EXHAUSTION UNDER THE PRISON LITIGATION REFORM ACT: THE CONSEQUENCE OF PROCEDURAL ERROR

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INTRODUCTION: AFTER THE DELUGE

As the twentieth century drew to a close, the number of Americans in custody soared. In 1990, state, federal, and local prisons housed slightly more than one million inmates. By 1996, that number had jumped past the one and a half million mark, and as of June 30, 2001, it hovered just below two million.1

The rising number of inmates brought a corresponding increase in the volume of inmate litigation: from 1990 to 1996, the number of suits filed in federal court by inmates increased from 42,263 to 68,235. Civil rights suits, brought against state officials under 42 U.S.C. § 1983 or federal officials directly under the Constitution,2 constituted the majority of prisoner suits.3

The volume of litigation imposed substantial costs on the state attorneys general who defended the vast majority of such suits; likewise, their processing consumed a significant portion of federal judicial resources. In 1995, prisoner civil rights suits constituted thirteen percent of all civil cases in the district courts.4

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4 See Jon O. Newman, Pro Se Prisoner Litigation: Looking for Needles in Haystacks, 62 BROOK. L. REV. 519, 519 (1996). This does not, of course, mean that they consumed thirteen percent of judicial resources; inmate suits are frequently dismissed relatively quickly. See Scalia, supra note 3, at 7 (noting that average processing time for inmate petitions received in 1995 was 277.9 days, with fifty percent disposed of in fewer than 161 days).
Worse still, state officials complained, many of these lawsuits were frivolous. By 1995, stories of outrageous inmate claims were a staple of newspaper reports. No regular reader of the nation’s dailies could avoid the tales of prisoners who sued for bald haircuts, broken cookies, and, most infamously, chunky peanut butter served when smooth was requested.1 Faced with this spectacular epidemic, Congress responded by enacting the Prison Litigation Reform Act (PLRA).2

Some of the PLRA’s provisions address structural issues such as prospective relief and consent decrees.3 Others impose restrictions on inmate suits.4 Most notably for the purposes of this Article, 42 U.S.C. § 1997e(a) provides that no inmate may bring suit under any federal law “until such administrative remedies as are available are exhausted.”5

The enactment of the PLRA inspired a flurry of academic commentary, much of it critical.6 It likewise inspired a flurry of litigation, in which the

4 42 U.S.C. § 1997e(a) (2000). In full, the relevant section provides: “No action shall be brought with respect to prison conditions under section 1983 of the Revised Statutes of the United States, or any other Federal law, by a prisoner confined to any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”
5 By its terms, the provision applies to suits as well as federal courts, yet this Article focuses on its effect on access to federal courts.
backers of the PLRA by and large prevailed.\textsuperscript{11} The exhaustion requirement received less scholarly attention,\textsuperscript{12} though cases dealing with exhaustion progressed farther through the federal hierarchy than the constitutional challenges. In the past two years, the Supreme Court has answered two questions about the scope of the requirement. In Boothe v. Churner,\textsuperscript{13} it held that the exhaustion requirement applies even when the grievance procedure cannot award the relief the inmate seeks, and in Porter v. Nussle,\textsuperscript{14} it held that the requirement applies to inmate claims of excessive force or physical abuse. After Boothe and Porter, the exhaustion requirement "applied to all inmates suits about prison life"\textsuperscript{15} and can be excused only when prison officials lack authority to take any action in response to a complaint.\textsuperscript{16}

But the Supreme Court's work is not done. Indeed, its recent decisions broadening the scope of the exhaustion requirement have only increased the significance of the remaining question: what happens when a prisoner makes a procedural misstep in the course of exhaustion? Though the Court had noted the question earlier, and in fact identified it as one demanding congressional


\textsuperscript{8} See, e.g., Rack v. United States, 365 F.3d 941 (5th Cir. 2004) (upholding termination of prospective relief); Haldix v. Johnson, 230 F.3d 684 (8th Cir. 2000) (upholding summary judgment); Rodriguez v. Cqen, 169 F.3d 1178 (9th Cir. 1999) (upholding three strikes provision); Ancil v. Tucker, 144 F.3d 17 (2d Cir. 1998) (upholding in forma pauperis provisions).

\textsuperscript{11} Brennan's article is an "exception notable for the breadth of its discussion. See Brennan, supra note 10. Schauer notes that some advocates "identify the PLRA's exhaustion rule as the statute's most damaging component," Schauer, supra note 10, at 1650, and urges reform, id. at 1665. Other scholars inclined to take the form of arguments that one or another type of claim should be exempted from the exhaustion requirement. See, e.g., Allen W. Bueta, Payment's Tails for Money Damages: An Exception to the Administrative Exhaustion Requirement of the Prison Litigation Reform Act, 69 fRIGHAM L. REV. 1355 (2003) (planner for money damages); Mietekow, supra note 10 (presenting evidence of excessive force). As discussed in the text, the Supreme Court quoted those hopes within months of an even prior to their publication.

\textsuperscript{12} 532 U.S. 731 (2001).

\textsuperscript{13} 534 U.S. 516 (2002).

\textsuperscript{14} id. at 532.

\textsuperscript{15} See Boothe, 532 U.S. at 776.
resolution, the PLRA is unfortunately silent on the issue. Federal courts have not yet confronted the question in significant numbers, though many of them seem to assume that a procedural error in an administrative grievance proceeding has no consequences for a subsequent § 1983 suit.17

That may soon change. In a terse opinion by Judge Easterbrook, the Seventh Circuit recently faced the issue squarely, concluding that not only does failure to exhaust defer a prisoner’s federal suit, but failure to exhaust properly bars it entirely.18

The conclusion is in many ways a natural one. Exhaustion requirements are familiar to federal judges. They exist in administrative law, where a litigant must frequently pursue all available remedies from an agency before seeking judicial review of the agency’s action. And they exist in the context of inmate litigation under the federal habeas statute.19 In both these circumstances, a failure to exhaust properly will frequently serve as a barrier to a subsequent suit.20 It is natural, then, for federal judges steeped in habeas practice or administrative law to assume that a similar result should obtain under the PLRA exhaustion requirement, that a failure to invoke state administrative remedies properly will bar a subsequent § 1983 suit via the doctrine of procedural default or some relative thereof.21

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18 See cases cited infra Part II.A.
19 Pum v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002). In the interest of full disclosure, I should mention that while practicing with the firm of Meyer, Brown, Rowe & Maw in Chicago, I represented an inmate whose § 1983 suit was dismissed for improper exhaustion. See Thomas v. Doyle, 39 Fed. Apps. 372 (7th Cir. 2002). This Article is not, however, merely an attempt to argue that case in a different forum. The issue presented is an important one, which other courts will be forced to address and which the Supreme Court will likely be called upon to resolve in the end. My aim here is to provide resources for those future decisionmakers.
21 See infra Part III.A-B.
22 The Supreme Court appears at times to have made the same assumption. In McCarthy v. Madigan, 503 U.S. 145, 152 (1993), when defining the wisdom of imposing an exhaustion requirement on the Roviaro claims of federal inmates seeking money damages, Justice Blackmun observed that plaintiffs’ “short, successive filing deadlines . . . create a high risk of forfeiture,” implying that failure to comply with procedural requirements would indeed bar relief. Blackmun may have been overestimating matters to swell a parade of horribles: the Court had earlier suggested that such consequences would depend on congressional intent. See Pavy, 457 U.S. at 514. The problem presented by the PLRA is that Congress failed to address the issue. One cannot, then, simply assume either that a subsequent suit should be barred or that it should not; instead, what is needed is a careful analysis of the mechanisms by which procedural error creates a bar in other contexts and the policy reasons supporting imposition of such a rule under the PLRA.
Natural, but quite likely wrong. As this Article will show, such an assumption has little basis in Supreme Court precedent, in the policies underlying the PLRA, or in the text of the statute itself. Nor, in fact, does the treatment of exhaustion in the context of direct administrative or collateral habeas review support imposition of a procedural default rule in the quite different circumstance of a suit under § 1983.

