, Colorado, Connecticut,

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Brief in Support of Plaintiffs' Motion for Summary Judgment at 5, Holloway v. Magness, No. 5:07CV00088 JLH-BD, 2011 WL 204891 (E.D. Ark. Jan. 21, 2011).

[7] Supplemental Affidavit of Winston Holloway at 1-2, Holloway v. Magness, No. 5:07CV00088 JLH-BD, 2011 WL 204891 (E.D. Ark. Jan. 21, 2011).

[8] *Id.* at 2.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 2-3.

[13] *See* Holloway v. State, 594 S.W.2d 2, 3-4 (Ark. 1980) (affirming Holloway's conviction on retrial); *see also* Holloway v. Arkansas, 435 U.S. 475, 476-91 (1978) (reversing and remanding Holloway's initial conviction). Holloway was convicted of one count of robbery, two counts of rape, and three counts of using a firearm in commission of a felony, after he helped rob a restaurant and rape two of the restaurant's female employees. *Holloway*, 594 S.W.2d at 3 ("[Holloway] was sentenced to life plus 116 years imprisonment."). The heinous acts Holloway committed might make it more difficult for some to feel sympathy for him or to care whether courts protect his constitutional rights; as explained in Part I.A, however, the argument over whether prisoners *should* retain constitutional rights inside prison is well-settled and is outside the scope of this Note.

[14] Supplemental Affidavit of Winston Holloway, *supra* note 6, at 2-3.

[15] *See* JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, VERA INST. OF JUSTICE, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN

Georgia, Illinois, Minnesota, North Carolina, or Oregon prisoner's ten-minute out-of-state call costs $12.85; in other states, the cost is even higher.[16] These costs reflect decisions by state departments of corrections to use prisoner telephone calls to fund general prison operations.[17] Throughout the country, the method through which departments of corrections use prisoner telephone calls to raise revenue is similar: a department of corrections contracts with a telephone company, granting the telephone company exclusive rights to provide telephone service to inmates.[18] In return for granting these exclusive privileges, the department of corrections receives a "commission" from the telephone company – i.e., a percentage of the telephone company's gross revenue from prisoners' telephone calls.[19] In states where these systems are in place, commissions average forty-two percent of gross revenues from prisoner telephone calls.[20] According to one study, nearly eighty-five percent of state prison systems receive commissions from telephone service providers.[21] These systems create higher prices for prisoners' telephone calls and give departments of corrections a greater incentive to allow phone companies to increase prices further on inmate calls.[22]

Under these systems, telephone companies usually install collect-call-only phones in the prisons.[23] As a result, prisoners generally do not pay their telephone call expenses. Instead, the cost falls on the "spouses, parents and other collect-call recipients who typically come from the country's poorest families."[24] The economic cost to prisoners' family and friends is not light. State prison systems receive over $152 million annually from these commissions, from a prison telephone market that is worth more than $362 million annually in gross revenue.[25]

AMERICA'S PRISONS 36-37 (2006), *available at* http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf.

[16] John E. Dannenberg, *Nationwide* PLN *Survey Examines Prison Phone Contracts, Kickbacks*, PRISON LEGAL NEWS, Apr. 2011, at 1, 16, *available at* https://www.prisonlegalnews.org/includes/_public/_issues/pln_2011/04pln11.pdf.

[17] *Id.* at 4.

[18] *See* GIBBONS & DE B. KATZENBACH, *supra* note 15, at 36.

[19] *See id.*

[20] Dannenberg, *supra* note 16, at 1.

[21] *Id.* at 14.

[22] Telephone companies always have an incentive to increase prices, if there is sufficient demand or if, as is the case here, the telephone company serves a captive market. Thus, this system gives each party to the contract an incentive to generate the most revenue from prisoner telephone calls. Unlike the free market, where competition drives prices down, this system creates incentives to price telephone calls at the point where prisoners and the people whom they call will spend the most money.

[23] *See* GIBBONS & DE B. KATZENBACH, *supra* note 15, at 36.

[24] Editorial, *The Bankrupt-Your-Family Calling Plan*, N.Y. TIMES, Dec. 22, 2006, at A34.

[25] Dannenberg, *supra* note 16, at 1.

On September 13, 2010, a federal magistrate judge in the Eastern District of Arkansas held that the Arkansas Department of Correction unconstitutionally infringed the First Amendment right of Holloway and other prisoners to use the telephone to communicate with people outside the prison.[26] Judge Deere's recommended disposition in *Holloway v. Magness* is the first opinion in the United States to hold that a commission paid from a telephone company to a department of corrections is unconstitutional.[27] Judge Deere's recommended disposition runs in direct opposition to Judge Posner's decision in *Arsberry v. Illinois*, where the Seventh Circuit held that prisoners in Illinois have no First Amendment right to use the telephone.[28] Other circuits also have weighed in on prisoners' constitutional right to telephone access: the Ninth Circuit stated that "prisoners have a First Amendment right to telephone access,"[29] the Sixth Circuit recognized that prisoners have a First Amendment right to limited telephone access,[30] the Eighth Circuit found that the First Amendment "may" include a right to prisoner telephone access,[31] and the First Circuit stated in a *dictum* that inmates have "no per se constitutional right to use a telephone."[32]

Against this backdrop of divergent views, this Note examines prisoners' First Amendment right to use the telephone to communicate with others outside the prison. Part I traces the Supreme Court's formulation of the standards by which courts evaluate prison regulations that infringe constitutional rights. In the absence of explicit Supreme Court direction, lower courts[33] have decided First Amendment challenges to regulations infringing prisoners' telephone use in numerous and inconsistent ways. Part II examines the first major issue on which lower courts disagree: whether limits on prisoner telephone use infringe any constitutional right. Part III examines the second major issue on which lower courts disagree: if a court finds that the limitation implicates a constitutional right, what level of scrutiny the court should use to evaluate whether the infringement is constitutional. To demonstrate these

[26] Holloway v. Magness, No. 5:07CV00088 JLH-BD, slip op. at 39 (E.D. Ark. Sept. 13, 2010). Judge Deere's recommended disposition, however, was not adopted by the federal district judge. *See* Holloway v. Magness, No. 5:07CV00088 JLH-BD, 2011 WL 204891, at *1 (E.D. Ark. Jan. 21, 2011) ("The Court does not agree that the contract between the telephone company and the prison system violates the First Amendment rights of inmates and therefore declines to adopt the recommendation of the magistrate judge on that issue."). The case currently is on appeal to the United States Court of Appeals for the Eighth Circuit.

[27] *Holloway*, slip op. at 39 ("[T]he Policy unreasonably infringes on Plaintiffs' first amendment right to communicate with their attorneys, friends, and family outside the prison walls.").

[28] Arsberry v. Illinois, 244 F.3d 558, 564-65 (7th Cir. 2001).

[29] Johnson v. California, 207 F.3d 650, 656 (9th Cir. 2000).

[30] Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir. 1994).

[31] Benzel v. Grammer, 869 F.2d 1105, 1108 (8th Cir. 1989).

[32] United States v. Footman, 215 F.3d 145, 155 (1st Cir. 2000).

[33] In this Note, the term "lower courts" refers to any Article III court other than the U.S. Supreme Court.

differences, this Note focuses on First Amendment challenges to commissions paid from a telephone service provider to a department of corrections ("commission cases"). Part IV explains why the Supreme Court should decide a commission case and details how the Court should resolve the lower courts' disputes.

I. EXTENDING CONSTITUTIONAL RIGHTS TO PRISONERS

A. *The Supreme Court's Treatment of Prisoners' Constitutional Rights*

Two principles guide the Supreme Court's decisions regarding prisoners' constitutional rights. First, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."[34] Prisoners retain those constitutional rights not inconsistent with their status as prisoners.[35] Thus, federal courts may not dismiss a prisoner's constitutional claim simply because the claimant is in prison, and "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[36] While extending constitutional rights to prisoners might be controversial, it is settled law.[37]

The Supreme Court's second guiding principle is that prison administrators deserve deference in determining how to run their prisons.[38] The Court's opinions cite three reasons for giving prison administrators deference: (1) "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform";[39] (2) the responsibilities of administrators, which include maintaining order, securing the prisons against escape, and rehabilitating prisoners, require expertise and complex planning;[40] and (3) such expertise, planning, and commitment of resources "are peculiarly within the province of the legislative and executive branches of government."[41]

These two guiding principles – that prisoners retain their constitutional rights inside prison and that prison administrators deserve deference in managing their prisons – often conflict, and when they do, judges must decide how to balance protection of prisoners' constitutional rights with prison administrators' flexibility to achieve their goals. Tracing the Supreme Court's

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[34] Turner v. Safley, 482 U.S. 78, 84 (1987).

[35] *See* Pell v. Procunier, 417 U.S. 817, 822 (1974).

[36] Procunier v. Martinez, 416 U.S. 396, 405-06 (1974).

[37] *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (holding that prisoners retain due process protections); Johnson v. Avery, 393 U.S. 483, 485-86 (1969) (holding that prisoners retain the constitutional right to petition the government); Lee v. Washington, 390 U.S. 333, 333 (1968) (holding that the Fourteenth Amendment's Equal Protection Clause protects prisoners against invidious racial discrimination).

[38] *See Turner*, 482 U.S. at 85.

[39] *Martinez*, 416 U.S. at 404-05.

[40] *Pell*, 417 U.S. at 827.

[41] *Turner*, 482 U.S. at 84-85; *Martinez*, 416 U.S. at 405.

approach to prisoners' First Amendment challenges reveals how the Court has attempted to balance these competing principles, and it exposes the challenges the Court has faced in enunciating a standard by which prisoners' constitutional challenges should be evaluated.

B. *The Supreme Court's Approach to Prisoners' Challenges Under the First Amendment*

Many prisoner challenges under the First Amendment involve claims that prison regulations, promulgated either by federal or state authorities, infringe the prisoners' right to free speech. The First Amendment to the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . . ."[42] That prohibition applies to the states through the Fourteenth Amendment's Due Process Clause: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[43]

The first major Supreme Court case to delineate a standard of review for prison regulations restricting freedom of speech was *Procunier v. Martinez*.[44] In *Martinez*, prisoners challenged the California Department of Corrections' broad regulation and censorship of prisoner mail.[45] Explaining that censorship of mail also infringed the constitutional rights of those who are not prisoners, the Court rejected "any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners."[46] The Court then stated that censorship of prison mail was justified if two criteria were met: (1) the prison regulations "further[ed] an important or substantial governmental interest unrelated to the suppression of expression"; and (2) the regulations did not infringe First Amendment freedoms more "than is necessary or essential to the protection of the particular governmental interest involved."[47] Applying these criteria, the Court held that the mail regulations were unconstitutional – they were not necessary to the furtherance of an important governmental interest unrelated to the suppression of expression.[48]

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[42] U.S. CONST. amend. I.

