
“The citizen’s right to access an impartial tribunal to seek redress for official grievances is so fundamental and so well established that it is sometimes taken for granted.”

I. INTRODUCTION

The Prison Litigation Reform Act (PLRA) requires that an inmate filing an excessive force claim in court under 42 U.S.C. § 1983 first exhaust “such administrative remedies as are available” within the prison grievance system. Congress added this exhaustion requirement to combat the increase in inmate litigation and to promote judicial efficiency by keeping frivolous claims out of federal court. Unfortunately, the PLRA’s exhaustion requirement has caused considerable confusion among the lower courts and necessitated several Supreme Court decisions to clarify the requirement’s scope and enforcement.


Prior to the PLRA, inmate litigation was governed by a much weaker exhaustion provision in the Civil Rights of Institutionalized Persons Act (CRIPA), which required exhaustion only if the court believed doing so was “appropriate and in the interests of justice.” The PLRA strengthened the exhaustion provision by removing CRIPA’s condition that the prison grievance system remedies meet federal standards. A series of Supreme Court cases decided after Congress enacted the PLRA intensified the procedural hurdle for inmates by introducing a proper exhaustion standard. These decisions removed judicial discretion by prohibiting judges from excusing a failure to exhaust. As articulated in Booth v. Churner, the discretion to dispense with administrative exhaustion “is now a thing of the past.”

Strict adherence to the exhaustion requirement continued until the Supreme Court considered the excessive force claim of a Maryland inmate, Shaidon Blake, in 2016. In Ross v. Blake, the Court held that an inmate need only exhaust administrative remedies that are “available,” meaning if the inmate can establish that the remedy was unavailable, then the claim can proceed in federal court.

The Court identified several general circumstances where remedies were

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4. See Ross, 136 S. Ct. at 1858-60 (identifying textual exception to exhaustion requirement and presenting three examples of when administrative remedies unavailable); Jones v. Bock, 549 U.S. 199, 216 (2007) (holding exhaustion affirmative defense, not pleading requirement, for plaintiff); Woodford, 548 U.S. at 93 (holding PLRA’s text indicates term “exhausted” to mean proper exhaustion). Proper exhaustion, under administrative law, means compliance with agency deadlines and other critical procedural rules. See Woodford, 548 U.S. at 90-91; see also Porter, 534 U.S. at 532 (holding exhaustion required for all inmate litigation, including general circumstances and particular episodes); Booth v. Churner, 532 U.S. 731, 740-41 (2001) (holding no exception to exhaustion requirement for monetary damages).


6. See § 7(b), 94 Stat. at 352-53 (identifying minimum standards for grievance method in CRIPA); Woodford, 548 U.S. at 84 (pointing out CRIPA authorized district courts to stay actions); Porter, 534 U.S. at 524 (explaining PLRA removed CRIPA condition requiring remedies meet federal standards). Under CRIPA, district courts were authorized to stay actions for a limited time while an inmate exhausted “such plain, speedy, and effective administrative remedies as are available.” See § 7(a)(1), 94 Stat. at 352; Woodford, 548 U.S. at 84.

7. See Woodford v. Ngo, 548 U.S. 81, 90-91 (2006) (drawing on administrative law principles to require strict adherence to agency deadlines and procedural rules); Lefkowitz, supra note 3, at 197 (commenting on Supreme Court interpretations and implications on statute). The Supreme Court cases have “turned a statute already restricting access to the courts into a great obstacle for prisoners to overcome.” Lefkowitz, supra note 3, at 197.

8. See Booth, 532 U.S. at 739 (holding PLRA amendment eliminated discretion to dispense with administrative exhaustion).

9. See id. (summarizing Court’s decision to eliminate judicial discretion).


11. See id. (outlining Court’s interpretation of PLRA’s built-in textual exception to exhaustion requirement).
considered unavailable, suggesting a more inmate-friendly approach to analyzing the exhaustion requirement. The *Ross* holding, however, also presented an analytical paradox for lower courts; theoretically a court must dismiss a case for lack of exhaustion without considering the merits of the claim, but in order to determine whether the inmate’s case is exempt from the exhaustion requirement under *Ross*, the judge must examine the merits of the claim.

Nearly twenty-four years after Congress enacted the PLRA, and over two years since the Supreme Court decided *Ross v. Blake*, this Note reexamines the implications of these changes in the area of inmate litigation. First, it traces the origins of the PLRA exhaustion requirement across the spectrum of interpretation, from a weak requirement in CRIPA to a strict requirement in the PLRA, all while tracking its interpretation in subsequent case law. Next, it identifies the problems that have manifested as a result of the evolution from weak to strict exhaustion enforcement, specifically with respect to practical application and constitutional issues. As illustrated in a later section, horrific prison brutality cases in the not-so-distant past necessitate reexamining the current exhaustion requirement standard. Finally, given the practical and constitutional problems associated with the current state of the law and its effect on prison brutality, this Note argues in favor of creating either an independent review board as a subset of the judiciary or a textual exemption to the PLRA exhaustion requirement for special circumstances, or ideally, both.

II. HISTORY

A. CRIPA: Exhaustion Prior to 1996

In 1980, Congress created the first exhaustion requirement for inmate

12. See Summs, supra note 5, at 484 (summarizing Court’s holding and how it represents evolving view towards exhaustion despite defending rigid standard).


15. See infra Sections II.A-D.

16. See infra Section II.E.


18. See infra Part III (naming solutions to problem).
litigation as part of CRIPA. Courts have long recognized the statutory exhaustion requirement because it allows agencies the authority to administer the programs delegated to them without interference. The exhaustion requirement also provides both a valuable resource for inmates to seek relief and a mechanism for prison administrators to fix problems internally, before requiring judicial intervention.

Perhaps most importantly, the exhaustion requirement benefits the judiciary because the inmate’s claim could be rendered moot if satisfactory internal measures are taken. If done properly, the grievance procedure could successfully resolve the issue and save valuable court time and resources. Even if the grievance process does not resolve the inmate’s claim, its documentation still serves as a useful record for judicial consideration.

The CRIPA exhaustion provision was weak, with the McCarthy Court even referring to it as a “limited exhaustion requirement,” because it mandated that the administrative remedies meet certain federal standards to be considered

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21. See McCarthy, 503 U.S. at 145 (explaining corrective action rationale for prison administration); Lynn S. Branham, The Prison Litigation Reform Act’s Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It, 86 CORNELL L. REV. 483, 495 (2001) (explaining exhaustion requirement counterbalance to Department of Justice interceding on prison operations). The original exhaustion provision was limited in scope: Exhaustion only applied to state and local inmates, not federal inmates, juveniles, or pretrial detainees. See Branham, supra, at 495. Moreover, courts only required exhaustion if it would be “appropriate and in the interests of justice”; if failure to exhaust did not result in dismissal; and if the grievance procedures had to meet certain requirements. See id. at 495-96; see also Allen E. Honick, Comment, It’s “Exhausting”: Reconciling a Prisoner’s Right to Meaningful Remedies for Constitutional Violations with the Need for Agency Autonomy, 45 U. BALTIMORE L. REV. 155, 162-63 (2015) (introducing duality of grievance system’s purpose).