These points are not obvious; indeed, several are quite counterintuitive. Moreover, the Seventh Circuit is an influential circuit, and Judge Easterbrook an influential judge.23 Add the heft of that endorsement to the natural tendency to reason by analogy to the administrative and habeas contexts, and other federal courts are quite likely to follow the Seventh Circuit.24

For anyone who thinks that civil rights suits should be resolved on their merits, this is a very alarming prospect. The Seventh Circuit’s approach allows—indeed, requires—dismissal of many inmate suits without any regard to their merits. To say that it could spell the end of civil rights litigation by state prisoners is only a small exaggeration—administrative review procedures are byzantine, and the time limits are very short.25 The unrepresented prisoner who makes it through the administrative process without some mistake is rare indeed, and under the Seventh Circuit’s approach, any misstep will doom a subsequent civil rights suit. If the Seventh Circuit’s approach wins broader support, of course, we should expect grievance systems to become more complex and unforgiving, precisely as a means of preventing § 1983 suits. Prison administrators, who generally have control over the structure and timing

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25 Peer also博在 the examples of Rhode Island (a three-day initial filing period) and Florida (a forty-eight-hour window of appeal). See Rhode, supra note 10, at 431 n.6. For a more thorough review of state procedures, see Brief of Amici Curiae American Civil Liberties Union et al. at 1–10; Beth v. Chaney, 531 U.S. 956 (2000) (No. 98-1664), and Brief of Am. Civ. Liberties Union et al. at *1–10, 20.

26 At the administrative stage, prisoners will almost always be represented. It is all but impossible, for one thing, to present a lawyer and receive advice within the five days permitted by some prison systems for the initial filing of a grievance.
of prison grievance procedures, can hardly be faulted for taking advantage of a
technique handed to them by the federal courts. And given that administrative
grievance procedures affect no one but prisoners—unlike, say, state court
filings periods and rules of procedure, which can apply to broader classes of
litigants—there is unlikely to be any significant political counterweight to
administrators' understandable desire to reduce litigation against themselves
and their staff.

Let us be candid. There is no denying that frivolous suits make up a large
number—and even a fairly large percentage—of the claims brought by inmates
under § 1983. But there are also real abuses that take place within the prison
system. Prisoners have, among other things, been raped, shot, and beaten to
death by guards. For those wrongs, there should be remedies. A rule that
controls access to courts not by examining the merits of a claim but by shutting
the door on unconsolled inmates who fail to navigate a procedural minefield is
not a good one. As Justice Breyer has recently stated, a rule that "would close
the doors of federal . . . courts to many state prisoners and . . . would do so
randomly" is not "consistent with our human rights tradition." At least, judges
should hesitate before calling into being such a rule unless it has
support in precedent, statutory text, or the policies underlying the PLRA.
Investigating these possible sources of justification is the task of this Article.
First, however, we need a little bit of background.

I. THE PLRA: ENACTMENT AND AFTERMATH

The inspiration for the PLRA was not so much the fact that the number of
inmate suits had increased as the perception that something had gone radically
wrong with the system, that federal courts were struggling with a sudden
epidemic of frivolous lawsuits. This perception did not arise unbidden from the
data, which indicated that the rate of inmate filings had actually decreased by

27 A Department of Justice Report found that nineteen percent of its sample (which consisted of 2,738
§ 1983 suits decided in 1992) was dismissed as frivolous. See ROGER A. HANSON & HENRY W.K. DALEY,
study notes that 29.7% of inmate civil rights petitions terminated in district court in 1995 were dismissed
and only 2.6% reached v.i.g. See SCALIA, supra note 3, at 6. For useful analysis of the pre-PLRA data, see
SERTAGNERI, supra note 10, at 1290-92.
28 See generally Maltzman, supra note 10, at 535-37 & nn.2-10 (discussing abuses of prisoners).
some seventeen percent between 1980 and 1996.\footnote{See Scalia, supra note 3, at 1 (finding drop from 72.7 to 60.5 petitions per 1000 inmates). This is not to say that the volume of suits did not present a problem.} Rather, it was the product of an aggressive media campaign by congressional Republicans and state attorneys general. The National Association of Attorneys General solicited from its members eye-catching lists of "top ten" frivolous lawsuits, which were then distributed to the press.\footnote{See Scalia, supra note 3, at 1 (finding drop from 72.7 to 60.5 petitions per 1000 inmates). This is not to say that the volume of suits did not present a problem.} From these lists came such popular favorites as the inmate who sued over the lack of salad bars on weekends, the one who sued over the color of his towels, and the alleged Eighth Amendment violation created by the substitution of creamy peanut butter for chunky.\footnote{See Scalia, supra note 3, at 1 (finding drop from 72.7 to 60.5 petitions per 1000 inmates). This is not to say that the volume of suits did not present a problem.} The peanut butter story, in particular, proved to have legs. Former Attorney General Edwin Meese repeated it in a public affairs forum, and Senator Dole, introducing the PLRA on the Senate floor, explained the law’s necessity by invoking lawsuits over defective haircuts, pizza party invitations, "and yes, being served chunky peanut butter instead of the creamy variety."

Much of the substance of the media offensive turned out not to withstand scrutiny. The declining rate of filings per prisoner suggested not what the United States was really experiencing was an epidemic of incarceration, of which increased litigation was merely a symptom.\footnote{See Scalia, supra note 3, at 1 (finding drop from 72.7 to 60.5 petitions per 1000 inmates). This is not to say that the volume of suits did not present a problem.} Several of the most-cited examples of frivolous cases, including the peanut butter story, were debunked by Second Circuit Judge Jon Newman.\footnote{See Scalia, supra note 3, at 1 (finding drop from 72.7 to 60.5 petitions per 1000 inmates). This is not to say that the volume of suits did not present a problem.} But the temptation to treat symptoms is hard to resist, and scrutiny was not the hallmark of the PLRA’s enactment, which, in the words of one commentator "was characterized by haste and lack of any real debate."\footnote{See Scalia, supra note 3, at 1 (finding drop from 72.7 to 60.5 petitions per 1000 inmates). This is not to say that the volume of suits did not present a problem.} As Mark Tushnet and Larry Yackle put it,
"conservatives won the battle of sound bites," and on April 26, 1996, the PLRA became law." The PLRA provisions fell into two relatively distinct categories. The first group, originally part of the 104th Congress’s Stop Turning Out Prisoners Act, set new (and retroactively effective) standards for federal injunctive relief and were intended to "get the federal courts out of the business of running jails." Of more concern for the purposes of this Article are the provisions that target individual inmate suits and are intended to relieve courts from the alleged burden of frivolous litigation. These provisions (1) require even prisoners proceeding in forma pauperis to pay filing fees by installment; (2) instruct district courts to conduct a preliminary screening of complaints and to dismiss sua sponte those that are frivolous, malicious, fail to state a claim, or seek monetary damages from a defendant who is immune to suit; (3) prohibit actions for mental or emotional injury unaccompanied by physical injury; (4) deny in forma pauperis status to prisoners, except those in imminent danger of serious physical injury, who have had three actions or appeals dismissed as frivolous, malicious, or failing to state a claim; (5) limit the attorneys’ fees that may be awarded; and (6) forbid prisoners from bringing suit "with respect to prison conditions" under any federal law "until such administrative remedies as are available are exhausted." This last requirement is quite important; failure to exhaust is common and the Supreme Court’s

n.4 (7th Cir. 2001) ("[The PLRA’s] provisions were never seriously debated."). There is general agreement that the Act is not a prime example of capital draftsmanship. See, e.g., Iannone v. Scott, 129 F.3d 649, 654 (7th Cir. 1997) ("The PLRA is not a paragon of clarity"). Turbin and Yarburt describe the PLRA as an example of a "symbolic statute"—one enacted primarily to make a point to a legislator’s constituents, without close attention to statutory design. See Turbin & Yarburt, supra note 10, at 3. Such statutes, Turbin and Yarburt observe, will occasionally produce "freakish, almost random result[s] in particular cases." Id. The consequence of improper exhaustion is a clear example of an issue the PLRA’s drafters apparently failed to consider.

14 Turbin & Yarburt, supra note 10, at 64.

15 I am not aware of any studies disclosing what proportion of in forma pauperis suits are dismissed for failure to exhaust administrative remedies. A study on habeas petitions filed in 1983 noted that seventy-five percent of the dismissals were for failure to exhaust. See Dancer v. Walker, 533 U.S. 167, 186 (2001) (Breyer, J., dissenting) (citing Bureau of Justice Statistics, Office of Justice Programs, Federal Bureau of Investigation, Report No. NCJ-180402, National Crime Statistics 3 (1995)).
clarificatory decisions have broadened the scope of claims for which exhaustion is required to include almost every conceivable § 1983 suit.

As already mentioned, the PLRA met a predominantly hostile academic reaction and a large number of court challenges. 30 Neither of these responses has had much effect; the statute has survived judicial scrutiny essentially unchanged, 31 and, to the extent that success can be measured by the volume of suits, the PLRA has worked. Prisoners filed 41,679 civil rights suits in 1995; in 2000, the number had fallen to 25,504. 32 That substantial decrease (thirty-nine percent) is all the more impressive when considered in light of the growing prison population. The filing rate—the number of suits per 1000 inmates—fell even further, from thirty-seven to nineteen. 33 Presumably these decreases resulted in large part from the requirement that in forma pauperis petitioners pay filing fees by installment and the three strikes provisions.