[43] U.S. CONST. amend. XIV, § 1; *see* Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (incorporating the First Amendment's Free Speech Clause into the Fourteenth Amendment's Due Process Clause).

[44] *Martinez*, 416 U.S. at 406.

[45] *Id.* at 398.

[46] *Id.* at 409.

[47] *Id.* at 413 (identifying security, order, and rehabilitation as substantial government interests).

[48] *Id.* at 415 (holding as unconstitutional mail regulations censoring statements that "magnify grievances," statements that contain "inflammatory political, racial, religious or other views," and "matter deemed 'defamatory' or 'otherwise inappropriate'"). The Court's opinion then described how the mail regulations were drawn much too broadly, instead of being narrowly drawn to reach only material that might encourage violence. *Id.* at 416.

While the Court in *Martinez* held that the prison regulations at issue must "further an *important* or *substantial* governmental interest,"[49] the Court's opinions following *Martinez* muddied and lessened that standard.[50] In *Pell v. Procunier*, the Court stated that a prisoner "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."[51] The Court's opinion also reinterpreted *Martinez*'s holding: "In Procunier v. Martinez . . . we could find no *legitimate* governmental interest to justify the substantial restrictions."[52] In *Jones v. North Carolina Prisoners' Labor Union, Inc.*, the Court held that a prohibition on bulk mailings "barely implicated" prisoners' First Amendment rights, and the regulation was therefore "reasonable" under the circumstances.[53] The Court also upheld a ban on union solicitation and group meetings inside the prison, stating that the ban "was rationally related to the reasonable, indeed to the central, objectives of prison administration."[54] In *Bell v. Wolfish*, a rule restricting inmates' receipt of hardback books unless mailed directly from the publisher was upheld as a "rational response" to a clear security problem.[55] Finally, in *Block v. Rutherford*, a ban on contact visits was upheld as "reasonably related" to security concerns.[56]

None of these decisions overruled *Martinez* or even explicitly stated that it was changing the standard used to evaluate challenges to infringements on prisoners' First Amendment rights. Thus, the evaluating standard was unclear. Did the government need to show that the regulation furthered an important governmental interest, or only a legitimate interest? How closely linked did the governmental interest and the prison regulation need to be? Should courts use different evaluating standards when the prison regulation also implicates the constitutional rights of nonprisoners? The Court's decisions in *Turner v. Safley* and *Thornburgh v. Abbott* attempted to answer these questions.

Turner involved two prison regulations promulgated by the Missouri Division of Corrections (MDC).[57] The first regulated correspondence between inmates in different prisons.[58] The MDC allowed correspondence between inmates who were immediate family members, but other correspondence was permitted "only if the classification/treatment team of each inmate deems it in

[49] *Id.* at 413 (emphasis added).

[50] *See* Block v. Rutherford, 468 U.S. 576, 586 (1984); Bell v. Wolfish, 441 U.S. 520, 550 (1979); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 131 (1977); Pell v. Procunier, 417 U.S. 817, 822 (1974).

[51] *Pell*, 417 U.S. at 822 (emphasis added).

[52] *Id.* at 826 (emphasis added).

[53] *Jones*, 433 U.S. at 130, 131.

[54] *Id.* at 129.

[55] *Bell*, 441 U.S. at 550.

[56] Block v. Rutherford, 468 U.S. 576, 586-88 (1984).

[57] Turner v. Safley, 482 U.S. 78, 81 (1987).

[58] *Id.* at 81.

the best interest of the parties involved."[59] The second regulated inmate marriage and provided that inmates can marry only after receiving permission from the superintendent.[60] The regulation stated that the superintendent's permission should be given only "'when there are compelling reasons to do so.'"[61]

The district court and the court of appeals invalidated both regulations, applying *Martinez*'s heightened scrutiny standard of review.[62] The Supreme Court, however, disagreed that the *Martinez* standard applied, and Justice O'Connor's majority opinion attempted to set out a clear standard of review: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[63] Justice O'Connor articulated four relevant factors to determine if a prison regulation meets the reasonableness standard: (1) whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether prisoners have alternative means of exercising the right upon which the regulation infringes; (3) whether accommodating a certain right will "have a significant negative 'ripple effect' on fellow inmates or on prison staff"; and (4) whether there are ready alternatives the prison administrators can use to achieve the same goals.[64]

Applying these four factors, the Court upheld the inmate-to-inmate correspondence regulation because the regulation barred communication with a limited group of people with whom communication "is a potential spur to criminal behavior."[65] Therefore, the MDC's valid security concerns justified the regulation.[66] Alternatively, the Court held that the marriage regulation unconstitutionally infringed prisoners' constitutional rights because it represented an "exaggerated response" to the MDC's security concerns, which could not justify such broad regulation of a fundamental right.[67]

Justice Stevens, however, would have invalidated both the marriage regulation and the correspondence regulation, and he would have imposed a

[59] *Id.* at 81-82 (internal quotation marks omitted). In at least one prison, the district court found that, in practice, the rule meant that inmates were unable to write non-family inmates. *Id.* at 82.

[60] *Id.* at 82.

[61] *Id.*

[62] *Id.* at 83.

[63] *Id.* at 87-89.

[64] *Id.* at 89-90.

[65] *Id.* at 91.

[66] *Id.*

[67] *Id.* at 97-98 ("There are obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a *de minimis* burden on the pursuit of security objectives.").

stricter standard under which prison authorities must justify their regulations.[68] In a vigorous dissent, Justice Stevens warned that the majority's standard was "virtually meaningless" and would "permit disregard for inmates' constitutional rights whenever . . . 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."[69] Justice Stevens also chastised the majority for finding facts and accepting expert speculation to support their conclusions.[70] Two years later, Justice Stevens would again find himself on the losing end of the struggle for prisoners' rights.[71]

In *Thornburgh*, the Court evaluated a challenge to federal prison regulations that authorized prison officials to reject publications sent to prisoners that were "found to be detrimental to institutional security."[72] The court of appeals invalidated the regulations under the *Martinez* heightened scrutiny standard, not the *Turner* reasonableness standard (the "*Turner* standard"), because the regulations implicated the constitutional rights of nonprisoners as well as prisoners.[73] The Supreme Court reversed, upholding the regulations and applying the *Turner* standard.[74] Justice Blackmun's majority opinion stated that, when prison administrators infringe prisoners' constitutional rights, "any attempt to forge separate standards for cases implicating the rights of outsiders is out of step with [the Court's intervening decisions between *Martinez* and *Thornburgh*]."[75] Thus, the proper analysis does not focus "on the identity of the individuals whose rights allegedly have been infringed."[76] Further, Justice Blackmun stated that the Court in *Martinez* rejected the correspondence regulation because eliminating the regulation did not "pose a serious threat to prison order and security."[77]

Justice Blackmun's opinion explicitly limited *Martinez* to regulations concerning outgoing correspondence, stating that courts should give prison officials greater discretion "to protect prison security" when addressing

[68] *Id.* at 100-01 (Stevens, J., concurring in part and dissenting in part). Justice Stevens' opinion was joined by Justices Brennan, Marshall, and Blackmun; thus, the Court established the standard used to evaluate regulations infringing prisoners' constitutional rights in a close, five-to-four decision. *Id.* at 100.

[69] *Id.* at 100-01.

[70] *Id.* at 112-13.

[71] *See* Thornburgh v. Abbott, 490 U.S. 401, 420 (1989) (Stevens, J., concurring in part and dissenting in part).

[72] *Id.* at 403 (majority opinion). The Court's references to "prison security" referred broadly to the promulgated rule, which states that a publication might be prohibited "only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." 28 C.F.R. § 540.71(b) (2010).

[73] *See* Abbott v. Meese, 824 F.2d 1166, 1170 (D.C. Cir. 1987).

[74] *See Thornburgh*, 490 U.S. at 404.

[75] *Id.* at 411 n.9.

[76] *Id.*

[77] *Id.* at 411.

incoming correspondence.[78] Because outgoing correspondence did not implicate prison security concerns directly, the less deferential *Martinez* standard still applied.[79] While the *Martinez* standard focused on whose constitutional rights a prison regulation violated, the new standard focused on which direction the mail flowed.[80] Finally, Justice Blackmun attempted to argue that the *Turner* standard did not give too much deference to prison officials: "We adopt the *Turner* standard in this case with confidence that . . . a reasonableness standard is not toothless."[81]

Again, Justice Stevens vigorously dissented to the standard the majority used to evaluate the prisoners' constitutional challenge, stating that the Court's analysis "upset[s] precedent in a headlong rush to strip inmates of all but a vestige of free communication with the world beyond the prison gate."[82] Justice Stevens explained that, as the majority conceded, "both publishers and recipients . . . ordinarily enjoy the fullest First Amendment protections."[83] According to Justice Stevens, by failing to distinguish regulations that implicate both prisoners' and nonprisoners' constitutional rights from regulations that implicate only prisoners' constitutional rights, the Court abandoned *Martinez*'s central premise.[84] The new distinction between nonprisoners who are senders and those who are receivers was both "peculiar" and "unjustified" to Justice Stevens.[85] Explaining that the Court's opinion in *Turner* confirmed and approved of the holding in *Martinez*, Justice Stevens found it inexplicable that the Court would partially overrule *Martinez* two years later.[86]

[78] *Id.* at 413.

[79] *Id.* ("The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials.").

[80] *Id.*

[81] *Id.* at 414 (internal quotation marks omitted).

[82] *Id.* at 422 (Stevens, J., concurring in part and dissenting in part). In this case, only Justices Brennan and Marshall joined Justice Stevens's opinion; Justice Blackmun, the fourth Justice to join Justice Stevens's opinion in *Turner*, authored the majority opinion. *Id.* at 403, 420.

[83] *Id.* at 421.

[84] *Id.* at 424-25 ("The decision in *Martinez* was based on a distinction between prisoners' constitutional rights and the protection the First Amendment affords those who are not prisoners – not between nonprisoners who are senders and those who are receivers.").

[85] *Id.* at 424.

[86] *Id.* at 426-27 ("The *Turner* opinion cited and quoted from *Martinez* more than 20 times; not once did it disapprove *Martinez*'s holding, its standard, or its recognition of a special interest in protecting the First Amendment rights of those who are *not* prisoners."). Further, Justice Stevens discussed how the Court's opinion in *Turner* "acknowledged that 'because the regulation may entail a consequential restriction on the [constitutional] rights of those who are not prisoners,' *Martinez* might posit the correct level of review." *Id.* (quoting Turner v. Safley, 482 U.S. 78, 97 (1987)).