22. See Branham, supra note 21, at 513 (identifying exhaustion provision’s stated purposes). One purpose is to promote judicial efficiency by potentially eliminating the dispute altogether through exhaustion procedures. See id. The other purpose is to give the agency a chance to resolve an issue before judicial intervention. See id.

23. See Parisi v. Davidson, 405 U.S. 34, 37 (1972) (explaining benefit of exhaustion requirement to allow agency to correct errors and moot judicial controversies); McKart, 395 U.S. at 195 (pointing out exhaustion requirement may alleviate courts’ need to intervene at all).

Further, a failure to exhaust did not automatically force the court to dismiss the case; more often than not, the court would just stay the case until the inmate exhausted the administrative remedies. The exhaustion requirement was subject to judicial determination as to whether the individual’s interest in securing access to court outweighed the aforementioned countervailing policy interests to require exhaustion.

An important, albeit less often cited CRIPA standard, is the requirement for an independent review of the disposition of grievances “by a person or other entity not under the direct supervision or direct control of the institution.” This requirement was abandoned in later prison reform legislation in a congressional effort to combat the “astronomical[]” growth of inmate litigation from 6,600 cases in 1975 to more than 39,000 cases in 1994. In abandoning this important independent review requirement, however, Congress dismissed the reality that “[w]hat for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.”

25. See Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7(a)(1), 94 Stat. 349, 352 (1980) (codified as amended at 42 U.S.C. § 1997e (2018)) (requiring exhaustion where “appropriate and in the interests of justice”); Porter v. Nussle, 534 U.S. 516, 523-24 (2002) (describing “limited exhaustion requirement”); McCarthy, 503 U.S. at 150 (calling CRIPA exhaustion requirement “limited”); Patsy v. Bd. of Regents, 457 U.S. 496, 510-11 (1982) (identifying specific standards necessary to require exhaustion under CRIPA). Under CRIPA, exhaustion was compulsory only when all of the following requirements were met: an adult convicted of a crime brought the case under § 1983; the Attorney General certified the prison grievance system or the court determined it was in substantial compliance with the minimum standards promulgated under CRIPA; the court considered exhaustion appropriate and in the interests of justice; and the court’s requirement of exhaustion would not result in a dismissal, but a stay of ninety days. See Patsy, 457 U.S. at 510-11.

26. See Patsy, 457 U.S. at 511 (stating inmate’s failure to exhaust grievance process did not result in automatic dismissal). The Court could instead stay the action for at most ninety days in order to allow the inmate to complete exhaustion. See id.

27. See McCarthy v. Madigan, 503 U.S. 140, 146 (1992) (exercising judicial discretion required in exhaustion analysis), superseded by statute, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. VIII, §§ 801-810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.). “[A]dministrative remedies need not be pursued if the litigant’s interests in immediate judicial review outweigh the government’s interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.” West v. Bergland, 611 F.2d 710, 715 (8th Cir. 1979). The McCarthy Court articulated three instances that would likely result in a judge waiving the exhaustion requirement: where “resort[ing] to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action”; where the administrative remedy is “inadequate ‘because of some doubt as to whether the agency was empowered to grant effective relief’”; and “where the administrative body is shown to be biased or has otherwise predetermined the issue before it.” See McCarthy, 503 U.S. at 146-48 (quoting Gibson v. Berryhill, 411 U.S. 564, 575 n.14 (1973)).

28. See § 7(b)(2)(E), 94 Stat. at 353 (requiring independent review); see also Honick, supra note 21, at 163 (explaining importance of objective, impartial review of internal grievance process). CRIPA allowed the U.S. Attorney General to intervene on behalf of inmates deprived of their rights and provided for attorney’s fees for the prevailing party. See § 3(a)-(b), 94 Stat. at 350 (outlining initiation of actions); Honick supra note 21, at 163.


30. See Preiser v. Rodriguez, 411 U.S. 475, 492 (1973) (explaining totality of control by state authority on inmates); Honick, supra note 21, at 166 (pointing out flaws in “frivolity” of inmate claim opinions). The “frivolity” often cited by PLRA proponents is based on flawed reasoning because these proponents lack the frame
B. PLRA: Exhaustion After 1996

In 1996, Congress enacted the PLRA with the goal of reducing the overall quantity of inmate suits while simultaneously effectuating an improvement in the quality of inmate suits.31 Nevertheless, as the Court noted in Jones v. Bock, the challenge was “ensuring that the flood of nonmeritorious claims [did] not submerge and effectively preclude consideration of the allegations with merit.”32

The PLRA’s language, “[n]o action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted[,]” introduced a significantly stricter standard for the exhaustion requirement in two significant ways.33 First, it removed the condition that administrative remedies be “plain, speedy, and effective” and that they satisfy minimum federal standards.34 Second, it eliminated the judicial discretion under CRIPA by removing the “appropriate and in the interests of justice” language.35 Practically, this meant that if a defendant raised a failure to exhaust affirmative defense, and the plaintiff had not exhausted, the court had to dismiss the case regardless of the claim’s merits.36 The effect of dismissing the case prematurely is that a court would not be able to reach the merits of the case, meaning some highly worthwhile claims would likely go unadjudicated.37
After Congress enacted the PLRA, a series of Supreme Court decisions further limited inmates’ access to federal courts. In the 2001 case, *Booth v. Churner*, the Supreme Court held that even though the administrative grievance process could not provide petitioner’s requested monetary relief, he was still required to exhaust those administrative remedies. In so deciding, the Court effectively eliminated the discretion that judges once exercised under CRIPA to excuse exhaustion based on the particular facts of a case. Although the issue in *Booth* was specific to damages, the Court’s decision to eliminate judicial discretion as “a thing of the past” was often cited in all types of subsequent prison litigation cases.

Additionally, in the 2002 case, *Porter v. Nussle*, the Supreme Court settled the issue of whether excessive force claims required complying with the PLRA’s exhaustion requirement. Prior to *Porter*, the Court typically reviewed excessive force claims under the Eighth Amendment’s prohibition against cruel and unusual punishment, as opposed to under § 1983 conditions of confinement violations. While not specifically addressed prior to *Porter*, if the Court analyzed excessive force claims under the Eighth Amendment, it would follow that the PLRA’s exhaustion requirement applicable to § 1983 would not be necessary. Some circuit courts that addressed the issue, however, saw no difference between excessive force claims and conditions of confinement claims.