There is no way of knowing, of course, whether the suits the PLRA has evidently deterred were frivolous. 34 But there is at least anecdotal evidence that the PLRA has succeeded in meting out punishment to inmates who persisted in frivolous litigation. The media, which so relished describing the inventive macerants who brought the most outrageous suits, has shown a similar enthusiasm for recounting their comeuppance. Recent stories have reassured the public that, for example, David Joynes, a Texas inmate who sued Penthouse on the basis of a Paula Jones pictorial that he claimed was less explicit than advertised, was fined $250. 35 Similarly, Dennis Saapless, also

STATISTICAL, U.S. DEPT. OF JURISDICTION, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 17 (1995). The figure may not translate readily into the § 1983 context, and the trend may well vary depending on whether failure to exhaust is held to bar a suit or only to deny it, but it seems likely that the exhaustion requirement will intercept a substantial portion of initial § 1983 suits.

30 See supra notes 10-11.
33 Id. Only the number of habeas petitioners' extraordinary writs, which can have maximum only the creation of the Antiterrorism and Effective Death Penalty Act (AEDPA) 28 U.S.C. § 2244(b)(3) (2000).
34 One might expect so. An inmate whose suit is dismissed presumably has less at stake and will be less willing to pay a filing fee; likewise, an inmate influenced by the three strikes provision is probably more likely than most to be a recreational litigant, or what courts sometimes call a "pro forma". All of which is to say that the PLRA provisions actually target frivolous suits. The exhaustion requirement, notably, does not. For a comprehensive assessment of the PLRA's effects, see Schlanger, supra note 10.
35 See Lawrence Hall, Nouvelle by Lawrence, STAR-LEDGER (Newark, N.J.), July 9, 2001, at 13.
incarcerated in Texas, was likewise fined and subjected to the three strikes provision after a series of suits relating to unsatisfactory dinner portions. There is also, of course, evidence that the sorts of abuses to which critics of the PLRA pointed have persisted.16

Thus to some extent the PLRA appears to be a successful statute. And some of its peculiarities have been explicated and smoothed out by courts. But the operation of the exhaustion requirement remains largely mysterious. We know, following Booth and Porter, that the requirement applies to virtually every suit imaginable. What we do not know is what kind of requirement it is—whether it can be analogized to administrative or habeas exhaustion, or whether it is something else altogether. That is the issue underlying the question of what happens when an inmate makes a procedural error, and it is the issue that the Seventh Circuit took up in Pozo v. McCaughtry.

II. Pozo v. McCaughtry

A. Precursors

The Seventh Circuit is thus far the only circuit explicitly to hold that the nonmerit denial of an inmate’s administrative grievance will bar a subsequent § 1983 suit.17 Other circuits have confronted situations in which the limitations period plainly had run—indeed, because of the short filing deadlines typical of prison grievance procedures, this situation will almost always obtain when a court finds that an inmate has failed to exhaust—but, perhaps because prison officials failed to raise the argument, these decisions seem to assume that the failure to exhaust in a timely fashion has no special significance. The Fifth Circuit, for example, has stated explicitly that an inmate could return to court after exhaustion, seemingly untroubled by the fact that his grievance was obviously time-barred. In Wendell v. Asher,18 the court considered, inter alia, due process claims relating to a disciplinary hearing conducted on June 27, 1997. The court noted that state prison procedures allowed inmates fifteen

16 See Rosana Ruhl, After All, This Isn’t a Nilson, HOUSTON CHRON., Dec. 1, 2001, at 35.
18 162 F.3d 887, 889 (5th Cir. 1998).
calendar days to file a grievance, but that the inmate "had never pursued administrative remedies at all." The court issued its decision on December 24, 1998, by which point the time limit had long since run on the inmate's administrative grievance. It nonetheless held that exhaustion was still possible, that the dismissal "will not . . . render judicial relief unavailable" and that "there are no apparent barriers to the refiling of this action in federal district court since [plaintiff] exhausts his administrative remedies." The Second Circuit has more than once reversed district courts that dismissed with prejudice because of a failure to exhaust, commenting that "[i]n failure to exhaust, administrative remedies precludes only the current lawsuit.

The majority of circuits thus apparently adhere to the principle that exhaustion regulates only the timing of a lawsuit, and they dismiss without prejudice on the assumption that the inmate will invoke the time-barred remedy and then file another suit. In at least one case, this assumption has been vindicated: prisoners did exhaust remedies time-barred at the time of suit and then returned to court, where they prevailed on the merits. This procedure—requiring inmates to resort to time-barred remedies as a precondition to suit, but without imposing any penalty for the nemesis disposition of their grievances—may seem pointless and even wasteful. In fact, as explained in subsequent sections, it protects the policies behind the PLRA exhaustion requirement and is quite likely the best reading of the statute.

Some courts, though, had noted the troubling possibility that an inmate could simply refuse to file a grievance at all and, once the deadline had passed,

39 Id. at 881.
40 Id. at 882. Other similar cases are easy to find. In Walker v. Mackenzie, 230 F.3d 573, 575-77 (9th Cir. 2001), for example, the court noted that the plaintiff, who faced a seven-day limitations period for appealing the denial of his grievance, did not do so, but he "concededly that he failed to exhaust available administrative remedies", but that he "may have a claim in federal court once he has fully exhausted his prison remedies." The Tenth Circuit has likewise stated that exhaustion is possible for a plaintiff whose claim was based on an incident five years in the past, and hence obviously time-barred under prison administrative requirements. See Lopez v. Sosik, 36 Fed. Appx. 353, 356 (10th Cir. 2002).
41 E.g., Manley v. Mackale, 278 F.3d 126, 131 (5th Cir. 2002).
42 In Jackson v. District of Columbia, 254 F.3d 282, 288-89 (D.C. Cir. 2001), the court dismissed a § 1983 claim action for failure to file the "Level I grievance" required by prison regulations within thirty days of the occurrence giving rise to the grievance. That time period had obviously expired by the time the court ruled—the plaintiffs received preliminary relief from the district court in 1999. See Jackson v. District of Columbia, 89 F. Supp. 2d 48, 50 (D.D.C. 2000) (noting greet of temporary restraining order in 1999, vacated by 254 F.3d 283 (D.C. Cir. 2001)). But the court of appeals held that the district court "should have dismissed the complaint without prejudice, allowing the prisoners to refile once they have completed the [prison] grievance procedure." Jackson, 254 F.3d at 280-81. The prisoners did sue, and prevailed on the merits in Garrell v. Ashcroft, 19 F. Supp. 2d 23 (D.D.C. 2002).
proceed to federal court on the theory that a time-barred remedy was not "available" within the meaning of the PLRA. 63 Such disdain for the administrative process, courts warned, would not be tolerated. 64 What the demand that prisoners respect the PLRA's exhaustion requirement amounted to in practice, however, was less clear; even courts that employed the strictest language continued to dismiss without prejudice, though some dropped hints that a procedural error could create an incurable failure to exhaust. 65

B. Pozo Itself

Pozo takes a substantial step beyond these cases. The Pozo plaintiff, a Wisconsin inmate, brought a § 1983 suit against prison officials after exhausting his administrative remedies. However, he missed a filing deadline at one stage in the prison grievance procedure, and the prison officials' ultimate denial of his grievance relied on this procedural failing. 66 The district court attached no significance to the grounds for the administrators' decision and ruled that, because Pozo had no administrative remedies remaining, he had satisfied the PLRA exhaustion requirement. 67 The Seventh Circuit reversed.