Thornburgh is the last major Supreme Court decision to evaluate infringements on prisoners' First Amendment free speech rights.[87] The Court never has decided a case in which prisoners challenged infringements on their right to use the telephone. Numerous principles from the Court's decisions, however, are relevant for adjudicating constitutional challenges to infringements on prisoners' telephone use. First, prisoners have a constitutional right to communicate with people outside the prison.[88] Second, prisoners retain those constitutional rights not inconsistent with their status as prisoners, and prison administrators receive deference in determining how to run their prisons.[89] Third, in general, courts will uphold prison regulations that infringe prisoners' constitutional rights if the regulations are "reasonably related to legitimate penological interests."[90] Courts, however, will apply the less deferential *Martinez* standard to regulations concerning *outgoing* correspondence.[91]

The Supreme Court has not provided uniform and clear standards to decide First Amendment challenges to infringements on prisoner telephone use.[92] Consequently, lower courts have decided these challenges in numerous and inconsistent ways.[93] The lower courts' different approaches and outcomes reveal two main issues the Supreme Court has yet to address: (1) whether prisoners have a constitutional right to use the telephone to communicate with others outside the prison; and, if there is a constitutional right, (2) what standard courts should use to evaluate infringements of the right. In the absence of explicit Supreme Court guidance, lower courts have approached these two issues in a variety of ways.

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[87] There have been other Supreme Court cases involving prisoner challenges to infringements of their First Amendment rights, *see, e.g.*, Shaw v. Murphy, 532 U.S. 223, 225 (2001), but none that rise to the level of "major" cases – i.e., none that changed the method by which the Supreme Court evaluates challenges to infringements on prisoners' First Amendment rights.

[88] *See, e.g.*, *Turner*, 482 U.S. at 92.

[89] *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 822 (1974); Procunier v. Martinez, 416 U.S. 396, 405 (1974).

[90] *Turner*, 482 U.S. at 89.

[91] *See Thornburgh*, 490 U.S. at 413.

[92] For cases that highlight the confusion over applying the Supreme Court's standards to First Amendment challenges to limitations on prisoner telephone use, see, for example, *Arsberry v. Illinois*, 244 F.3d 558, 564-65 (7th Cir. 2001), *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000), *Washington v. Reno*, 35 F.3d 1093, 1099-100 (6th Cir. 1994), and *Holloway v. Magness*, No. 5:07CV00088 JLH-BD, slip op. at 20-21 (E.D. Ark. Sept. 13, 2010).

[93] *Compare Arsberry*, 244 F.3d at 564-65 ("Not to allow [prisoners] access to a telephone might be questionable on other grounds, but to suppose that it would infringe the First Amendment would be doctrinaire in the extreme . . . ."), *with Holloway*, slip op. at 20-21 ("[R]egulations and policies that limit or impede prisoner communication with family, friends, attorneys, and others implicate first amendment rights.").

II. A CONSTITUTIONAL RIGHT TO PRISONER TELEPHONE USE

In challenges to limits on prisoner telephone use generally – and to commission cases specifically – the threshold issue is whether the limitation infringes any constitutional right. If a court finds that the limitation does infringe a constitutional right, the court then determines whether the limitation is constitutional. If the limitation does not infringe a constitutional right, the court's analysis is over – the prison can limit telephone use as much as it desires without violating the Constitution. Part II.A details the lower courts' disagreements over this threshold issue; Part II.B analyzes the reasoning behind the courts' divergent views.

A. *Is There a Constitutional Right?*

The threshold question upon which lower courts disagree is whether prison regulations limiting prisoner telephone use infringe any constitutional right.[94] Courts in different circuits, under varying levels of analysis, have answered this question in several ways.[95] The Sixth and Ninth Circuits have held that prisoners have a First Amendment right to communicate with others and that this right includes the right to use the telephone.[96] The Eighth Circuit has stated that the First Amendment "may" include a right for prisoners to use the telephone to communicate with others outside the prison.[97] On the other hand, the Seventh Circuit has held squarely that the First Amendment includes no right for prisoners to use the telephone,[98] and the First Circuit has stated that inmates have no constitutional right to telephone use.[99] Comparing two commission cases – Judge Posner's opinion in *Arsberry* with Judge Deere's recommended disposition in *Holloway* – demonstrates these divisions most clearly.

In both *Arsberry* and *Holloway*, the respective department of corrections[100] entered into a contract with one telephone company, granting that company the exclusive right to provide telephone service to prisoners.[101] In each case,

[94] This Note focuses on commission cases. For this threshold issue, however, any limitation on prisoner telephone use should be analyzed the same way as a commission case. Thus, in Part II, commission cases are one subset of the cases used to examine the constitutional right at issue.

[95] *See, e.g*, *Arsberry*, 244 F.3d at 564-65; *Johnson*, 207 F.3d at 656; Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996); *Reno*, 35 F.3d at 1099-100.

[96] *Johnson*, 207 F.3d at 656; *Reno*, 35 F.3d at 1099-100.

[97] Benzel v. Grammer, 869 F.2d 1105, 1108 (8th Cir. 1989).

[98] *Arsberry*, 244 F.3d at 564-65.

[99] United States v. Footman, 215 F.3d 145, 155 (1st Cir. 2000).

[100] In *Arsberry*, plaintiffs sued the State of Illinois, which oversees the state and county department of corrections. *Arsberry*, 244 F.3d at 558, 561. In *Holloway*, plaintiffs sued the Arkansas Department of Correction. Holloway v. Magness, No. 5:07CV00088 JLH-BD, slip op. at 1-2 (E.D. Ark. Sept. 13, 2010).

[101] *Arsberry*, 244 F.3d at 561; *Holloway*, slip op. at 2.

under the system the telephone company created, prisoners could make only collect calls to those outside the prison.[102] The telephone service and the departments of corrections did not allow prisoners to receive telephone calls from anyone outside prison.[103] In return for enjoying the exclusive right to provide telephone service to prisoners, the telephone company in each state agreed to pay the department of corrections a "commission" – a percentage of the revenue the telephone company generated from prisoner telephone calls.[104] In Illinois, the telephone company agreed to pay the State fifty percent of its gross annual revenue derived from prisoner telephone calls.[105] In Arkansas, the telephone company agreed to pay the Arkansas Department of Correction (ADC) forty-five percent of all gross revenue derived from prisoner telephone calls.[106] The ADC uses this revenue, which is not related in any way to costs for providing telephone service, to pay for general prison operations.[107] In both cases, the relevant question presented was whether the commission violated the First Amendment of the U.S. Constitution.[108]

In *Arsberry*, Judge Posner found that the commission did not implicate *any* constitutional right.[109] Judge Posner distinguished the *content* of speech made through the telephone from the *use* of the telephone itself, stating that the First Amendment sometimes protects the speech's content but does not protect the telephone's use.[110] Judge Posner analogized the commission to a tax and argued that governments frequently impose taxes on communications protected by the First Amendment without raising a constitutional issue.[111] Judge Posner also distinguished *Arsberry* from *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, in which the Supreme Court invalidated

[102] *Arsberry*, 244 F.3d at 561; *Holloway*, slip op. at 3-4.

[103] *Holloway*, slip op. at 3; Petition for a Writ of Certiorari at 3, *Arsberry*, 244 F.3d 558, *cert. denied*, 534 U.S. 1062 (2001) (No. 01-352).

[104] *Holloway*, slip op. at 4- 5; Petition for a Writ of Certiorari, *supra* note 103, at 3.

[105] *Arsberry*, 244 F.3d at 561.

[106] *Holloway*, slip op. at 5.

[107] *Id.* at 6-7.

[108] *Arsberry*, 244 F.3d at 564; *Holloway*, slip op. at 20-21.

[109] *Arsberry*, 244 F.3d at 564-65. One distinction between *Arsberry* and *Holloway* is that *Arsberry*'s plaintiffs included prisoners' friends and family members who argued that *their* constitutional rights also were violated by the commission. Because Judge Posner resolved that the commission implicated no constitutional right, however, the opinion never addressed whether a different standard of review would apply for the claims of friends and family members outside of prison than for the prisoners' claims. *Id.*

[110] *Id.* at 564 ("It is true that communications the content of which is protected by the First Amendment are often made over the phone, but no one before these plaintiffs supposed the telephone excise tax an infringement of free speech.").

[111] *Id.* ("Any regulation direct or indirect of communications can have an effect on the market in ideas and opinions, but that possibility in itself does not raise a constitutional issue. Otherwise the entire tax and regulatory operations of American government would be brought under the rule of the First Amendment." (citations omitted)).

a tax arbitrarily imposed on newspapers.[112] Judge Posner stated that the entire content of newspapers is protected by the First Amendment, whereas most of the content of telephone calls is not:

> Although the telephone *can* be used to convey communications that are protected by the First Amendment, that it [sic] is not its primary use and it is extremely rare for inmates and their callers to use the telephone for this purpose. Not to allow them access to a telephone might be questionable on other grounds, but to suppose that it would infringe the First Amendment would be doctrinaire in the extreme, though the Ninth Circuit disagrees.[113]

Thus, because Judge Posner held that the commission did not implicate any constitutional right, he did not have to evaluate whether an infringement on a constitutional right would be lawful in this circumstance. In his opinion, Judge Posner never cited or mentioned any Supreme Court decision involving prisoners' First Amendment rights.

In stark contrast to Judge Posner's decision, Judge Deere's recommended disposition in *Holloway* held that the commission did implicate and infringe prisoners' First Amendment rights.[114] Judge Deere first noted that the Supreme Court "has squarely held that inmates have a constitutional right to communicate with people outside of prison."[115] She then explained that the First Amendment covers more than the content of speech; "[r]ather, it also encompasses the *opportunity* to speak, the *opportunity* to worship, the *opportunity* to assemble."[116] Defendants argued that inmates can communicate with family and friends through letters and personal visits, and therefore the telephone is an "extra" means of communication.[117] Judge Deere explained that this argument responds to the second of the *Turner* standard's four factors – "whether there are alternative means of exercising the asserted constitutional right that remain open to inmates"[118] – which applies *after* a regulation implicates a constitutional right.[119] According to Judge Deere, "It begs the question to apply one leg of a first amendment analysis to conclude that there is no first amendment issue to be analyzed."[120] Thus, the "better view" is to

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[112] Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 579 (1983).

[113] *Arsberry*, 244 F.3d at 564-65 (citations omitted).

[114] Holloway v. Magness, No. 5:07CV00088 JLH-BD, slip op. at 20-21 (E.D. Ark. Sept. 13, 2010).

[115] *Id.* at 13 (citing Turner v. Safley, 482 U.S. 78 (1987)).

[116] *Id.* at 15 ("Without the opportunity to speak, to assemble, to worship, the First Amendment is left in tatters.").

[117] *See id.* at 19-20.

[118] *Turner*, 482 U.S. at 90.

[119] *Holloway*, slip op. at 20.