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38. See Lefkowitz, supra note 3, at 197 (commenting Supreme Court’s decisions after PLRA make “greater obstacle” for inmates to overcome).
40. See id. at 741 (holding Congress mandates exhaustion regardless of relief sought).
41. See id. at 739 (introducing Court’s decision to eliminate judicial discretion).
43. Contra Nussle v. Willette, 224 F.3d 95, 97 (2d Cir. 2000) (exhausting administrative remedies not required for assault or excessive force claims), rev’d sub nom. Porter v. Nussle, 534 U.S. 516 (2002). The Second Circuit in *Nussle* concluded that the PLRA’s text and legislative history indicated the exhaustion requirement does not include particular instances of excessive force. See id. at 100. The term “prison conditions” does not obviously refer to particular instances of excessive force or assault, rather “prison conditions” in the plural form likely refers to “attendant circumstances” or an “existing state of affairs.” See id. at 101. Additionally, the floor statements from the PLRA debate in the Senate suggest the concern over frivolous suits was focused on the subject matter of the suit and not the actual merits of the case. See id. at 105. Senator Hatch commented that the PLRA was designed to “help restore balance to prison conditions litigation and . . . ensure that Federal court orders are limited to remedying actual violations of prisoners’ rights.” 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995) (emphasis added) (statement of Sen. Hatch).
45. See Freeman v. Francis, 196 F.3d 641, 643 (6th Cir. 1999) (stating Supreme Court has not addressed discrete issue).
requiring exhaustion under both as a result.\footnote{46} Ultimately siding with the circuit courts, the Supreme Court held definitively in \textit{Porter} that there was no excessive force exception to the exhaustion requirement because Congress likely did not intend to divide inmates’ petitions into two discrete subcategories.\footnote{47} 

Finally, in the 2006 case, \textit{Woodford v. Ngo}, the Supreme Court raised the bar even further for inmates by requiring strict adherence to all institutional deadlines and procedures, otherwise known as “proper exhaustion.”\footnote{48} The \textit{Woodford} majority reasoned that requiring proper exhaustion serves all the PLRA’s goals by incentivizing inmates to use the system available to them and giving prison officials the “opportunity to correct their own errors.”\footnote{49} While in theory these are admirable goals, the practical effect of \textit{Woodford} prevented inmates who had not exhausted—but had understandable reasons for failing to do so—from exhausting and refiling because by that point their claim would almost certainly be considered untimely.\footnote{50}

\footnote{46}. See 18 U.S.C. § 3626 (2018) (addressing remedies and limitations of inmate litigation); Smith v. Zachary, 255 F.3d 446, 449 (7th Cir. 2001) (confirming excessive force claims included in jurisdiction of PLRA exhaustion requirement cases). The Seventh Circuit reasoned that in § 3626, Congress intended to include both cases involving conditions of confinement and cases arising from the effects of government officials’ actions on inmates’ lives. \textit{Smith}, 255 F.3d at 449. Therefore, the plaintiff’s assault claim clearly fell within the latter category and was subject to PLRA exhaustion requirements. \textit{See id.; see also Higginbottom v. Carter}, 223 F.3d 1259, 1261 (11th Cir. 2000) (per curiam) (deciding exhaustion necessary for excessive force claims to reduce frivolous inmate suits); Booth v. Churner, 206 F.3d 289, 291 (3d Cir. 2000) (holding PLRA applies to excessive force claims based on its plain language), \textit{aff’d}, 532 U.S. 731 (2001); \textit{Freeman}, 196 F.3d at 644 (introducing notion of broad exhaustion requirement necessary to reduce inmate litigation).

\footnote{47}. See \textit{Porter}, 534 U.S. at 526-27 (holding prison conditions include excessive force claims). The Court settled a circuit split on this issue by deciding that the PLRA exhaustion provision caption “suits by prisoners” indicated Congress’s intent to include the entire universe of prisoner suits, not just conditions of confinement claims. \textit{See id.} at 527-28. The Court also looked to prior Supreme Court cases that classify excessive force suits as “with respect to prison conditions.” \textit{See id.} at 526-29.

\footnote{48}. See 548 U.S. 81, 84 (2006) (holding proper exhaustion of administrative remedies necessary). The Court concluded that exhaustion requirements create an incentive for parties to give the agency an opportunity to adjudicate their claims. \textit{See id.} at 90. To adjudicate the claim correctly, the system must “impos[e] some orderly structure on the course of its proceedings[,]” as such, requiring proper exhaustion as a prerequisite for the internal grievance system. \textit{See id.} at 90-91.

\footnote{49}. \textit{See id.} at 94 (articulating benefits of proper exhaustion with respect to PLRA’s goals). The Court noted that the plaintiff’s argument not to require proper exhaustion would be “unprecedented.” \textit{See id.} at 96. The plaintiff failed to identify any statute where exhaustion was required but could still be bypassed by ignoring the procedural rules. \textit{See id.} at 96-97.

\footnote{50}. \textit{See id.} at 118 (Stevens, J., dissenting) (providing example of sexual assault victim time-barred from filing grievance); \textit{see also LeFkowitz}, \textit{supra} note 3, at 204 (pointing out difficulty inmates have navigating prison grievance systems). Several Justices believed that allowing untimely grievances to satisfy the grievance requirement would allow inmates to bypass the grievance process all together. \textit{See LeFkowitz}, \textit{supra} note 3, at 204. But this mentality does not consider the fact that each prison system has the freedom to create its own grievance process, some of which are extremely complicated. \textit{See id.} For example, New York’s three-tiered grievance system requires an initial filing twenty-one days after the alleged incident, then a mandatory seven-day response time for appeal directed to the superintendent, and finally another mandatory seven-day response time for appeal to the Central Office Review Committee. \textit{See id.} If an inmate were to lapse even one day on any of these deadlines, that inmate could be barred from bringing that claim in court. \textit{See id.}
D. Ross v. Blake

In 2016, the Supreme Court considered another § 1983 claim in Ross v. Blake, except this time, instead of tightening the grip on inmate litigants, the Court seemed to open the door for exceptions to the mandatory exhaustion requirement—even if just a crack.51 Two guards in a Maryland prison, James Madigan and Michael Ross, moved an inmate, Shaidon Blake, to the facility’s segregation unit.52 Blake alleged that during the move, Madigan shoved him in the back, pushed him, and punched him in the face four times—driving his head into the wall—while Ross held him.53 Blake reported the assault to a senior corrections officer who referred the incident to the Maryland prison system’s Internal Investigative Unit (IIU).54 When Blake later sued both guards in federal court, Ross raised the PLRA exhaustion requirement as an affirmative defense against Blake’s § 1983 excessive force claims.55 Unbeknownst to Blake, to properly exhaust his claim internally, he needed to file a claim under the Administrative Remedy Procedure (ARP), which involves filing a formal grievance with the prison’s warden.56 Given the reasonableness of Blake’s error, this case presented an opportunity for the Court to specify when, if ever, it would excuse a failure to exhaust.57