The Seventh Circuit opinion began by distinguishing between two understandings of exhaustion. 68 One, drawn from the context of collateral attack, holds that "a prisoner exhausts state judicial remedies by using whatever is available at the moment; if no remedies are left, then the challenge may proceed in federal court," subject of course to the possible bar of procedural default. 69 The other, found in administrative law, takes exhaustion

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63 The apparent loophole also exists for habeas petitions, of course, and it is one that the procedural default doctrine cannot. See infra Part III.A.
64 See, e.g., Hartshvid v. Valve, 199 F.3d 305, 309 (6th Cir. 1999) ("An inmate cannot simply fail to file a grievance or abandon the process with permission and claim that he has exhausted his remedies or that it is futile for him to do so because his grievance is now time-barred under the regulations.").
65 See, e.g., McCoy v. Critton, 270 F.3d 503, 512 (7th Cir. 2001) (affirming dismissal without prejudice on the ground that inmate failed to exhaust his ability to seek a hearing in time of dismissal limitation, but noting the possibility that an inmate's "failure to griever would deprive him of all legal relief forever"); Harper v. Jenkins, 179 F.3d 1311, 1312 (11th Cir. 1999) (affirming dismissal without prejudice of suit of inmate whose grievance had been grievor as inmates and who had failed to appeal the denial).
66 Pozo v. McCAugherty, 286 F.3d 1022, 1120 (7th Cir. 2002).
67 Id. at 1023.
68 Id. at 1024.
69 "Procedural default" occurs when a habeas petitioner commits a procedural error in the course of exhausting state remedies and the last state-court decision rejecting his claim rests on a procedural ground. Absent some excuse, federal habeas courts will not address the merits of a procedurally defaulted claim and will instead dismiss with prejudice. See, e.g., Edwards v. Carpenter, 529 U.S. 449, 451 (2000) (discussing procedural default).
to mean "using all steps that the agency holds out, and using them properly (so that the agency addresses the issues on the merits)." Which sort of exhaustion was mandated by the PLRA, the court observed, was a question that need not be answered, because the old habeas understanding had been "revised by O'Sullivan v. Boerckel." And replaced by a new understanding under which "procedural default also means failure to exhaust one's remedies." This conclusion would ordinarily mean little for a § 1983 plaintiff, as no court has ever held that a § 1983 claim can be procedurally defaulted. Judge Easterbrook surmised that difficulty with the observation that "[i]n theory, the parties have agreed" that the new understanding applies to exhaustion under § 1997e(a) of the PLRA.

Pope thus contains two distinct holdings. First, relying on Boerckel, it holds that, as far as habeas petitioners are concerned, a procedural default is now to be considered also a failure to exhaust. Second, it goes on to hold that civil rights suits filed after the exhaustion of prison administrative remedies required by the PLRA are governed by habeas doctrines, such as procedural default, relating to the exhaustion of state judicial remedies. Its ultimate conclusion is that an attempt at exhaustion rejected on nonmerit grounds is no exhaustion at all, and that inmates who have erred at some step in a prison grievance process should have their suit dismissed for failure to exhaust. 16

16 Pope, 266 F.3d at 1024. As defined in more detail infra Part II.B, this is an oversimplification of the law. When a litigant has failed to observe agency procedural requirements, reviewing courts will typically hold that he has waived his claims, not that he has failed to exhaust them. See, e.g., Sime v. Apfel, 330 U.S. 103, 106 (2000) (per curiam) (noting petition presented 'as whether a claimant was entitled to judicial review of an issue' by failing to exhaust agency remedies); Blum v. Dye, Office of Workers' Comp. Programs, 663 F.3d 139, 143 (6th Cir. 2002) (procedural default is implied if petitioner fails to timely appeal administrative law judge decision to administrative board of review 'as required' from raising issue in court). Such a default might be more accurately termed a "resort," which differs from waiver in that it need not be intentional. See United States v. Olano, 507 U.S. 725, 733 (1993) (distinguishing between waiver and forfeiture). The distinction is not always observed. See Freising v. Contreris, 975 F.2d 823 (9th Cir. 1992) (procedural default is implied by failure to raise issue in court). Other cases, on the other hand, allow review only of agency actions taken after a hearing, and thus exclude de novo reviews of unreviewed applications. See, e.g., Demch v. Schweiker, 700 F.2d 865, 872 (8th Cir. 1983). Although courts have characterized this as an exhaustion requirement, see id., it is a consequence of a statutory directive to "exhaust available remedies," but rather of the specification of the types of agency action subject to review.

17 Id.
18 Id. Why such an agreement was sensible is obscure at best; subsequent revisions will suggest the application of procedural default to § 1983 suits is conceptually quite hard to justify. See discussion infra Part IV.
This is, it should be clear, a substantial step beyond even the concerns expressed by some courts about disdain for the administrative process. The hallmark of an exhaustion requirement is that it delays a federal suit until the required procedures have been invoked.72 That is why dismissals for failure to exhaust are without prejudice. Skepticism about the possibility of exhausting administrative remedies by ignoring them until time-barred is well founded, but the concern in such cases is with inmates who have not submitted grievances, not with cases whose grievances have been rejected on nonmerits grounds. And the inference to be drawn is perhaps that grievances must be submitted, even if patently untimely, before suit can be filed.73 By holding that the nonmerits denial of a grievance can forever bar a subsequent § 1983 suit, \textit{Pozo} moves from delay to denial, from "until" to "unless."74 An inmate who has seen his grievance denied on nonmerits grounds has failed to exhaust and can never remedy that failure; his claims of constitutional violations will never be heard.

72 See, e.g., Edwards v. Carpenter, 529 U.S. 448, 455 (2000);\textit{Boosley v. United States}, 532 U.S. 614, 622 (2001) (discussing actual innocence). But there is no indication that those grounds will excuse a failure to exhaust. Exhaustion, in other contexts, carries its own exceptions, such as the agency's inability to provide the relief sought. See, e.g., Rezal v. Cooper, 507 U.S. 258, 269 (1993) (exhaustion required only if "where relief is available from an administrative agency"). But the Supreme Court has held that the PLRA does not incorporate those exceptions. See\textit{Booth v. Chandler}, 532 U.S. 787, 789 n.6 (2001). The Seventh Circuit's hybrid default/abandonment creation that seems to be broader than ordinary procedural default, a surprising result, though one we saw in Wisconsin embraced. See Respondents' Brief in Opposition to Petition for Certiorari at 14, Pozo v. McCaughey, 206 F.3d 1022 (7th Cir. 2002) (to, n.204), available at 2002 WL 3315610, at *14.

73 See, e.g., \textit{McCarthy v. Madigan}, 503 U.S. 140, 144 (1997) (exhaustion "governs[] the timing of federal court decisionmaking"). This is not to say that errors in the exhaustion process cannot have significant consequences for a subsequent suit in other contexts. Plausibly may do both in administrative law and in habeas jurisprudence. But in those situations, as discussed in more detail infra Part III.A.1.b, what happens is that a plaintiff who is deemed to have exhausted available state remedies on the merits—not that the claim is dismissed for failure to demonstrate an "exhaustion"—the new case may never be achieved. There are, moreover, identifiable mechanisms by which procedural "mistakes" affect the merits waiver or failure rules in the administrative context, and the adequate and independent state ground doctrine in habeas practice. The question then is whether those mechanisms can operate in the PLRA context, and that is a question the Seventh Circuit never considered.

74 This may seem an odd and pernicious requirement. However, it fits with the Supreme Court's interpretation of the PLRA, which has refused to recognize facility as an exception to the exhaustion requirement. See\textit{Booth v. Chandler}, 532 U.S. at 789 n.6. More significantly, it actually makes a good and of policy sense, for reasons explained in Part IV.C.

75 See Pozo, 206 F.3d at 1024 ("Failure to do what the state requires him, and does not just postpone, but under § 1983.")
In offering this interpretation of the PLRA, Judge Easterbrook could have appealed to several standard forms of legal argument: textualism, doctrinalism, pragmatic or policy-based analysis, or the characteristic legal mode of analogical reasoning. Of these options, Easterbrook employs only some. He ignores the text entirely, not even bothering to quote § 1997(e)(a). The cursory treatment is perhaps understandable; the statute sets out the exhaustion requirement with no explanation of what is meant by exhaustion or how related doctrines are to be treated. The significance that can be gleaned from the text, however, suggests that one ought not to be too casual in applying procedural default to § 1983 petitions. Section 1997(e)(a) simply does not mention procedural default, and the doctrine is quite distinct from exhaustion. And what the statute does say suggests the standard rule that an exhaustion requirement may defer a federal suit but cannot bar it; it provides that inmates may not sue "until such administrative remedies as are available are exhausted." 18

Pozo's primary argument is doctrinal and consists of the claim that O'Sullivan v. Boerckel "positioned" the "old understanding" of exhaustion, under which a procedurally defaulted claim was deemed exhausted, and replaced it with a new understanding under which procedurally defaulted claims are considered unexhausted. 19 That would be a stunning change in habeas jurisprudence, were it an accurate description of Boerckel. It would, for