[120] *Id.* at 20.

acknowledge that prison regulations impeding prisoner communication with those outside the prison implicate First Amendment rights.[121]

Judge Posner and Judge Deere's contrasting analyses of commission cases with nearly identical facts, as well as the circuit courts' opposing statements regarding the constitutionality of prisoner telephone use, reveal the unclear state of the law. Why do judges' opinions differ so widely? While scholars and courts have noted the courts' lack of uniformity,[122] there has been almost no analysis as to *why* judges hold such widely divergent views. The next section addresses this issue.

B. *Defining the Right*

The lower courts' primary source of disagreement is how to define the constitutional right – or lack of a right – in question. Some courts define the right narrowly, asking whether prisoners have a constitutional right to use the telephone.[123] Other courts define the right more broadly, asking whether prisoners have a constitutional right to communicate with others outside the prison.[124] Generally, courts that find that limitations on prisoner telephone use implicate no constitutional right define the right narrowly;[125] conversely, courts that find that the limitations do implicate a constitutional right define the right broadly.[126]

For instance, in *Arsberry*, the court framed the issue as whether lack of access to a telephone violates the First Amendment.[127] Nowhere in the First Amendment section of the opinion did Judge Posner discuss prisoners' right to communicate with others outside the prison or whether use of a telephone was one means of exercising this right.[128] Additionally, Judge Posner did not

[121] *Id.* at 20-21.

[122] *See, e.g.*, *id.* at 19-20; Madeleine Severin, *Is There a Winning Argument Against Excessive Rates for Collect Calls from Prisoners?*, 25 CARDOZO L. REV. 1469, 1514-21 (2004).

[123] *See, e.g.*, Arsberry v. Illinois, 244 F.3d 558, 564-65 (7th Cir. 2001); United States v. Footman, 215 F.3d 145, 155 (1st Cir. 2000) ("Prisoners have no per se constitutional right to use the telephone . . . .").

[124] *See, e.g.*, Valdez v. Rosenbaum, 302 F.3d 1039, 1048 (9th Cir. 2002).

[125] *See, e.g.*, *Arsberry*, 244 F.3d at 564-65.

[126] *See, e.g.*, Pope v. Hightower, 101 F.3d 1382, 1385 (11th Cir. 1996) ("The right at issue in the present case may be defined expansively as the First Amendment right to communicate with family and friends.").

[127] *Arsberrry*, 244 F.3d at 564-65. Interestingly, in *Arsberry*, Judge Posner assumed that nonprisoners use the telephone for First Amendment purposes more than prisoners do. *Id.* at 565.

[128] Judge Posner did discuss the idea that "liberty" in the Due Process Clause may include a right to visitation by family members. *Id.* at 565. Judge Posner, however, dismissed plaintiffs' due process claim as well, stating that the claim was "no different from claiming that a state that raised the gasoline tax and by doing so increased the cost to the plaintiffs of traveling to visit their inmate relatives would be violating the Constitution." *Id.*

analyze or explain why limits on telephone use were different from limits on inmate mail correspondence, which the Supreme Court repeatedly has held implicate prisoners' First Amendment rights.[129]

Recently, numerous commission case opinions have acknowledged the constitutional right to communicate with others outside the prison, but the opinions still have defined the constitutional right in question narrowly. These cases distinguished the constitutional right to communicate with others from the right to use a telephone, or any other specific means, for the communication.[130] While acknowledging a broader right, these courts defined the right in question narrowly as the "right of inmates to use a telephone"[131] or as the right to a "specific rate for their telephone calls."[132]

Alternatively, the Ninth Circuit defined the right as "the right to communicate with persons outside prison walls,"[133] and the Eleventh Circuit defined the right as the "right to communicate with family and friends."[134] Similarly, in *King v. Frank*, a federal district judge, citing *Thornburgh v. Abbott*, stated that prison regulations restricting prisoner telephone use and receipt of publications implicate prisoners' First Amendment rights and fall under the same First Amendment analysis.[135] Finally, in *Holloway*, Judge Deere spent a substantial portion of the First Amendment analysis defining the right in question as the right to communicate with others.[136]

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at 566.

[129] *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 407-14 (1989); Turner v. Safley, 482 U.S. 78, 84-93 (1987).

[130] *See, e.g.*, Walton v. N.Y. State Dep't of Corr. Servs., 921 N.E.2d 145, 155 (N.Y. 2009).

[131] *Id.*

[132] Beaulieu v. Ludeman, No. 07-CV-1535 (JMR/JSM), 2008 WL 2498241, at *19 (D. Minn. June 18, 2008).

[133] Valdez v. Rosenbaum, 302 F.3d 1039, 1048 (9th Cir. 2002).

[134] Pope v. Hightower, 101 F.3d 1382, 1385 (11th Cir. 1996).

[135] King v. Frank, 328 F. Supp. 2d 940, 945 (W.D. Wis. 2004). Analytically, the notion that telephone and mail regulations fall under the same First Amendment analysis makes perfect sense, as both limit prisoners' communication with the outside world. Doctrinally, however, courts rarely recognize this point – and it appears that they actively avoid acknowledging it. *See infra* notes 145-148 and accompanying text.

[136] Holloway v. Magness, No. 5:07CV00088 JLH-BD, slip op. at 13-15 (E.D. Ark. Sept. 13, 2010) ("Among the first amendment rights prisoners retain is the right to communicate with people on the outside . . . ."). Judge Deere also stated, "The United States Supreme Court has squarely held that inmates have a constitutional right to communicate with people outside of prison." *Id.* at 13 (citing Turner v. Safely, 482 U.S. 78 (1987)). This is a strong statement, and the citation does not have a pincite to a specific sentence in *Turner* where the Court "squarely held" that prisoners have this right. Yet, because every case before the Supreme Court that has dealt with bans on prisoner communication has gone through a constitutional analysis, it follows logically that the Supreme Court has acknowledged that prisoners have a constitutional right to communicate with others outside the prison.

The way in which a court defines the constitutional right in question has substantial implications for that court's analysis and holding. First, by defining the right narrowly, a lower court can ignore Supreme Court precedent on prisoners' First Amendment rights. Because the Supreme Court has not ruled on any First Amendment challenge to limits on prisoner telephone use, a court that defines the constitutional right in question as the right to use the telephone can claim that no Supreme Court case is on point. Defining the right as the right to communicate with others outside the prison necessarily means that a lower court must use Supreme Court cases for guidance, as the *Martinez*/*Turner*/*Thornburgh* line of cases deals with prison regulations that limit prisoners' ability to communicate with others outside the prison.[137]

Second, the different interpretations of the constitutional right reveal general views about how courts should treat prisoners' rights. Should courts define constitutional rights for prisoners in the same way they define constitutional rights for citizens outside of prison?[138] Should courts ensure that prisoners retain constitutional rights not inconsistent with their status as prisoners?

Those who claim that prisoners have no constitutional right to use the telephone make arguments that reveal a less sensitive approach to prisoners' rights than the Supreme Court's approach. The following subsections detail these arguments and explain how these arguments diverge from the Supreme Court's approach to prisoners' First Amendment rights.

1. The Alternative Means of Communication Argument

Many argue that prisoners have other means of communication with the outside world – for example, prisoners can send and receive mail, and they can receive visitors.[139] Therefore, the argument goes, because limiting telephone use does not completely deprive a prisoner of communication with the outside world, no deprivation of any constitutional right has occurred. This argument misperceives Supreme Court decisions on prisoners' First Amendment rights, under which a court must analyze any prison policy limiting communication with those outside prison under the deferential *Turner* standard of review or the less deferential *Martinez* standard. The argument also is unusual because it is the second factor of the four-factor *Turner* standard: whether prisoners have alternative means of exercising the right upon which the regulation infringes.[140] In other words, those who make this claim use one prong of the *Turner* standard to argue that the *Turner* standard should not apply.[141]

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[137] *See* Thornburgh v. Abbott, 490 U.S. 401, 408 (1989); *Turner*, 482 U.S. at 81-82; Procunier v. Martinez, 416 U.S. 396, 398-400 (1974).

[138] This question goes only to defining constitutional rights, not to determining whether an infringement of a constitutional right is permissible or impermissible.

[139] *See* Walton v. N.Y. State Dep't of Corr. Servs., 921 N.E.2d 145, 156 (N.Y. 2009).

[140] *Turner*, 482 U.S. at 90.

[141] *See Holloway*, slip op. at 20.

2. The Affirmative Obligation Argument

A subspecies of the alternative means of communication argument is the argument that the U.S. Constitution does not require prisons to provide telephone service to prisoners. According to the federal district judge in *Holloway* (who did not adopt Judge Deere's recommended disposition), because the First Amendment is a limit on governmental power – not a positive obligation on the part of the government – the First Amendment does not require "that the government provide telephones, videoconferencing, email, or any of the other marvelous forms of technology that allow instantaneous communication across geographical distances."[142] Thus, because the government has no affirmative obligation to provide the service, it does not matter how much prisons curtail the use of telephones.[143]

This argument[144] is related closely to the alternative means of communication argument because it also relies on the availability of alternative forms of communication.[145] The argument seems to be that, while the First Amendment places no affirmative obligation on prisons to provide telephone service, the First Amendment does place an affirmative obligation on prisons to provide mail access and visitation rights, subject to the *Turner* standard.[146] The argument is therefore subject to the same criticism as the alternative means of communication argument: it uses one prong of the *Turner* standard to argue the *Turner* standard does not apply. Moreover, the court that made this argument did not explain the distinction between First Amendment protections for prisoner mail and the lack of First Amendment protections for prisoner telephone use – other than to assert that new forms of instantaneous

[142] Holloway v. Magness, No. 5:07CV00088 JLH-BD, 2011 WL 204891, at *7 (E.D. Ark. Jan. 21, 2011).

[143] *Id.* The court stated that the U.S. Constitution's Eighth Amendment, not the First Amendment, imposes positive obligations on prisons. *Id.*

[144] This argument has been made in depth by only one court. *Id.* The rationale behind the argument, however, is similar to the underlying rationale of the alternative means of communication argument: because prisoners can send and receive mail and see visitors, courts do not need to worry about the constitutionality of prisoner telephone use.

[145] *Id.* at *10 ("Here, as in *Walton*, alternate means of communication remain available to the inmates and their families, including mail and visitation."). To evade Supreme Court precedent, the affirmative obligation argument necessarily relies on the availability of alternative means of communication. In fact, the affirmative obligation argument must acknowledge that prisoners have a constitutional right to specific forms of communication, such as mail and visitation rights, but not to other forms of communication. *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 407-14 (1989); *Turner*, 482 U.S. at 90.