Before reaching the holding specific to these facts, the Ross Court rejected the special circumstances exception to the PLRA exhaustion requirement that was previously used by the Second Circuit.58 The Court looked to statutory
interpretation, determining that the mandatory language “inmate ‘shall’ bring ‘no action’” left no room for an exception to an inmate’s obligation to exhaust. The Court also employed a historical interpretation, holding that a special circumstances exception would resurrect CRIPA’s lenient judicial discretion standard. In spite of that, Congress specifically amended CRIPA to create the PLRA in an effort to make substantive change, and the Supreme Court cannot negate that change by judicial interpretation.59

Despite having rejected the special circumstances exception, Ross introduced a textual exception to mandatory exhaustion: An inmate need only exhaust remedies that are available.60 Further, the Court laid out three examples where the remedies would be considered unavailable to the plaintiff.61 First, if the officers are unable or unwilling to provide any relief to aggrieved inmates. Second, if no ordinary inmate can discern or navigate the administrative scheme.62 Third, if prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.63 The Court ultimately remanded the case to the lower court to make a factual determination under the aforementioned new rule, but suggested it likely fit into the second category.64

he could not file a grievance because under New York prison regulations, disciplinary decisions are “non-grievable” and his prior complaints had been ignored or not fully investigated. See id. at 674. The Second Circuit recognized that if true, the facts alleged would justify failing to file an ordinary grievance, and thus qualify as a special circumstances exception to the exhaustion requirement. See id. at 678.65

9. See Ross, 136 S. Ct. at 1856 (quoting 42 U.S.C. § 1997e(a) (2018)) (stating remedies’ availability only qualifier on exhaustion). The Court also noted the uniqueness of a statutory exhaustion requirement, in that courts can only create an exception if Congress expresses a desire for one. See id. at 1857.

10. See id. at 1858 (introducing historical analysis and referencing CRIPA scheme).

11. See id. (noting appellate courts’ disregard for congressional intent). The Ross opinion emphasized that when Congress amends legislation, the courts must “presume it intends [the change] to have real and substantial effect.” See Stone v. INS, 514 U.S. 386, 397 (1995) (stressing importance of judiciary deferring to congressional intent).

12. See Ross, 136 S. Ct. at 1858 (suggesting built-in textual exception to mandatory exhaustion).


14. See Ross, 136 S. Ct. at 1859 (introducing “dead end” exception). One example of a dead end is a system where the prison handbook directs inmates to file their grievances with a certain office, but then that office refuses to process the grievances. See id.

15. See id. (introducing “opaque” exception). A system generating some reasonable mistakes would not apply to this exception because the inmate should err on the side of exhaustion. See id. A system so complicated that no ordinary inmate could make sense of it, however, would be considered opaque. See id.

16. See id. at 1860 (introducing “thwart” exception). A system where an inmate was prevented from filing a grievance as a result of dishonesty or threats by officers would qualify as a thwart exception. See id.

17. See id. at 1859-60 (stating Court’s ultimate holding). The opinion remarked that these exceptions should not often arise because it is in the prison’s best interest to maintain a functioning grievance process. See id. at 1859. The phrasing also suggests, however, that courts should not hesitate to apply the exception because
E. Post Ross v. Blake Problems

1. Practical Problems

While Ross v. Blake did open the door to some exceptions from the exhaustion requirement, several practical problems associated with the PLRA began to surface in the application of this new rule. Lower courts have misunderstood Ross as a comprehensive list of exceptions, rather than a directive for the courts to engage with the facts of the case when determining whether to excuse a failure to exhaust. In that same vein, strict adherence to proper exhaustion required under the PLRA and subsequent case law make it possible for a court to dismiss a case regardless of the merits or potential applicability to an exhaustion exception under Ross. As Justice Stevens critiqued in his Woodford dissent, the PLRA “does not distinguish between a denial on the merits and a denial based on a procedural error.”

Despite the exceptions detailed in Ross, the exhaustion requirement still acts as a structural barrier to court for inmates. Uncomfortable at best, inmates have the dangerous task of filing grievances against the same entity that controls all other aspects of their lives. The exceptions laid out in Ross do not sufficiently

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69. See Cohen, supra note 36, at 200 (explaining lower courts’ error in interpreting Ross’s exhaustive list of exceptions). The three exceptions noted in Ross were identified as potentially relevant to the case at bar, but they were not an exhaustive list of all exceptions to be applied in future cases. See id.; see also infra notes 128-30 and accompanying text (identifying lower courts’ misunderstanding and implications).

70. See Woodford v. Ngo, 548 U.S. 81, 117-18 (2016) (Stevens, J., dissenting) (articulating problems with PLRA proper exhaustion). Justice Stevens remarked that “the procedural default sanction created by this Court, unlike the exhaustion requirement created by Congress, bars litigation at random, irrespective of whether a claim is meritorious or frivolous.” Id.; see Stern, supra note 13, at 1519-20 (analyzing merits of Stevens’s dissent). Justice Stevens stated that Congress, in passing the PLRA, never intended to limit inmates’ constitutionally-protected right to access the federal courts. See Woodford, 548 U.S. at 104-06 (Stevens, J., dissenting). Further, the PLRA already effectively reduced the quantity of inmate litigation “without the need for an extrastatutory procedural default sanction” created by the proper exhaustion requirement. See id. at 115.

71. 548 U.S. at 105 (Stevens, J., dissenting) (detailing PLRA’s inability to determine merits of particular grievance).

72. See Honick, supra note 21, at 168 (calling PLRA “roadblock” between inmates and courts). The PLRA was a significant change from the unabridged access to federal courts emphasized in CRIPA. See id. at 167-68.