18 For a description of modalities of constitutional interpretation including four types to those listed in the text, see PHILIP BOSSERT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982). Since this article presents a case of statutory, rather than constitutional, interpretation, the approach is not exact.
19 See, e.g., Fratalli v. Johnson, 290 F.3d 1223, 1231 (9th Cir. 2002) (noting that the "long-established difference between the exhaustion requirement and the procedural default doctrine preclude any conclusion that Congress implicitly intended to reach" one by statutory reference to the other). On the other hand, the Supreme Court has "recognized the irrepressibility of the exhaustion rule and the procedural-default doctrine." Edwards v. Carpenter, 529 U.S. 446, 453 (2000), and of course the habeas exhaustion requirement, 28 U.S.C. § 224 (2000), does not mention procedural default. The question that needs to be asked is whether the theory that supports application of procedural default to habeas petitioner can be applied to a § 1983 suit. The Seventh Circuit treated this as a very superficial policy question without any consideration of the theoretical underpinnings of procedural default.
20 42 U.S.C. § 1997e(c) (2000). Again, it is useful to restate the habeas exhaustion requirement, whose language can more naturally support a bar. 28 U.S.C. § 224(a) provides that the writ may not issue "unless . . . the applicant has exhausted the remedies available in the courts of the State." (emphasis added). The use of the word "remedies" and the demand that remedies be exhausted by the petitioner could suggest that the requirement is only satisfied by a petitioner's active invocation of state remedies. However, that reading has been decisively rejected by the Supreme Court, see infra note 108, and belied by the current statutory regime, which keys exhaustion to availability of state remedies, not their active pursuit by the petitioner. See 24 U.S.C. § 224(a).
21 See Pozo, 298 F.3d at 1024.
one thing, effectively eliminate the cause and prejudice exception to procedural default for habeas petitioners, since a showing of cause and prejudice will not excuse a failure to exhaust. It would not get Easternbrooke all the way to his conclusion, of course, since it would not establish that procedural default could be applied to a § 1983 suit. But speculating about what it would mean for the Supreme Court to eliminate the distinction between procedural default and failure to exhaust is somewhat beside the point, as Boeckeit plainly did no such thing.

The petitioner in Boeckeit was an Illinois inmate who sought to present, via a habeas petition, claims he had pursued through the ordinary course of state appellate review but never presented to the state supreme court in a petition for discretionary review. The question that Boeckeit confronted was whether discretionary review from a state supreme court counted as an available remedy inmates must pursue in order to satisfy the exhaustion requirement. The Court concluded that it did, and thus that by failing to seek a hearing in the Illinois Supreme Court, the petitioner had failed to exhaust his state remedies.

The Seventh Circuit quoted no language in Boeckeit and never cited a particular page of the opinion. The court’s neglect makes it extraordinarily difficult to figure out what aspect of the Boeckeit opinion was believed to have “merged” the administrative law and collateral attack understandings of exhaustion, but it seems to be the conclusion just discussed. The problem, however, is that this is simply a conclusion about whether discretionary review is an available remedy for the purposes of the habeas exhaustion requirement. It says nothing about the relationship between exhaustion and procedural default, and it says nothing about whether the remedy was still unexhausted at the time of the federal petition.

The Boeckeit Court did, however, subsequently address both those issues. The petitioner’s failure to seek discretionary review lay some twenty years in

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88 Id. at 441.
89 Id. at 439-40. 439-48. Boeckeit also presented a situation in which the petitioner had never invoked an available state remedy, not one in which he had invoked it improperly. The distinction is of little moment in the habeas context, where the procedural default doctrine in such cases essentially hypothesizes a state court decision rejecting the claim on procedural grounds, thereby causing the failure to exhaust. See, e.g., Gray v. Netherland, 511 U.S. 152, 161-62 (1994) (finding that exhaustion requirement is satisfied if it is clear that the habeas petitioner’s claims are now procedurally barred under state law”) (internal citations omitted) (quoting Castille v. Partin, 499 U.S. 152, 154-55 (1991)). Procedural default is significant in the prison grievance context, however, because administrators’ ability to hear inmates’ claims creates a situation in which claims cannot be exhausted by neglect. See supra Part IV.C.
the past, and the Court went on to note that "this state court remedy—a petition for leave to appeal to the Illinois Supreme Court—is no longer available." Consequently, the Court held, the failure to pursue it "resulted in a procedural default." Again, this is assuredly not a statement that a procedural default is equivalent to a failure to exhaust, or that procedurally defaulted claims are to be deemed exhausted. Indeed, by observing that the state court remedy was no longer available, the Court strongly intimated that it was exhausted at the time of the federal petition. To make matters clearer, the Court went on to point out that analysis of a habeas petition presented two distinct questions: "whether a petitioner has exhausted his state remedies" (exhaustion) and "whether he has properly exhausted those remedies" (procedural default). Boeckel, as the other circuits have recognized, is simply an application of the rule that once an unexhausted remedy becomes unavailable, the failure to exhaust "matures[s] into a procedural default." 88

One is hard pressed to account for a misreading this drastic, most of all by a judge of Easterbrook's caliber. By holding that procedural default "also means failure to exhaust one's remedies," 89 the Seventh Circuit set itself against every other federal circuit. 90 By attributing that holding to Boeckel, it

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88 Boeckel, 525 U.S. at 848.
89 Id.
91 Posto v. McCaughey, 286 F.3d 1022, 1024 (7th Cir. 2002).
92 See, e.g., Frazier v. Johnson, 390 F.3d 1223, 1231 (9th Cir. 2002) ("If a petitioner failed to present his claims in state court and has no longer raise them through any state procedure, state remedies are no longer available, and are thus exhausted."); Bras v. Cockrell, 283 F.3d 370, 375 (5th Cir. 2002) ("It is well established that a claim is exhausted if it is procedurally barred."); Apocio v. Atkins, 280 F.3d 78, 90 n.9 (4th Cir. 2001) (finding that claims "could be deemed exhausted through petitioner's procedural default"); Wenger v. Frank, 288 F.3d 318, 323 (3d Cir. 2001) (stating, in a discussion of Boeckel, that "[i]f a claim has not been fairly presented to the state courts but further state-court review is clearly foreclosed under state law... , the claim is procedurally defaulted, not exhausted."); Last v. Cupke, 261 F.3d 594, 608 (5th Cir. 2001) ("If no remedy exists... no exhaustion problem exists... "); Smith, 216 F.3d at 1139 (stating that Boeckel holds that failure to exhaust "matures into a procedural default as soon as the once available remedy was closed.").
93 United States v. Swartz, 246 F.3d 728, 729 (D.C. Cir. 2001) (failure to present claim results in procedural default, which can be excused by showing of cause and prejudice or actual innocence); Baker v. Commissioner, 220 F.3d 276, 288 (4th Cir. 2000) ("A claim that has not been presented to the highest state court nevertheless may be reviewed as exhausted if it is clear that the claim would be procedurally barred under state law if the petitioner attempted to present it to the state court."); Thomas v. Gibson, 214 F.3d 1213, 1211 (10th Cir. 2000) (a claim not presented to state courts and procedurally barred "are considered exhausted and procedurally defaulted."); Tucker v. Brownlee, 198 F.3d 1059, 1066 (9th Cir. 1999) ("If a petitioner fails to exhaust now remedies and the court to which he should have presented his claim would now find it procedurally barred, even is a procedural default."); (quoting Sloan v. Dale, 54 F.3d 1371, 1381 (8th Cir. 1995); Turley v. Conner, W.H. Dep't of Comms, 23 F.3d 395, 395 (1st Cir. 1994) (unpublished table decision) "Petitioner's failure to appeal
set itself against the Supreme Court, which has instead cited that care for the proposition that "a prisoner who had presented his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it . . . would have 'concededly exhausted his state remedies' . . ."12

The path of precedent, then, is worse than a dead end in terms of support for Pard's rule; it is better described as heading off a cliff. There are, however, two other modes of argument left, policy analysis and analogical reasoning. The policy argument, which Judge Easterbrook did deploy, is both simple and powerful: without some doctrine akin to procedural default, prisoners could "exhaust" state remedies by spurning them,13 a result plainly at odds with the purpose of the exhaustion requirement, which is to promote recourse to administrative process. The argument, I will show, has some weaknesses—chiefly that its factual premise is wrong—but these will be addressed later.14

Analogical analysis seeks to understand the nature of the PLRA exhaustion requirement by comparing it to forms of exhaustion with which courts are more familiar. Judge Easterbrook offered two different models of exhaustion, drawn from administrative law and habeas practice.15 Because he believed that Boerckel had eliminated the distinction, he found it unnecessary to choose between them. But Boerckel did no such thing, and if we want to understand the consequences of a procedural error in a prison grievance proceeding, we need first to understand exhaustion requirements more generally.