[146] *See Holloway*, 2011 WL 204891, at *10 ("Although the Court does not doubt that Holloway and Breault would engage in more of the real-time, verbal communication afforded by telephone technology if prices were lower, the hardship they allege 'is not a constitutionally significant curtailment of the free speech and association guarantee, particularly given the limited nature of that right in prison settings.'" (quoting Walton v. N.Y. State Dep't of Corr. Servs., 921 N.E.2d 145, 156 (N.Y. 2009))).

communication were not protected by the First Amendment.[147] Does the temporal distinction mean that, in one hundred years, regulations on prisoner telephone use will implicate First Amendment rights? An intellectually sound distinction between telephones and mail is necessary to avoid using Supreme Court precedent, where any prison regulation involving mail correspondence necessarily implicates prisoners' First Amendment rights.[148]

Further, the affirmative obligation argument does not address the subject of commission cases. In every commission case, the prison has provided telephone access to prisoners, and neither side is arguing that the phones should be taken away.[149] Nor are prison administrators arguing that the money derived from commissions goes to pay for providing telephone service; providing prisoners telephone service costs the government nothing.[150] Finally, one can make the argument that prisons *do* have an affirmative obligation to provide telephone service, as numerous courts have held that certain restrictions on pre-trial detainees' use of telephones to speak with their attorneys are unconstitutional.[151]

3. The "Commissions Are No Different from a Tax" Argument

Those who find no constitutional right also argue that the commissions in commission cases are no different from a governmental tax on telephone use.[152] The commissions at issue, however, are not a tax. Statutory or constitutional authority is a prerequisite to any tax;[153] the commissions at issue

[147] *Id.* at *7.

[148] *See, e.g.*, *Thornburgh*, 490 U.S. at 407-14; *Turner*, 482 U.S. at 89-91.

[149] The Supreme Court has long held that the government cannot deny a person a benefit – even if the benefit is a privilege, rather than a right – "on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." Perry v. Sindermann, 408 U.S. 593, 597 (1972); *see* Sherbert v. Verner, 374 U.S. 398, 404 (1963).

[150] *See Holloway*, 2011 WL 204891, at *2 ("None of the revenue derived from the contract is used for telephone-related expenditures.").

[151] *See, e.g.*, Johnson-El v. Schoemehl, 878 F.2d. 1043, 1052-53 (8th Cir. 1989); Johnson *ex rel.* Johnson v. Brelje, 701 F.2d 1201, 1207-08 (7th Cir. 1983); Tuggle v. Barksdale, 641 F. Supp. 34, 37-38 (W.D. Tenn. 1985). These holdings are in addition to the numerous court opinions that have stated that prisoners have at least some right to telephone access. *See supra* notes 95-96 and accompanying text.

[152] *See* Arsberry v. Illinois, 244 F.3d 558, 564 (2001) ("Communications protected by the [First Amendment] are . . . frequently made by printing words on paper, yet no one supposes that the consequence is to bring the corporate income tax, when imposed on manufacturers of paper, within the purview of the First Amendment . . . ."). Judge Posner continually analogized the commission at issue in *Arsberry* to a tax. *Id.* at 564-65. This analogy does not seem to have been questioned by the plaintiffs; instead – likely to their own detriment – the plaintiffs used the same analogy in their filings. *See* Petition for a Writ of Certiorari, *supra* note 103, at 23-24.

[153] *See, e.g.*, U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes . . . ."); ARK. CONST. art. 16, § 11.

are the result of contracts between two parties. The same democratic processes that create the power to tax also check the government's taxing power. At the constitutional level, the Equal Protection Clause ensures that governments cannot arbitrarily tax one group and not another;[154] at the political level, voters can elect representatives who keep tax rates at a reasonable level. The commissions operate so that prison administrators reap the benefits of the government's taxing power – they receive money to fund their prisons – without adhering to the checks on that power (i.e., the democratic processes).

The Supreme Court consistently has been distrustful of economic regulation that sidesteps these democratic processes: "[T]he general applicability of any burdensome tax law helps to ensure that it will be met with widespread opposition. When such a law applies only to a single constituency, however, it is insulated from the political constraint."[155] Supreme Court cases upholding economic regulation that burdens the First Amendment have "emphasized the general applicability of the challenged regulation to all businesses."[156] To this end, "A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest."[157] This is the strictest form of scrutiny the Court uses to analyze *any* law.

Thus, analogizing prison telephone commissions to a governmental tax or license fee does not allow a court to hold that the commissions implicate no constitutional right. Supreme Court cases make clear that "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution"[158] and that any tax that infringes constitutional rights will be upheld only under the strictest scrutiny.[159] Moreover, because federal and state governments cannot charge people for the exercise of their constitutional rights, analogizing governmental action to a tax does not help answer the initial question of whether an infringement on a constitutional right occurred. Governmental action that infringes a constitutional right through non-monetary means does not stop infringing simply because the same infringement occurs

[154] *See* U.S. CONST. amend. XIV, § 1.

[155] Leathers v. Medlock, 499 U.S. 439, 445 (1991). For examples of cases in which the Supreme Court has held taxes unconstitutional under the First Amendment, see *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592-93 (1983) (invalidating a special use tax on the cost of paper and ink products consumed in the production of a publication), *Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1943) (invalidating a license tax on people who solicit or canvass orders for goods and merchandise), and *Grosjean v. American Press Co.*, 297 U.S. 233, 251 (1936) (invalidating a license tax on publishing firms that sell advertising and have a circulation of more than 20,000 copies per week).

[156] *Minneapolis Star & Tribune Co.*, 460 U.S. at 583.

[157] *Id.* at 582.

[158] *Murdock*, 319 U.S. at 113.

[159] *See, e.g.*, *Minneapolis Star & Tribune Co.*, 460 U.S. at 582-83; *Murdock*, 319 U.S. at 113; *Grosjean*, 297 U.S. at 251.

through monetary means. While the level of scrutiny under which a court analyzes an issue might change depending on the government's method of infringement, the answer to the threshold question of whether the government has infringed a constitutional right does not change.

In *Arsberry*, the seminal case analogizing a commission to a tax, Judge Posner implicitly acknowledges that this analogy does not answer the initial question of whether the government has infringed a constitutional right by stating, "[I]t is extremely rare for inmates and their callers to use the telephone [to convey communications that are protected by the First Amendment]."[160] Without this sentence, which is not supported by any source, Judge Posner would not be able to distinguish the First Amendment claim in *Arsberry* from that in *Minneapolis Star & Tribune Co.* and hold that the commission does not implicate any First Amendment right.[161] Thus, Judge Posner's basis for holding that the First Amendment does not apply is a conclusory statement that prison telephone calls do not convey the correct information needed to implicate the First Amendment's free speech guarantee. Judge Posner's tax analogy – instead of helping to resolve the threshold issue – diverts attention away from the real threshold issue: whether prisoners have a constitutional right to communicate with others outside the prison. Yet, as explained in Part II.A, *supra*, Judge Posner does not cite or explain why he does not need to distinguish any of the numerous Supreme Court cases acknowledging that prisoners have a First Amendment right to communicate with the outside world. Because Judge Posner's tax analogy provides no help in resolving the threshold issue, the analogy is a distraction.[162]

As Judge Posner's conclusory holding illustrates, the arguments against a constitutional right often disregard that the telephone is a unique and essential way for many prisoners to communicate with the outside world. For instance, prisoners might not be able to read and write letters. One study found that forty percent of the national prison population is functionally illiterate.[163] Outside of prison, however, citizens have so many outlets for communication and expression that the telephone might not be a unique or essential form of communication. Furthermore, as the plaintiffs in *Holloway* argued,

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[160] Arsberry v. Illinois, 244 F.3d 558, 564 (7th Cir. 2001).

[161] *See supra* Part II.A.

[162] Further, because the tax analogy goes only to the question of whether the infringement is constitutional – and not to the initial question of whether the governmental action infringes a constitutional right – judges that analogize a commission to a tax must explain why they are applying a standard that is different from the *Turner* standard or the heightened-scrutiny standard, which are the only two standards through which courts have analyzed prison administrators' infringements of First Amendment rights. *See infra* Part III.

[163] The Center on Crime, Communities & Culture, Education as Crime Prevention: Providing Education to Prisoners 3 (Sept. 1997), *available at* http://www.prisonpolicy.org/scans/research_brief__2.pdf. Thus, for many inmates, the argument that they can write and receive letters as an alternative to telephoning is incorrect.

> There also are many non-First Amendment grounds and procedures – political, as well as legal – for challenging taxes and other governmentally-imposed economic burdens. Consequently, free world citizens generally rely on legislative action, administrative action, free market competition, political activism and protests, and multiple other means to avoid substantial economic burdens on First Amendment rights. While those may obviate the need for many First Amendment challenges in the free world, they do not do so for these inmate plaintiffs.[164]

When lower courts disregard the importance of the telephone to a prisoner's ability to communicate with the outside world – and especially when courts decide this without a careful analysis of the facts – the courts are showing a level of insensitivity that is inconsistent with Supreme Court precedent.[165]

Courts use flawed reasoning and ignore Supreme Court precedent when they find that prison policies limiting prisoner telephone use implicate no constitutional right. The alternative means of communication argument, the affirmative obligation argument, and the "commissions are no different from a governmental tax" argument all ignore specific Supreme Court holdings[166] and deviate from the Court's general guiding principles regarding prisoners' constitutional rights.[167] Alternatively, holding that limits on prisoner telephone use implicate a First Amendment right allows a court to evaluate whether the limitation on prisoner telephone use is constitutional. Part III examines the different standards of review lower courts use to evaluate prison infringements on constitutional rights and analyzes the possible standards of review under which courts might review commission cases.

III. THE STANDARD OF REVIEW IN COMMISSION CASES

A. *Rational Basis or Heightened Scrutiny?*

The juxtaposition of *Arsberry* and *Holloway* reveals major differences in how courts determine whether prison policies limiting prisoner telephone use implicate a constitutional right. If, however, a court does find that a prison action implicates constitutional rights, the analysis is not over. The court still must determine whether the regulation unconstitutionally infringes the constitutional right in question. Even with Supreme Court guidance on the issue,[168] lower courts do not agree uniformly on which circumstances necessitate using the *Turner* standard and which circumstances allow for a

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[164] Reply Brief in Support of Plaintiffs' Motion for Summary Judgment and Brief in Opposition to Defendants' Cross-Motions for Summary Judgment at 15-16, Holloway v. Magness, No. 5:07CV00088 JLH-BD, 2011 WL 204891 (E.D. Ark. Jan. 21, 2011).

[165] *See supra* Part I.A.

[166] *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); Turner v. Safley, 482 U.S. 78, 89-91 (1987).

[167] *See supra* Part I.A.