73. See id. at 182 (explaining inherent conflict within prison system). At times, inmates must submit their grievances to the same exact official named as a defendant in the underlying action. See id.; see also Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 891 (2009) (introducing “carceral burden” concept for state). When the state puts individuals in prison, they incur an affirmative duty to protect those individuals from potential harm resulting from the incarceration. See Dolovich, supra, at 891; see also supra note 30 and accompanying text (explaining difficulty of inmate and prison official relationship).
guard against the perverse incentive that prison officials have to misplace or ignore grievances that would reflect poorly on themselves or their fellow officers.74

Finally, the proper exhaustion requirement—made law through Woodford—does not realize its intended goal of reducing frivolous claims.75 Frivolous claims are typically filed by “frequent filers” who are well-versed in the grievance system, and therefore not deterred by its intricacies.76 Rather, the exhaustion requirement deters first-time grievance filers who likely do have meritorious claims but fear the nuanced requirements and tight deadlines.77

2. Constitutional Concerns

These practical problems have culminated in an unconstitutional barrier to inmates’ access to court.78 The Supreme Court has recognized that an inmate’s access to the court system is a constitutionally-protected right found in the Due

74. See Shapiro & Hogle, supra note 34, at 2056 (explaining reality of retaliation in prison life). Inmates who file grievances could be “beaten, raped, placed in solitary confinement, denied medical care, [or] transferred” away from family. Id. The risk associated with filing a grievance is often too great for inmates to pursue, even if that means being deprived of a constitutionally-protected right. See id. at 2056-57; see also GIBBONS & KATZENBACH, supra note 31, at 93-94 (elaborating on retaliation problem). Prison officials can also obstruct the grievance procedure by withholding pens and paper in segregation or discarding completed grievances without making copies. See GIBBONS & KATZENBACH, supra note 31, at 93. Many prison systems lack confidentiality mechanisms like anonymous deposit boxes, which can help reduce retaliatory measures. See id.; see also Honick, supra note 21, at 182-83 (stating prison officials’ incentive to dismiss grievances against them on procedural grounds).

75. 548 U.S. at 104-06 (Stevens, J., dissenting) (alleging proper exhaustion does not realize PLRA’s purpose). Justice Stevens argued that the PLRA already had the desired effect of reducing the quantity of prison litigation without needing an “extrastatutory procedural default sanction.” See id. at 115. The number of inmate civil rights suits dropped from 41,679 in 1995 to 25,504 in 2000. See id.; see also Honick, supra note 21, at 179-80 (suggesting proper exhaustion reduced PLRA’s effectiveness).


77. See Honick, supra note 21, at 180 (explaining danger of first-time filers falling prey to complicated grievance procedures). For example, an Oklahoma inmate was attacked by fellow inmates, who were purposefully let into his cell by guards, spent several months in the hospital, and suffered permanent injuries. See id. The inmate’s grievance was dismissed for failure to exhaust because he had appealed the initial dismissal prematurely. See id.

78. See Woodford v. Ngo, 548 U.S. 81, 123 (2006) (Stevens, J., dissenting) (suggesting majority decision ignores constitutional duty to respect dignity of all persons). Justice Stevens argued that “Congress created a rational regime designed to reduce the quantity of frivolous prison litigation while adhering to their constitutional duty ‘to respect the dignity of all persons,’ even ‘those convicted of heinous crimes.’” Id. (quoting Roper v. Simmons, 543 U.S. 551, 560 (2005)); see Summ, supra note 5, at 490 (stating PLRA deters inmates from filing constitutional claims in Article III courts); Margo Schlanger, Trends in Prisoner Litigation, as the PLRA Enters Adulthood, 5 U.C. IRVINE L. REV. 153, 153 (2015) (remarking PLRA undermined inmates “ability to bring, settle, and win lawsuits”). “The PLRA conditioned court access on prisoners’ meticulously correct prior use of onerous and error-inviting prison grievance procedures.” Schlanger, supra, at 153.
Process Clause.79 As Supreme Court Chief Justice William Rehnquist remarked in a 1995 inmate litigation suit, “[P]risoners do not shed all constitutional rights at the prison gate.”80 The procedural constraints of the PLRA’s exhaustion requirement burden, and in some cases eliminate, an inmate’s constitutional right of meaningful access to the courts at that time.81

Ross v. Blake indicates that the exhaustion requirement—as currently enforced—falls short of protecting the fundamental right for all citizens to access the courts and that additional safeguards need to be implemented.82 Unfortunately, the Ross Court believed that its hands were tied and refused to rewrite the statutory text, indicating Congress had to be the branch of government to do so.83 The Court rested its decision on the difference between judge-made exhaustion, which is subject to numerous exceptions, and statutory exhaustion, which “stands on a different footing” and is immune from judicial exceptions.84

Nevertheless, inmates’ access to court is not simply a matter of statutory construction subject to differing interpretations; it is a constitutional right, worthy of the utmost protection.85 In the past, the Court has not hesitated to

79. See Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (stating inmates “may not be deprived of life, liberty, or property” under Due Process Clause); see also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) (articulating importance of each clause of Constitution). “It cannot be presumed that any clause in the constitution is intended to be without effect.” Marbury, 5 U.S. (1 Cranch) at 174; see Summs, supra note 5, at 490 (reiterating Supreme Court recognized inmates’ constitutionally-protected right to access courts); see also Honick, supra note 21, at 191 (remarking on inmates’ vulnerability in prison system). “Prisoners lose many rights upon incarceration, but fundamental human rights are not among them.” Honick, supra note 21, at 191.


81. See Summs, supra note 5, at 489 (examining access to court under Due Process Clause analysis). The PLRA does not prohibit administrative courts from resolving Due Process Clause claims but does deter inmates from filing in Article III courts. See id. at 490.

82. See id. at 489 (suggesting Ross indicated need for additional procedural safeguards); see also Cohen, supra note 36, at 199-200 (explaining blanket exemptions inappropriate). Justice Kagan’s opinion in Ross, however, suggests analyzing the detained plaintiff’s ability to use the grievance procedure might be required. See id.


84. See Ross, 136 S. Ct. at 1857 (explaining difference between statutory exhaustion and judicial exhaustion doctrines). For statutory exhaustion, “Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to.” Id.