III. EXHAUSTION IN CONTEXT

Pard posits two models for exhaustion: administrative exhaustion and collateral attack (which I call "habeas") exhaustion. The Seventh Circuit's assertion that Boerckel collapsed any difference between the two obviated the need to choose between them, but, as we have seen, the assertion is simply not correct. Consequently, we must decide which model—if either—suits the

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13. Pard, 286 F.3d at 1023.
14. See infra Part IV.C.
15. See Pard, 286 F.3d at 1024.
PLRA requirement. Each seems superficially plausible. The requirement to invoke state procedures before turning to federal courts smacks of a federalism reminiscent of much of the Supreme Court's habeas jurisprudence. And the desire to allow prison administrators a chance to resolve disputes before courts intervene echoes the logic of administrative exhaustion. But in the end, I will suggest, PLRA exhaustion is a strange creature that fits well with neither model.

A. Habeas Exhaustion

The first point to be noted is that, as the Plasto court recognized, application of the traditional habeas approach to exhaustion would not bar as exhausted claims that had been rejected on procedural grounds. The bar comes from the antitypically distinct doctrine of procedural default. One resolution of the Plasto question, then, would be simply to say that Congress made no mention of procedural default in the PLRA, and that the "long-established differences between the exhaustion requirement and the procedural default doctrine preclude any conclusion that Congress implicitly intended to reach" one by a statutory reference to the other. But this is hardly a satisfying answer; procedural default is, after all, a judge-made doctrine with no textual basis in the habeas statute, so it is at least an open question whether some similar rule

98 See, e.g., Edwards, 529 U.S. at 451 (articulating procedural default doctrine to "comity and federalism").

Twenty years ago, the Supreme Court noted the "difficult" questions that would be presented by invoking an exhaustion requirement on § 1983 suits, including what preventive effect state administrative determinations would have on supernumerary federal suits, and "what consequences should attach to its failure to comply with procedural requirements of administrative proceedings." Pena v. Bd. of Magistrs., 477 U.S. 466, 514 (1986). The questions are difficult, I will suggest, because a § 1983 suit seeks review "neither of state judicial decisions [as a habeas petition does] nor of agency action (as claims subject to administrative exhaustion typically are). It is instead a freestanding cause of action independent of state proceedings, and for this reason neither exhaustion model comfortably applys." See, e.g., Hertress v. City of Chicago, 779 F.2d 636, 660 (7th Cir. 1985) ("A suit under 42 U.S.C. § 1983 is not a mode of judicial review of a state administrative agency's or state court's action . . . but is an independent as well as an original federal action."). Additionally, much of the policy basis for administrative exhaustion depends on an agency's ability to provide the relief sought or its expertise in applying a particular statute, neither of which is necessarily present in § 1983 suits under the PLRA. Habeas exhaustion Newlin relies on the principle that state courts should be the primary decisionmakers about the liberty of indigent charged with crimes under state law. The same cannot be said of prison administrators hearing inmates' allegations of constitutional violations.

99 Franklin v. Johnson, 290 F.3d 1223, 1231 (10th Cir. 2002) (citing Jackson v. Johnson, 194 F.3d 641, 652 n.35 (5th Cir. 1999)).
should be implied under the PLRA. What we need to do, then, is to examine the conceptual and policy bases for the procedural default doctrine in order to ascertain whether it theoretically can and pragmatically should be applied to PLRA exhaustion.

1. A Brief History of Exhaustion and Procedural Default

A person in custody may seek federal habeas relief on the grounds that his detention is "in violation of the Constitution or laws or treaties of the United States." In its original form, as part of the Judiciary Act of 1789, the habeas statute offered the writ only to those detained by the federal government. A post-Civil War amendment, motivated by pervasive doubts about state courts' willingness to protect federal rights, extended the scope of the writ to state prisoners. Nothing in this language detailed the effects that state-court adjudications should have on the timing of a petition or its merits. The exhaustion doctrine arose to deal with the former issue, and procedural default with the latter.

The Supreme Court's early cases indicated some preference for awaiting state-court judgments but characterized the decision as to whether to intervene before judgment as one within the discretion of the habeas court. Subsequent decisions narrowed the permissible occasions for prejudgment review,

100 One reason against judicial implication of such a rule might be provided by Darby v. Cisneros, 509 U.S. 500, 113 S. Ct. 2741, 124 L. Ed. 2d 449 (2003), which finds judicial augmentation of statutory exhaustion schemes. See also Thomas v. Woodson, 337 F.3d 720, 723 (6th Cir. 2003) ("Congress did not specify application of procedural default"). And the Supreme Court has intimated that we are not to impose such requirements when Congress releases"). But it would also be plausible—though in tension with the Fifth and Ninth Circuits cited in the preceding footnote—to suppose that Congress intended no exhaustion requirement it imposed to be accompanied by the hardship of procedural default. The current codification of the habeas exhaustion requirement, 28 U.S.C. § 2254, likewise makes no mention of procedural default, but the Court continues to apply the doctrine. The reason procedural default makes sense in the habeas context but not with regard to "L.R.A. I will suggest, is that procedural default requires in the nature of collateral review, and § 1983 Erie law are not collapse attacks. See infra Part IV.


103 Act of Feb. 5, 1867, ch. 28, 14 Stat. 387 (codified at 28 U.S.C. §§ 2241-2255 (2000)). The habeas statute thus provides a tidy example of the constitutional sea-change wrought by the Civil War and its aftermath, the shift from a vision of the states as bulwarks of liberty against a potentially oppressive national government to one in which the states were seen as potential oppressors and the national government as intervening to protect federal rights.

104 See C.Albert Jones, 117 U.S. 241, 252-3 (1886) (habeas court has "discerned, whether it will discharge the petitioner, upon habeas corpus, in advance of his trial in the court in which he is indicted").
describing them as “exceptional circumstances of peculiar urgency,” and in 1948, Congress codified the exhaustion doctrine, providing that the writ “shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.” The 1948 enactment explained further that “an applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.” The gloss suggests that the availability of state remedies is the dominant criterion for exhaustion. And since Fay v. Noia, availability has been the touchstone of the exhaustion doctrine, an understanding that has persisted even as the Court has rejected much of the remainder of Noia.

Requiring habeas courts to wait until state remedies were no longer available obviously served the purposes of reducing federal intrusion into the state criminal justice system and allowing state courts the first opportunity to rectify any mistakes. But it raised the troubling question of what effect the

108 United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 17 (1925); see also, e.g., Lumpkin v. Brown, 205 U.S. 179, 182 (1907) (also noting restriction of prejudgment review to exceptional circumstances).

Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for [a] crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted.

321 U.S. at 116-17.
110 Rose, 455 U.S. at 518 n.9 (quoting 28 U.S.C. § 2254(d) as originally enacted).

Brown v. Allen actually involved a different reality, stating that the “failure to sue a state’s available remedy . . . bars federal habeas corpus.” 344 U.S. 443, 487 (1953). The reasoning appears to have been that a prisoner who fails to use an available remedy has not exhausted it, regardless of whether it has become unavailable by the time of the federal petition. “The nature requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ.” 61, see also Davis v. Barsky, 179 U.S. 399, 402 (1900) (writ of habeas corpus may not issue until "after an appeal made to the state courts has been denied"). Noia explicitly rejects this reading, see 372 U.S. at 434 ("This contention is refuted by the language of the statute and by its history."); and the more recent Supreme Court decisions have adhered to Noia or least to that extent. See, e.g., Grey v. Netherland, 518 U.S. 152, 161 (1996) (exhaustion requirement “is satisfied if it is clear that [the habeas petitioner’s] claims are now procedurally barred under [state] law.”) (alterations in original) (citations omitted); see also Henry M. Hart, Jr., Foreward: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 113 (1959) ("In origin, the judiciially developed doctrine of exhaustion of state remedies was indisputably a doctrine of exhaustion only of remedies presently available. . . . Prior to the enactment of section 2254, the doctrine seems never to have been applied unequivocally as a doctrine of forfeiture by reason of failure to exhaust previously available state remedies, nor is any warrant apparent in reason or authority for the judicial preemption of any such doctrine.") (citations omitted).
state proceedings should have on the federal habeas action. The first possibility—and the normal consequence under ordinary rules of preclusion—was that a completed course of state-court adjudication would be res judicata, barring a inmate from litigation claims that were (and perhaps even those that could have been) presented to the state courts. But the scope of claims cognizable via habeas was initially quite narrow, extending only to allegations that the state court lacked subject matter jurisdiction, and because res judicata does not usually prevent collateral attacks on subject matter jurisdiction, the possibility of preclusion did not arise. This interpretation persisted until 1915, when the scope of the writ began to widen, and the question of preclusive effect presented itself.

Some of the early twentieth-century cases, while rejecting a strict application of res judicata to nonjurisdictional issues, did indeed state that reconsideration of issues addressed by the state courts would be unusual.