[168] *See supra* Part I.B.

heightened level of scrutiny to judge the prison regulation's constitutionality.[169]

By its own terms, the *Turner* standard applies only to prison *regulations*.[170] While the Court did not define "prison regulations," the Court did explain why a rational basis standard of review was more appropriate than heightened scrutiny: the standard was "necessary" to give the appropriate degree of deference to prison administrators who "'make the difficult judgments concerning institutional operations.'"[171] Further, the Court was concerned that "[s]ubjecting the day-to-day judgments of prison officials" to a heightened standard of review "would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[172]

The Court has made clear, however, that not all prison policies infringing constitutional rights receive *Turner*'s generous level of deference. In *Johnson v. California*, the Court held that strict scrutiny was the proper standard to apply in an equal protection challenge to the California Department of Corrections' unwritten policy of racially segregating prisoners for up to sixty days each time the prisoners entered a new correctional facility.[173] Justice O'Connor's majority opinion stated that the *Turner* standard applies only "to rights that are 'inconsistent with proper incarceration.'"[174] According to Justice O'Connor, racial classifications were "not susceptible to the logic of *Turner*" and the right not to be discriminated against never needed to be "compromised for the sake of proper prison administration."[175] For this reason, the Court found no justification to give extra deference to prison officials when they institute policies that make racial classifications.[176]

Even before the Supreme Court's ruling in *Johnson*, the D.C. Circuit and the Eighth Circuit had stated that not all prison policies deserve *Turner*-style

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[169] *Compare* Holloway v. Magness, No. 5:07CV00088 JLH-BD, slip op. at 25 (E.D. Ark. Sept. 13, 2010) (stating that the *Turner* standard applies to the ADC's policy of charging a commission for prisoner telephone use), *with* Pitts v. Thornburgh, 866 F.2d 1450, 1453-54 (D.C. Cir. 1989) (stating that the *Turner* standard applies only to "regulations that govern the day-to-day operation of prisons" and not to "general budgetary and policy choices made over decades in the give and take of city politics").

[170] *Turner*, 482 U.S. at 89 ("[W]hen a prison *regulation* impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." (emphasis added)).

[171] *Id.* (quoting Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 128 (1977)).

[172] *Id.*

[173] Johnson v. California, 543 U.S. 499, 502-09 (2005).

[174] *Id.* at 510 (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)). Justice O'Connor also wrote the majority opinion in *Turner*, 482 U.S. at 81.

[175] *Johnson*, 543 U.S. at 510.

[176] *Id.* at 510-11. For similar reasons, the Court also has not used the *Turner* standard to evaluate Eighth Amendment claims of cruel and unusual punishment. *See* Hope v. Pelzer, 536 U.S. 730, 738 (2002).

deference, or any judicial deference.[177] In *Pitts v. Thornburgh*, women inmates brought an equal protection claim against the Federal Bureau of Prisons, based on the geographic locations of prison facilities for women versus those for similarly situated men.[178] The D.C. Circuit upheld the policy of imprisoning women farther away from the District of Columbia than men under a heightened scrutiny analysis, rather than a *Turner*-style reasonableness analysis.[179] The court held that *Turner* did not apply to the type of prison policy at issue:

> *Turner* applies to cases involving regulations that govern the day-to-day operation of prisons and that restrict the exercise of prisoners' individual rights within prisons. This case, in stark contrast, challenges general budgetary and policy choices made over decades in the give and take of city politics. Equally important, the basic policy decision whether to provide a local women's prison facility does not directly implicate either prison security or control of inmate behavior, nor does it go to the prison environment and regime.[180]

The court also explained that *Turner*, and the cases upon which *Turner* relied to derive its standard of review, involved prison regulations promulgated for security reasons.[181] Thus, because *Turner* did not apply, and because courts generally review equal protection claims based on gender classifications under a heightened scrutiny analysis, the court held that heightened scrutiny was appropriate.[182]

Courts generally review prison policies that limit prisoners' telephone use under the *Turner* standard.[183] The courts seem to use the *Turner* standard reflexively as the default standard of review even for prison actions that are not

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[177] *See* Pargo v. Elliott, 49 F.3d 1355, 1357 (8th Cir. 1995); Pitts v. Thornburgh, 866 F.2d 1450, 1453 (D.C. Cir. 1989).

[178] *See Pitts*, 866 F.2d at 1451 ("[A]ppellants, and other long-term women offenders, find themselves incarcerated at the Federal Correctional Institution in Alderson, West Virginia, a remote, mountain-bound hamlet situated far from Washington, D.C. Pointing to the District's policy and practice of incarcerating similarly situated males in District-operated prison facilities located near the District of Columbia, appellants complain that the differential treatment of (and accompanying burden on) women offenders runs afoul of the equal protection guarantees of the Constitution.").

[179] *Id.* at 1453 ("For the reasons that follow, we decline the District's invitation and conclude that the heightened scrutiny traditionally applied in cases alleging gender discrimination is appropriate.").

[180] *Id.* at 1453-54.

[181] *Id.* at 1454.

[182] *Id.* Under a heightened scrutiny analysis, the court must determine whether the challenged policy is (at a minimum) substantially related to the achievement of an important governmental objective. *Id.* at 1455.

[183] *See, e.g.*, Johnson v. California, 207 F.3d 650, 656 (9th Cir. 2000); Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir. 1994); Benzel v. Grammer, 869 F.2d 1105, 1108 (8th Cir. 1989).

the typical "regulations" at issue in *Turner*, such as the contracts at issue in commission cases.[184] In most commission cases, courts apply the *Turner* standard without discussing why it, rather than another standard of review, applies.[185] Only Judge Deere's recommended disposition in *Holloway* discussed in detail why the *Turner* standard applied, as opposed to heightened scrutiny. Judge Deere distinguished *Holloway* from *Pitts* by stating that courts historically have analyzed prisoners' First Amendment challenges under the *Turner* standard, whereas *Pitts* involved an equal protection challenge.[186] Furthermore, Judge Deere stated that, even though the commission was not a "'day-to-day prison regulation,' it [did] involve a Board policy that affects inmates' daily lives."[187] According to Judge Deere, subjecting the ADC's contractual agreements to heightened scrutiny would place an undue burden on the ADC and would allow courts to become too involved in prison operations.[188] Thus, Judge Deere reasoned that the more deferential *Turner* standard should apply.[189]

Not all prison policies receive the *Turner* standard's generous deference. Yet, beyond the *Pitts* rationale, lower courts have not explicated the Supreme Court's precedents on when the *Turner* standard should apply. While Judge Deere's opinion provides a starting point for analyzing the appropriate standard of review in commission cases, it fails to distinguish these cases from the *Pitts* rationale in a meaningful way. The next section will provide a deeper analysis of the appropriate standard of review in commission cases.

B. *When Does the* Turner *Standard Apply?*

A major problem in determining when the *Turner* standard – and not another standard of scrutiny – applies is the lack of thoughtful analysis given to the issue.[190] The *Turner* standard almost certainly is the correct standard to apply when prison regulations limit prisoner telephone use due to security concerns.[191] Applying the *Turner* standard, however, is more problematic in

[184] *See, e.g.*, *Johnson*, 207 F.3d at 656; Holloway v. Magness, No. 5:07CV00088 JLH-BD, slip op. at 24-25 (E.D. Ark. Sept. 13, 2010).

[185] *See, e.g.*, *Johnson*, 207 F.3d at 656 (stating that prisoners' right to telephone access "is subject to reasonable limitations arising from the legitimate penological and administrative interests of the prison system" but providing no further explanation for the standard of review).

[186] *Holloway*, slip op. at 24.

[187] *Id.*

[188] *Id.* at 25.

[189] *Id.* Judge Deere also noted that the standard might be different if the plaintiffs were nonprisoners, i.e., the friends and family members outside of prison who want to communicate with prisoners. *Id.* at 26. In *Holloway*, however, the prisoners' friends and family members were not parties to the case. *Id.* at 26 n.15.

[190] *See supra* Part III.A.

[191] *See, e.g.*, Pope v. Hightower, 101 F.3d 1382, 1384-85 (11th Cir. 1996) (applying the

commission cases, where the "regulation" at issue is the commission paid from the telephone company to the department of corrections. In these cases, the prison does not request a commission for security purposes.[192] At a minimum, deciding whether to apply the *Turner* standard to commission cases deserves a more thoughtful analysis than courts usually give to the issue.[193]

Prison security concerns have formed the basis for the Supreme Court cases that established and upheld the *Turner* standard. The regulations at issue in *Turner* and *Thornburgh* were promulgated either partially or fully for security reasons.[194] The cases on which *Turner* and *Thornburgh* relied to establish an appropriate standard of review also involved prison regulations promulgated for security reasons.[195] In these cases, the Court was concerned that prison authorities receive appropriate deference for their efforts to curb security risks and increase order within the prisons.[196] In *Thornburgh*, for example, the

Turner standard to a prison restriction limiting prisoner telephone calls to a ten-person list); Benzel v. Grammer, 869 F.2d 1105, 1108 (8th Cir. 1989) (applying the *Turner* standard to a restricted telephone list for segregated inmates).

[192] Departments of corrections use the revenue from the commission for general prison funds. Arguably, a commission implicates security concerns because without the additional funds, the prison would have less revenue with which to pay for security. Such a security concern, however, is far removed from cases in which internal security concerns directly relate to the prison regulation at issue. Moreover, such a principle, if recognized, would support deferential review of every prison revenue-raising scheme – a significant departure from the *Turner* rationale. *See* Turner v. Safley, 482 U.S. 78, 89 (1987).

[193] One scholar that has provided a thoughtful analysis of this issue has argued for the abolition of the *Turner* standard, explaining that courts' reflexive deference to prison officials and utilization of a "one-size-fits-all approach" to deference "ignores different types of prison regulations and their contexts." Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2091 (2011). Professor Berger argues for a more individualized inquiry into the fact and nature of the department of corrections' actions to determine whether the department deserves such a high level of deference. *Id.* at 2091-92. This argument, while thought-provoking, is outside the scope of this Note, as the argument applies to all constitutional challenges to prison actions, whereas this Note argues only that the *Turner* standard does not apply to commission cases.

[194] Thornburgh v. Abbott, 490 U.S. 401, 407 (1989) (stating that the correspondence regulations at issue implicate security concerns); *Turner*, 482 U.S. at 91, 97 (stating that the correspondence regulation "was promulgated primarily for security reasons" while the marriage regulation was promulgated for "both security and rehabilitation concerns").

[195] *See* Block v. Rutherford, 468 U.S. 576, 589-91 (1984); Bell v. Wolfish, 441 U.S. 520, 548-49 (1979); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 126-27 (1977).

[196] The Court, however, has not limited the *Turner* standard to prison regulations that implicate security concerns, even though the Court never has applied the *Turner* standard to prison regulations that were not – at least partially – promulgated for security reasons. As discussed in Part I.A, *supra*, the Court has stated in dicta that other reasons prison administrators deserve deference include maintaining order and rehabilitating prisoners. *See* Pell v. Procunier, 417 U.S. 817, 822-23 (1974).