85. See Bounds v. Smith, 430 U.S. 817, 821 (1977) (establishing “beyond doubt” inmates have constitutional right of access to courts), abrogated by Lewis v. Casey, 518 U.S. 343 (1996); Ex parte Hull, 312 U.S. 546, 549 (1941) (holding invalid regulation requiring prison’s official review of petitions). The prison officials could not “abridge or impair” inmates’ fundamental right to access federal courts by requiring that habeas petitions be reviewed internally first. See Ex parte Hull, 312 U.S. at 549; see also Johnson v. Avery, 393 U.S. 483, 487 (1969) (holding prison regulation barring inmates from assisting other inmates in preparing claims invalid). The Court reasoned that a regulation which denies inmate-to-inmate assistance has the same effect of forbidding illiterate and poorly-educated inmates from filing petitions. See Johnson, 393 U.S. at 487. The Court echoed the district court’s conclusion that “[f]or all practical purposes, if such prisoners cannot have the assistance of a ‘jail-house lawyer,’ their possibly valid constitutional claims will never be heard in any court.” See id. (alteration in original) (quoting Johnson v. Avery, 252 F. Supp. 783, 784 (M.D. Tenn. 1966)).
protect individuals’ right of access to court by striking down regulations that require indigent petitioners to pay filing fees or insisting on inmates receiving trial records free of charge.86

F. Davon’s Story and the “Carceral Burden”

Ross’s practical and constitutional problems are best illustrated by the experience of Davon Washington—a twenty-two-year-old inmate who was transferred from Rikers Island in New York City to the Albany County Correctional Facility after an altercation with a city deputy warden.87 In Albany, Davon endured systematic abuse designed specifically for inmates accused of assaulting corrections officers.88 These officers forced Davon to follow a series of complicated commands, and when he made mistakes following the orders, the officers punched him in the face, stomped on him, and violated him.89 Later, officers returned to his cell and attacked him again, leaving him with a chipped tooth, a split lip, and bruises all over his body.90 After the attack, Davon received an infraction ticket for trying to assault an officer, which imposed a penalty of 360 days in isolation and rescinded his phone privileges.91 While still incarcerated, Davon wrote a letter to the Mayor of New York City detailing the abuse and requesting to be transferred.92 He never received a response.93

Davon’s assault is not unlike many other inmates’ experiences across the country.94 The nature of the prison system is conducive to widespread abuse
This rampant system of abuse embodies exactly where the PLRA falls short of protecting inmates and why prison litigation law must be changed. A system where corrections officers can beat a young man nearly to death while in state custody, as lieutenants and superintendents stand by and watch, is broken.

In 2009, UCLA law professor Sharon Dolovich introduced the concept of a “carceral burden.” Dolovich explained that the state, by choosing incarceration as a form of punishment, has incurred an affirmative obligation to protect those incarcerated individuals. Incarceration, by its very nature, puts inmates in a potentially dangerous situation while simultaneously depriving them of the ability to care for and protect themselves. Prison officials must therefore be proactive and take appropriate steps to prevent unnecessary suffering, because the failure to do so is an added punishment.

Programs and the National Institute of Mental Health found that 6964 general population male prisoners surveyed reported 1466 incidents of staff-on-prisoner physical assault over a six-month period. By these numbers, one in every five inmates was abused. The problem is not a small group of sadists who have gone rogue. Rather, “[e]xperts in law, psychology, prisoners’ rights litigation, human rights, and organizational theory” agree that the prison environment’s structure increases the likelihood of abuse occurring and continuing to occur until stopped. The classic example of prison abuse spiraling out of control is the Stanford Prison Experiment, where researchers divided a group of college students into guards and inmates in a simulated prison context. Over time, the most aggressive guards moved up into leadership positions and became role models for the less aggressive guards, resulting in an environment where rampant aggression was tolerated and even encouraged.

When the state violates its burden and causes serious harm to inmates, the prison conditions can be considered cruel and unusual punishment in violation of the Eighth Amendment. When a judge sentences an offender, he or she also “commits the state to providing for the prisoner’s needs in an ongoing way for the specified term.”

Prisons are home to a uniquely powerless population, the vast majority of whom are poor and uneducated. In fact, “[i]n all but two states, [prisoners] are deprived of even that most basic instrument of political self-defense—the vote.”

Prison officials, by creating the condition of confinement, are administering a state punishment, and therefore open to scrutiny under the Eighth Amendment’s Cruel and Unusual Punishment Clause. Not every deprivation rises to the level of cruel and unusual punishment of course, because deprivation to some extent is part of the punishment inherent in imprisonment. Prisons are home to a uniquely powerless population, the vast majority of whom are poor and uneducated.

In fact, “[i]n all but two states, [prisoners] are deprived of even that most basic instrument of political self-defense—the vote.”
While incarcerated, a state inmate’s entire existence is at the will of the state’s authority because “[f]or state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State.” 103 This may seem innocuous with respect to the type of peanut butter provided in the cafeteria, but can mean the difference between life and death for inmates repeatedly abused by corrections officers. 104 Davon and inmates in similar situations cannot escape the abuse or retaliate, and so their only feasible means of recourse is in the judicial system, which is why inmates’ unfettered access to court is a fundamental right. 105

III. ANALYSIS

In light of the structural barriers impeding inmates’ fundamental right to access court, the state is falling far short of upholding its “carceral burden.” 106 Ever since Congress enacted the PLRA and removed the power to excuse a failure to exhaust from courts’ discretion, the Supreme Court has shied away from reinstating that discretion via case law for fear of judicial overreach. 107 But federal authorities, including the judiciary as the protector of constitutional rights, have the obligation to right this wrong, even if the injustices are occurring in state rather than federal prisons. 108

The landmark Supreme Court case Marbury v. Madison made clear that the Legislature’s powers “are defined, and limited; and that those limits may not be mistaken, or forgotten.” 109 Regardless of any congressional statute, the adequate provisions. See id.; see also Fathi, supra note 100, at 1462 (identifying high incarceration rate in United States). The United States has the highest incarceration rate and the largest incarcerated population in the world, yet a markedly less developed prison oversight system. See Fathi, supra note 100, at 1462.

103. See Preiser v. Rodriguez, 411 U.S. 475, 492 (1973) (illustrating total control prisons have over prisoners).

104. See Santo, supra note 76 (highlighting notorious peanut butter lawsuit). But see Ransom, supra note 17 (recounting lawsuit brought by young prisoners transferred to Albany and abused).

105. See Summa, supra note 5, at 487 (highlighting inmates’ reliance on courts to intervene in abuse or prison conditions claims). “Inmates have little choice but to rely upon the courts to intervene when their challenges to . . . living conditions or to injuries inflicted upon them are dismissed administratively.” Id.

106. See Delovich, supra note 73, at 978 (suggesting courts play key role in cruel prison conditions). Judges are forced to ignore prisoners’ shared humanity in order to adhere to current standards, which significantly defer to prison officials. See id.; see also Fathi, supra note 100, at 1453 (citing combination of factors creating risk of mistreatment and abuse in prisons). “[N]o other group in American society is so completely disabled from defending its rights and interests.” Fathi, supra note 100, at 1453.

107. See Ross v. Blake, 136 S. Ct. 1850, 1858 (2016) (relying on PLRA’s history to reject “special circumstances” exception). The Court has recognized that when Congress amends legislation, the judiciary must presume Congress intends the change to have real and substantial effect. See Stone v. INS, 514 U.S. 386, 397 (1995) (analyzing congressional intent to review agency decisions).