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107 See, e.g., Ex parte Watkins, 28 U.S. (3 Pet) 193, 203 (1830) ("A judgment given under a jurisdiction cannot be set aside, unless that judgment be an absolute nullity: and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous."). The fact that habeas is the only challenge state court jurisdiction offers some explanation for the early cases' willingness to narrow before judgment, since nothing that occurred at a later point in the state proceeding could now be said to void it of jurisdiction.

108 See Noia, 372 U.S. at 423 ("The familiar principle that res judicata is inapplicable in habeas proceedings . . . is really but an instance of the larger principle that void judgments may be collaterally impeached."). Res judicata can bar attacks on subject matter jurisdiction in some circumstances; if a litigant was afforded an opportunity to challenge jurisdiction in the first proceeding, it will usually be denied the opportunity to contest it again. This might alternatively be described as the operation of collateral estoppel, i.e., issue preclusion rather than claim preclusion.


110 See, e.g., Ex parte Hawk, 321 U.S. 114, 118 (1944) ("When the state courts have considered and adjudicated the merits of its construion, and this Court has either reviewed or declined to review the state
However, the Supreme Court definitively rejected that alternative in Brown v. Allen 114 and has shown but little inclination to reconsider it subsequently. 115 Habeas courts that do decide federal issues resolved by state courts, and, before AEDPA, decided them de novo 116. What, then, of issues the state courts do not resolve because the prisoner has failed to present them, or to present them in the manner state procedure requires?

The most natural conclusion might be that a state court's failure to decide an issue can have no more preclusive effect than a decision, and thus that a habeas petitioner would be entitled to de novo adjudication of federal claims never considered by state courts. With a narrow exception for cases in which the petitioner had "deliberately bypassed" 117 the state judicial system, this was essentially the Warren Court's approach. 118 But full-scale federal adjudication

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114 344 U.S. 446, 452 (1953).
115 In Wright v. West, 503 U.S. 402 (1992), Justice Thomas, joined by Chief Justice Breyer and Justice Scalia, suggested that some form of collateral review was appropriate, at least with respect to "related constitutional questions requiring the application of law to fact." Id. at 418-19. Three other Justices would specifically reiterate this conclusion. See id. at 409-10 (opinions of O'Connor, J., joined by Blackmun and Scalia, J.). AEDPA, as discussed in the following note, changed the law in the direction of Justice Thrown's suggestion.
116 Currently, 28 U.S.C. § 2254(d)(1) effectively demands some deference to state-court application of federal law, allowing habeas relief only if the state courts have rendered "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The "unreasonable application" clause grants state courts some latitude in their application of law to fact (as in, say, an ineffectiveness assessment of counsel's performance) "as unreasonable application of federal law is different from an erroneous application of federal law." Williams v. Taylor, 529 U.S. 362, 400 (2000). Limiting the source of the federal law to the Supreme Court mirrors another restriction after AEDPA, a federal dispute cannot, for example, grant a habeas petition on the basis of circuit law alone, even though the law is binding on the circuit court. See id. at 412.
117 ibid., 372 U.S. at 418. 118 See id. at 399 (“The doctrine under which state procedural defaults are held to consist with adequate and independent state law grounds barring direct Supreme Court review is not to be extended as a limit the powers granted the federal courts under the federal habeas statute.”). Just as marked a sub omni break in habeas jurisprudence, in Brown v. Allen the Court had noted the hearing the habeas petition of a prisoner who had failed to file an appeal would allow habeas to be used in two ways of an appeal” and “would subvert the entire system of state criminal justice and deny state power in the detection and punishment of crime.” 344 U.S. at 485; see also Doer v. Baxton, 239 U.S. 200 (1915) (“The federal courts will not consider on habeas corpus claims which have not been raised in the state courts.”). In addition to the now-partitioned interpretation of the exhaustion requirement “exhaustion” available results from discussing supra note 10, Brown relied on a collateral source—source. See Brown, 344 U.S. at 486 (“Failure to appeal is much like a failure to raise a known and existing questions of unconstitutional proceeding in court prior to conviction in accordance. Such failure, of course, bar subsequent objection to conviction or these grounds.”). It is also suggested that a plaintiff's failure to
of claims not considered by state courts created an obvious tension with the statutory exhaustion command: a state criminal defendant could obtain federal habeas relief without state courts ever having had an opportunity to hear his federal claims. The possibility of such results threatened the principles underlying the exhaustion requirement: that state courts should be given a chance to correct their own mistakes, and that the state criminal process should be the "main event" rather than a "byout on the road" preliminary to a dispositive federal habeas hearing. Driven in part by a desire to preserve the efficacy of state procedural rules, the Supreme Court crafted the doctrine that has come to be known as procedural default.

The argument of this Article does not require a full discussion of the evolution of the procedural default doctrine, a task which has been undertaken elsewhere. For present purposes, it is enough to note two different steps in that evolution: first, the regime of Fay v. NOia, and second, its successor, that of Wainwright v. Sykes. NOia broke new ground by rejecting some earlier cases suggesting that failure to present federal claims to state courts would bar subsequent habeas relief. Wainwright rejected NOia, giving us the modern regime. The difference between the two has to do with the standards applied to determine whether a federal claim has been forfeited. NOia held that forfeiture follows only from classic waiver: "an intentional relinquishment or abandonment of a known right." Wainwright, by contrast, looked to the procedural rules of state law and held that failures to observe those rules generally forfeit federal claims for the purposes of habeas.

comp AFL with state procedural rules might create an adequate and independent state ground supporting the judgment. See id. at 458 ("[w]here the state action was based on an Arizona state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed."). This theory, as discussed infra and accompanying note 131-40, is the centerpiece of the modern procedural default doctrine.


120 See infra note 131.

121 See NOia, 372 U.S. at 459 n.44. The earlier cases are discussed supra note 108. See also Ex parte Spencer, 228 U.S. 652, 659-61 (1913).

122 NOia, 372 U.S. at 459 n.44. The earlier cases are discussed supra note 108. See also Ex parte Spencer, 228 U.S. 652, 659-61 (1913), but the delay amounted to little more than a refusal to accord a de minimis burial. See, e.g., Evans v. Pendleton, 425 U.S. 135, 144-47 (1976) (Brennan, J., dissenting) (acknowledging the majority of disposing from notice without "comply[ing] to a point with the constitutional and statutory principles and policy considerations underpinning that case").

123 NOia, 372 U.S. at 459 n.44. Exceptions to the forfeiture rule include a showing of "actual innocence" or "cause and prejudice." See, e.g., Edwards v. Carpenter, 529 U.S. 446, 451 (2000); United States v. Stewart, 246 F.3d 712, 718 (D.C. Cir. 2001). The meaning of this latter has proved somewhat elusive. See Edwards, 529 U.S. at 451 (noting the Court's failure to "define the meaning of 'cause' with precision").
This change in the forfeiture standard is but a symptom of a larger conceptual shift that has occurred in the Court’s understanding of the habeas action. The rule applied in *Noia* uses the waiver standard that governs acts outside of litigation and embodies the then-prevailing conception of a habeas petition as an action entirely disconnected to prior state proceedings. The forfeiture rule in *Wainwright*, in contrast, employs the standard for forfeiture of a claim within a single course of litigation, an approach that makes sense if a habeas action is viewed as a collateral attack on state-court judgment. *AEDPA*, which largely codified the changes in habeas worked by *Wainwright* and its successors, has made this new understanding explicit: the federal habeas court is directed to review the “decisions” of the state courts, and its review is both deferential and circumscribed.123

The transition from a conceptual model on which a habeas action is independent of prior state court adjudications to one on which it is an attack on those adjudications provides the theoretical basis for application of the procedural default doctrine. I suggested above that it might be natural to suppose that a state court’s failure to decide an issue can have no more preclusive effect than its decision. As a matter of preclusion law, this is true, and preclusion law is the relevant consideration if a habeas action is independent of prior state proceedings.124 But once the Court began to conceive of habeas as an attack on state adjudications, the issue became not preclusion, but rather a federal court’s ability to set aside or reverse state judgments. From this perspective, the distinction between deciding a federal claim and refusing to do so appears quite different, for a state court that refuses to decide a federal claim will do so on the grounds that it has not been presented in accordance with the requirements of state procedure. Federal courts owe no deference to the decisions of state courts on matters of federal

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123 Even before *AEDPA*, the Supreme Court had indicated that the characterization of a habeas petition as a civil action independent of state decisions misrepresented both the interests at stake and the purposes of deciding the petition. See, e.g., *Coleman*, 501 U.S. at 730 (application of adequate and independent state grounds doctrine is justified because “a state prisoner is in custody pursuant to a judgment”), *Noia*, 372 U.S. at 469 (Harlan, J., dissenting) (“To habeas as an on direct review, entering the prisoner’s appeal invalidates the judgment of conviction and renders ineffective the state rule relied upon to sustain that judgment.”). The use of the adequate and independent state grounds doctrine as the test for the procedural default rule makes clear that a habeas court does, in practice, review state judgments; *AEDPA*’s advisory directive to states the decisions of state courts has simply made that understanding explicit.