Court referred to prison security, order, prison management, disruptive conduct, and disorder approximately twenty times.[197] The Court made clear that it granted prison administrators such a high level of deference specifically because the regulations addressed the administrators' security concerns.[198]

Turner also focused on ensuring that prison administrators received appropriate deference for "day-to-day judgments" concerning "institutional operations."[199] In *Pitts*, the D.C. Circuit latched onto this reasoning to hold that "general budgetary and policy choices made over decades in the give and take of city politics" were not examples of prison policies to which *Turner* applied.[200] Similarly, commission cases deal less with prison officials' day-to-day judgments and more with general budgetary matters. The commission is part of a contract between the department of corrections and the telephone company.[201] The department of corrections uses the contract to raise general prison funds and to bypass the normal route for raising funds – appropriations from the state legislature.[202] In this sense, the department of corrections uses the commission for general budgetary purposes and not for day-to-day prison management.

Although *Pitts*'s reasoning applies to commission cases, no court has held that a heightened standard of scrutiny applies to a commission case. When courts explain why *Pitts*'s rationale does not apply – which is rare – the main argument made is that the constitutional claims at issue are different. In *Holloway*, for example, Judge Deere distinguished *Pitts* by pointing out that *Pitts* involved gender issues raised in an equal protection claim while *Holloway* involved a First Amendment claim, and First Amendment claims in the prison context historically have been analyzed under the *Turner* standard.[203] Similarly, the district court's opinion in *Holloway* stated that *Pitts* involved an equal protection claim, and the reasoning has not "been extended to First Amendment claims asserted by prisoners."[204]

Distinguishing *Pitts* on the constitutional claim's basis misinterprets *Pitts* and Supreme Court precedent. One purpose of *Turner* and *Thornburgh* is to

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[197] *Thornburgh*, 490 U.S. at 403-19.

[198] *Id.* at 408 ("[T]his Court has afforded considerable deference to the determinations of prison administrators who, *in the interest of security*, regulate the relations between prisoners and the outside world." (emphasis added)). Additionally, the Court stated, "In particular, we have 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 . . . ." *Id.* at 407.

[199] *Turner*, 482 U.S. at 89.

[200] Pitts v. Thornburgh, 866 F.2d 1450, 1453-54 (D.C. Cir. 1989).

[201] *See* GIBBONS & DE B. KATZENBACH, *supra* note 15, at 36.

[202] *See* Holloway v. Magness, No. 5:07CV00088 JLH-BD, slip op. at 6-7 (E.D. Ark. Sept. 13, 2010).

[203] *Id.* at 24.

[204] Holloway v. Magness, No. 5:07CV00088 JLH-BD, 2011 WL 204891, at *10 n.55 (E.D. Ark. Jan. 21, 2011).

give *more* deference to prison regulations that infringe people's constitutional rights than a court would give to claims arising outside the prison context.[205] Thus, if the court in *Pitts*, for instance, found that the prison regulation was the type that implicated the *Turner* standard, that standard should apply regardless of the basis for the constitutional claim. Nothing in *Turner* or *Thornburgh* indicates that the basis of the constitutional claim – i.e., whether the claim is based on the Equal Protection Clause or on the First Amendment – is the relevant factor in determining if the *Turner* standard applies.[206]

The more appropriate interpretation of *Pitts* is that a court should first determine whether the *Turner* standard applies. If it does not apply, then the court should analyze the prison policy under the same level of scrutiny with which courts analyze infringements of the same constitutional right(s) outside of the prison context.[207] This approach is compatible with the general guiding principles the Supreme Court has enunciated: prisoners retain those constitutional rights not inconsistent with their status as prisoners, and prison administrators deserve deference in deciding how to run their prisons.[208] The Court's opinions in *Turner* and *Thornburgh* are attempts to reconcile these sometimes-conflicting principles. If, however, prison policies infringe prisoners' constitutional rights for reasons beyond the Supreme Court's rationale for giving administrators deference, these two principles are not in conflict. When a prison policy does not warrant additional deference,

[205] *See* Thornburgh v. Abbott, 490 U.S. 401, 407 (1989) ("We have recognized, however, that [prisoners' constitutional rights] must be exercised with due regard for the 'inordinately difficult undertaking' that is modern prison administration." (citing Turner v. Safley, 482 U.S. 78, 85 (1987))).

[206] *Turner*'s holding – "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests" – confirms this point. *Turner*, 482 U.S. at 89. Because the Court does not modify the phrase "constitutional rights," its holding appears to encompass all constitutional rights impinged upon by prison regulations. The Court's ruling in *Johnson v. California* generally is consistent with this point. Although *Johnson* focused on the basis of the claim – i.e., that the claim was based on racial discrimination – the Court explained that racial classifications *never* are "susceptible to the logic of *Turner*." Johnson v. California, 543 U.S. 499, 510 (2005). Because the right to be free from racial discrimination never needs to be compromised to ensure proper prison administration, the Court was able to make a blanket rule that prison administrators do not receive *Turner*-level deference when making racial classifications.

One sentence of the Court's opinion in *Johnson*, however, is not necessarily consistent with *Turner*. In *Johnson*, the Court explained that the *Turner* Court asked "whether the regulation that burdened the prisoners' *fundamental rights* was 'reasonably related' to 'legitimate penological interests.'" *Id.* at 509-10 (emphasis added) (quoting *Turner*, 482 U.S. at 89). This shift in phrasing from "constitutional rights" in *Turner* to "fundamental rights" in *Johnson* might be an attempt to narrow *Turner*'s application to fundamental rights; the Court in *Johnson*, however, offered no explanation for this change in language.

[207] *See* Pitts v. Thornburgh, 866 F.2d 1450, 1454-55 (D.C. Cir. 1989).

[208] *See supra* Part I.A.

prisoners retain their constitutional rights not inconsistent with their status as prisoners. Prisoners have reduced constitutional rights only to the extent required by their incarceration.

Commission cases elucidate most clearly the flawed reasoning courts use to decide challenges to limitations on prisoner telephone use. Almost every court to hear a commission case has found the commissions constitutionally acceptable, yet the reasoning differs from case to case. Some courts hold that there is no constitutional right to use the telephone;[209] other courts hold that commissions do implicate a First Amendment right but that the commission is constitutional under the *Turner* standard;[210] still, other courts hold that the First Amendment places no affirmative obligation on prisons to provide prisoners any form of communication – except mail and visitation rights.[211] The multiple rationales judges use to uphold commissions as constitutional, coupled with the flawed reasoning and lack of thoughtful analysis within these opinions, do not do justice to such important constitutional questions. The issue of prison telephone commissions therefore rises to a level necessitating Supreme Court review.

IV. HOW THE SUPREME COURT SHOULD RESOLVE THE CONSTITUTIONAL QUESTIONS

This Note has explained lower courts' major disagreements in deciding challenges to prison policies limiting prisoner telephone use and has analyzed the underlying reasons behind these disagreements. Commission cases demonstrate most clearly the lower courts' disagreements and the analytical inconsistencies which bedevil their adjudication of prisoner telephone cases. Further, the commissions discussed throughout this Note are prevalent across the country, and they place extra social, familial, and economic burdens on the country's poorest citizens.[212] Because these disagreements involve important constitutional questions and have the potential to impact many lives, the Supreme Court should grant a writ of certiorari in a commission case.

A. *A Constitutional Right*

The Supreme Court should hold that prisoners have a First Amendment right to communicate with others outside the prison and that the right to use the telephone is one component of this right. This holding would be faithful to Supreme Court precedent. In every Supreme Court case in which prison policies limited communication with those outside of prison – or even with prisoners incarcerated elsewhere – the Court has held that constitutional rights

[209] *See, e.g.*, Arsberry v. Illinois, 244 F.3d 558, 564-65 (7th Cir. 2001).

[210] *See, e.g.*, Johnson v. California, 207 F.3d 650, 656 (9th Cir. 2000).

[211] *See, e.g.*, Holloway v. Magness, No. 5:07CV00088 JLH-BD, 2011 WL 204891, at *7 (E.D. Ark. Jan. 21, 2011).

[212] *See* GIBBONS & DE B. KATZENBACH, *supra* note 15, at 36-37.

were implicated.[213] Limits on prisoner telephone use present no intellectually sound distinction from limits on other modes of communication that do implicate First Amendment rights. A prisoner that has a First Amendment right to send and receive mail[214] also has a First Amendment right to use the telephone.

This holding also would be faithful to the Court's general principles regarding prisoners' constitutional rights. While the Court has given prison administrators deference to enact regulations, it always has reaffirmed the principle that judges do not assume prisoners lose their constitutional rights solely because of their confinement.[215] Holding that prisoners do not have a right to communicate with others outside the prison – or holding that prisoners have a right to communicate with those outside prison, but not by telephone – would inappropriately depart from this long-held principle.

Dissenting in *Thornburgh v. Abbott*, Justice Stevens worried that the majority's opinion would "strip inmates of all but a vestige of free communication with the world beyond the prison gate."[216] Without a First Amendment right for prisoners to communicate with others outside the prison, what restricts prison administrators from barring communication with the outside world altogether? At this point, the argument that there is no right to use the telephone because prisoners have alternative means of communication – i.e., they can write letters or receive visitors[217] – breaks down. If prisoners do not have a constitutional right to communicate with those outside prison, there is no difference between depriving prisoners of some forms of communication but not of others. Alternatively, if prisoners have such a constitutional right, then a court must determine whether a deprivation of the right is constitutionally acceptable by reviewing the deprivation under the *Turner* standard or under heightened scrutiny.[218] The availability of alternative

[213] *See* Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); Turner v. Safley, 482 U.S. 78, 89 (1987); Bell v. Wolfish, 441 U.S. 520, 550 (1979); Procunier v. Martinez, 416 U.S. 396, 413-14 (1974).

[214] *See Thornburgh*, 490 U.S. at 407; *Turner*, 482 U.S. at 89; *Bell*, 441 U.S. at 550; *Martinez*, 416 U.S. at 413-14.

[215] *See* Pell v. Procunier, 417 U.S. 817, 822 (1974) ("[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.").

[216] *Thornburgh*, 490 U.S. at 422 (Stevens, J., concurring in part and dissenting in part). While Justice Stevens was criticizing the decision to remand for "another finding of 'reasonableness,'" *id.*, this fear applies to the initial question of whether prisoners have a constitutional right to communicate with those outside the prison as well.

[217] *See* Holloway v. Magness, No. 5:07CV00088 JLH-BD, slip op. at 19-20 (E.D. Ark. Sept. 13, 2010) ("The ADC Defendants argue that other means of communicating render prisoners' telephone access an 'extra,' rather than a basic means of communication. They argue that inmates can communicate with family, friends, and others through letters and personal visits and, therefore, there is no call for a first amendment examination.").