108. See Johnson v. Avery, 393 U.S. 483, 486 (1969) (identifying limits to state’s authority to oversee prisons). The federal government’s authority supersedes the states’ authority if paramount constitutional concerns are at stake. See id.

109. See 5 U.S. (1 Cranch) 137, 176-77 (1803) (stating limits on legislative power). The Court, in recognizing certain well-established principles, stated that the original and supreme will organized the government by assigning different departments certain powers and setting certain limits “not to be transcended
Constitution is “the fundamental and paramount law of the nation.” Where, like here, a congressional statute contravenes the Constitution, the Supreme Court is not only within its power, but within its sacred duty, to amend it.

This Note suggests two possible solutions to this problem, both of which incorporate an element of judicial oversight crucial to upholding the constitutionality of the PLRA: implementing an independent review by a judiciary body for exhaustion purposes, creating a textual exemption to the exhaustion requirement for special circumstances, or ideally, both.

A. First Proposed Solution: Independent Review Board

Prison officials are naturally incentivized to protect themselves and their colleagues from inmate grievance reports that may portray them in a negative light. Even the most law-abiding corrections officers could be tempted to misplace a grievance form or ignore an inmate’s plea for help in order to avoid reprimand to themselves or their fellow officers. In fact, corrections officers who do report their fellow officers for abuse are often threatened or retaliated against by their colleagues.

by those departments.” See id. at 176. The Court questioned, “[T]o what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?” Id. at 177 (emphasizing Constitution’s supremacy). The Constitution was contemplated as the paramount law of the nation, and therefore above any act of the Legislature. See id. at 178. “If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.” Id. at 93-94.

112. See infra Part III (foreshadowing argument).

113. See GIBBONS & KATZENBACH, supra note 31, at 93-94 (explaining incentive for corrections officers to ignore or mishandle grievances). The Commission on Safety and Abuse in America’s Prisons (Commission) reported that many corrections officers and managers indicated they would be eager to report abusive conditions, but they often did not feel safe enough to report them themselves. See id. at 93. The Commission reported incidents of retaliation from other officers in the form of telephone and in-person threats to those accused of informing on their colleagues. See id. at 93-94. Further, it is not just corrections officers who are subjected to this fear of retaliation; “doctors and nurses frequently fail to report signs of violence that they observe” as well. Id. at 94.

114. See id. at 93-94 (highlighting importance of trust between officers in light of dangers of job). Michael Gennaco, chief attorney at Los Angeles County’s Office of Independent Review, told the Commission that “[t]here’s a significant pressure placed on a deputy or any other correctional officer not to report in order to remain within the group of colleagues that are there backing them up every day with regard to a very dangerous occupation.” Id. at 94. Former Florida prison warden Ron McAndrew explained that the majority of officers ‘did the work as required by rules and regulations, but often with the exception of not reporting certain incidents observed . . . for fear of job loss or retaliation.’” Id. at 94 (second alteration in original).

115. See id. at 93 (recounting retaliation incidents). Former Florida prison warden Ron McAndrew explained
To combat this perverse incentive, some have suggested implementing disciplinary, or even criminal, sanctions for officers who do not report abuse or mishandle grievances.116 Others have suggested creating informal hearings for inmates to report abuse as a sort of intermediary before reaching the level of judiciary intervention.117 Neither of these solutions, however, is likely to be successful for one simple reason: They rely on corrections officers within the four walls of the prison, who are already in a dangerous situation, to put themselves in even greater danger by going against their fellow officers.118

Instead, this Note suggests creating an independent review board as a subset of the federal judiciary, tasked with reviewing inmates’ litigation suits.119 This would be a return to CRIPA’s requirement of an independent review of the disposition of the grievances “by a person or other entity not under the direct supervision or direct control of the institution.”120 In the years since Congress enacted the PLRA, the judiciary has overwhelmingly deferred to prison administrators to conduct the operations of the prison as they see fit.121 As a

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116. See id. at 94 (concluding administrative and criminal sanctions needed for failure to report). The Commission urged corrections departments to support that requirement by committing to protect people against retaliation. See id.

117. See Summs, supra note 5, at 490 (arguing for informal adjudicatory hearings in Bureau of Prisons policies). Informal hearings could be useful in creating a more significant record for future judicial proceedings. See id. Informal hearings could also provide an opportunity for inmates to seek external help where risk of unconstitutional deprivation is particularly high. See id. at 490-91.

118. See GIBBONS & KATZENBACH, supra note 31, at 93-94 (reiterating dangers of working in prisons).

119. See id. at 80 (introducing British independent oversight). Her Majesty’s Inspectorate of Prisons, an independent monitoring system, “examine[s] and report[s] on conditions in each of the 139 prisons and jails in England and Wales.” Id. Chief Inspector Owers stated, “Even in well-run prisons I don’t think I have ever been on an inspection which hasn’t found something, however small, that the governor or the warden of the prison didn’t know was happening and where the warden hasn’t said, ‘I’m glad you told us that . . . .’” Id. Gradually, oversight mechanisms like those in Britain have developed in forty-six European countries. See id.; see also Fathi, supra note 100, at 1453-54 (explaining lack of independent oversight in United States). The United States, unlike many other countries, has not ratified the Optional Protocol to the Convention Against Torture, a national oversight body aided by periodic visits from the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See Fathi, supra note 100, at 1453-54. The main vehicle for oversight in the United States has been the federal courts and constitutional protections. See id. at 1454. The federal courts’ oversight was reduced by several PLRA provisions: “[t]he exhaustion of remedies requirement”; “[t]he physical injury requirement”; “[g]eneral provisions applicable to children”; “[t]he limitations on attorney fees.” See id. at 1454-56.


121. See Shapiro & Hogle, supra note 34, at 2037 (expanding on highly deferential standard for prison officials).

[T]he Supreme Court has been loath to permit judges or juries to question the decisions of guards, wardens, doctors, or other prison personnel. Judicial deference to prison staff manifests in virtually every standard for constitutional claims arising from official misconduct in prisons and jails, and it often hinders the vindication of prisoners’ constitutional rights.
result, this deference has limited inmates’ access to court and created a substantial gap in inmates’ constitutional protections. The judiciary can take a more proactive role in closing that gap by reviewing inmates’ claims that would otherwise be dismissed for failure to exhaust administrative remedies at the motion to dismiss stage.

B. Second Proposed Solution: Textual Exception for Special Circumstances

Another possible solution to the structural barrier created by the PLRA’s strict exhaustion requirement is to include a textual exception for special circumstances. In no uncertain terms, the Supreme Court rejected the special circumstances exception to the exhaustion requirement that previously garnered traction in the circuit courts. The Court stated that both the statutory and legislative history of the PLRA indicate Congress intended to move away from the weaker CRIPA standard and towards a stricter PLRA standard.

In lieu of the special circumstances exception, the Ross Court named three specific exceptions to the exhaustion requirement that lower courts understood to be a closed class of exceptions. Meaning, if the facts of the case did not fit into the three exceptions, then the case must be dismissed for lack of

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Id. (footnote omitted).

122. See id. at 2039 (explaining deferential standard for use of force and conditions of confinement claims). To plead a use of force or conditions of confinement claim, an inmate must provide evidence that he or she suffered objectively inhumane treatment or conditions, and that the official had malignant intent or failed to remedy a known risk. See id. Therefore, the question for a factfinder is whether the official’s force was reasonable, but whether the inmate can produce evidence that the guard was driven by unacceptable motives. See id. at 2040.

123. See Stern, supra note 13, at 1538 (explaining courts’ power to dismiss automatically once defendants raise exhaustion at motion to dismiss stage). The Woodford proper exhaustion standard provided “a straightforward method of dismissing prisoner claims . . . on procedural grounds, without reaching the merits.” See id. at 1537. The Woodford opinion helped courts to quickly clear inmates’ unexhausted claims from their dockets. See id.

124. See Giano v. Goord, 380 F.3d 670, 676 (2d Cir. 2004) (introducing special circumstances exception), abrogated by Ross v. Blake, 136 S. Ct. 1850 (2016). “[T]here are certain ‘special circumstances’ in which, though administrative remedies may have been available . . . the prisoner’s failure to comply with administrative procedural requirements may nevertheless have been justified.” Id. The court refused to make any broad statements of what constitutes special circumstances, but held the officer’s alleged retaliatory behavior was sufficient to justify Giano’s failure to exhaust. See id. at 678-79.


126. See Ross, 136 S. Ct. at 1855 (explaining basis for rejecting special circumstances exception); see also supra Section II.D (detailing decision behind special circumstances rejection).

exhaustion. In actuality, the Supreme Court wanted lower courts to “engage with [the] facts” to determine on a case-by-case basis whether exhaustion should be excused. As a result, creating a closed class of specific exceptions prevents judges from analyzing the facts and ensuring meritorious inmate claims do not fall prey to procedural missteps.

A special circumstances exception would return to the judiciary the ability to look at a case holistically and determine whether to excuse a failure to exhaust based on the merits. A textual exception creates a flexible middle ground where the PLRA’s goal of reduced frivolity can be realized without compromising constitutional protections. The judiciary is uniquely qualified to analyze the facts of each case in a way that gives inmates’ claims the individualized attention necessary when faced with the issue of life and death.

128. See Cohen, supra note 36, at 200 (detailing how district courts misread Ross). Lower courts thought they were constrained to the three circumstances identified in Ross when excusing a failure to exhaust. See id. Those three circumstances, however, were simply identified as applicable to the facts of that specific case. See id.

129. See id. (explaining Ross Court’s intended directive). Misreading Ross could lead to even greater repercussions for young inmates, mentally-ill inmates, or inmates with a low IQ. See id. at 202. While some courts have made exceptions for the extraordinary inmate, most courts adhere to the PLRA’s strict exhaustion requirement as long as the grievance process was in place and others were able to use it. See id. at 204.

130. See id. at 201 (explaining danger of courts misreading Ross). “[T]he possibility of lower courts continuing to apply [the Ross exceptions] differently than the Court intended has the critical consequence of unduly limiting access to the courts for the incarcerated population.” Id. at 202.

131. See McCarthy v. Madigan, 503 U.S. 140, 146 (1992) (highlighting judicial discretion allotted under CRIPA), superseded by statute, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. VIII, §§ 801-810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.). The Court employed a balancing test to measure whether the individual’s interest in retaining prompt access to a federal judicial forum outweighs the benefits of exhaustion. See id.; Summs, supra note 5, at 472-73 (elaborating on CRIPA standard); see also Fathi, supra note 100, at 1454 (explaining importance of federal courts’ oversight role). The Supreme Court’s decisions to hold prison conditions to constitutional standards have paved the way for inmates to file lawsuits challenging all aspects of prison life. See Fathi, supra note 100, at 1454. In meritorious cases, the federal court system has “issued prison-wide or even statewide orders” to remedy the unconstitutional problems that led to its adoptive role in prison oversight. See id. Contra supra notes 58-60 and accompanying text (rejecting special circumstances exception).

132. See Giano v. Goord, 380 F.3d 670, 676 (2d Cir. 2004) (highlighting special circumstances exception), abrogated by Ross v. Blake, 136 S. Ct. 1850 (2016). In some cases, an inmate’s failure to comply with administrative procedural requirements was justified, and their claim should not have been prevented from proceeding to court because it was too late to go back and file grievances. See id.; see also Cohen, supra note 36, at 194 (elaborating on special circumstances exception). This exception was originally created to assist incarcerated plaintiffs who reasonably failed to comply with the grievance procedures, not to assist those who purposefully failed to follow the procedures. See Cohen, supra note 36, at 194-95.

133. See Summs, supra note 5, at 490 (reiterating Supreme Court recognized inmates’ constitutionally-protected right to access courts); see also Cohen, supra note 36, at 200 (explaining lower courts’ error in interpreting Ross as exhaustive list of exceptions). The three exceptions noted in Ross were identified as potentially relevant to the case at bar; they were not an exhaustive list of all exceptions to be applied in future cases. See Cohen, supra note 36, at 200. Applying blanket exemptions is inappropriate, and courts should instead analyze the inmate’s ability to use the grievance procedure. See id.
IV. CONCLUSION

Davon’s experiences, among the thousands of similar inmate experiences across the country, make it clear that the American prison litigation system is broken. The PLRA exhaustion requirement, while originally well-intentioned, has created a structural barrier for inmates bringing § 1983 claims in federal court. This barrier unconstitutionally limits inmates’ fundamental right to access the court system. In the immortal words of Chief Justice Rehnquist, “[A] law repugnant to the constitution is void.”134 The PLRA’s exhaustion requirement, as it stands today, is repugnant to the Constitution and necessarily void.

As a result of Congress’s unwillingness to remedy the PLRA’s shortcomings via statutory amendment, the Supreme Court must act. The Court is uniquely qualified to incorporate judicial oversight of PLRA claims, either by way of an independent review board or a textual exemption for special circumstances. Both remedies would incorporate a new, or at least reimagined, role for the judiciary to engage with the facts of each case to determine whether to excuse a failure to exhaust. Judicial oversight brings an independent, third party into the often-insulated world of prisons to protect those most vulnerable. Regardless of their crimes, inmates are still Americans and deserve the constitutional protections afforded to them—the most important of which is the unfettered access to court.

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