[218] This is the appropriate way for lower courts to draw the line – i.e., to determine the

means of communication is a factor in analyzing whether the infringement is constitutionally acceptable;[219] it is not an argument that judges or parties to a case can make *before* a court undertakes such an analysis. Otherwise, judges are using an ad hoc standard to determine the acceptable level at which prison administrators can limit prisoner communication with the outside world.

Practical considerations should also lead the Court to hold that prisoners have a First Amendment right to communicate with others outside the prison. A lack of a right to communicate with others outside the prison diminishes greatly prisoners' relationships with friends and family. Importantly, this also causes harm to people outside the prison who want to communicate with prisoners. Does Winston Holloway's son, who serves in the U.S. Army, not have a right to communicate with his father?[220] Communication with family and friends also can help prisoners rehabilitate and prepare them for a return to society.[221] Indeed, the Court has stated that rehabilitation is a "paramount objective of the corrections system."[222] If prisoners enjoy a right to communicate with those outside of prison, concerns about the ways in which prisoners might use this right still can be addressed by giving prison administrators deference to combat these concerns – exactly as the Court previously has done.[223]

B. *Heightened Scrutiny over the* Turner *Standard*

The Court should analyze commission cases under heightened scrutiny, rather than under the *Turner* standard. In doing so, the Court should take the opportunity to explain further the boundaries of the *Turner* standard. *Turner* and *Thornburgh* focused on ensuring prison administrators received appropriate deference for curbing security risks and maintaining order. For these types of regulations, courts have ample reason to accord prison

acceptable level of deprivation – instead of through an ad hoc standard, as is current practice.

[219] *Turner*, 482 U.S. at 90.

[220] In *Holloway*, this argument is somewhat theoretical, because Holloway's family members are not parties to the case. *See Holloway*, slip op. at 26 n.15. In *Arsberry*, however, the prisoners' family members were parties to the case, but this did not sway the court that the commission infringed anyone's constitutional rights, inside or outside of the prison. *See* Arsberry v. Illinois, 244 F.3d 558, 561, 564-65 (7th Cir. 2001).

[221] *See Keeping in Touch with a Parent in Prison*, N.Y. TIMES, Jan. 14, 2006, at A14 ("One way to cut down on the number of inmates who end up right back in prison shortly after being released is to make sure that they preserve their ties with their families, especially with spouses and children, while they are serving time.").

[222] Pell v. Procunier, 417 U.S. 817, 823 (1974).

[223] For instance, prison administrators likely have legitimate concerns that prisoner access to email could disrupt security both inside and outside the prison. Accordingly, security-based prohibitions or restrictions on email use should be judged by the deferential *Turner* standard. Thus, the argument that a First Amendment right for prisoner telephone use would allow prisoners access to all modern forms of communication is incorrect.

administrators high levels of deference.[224] None of those reasons, however, is present in commission cases. Subjecting commissions to a higher level of scrutiny would not "hamper [prison administrators'] ability to anticipate security problems," nor would it intrude upon the "day-to-day judgments" of prison officials.[225] The Court should follow the *Pitts* rationale and hold that the *Turner* standard does not apply to prison actions that involve general budgetary policies and do not directly address security, order, or rehabilitation concerns.

After *Turner*, the Court evaluated prison correspondence regulations infringing the First Amendment rights of those *outside* prison under the less deferential *Martinez* standard.[226] In *Thornburgh*, the Court ended the practice of using the *Turner* standard to evaluate actions that infringe only prisoners' constitutional rights while using the *Martinez* standard to evaluate those actions that also infringe outsiders' rights.[227] The Court erased this distinction, and thus partially overruled *Martinez*, limiting the case to apply only to outgoing correspondence, specifically – and, it seems, solely – for reasons of prison security.[228] Applying the *Turner* standard in commission cases would constitute an expansion of the standard not warranted by any reasoning found in *Thornburgh*. To reiterate, the commissions at issue (1) do not implicate specific prison security concerns and (2) do implicate the constitutional rights of those outside of prison. Thus, even if the Court does not want to follow the *Pitts* rationale for heightened scrutiny, the Court still should hold that the heightened scrutiny standard enunciated in *Martinez* applies to commission cases.

C. *Not Reasonably Related to Legitimate Penological Interests*

Finally, even if the Court chooses to apply the more deferential *Turner* standard, commissions paid from the telephone companies to the departments of corrections are not reasonably related to legitimate penological interests.[229]

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[224] *See Turner*, 482 U.S. at 89 ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.").

[225] *Id.*

[226] Procunier v. Martinez, 416 U.S. 396, 413 (1974).

[227] Thornburgh v. Abbott, 490 U.S. 401, 413 (1989).

[228] *Id.* at 413-14. Similarly, the Court based its new distinction for correspondence regulations – that correspondence coming into the prison received *Turner* deference but outgoing correspondence still received *Martinez* deference – solely on its implications for prison security. *Id.* at 413.

[229] I am analyzing the commissions under the *Turner* standard because if the commissions do not pass the *Turner* standard – as I argue – then, *a fortiori*, the commissions do not "further an important or substantial governmental interest." *Martinez*, 416 U.S. at 413.

Turner identified four relevant factors to determine the reasonableness of the challenged regulation.[230] First, "there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it."[231] This connection cannot be "so remote as to render the policy arbitrary or irrational."[232] Assuming a legitimate governmental interest in commission cases, there still is no connection between the commission and prisoners' use of telephones. The connection between the "regulation" – infringing the ability of prisoners and their families to communicate – and the "asserted goal" – raising general revenues – is both remote and arbitrary. The connection is remote because raising general revenue has little to do with limiting communication between prisoners and nonprisoners; the connection is arbitrary because departments of corrections offer no justification for the specific percentage of revenues they receive from the telephone company – i.e., why is the commission fifty percent and not sixty-five percent?

The second *Turner* factor – availability of alternative means of exercising the right in question[233] – is a more fact-intensive inquiry in commission cases. Some prisoners might find it difficult to prove that the telephone is an important source of communication with family and friends. Many prisoners, however, will not find it difficult to prove that the telephone is a unique and essential form of communication with those outside the prison and that mail and personal visits are not viable alternatives.[234]

The third factor in determining reasonableness is the feared "ripple effect" that accommodating an asserted right might have on fellow inmates or on prison staff.[235] In commission cases, allowing prisoners to use the telephone more often will not directly have an adverse impact on prison staff or prison inmates. In fact, prison experts agree that allowing prisoners access to telephones can enhance prisoners' behavior and rehabilitation,[236] leading to fewer disciplinary incidents and *increased* prison security.

The fourth factor in determining reasonableness is whether there are ready alternatives that the prison administrators can use to achieve the same goals.[237] For commission cases, the logical alternative to raising general revenue for

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[230] *Turner*, 482 U.S. at 89.

[231] *Id.* (internal quotation marks omitted).

[232] *Id.* at 89-90.

[233] *Turner*, 482 U.S. at 90.

[234] *See, e.g.*, Affidavit of Winston Holloway at 1-2, Holloway v. Magness, No. 5:07CV00088 JLH-BD, 2011 WL 204891 (E.D. Ark. Jan. 21, 2011).

[235] *Turner*, 482 U.S. at 90.

[236] *See* BUREAU OF PRISONS, PROGRAM STATEMENT NO. 5264.07, TELEPHONE REGULATIONS FOR INMATES (2002) ("Telephone privileges are a supplemental means of maintaining community and family ties that will contribute to an inmate's personal development. . . . Contact with the public is a valuable tool in the overall correctional process.").

[237] *Turner*, 482 U.S. at 90.

prisons is through a legislative appropriation – the traditional source of prison funding. Analyzing this factor for commission cases reveals the invidiousness of the commissions at issue. Prison administrators – either unwilling or unable to obtain sufficient funds from the legislature – charge both prisoners and the people with whom prisoners speak on the telephone to make up for the lack of adequate funds. Even if prison administrators have a difficult time obtaining adequate appropriations, nothing in *Turner* suggests that administrators can use the inadequacy of legislative appropriations as the basis for charging people for their constitutional rights.[238]

In his dissent in *Turner*, Justice Stevens worried that the new standard of review announced would be "virtually meaningless" and would "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."[239] In *Thornburgh*, in an apparent attempt to diffuse Justice Stevens' concerns, Justice Blackmun's majority opinion insisted that "a reasonableness standard is not toothless."[240] A commission case will test that statement. If the Court can find a reasonable relationship between infringements on telephone use and general funding of prisons, then the Court likely can find a reasonable relationship between any prison policy and its asserted justification. This would be even worse than Justice Stevens imagined in his partial dissent in *Turner*; prison administrators would not have to produce even a "plausible security concern"[241] to justify the connection between the infringement and the penological interest. Thus, because the commissions at issue are not reasonably related to legitimate penological interests, and because upholding the commissions would render the *Turner* standard meaningless, the Court should find that the commissions are unconstitutional under the *Turner* standard.

CONCLUSION

Contracts between departments of corrections and telephone companies, where departments of corrections grant telephone companies exclusive rights to provide telephone service to inmates in exchange for a percentage of the telephone company's revenues – a "commission" – are prevalent throughout the United States. Prisoners, as well as prisoners' families and friends, have challenged these commissions as unconstitutional infringements on their First Amendment right to free speech. In these challenges, lower court opinions either differ or do not provide enough analysis on three main issues: (1) whether the commissions implicate any First Amendment right; if so, (2) whether courts should analyze those infringements under the *Turner* standard

[238] *Id.* at 89-94.

[239] *Id.* at 100-01 (Stevens, J., concurring in part and dissenting in part).

[240] Thornburgh v. Abbott, 490 U.S. 401, 414 (1989).

[241] *Turner*, 482 U.S. at 101 (Stevens, J., concurring in part and dissenting in part).

or under a less deferential, heightened scrutiny standard; and, if a court applies the more deferential *Turner* standard, (3) whether the infringement is reasonably related to legitimate penological interests.

Because these commissions are prevalent throughout the country, and because multiple constitutional questions arise from challenges to these commissions, the Supreme Court should decide a commission case. The Court should hold that prisoners have a First Amendment right to communicate with others outside the prison, as this holding is faithful both to the Court's precedents and stated general principles of prisoners' constitutional rights. The Court also should analyze commission cases under a heightened scrutiny standard, as commission cases involve none of the Court's stated reasons for allowing prison administrators deference. But, even under the more deferential *Turner* standard, the infringement should be found unconstitutional because it is not reasonably related to a legitimate penological interest. If limiting prisoner telephone use is considered reasonably related to providing general funds for prisons, then any infringement on prisoners' constitutional rights can be reasonably related to any justification for the infringement, and the *Turner* standard is meaningless.

In the past, the Court has shown sensitivity to prisoners' constitutional rights that often is not manifested in lower court decisions. A commission case would allow the Court to reaffirm the general principles that the lower courts may have diluted. More importantly, in a world far removed from courtroom battles over legal principles and constitutional standards, the decision would allow Winston Holloway's son to talk to his father more than once a month.