124 More precisely, the failure to decide an issue can have as much as judicial effect as a decision, but will not give rise to collateral estoppel.
law, but they do defer with regard to state law, and the refusal to decide a federal claim on state procedural grounds is, of course, a matter of state law. The key question, then, becomes the ability of a federal court to reach a federal issue despite the fact that a state decision rests on state law, and that is the question answered by the doctrine of the adequate and independent state ground.

2. Procedural Default and the Adequate and Independent State Ground

The birthplace of the adequate and independent state ground doctrine is generally taken to be the Supreme Court's 1875 decision in Murdock v. City of Memphis. There, the Court announced that after deciding that a state court's resolution of a federal question was erroneous, it would examine the record to see if an alternative state law ground actually decided by the state court could sustain the judgment. In such cases, the Court announced, "the judgment must be affirmed without inquiring into the soundness of the decision on [the state ground]." Later cases refined the rule to make the adequate and independent state ground analysis a threshold step before review of the federal question and began the practice of dismissing for want of jurisdiction cases in which such a state ground was detected. Eventually, in Herb v. Pitcairn, the Court decided that the barrier was one of constitutional dimension: "[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." The general rule now may be simply stated: an adequate and independent state ground will shield a state judgment from federal review, for it implies that resolution of any federal issues will not affect the judgment.

123 Again, AEDPA has changed the rule to some extent in the habeas context. See supra note 119.
124 Weisberg identified the adequate and independent state ground doctrine as "the source of procedural default, and the Court has frequently repeated that characterization. See, e.g., Tate v. Cain, 322 U.S. 11, 17, 89 (1947) ("Procedural default is typically an instance of the independent and adequate state ground doctrine...") (citations omitted); Harris v. Reed, 489 U.S. 255, 260 (1989) ("The procedural default rule... has as historical and theoretical basis in the 'adequate and independent state ground' doctrine.") (citing Weisberg, 433 U.S. at 78-79, 81-82, 87).
125 87 U.S. (20 How.) 590 (1875).
126 Id. at 596.
128 244 U.S. 117, 120 (1917).
129 Like most simple statements, this one elides significant complexities, but this Article does not require us to address them. I have addressed elsewhere the probe warrant of the issues presented by the procedural adequate and independent state ground. See Kenneth Lasswell, III, Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered, 97 COLUM. L. REV. 188 (2003).
Though Murdock concerned a substantive state ground on direct review, the Supreme Court has several times stated that the adequate and independent state ground doctrine applies to procedural grounds and collateral review as well, though in that garb it usually goes by the name of procedural default. These different contexts produce some additional wrinkles in the doctrine. Though often treated as a mere corollary of its substantive counterpart, the procedural adequate and independent state ground doctrine actually gives federal courts somewhat greater freedom to reach federal questions, and in particular to look through state procedural rules deemed inadequate on qualitative grounds such as novelty, inconsistent application, or burdensomeness. The distinction persists on collateral review; indeed, it grows. While in the context of direct review an adequate and independent state ground creates a jurisdictional bar, collateral review is precluded only for reasons of comity and federalism. As that distinction suggests, the grounds for collateral review are broader. Not only must a state procedural rule be found adequate according to the qualitative standards discussed above, but a habeas petitioner can obtain a resolution of his federal claims by showing "cause and prejudice" or "actual innocence." Why the Court has chosen to increase the possibility of federal review in the habeas context despite a procedural bar is not entirely clear. I have suggested elsewhere that, as a theoretical matter, the natural conclusion is rather that review should be more tightly circumscribed. The answer is perhaps best sought in the practical realities of habeas litigation and the differing institutional competencies of the Supreme Court and the lower federal courts. To put it simply, the best understanding of the current habeas jurisprudence may be that it functions as a dispensed version of direct review serving a function (error correction) for which the Court has neither the capacity nor the inclination. Doctrinal intricacies aside, the Court has made

136 See supra note 128. If a habeas action were only independent of state proceedings, this would not be obvious, since the doctrine operates primarily to shield state judgments. But I have already observed that the current habeas statute, as interpreted by the Supreme Court, does direct a habeas court to review state decisions. And it is hard to deny that a grant of habeas relief opens the judgment of conviction—a state that refused to restore the civil rights of a successful habeas petitioner on the grounds that his felony conviction had not been commuted would have to see it could no longer rely on that judgment.

137 See generally Roosevelt, supra note 133.


140 See Roosevelt, supra note 133, at 1914-15.

141 See id.; see also Straus, supra note 137, at 252, 255-64. The point has been made elsewhere. See, e.g.,
clear that procedural default, though it differs in some particulars, is simply the procedural adequate and independent state ground doctrine applied to collateral review.\(^{140}\)

3. Habeas Exhaustion and the PLRA

That, then, is the story of exhaustion and procedural default in the habeas context. The exhaustion requirement was a judicial creation, originating in a concern that federal courts ought not to intervene in state proceedings before they have come to a close. It is thus purely a rule about the timing of federal judicial action.\(^{141}\) Both Congress's original codification of the habeas exhaustion requirement and AEDPA's more recent version specifically tie it to the availability of state remedies.\(^{142}\)

Procedural default has quite different origins. The modern version was introduced by the Supreme Court in Wainwright v. Sykes, and it was there presented not as a judicially-created supplement to the exhaustion doctrine, but as a relatively straightforward application of the adequate and independent state ground doctrine.\(^{143}\) In subsequent cases the Court reaffirmed that characterization, stating that procedural default "has its historical and theoretical basis in the adequate and independent state ground doctrine."\(^{144}\)

The Court linked procedural default to exhaustion on policy grounds in Coleman v. Thompson, but again located its doctrinal source in the adequate and independent state ground doctrine, stating that procedural bars arose when "the state judgment rests on independent and adequate state procedural grounds."\(^{145}\)

That leads to the main point of this excursion. Procedural default is not part and parcel of the exhaustion requirement. However effective a handmaiden it

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\(^{140}\) See supra note 128.

\(^{141}\) See, e.g., McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ("The doctrine of exhaustion of administrative remedies . . . gives the federal courts an opportunity to pass upon the merits of a federal law and prevent disruption of state judicial proceedings") (internal quotation marks omitted).

\(^{142}\) See 28 U.S.C. § 2244(b)(3)(A) (2000) (habeas application may not be granted unless "the applicant has exhausted the remedies available in the courts of the State").

\(^{143}\) Wainwright in fact performs a lengthy qualitative analysis of the 28 U.S.C. § 2244(b)(3)(A) (2000) exhaustion requirement, and then concludes that the applicant in that case had failed to exhaust the available state remedies.

\(^{144}\) See 28 U.S.C. § 2244(b)(3)(A) (2000) (habeas application may not be granted unless "the applicant has exhausted the remedies available in the courts of the State").

may be, its source is elsewhere. In the habeas context, that source is the current understanding of collateral review, the fact that a federal court deciding a habeas petition is reviewing a state decision which may be shielded by an adequate and independent state ground. And so to decide whether the PLRA exhaustion requirement should be accompanied by some form of the doctrine of procedural default, we need to ask first whether the PLRA converted the § 1983 cause of action into a collateral attack on prison grievance proceedings, and second whether, if not, there is some compelling need nonetheless to impose procedural default to protect the integrity of PLRA exhaustion. I will suggest that the answer to both these questions is no, but the analysis must await an explication of the second model Post proposed for understanding PLRA exhaustion, and of PLRA exhaustion itself. To those tasks I now turn.

B. Administrative Exhaustion

The second potential model for the PLRA is administrative exhaustion. Administrative exhaustion requirements are supported by policy considerations similar to those animating the demand for habeas exhaustion. Echoing (or refiguring) its concern for the autonomy of the state, the Supreme Court has noted the desirability of "protecting administrative agency authority." 146 Administrative exhaustion also "promot[es] judicial efficiency" 147 by allowing the agency the opportunity to correct its own errors and by possibly creating a record to facilitate judicial review.

Unlike the complicated and tortuous history of procedural default in the habeas context, the rules governing administrative exhaustion are quite simple. Fifty years ago in United States v. L.A. Tucker Truck Lines, Inc., the Supreme Court held that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." 148 Administrative exhaustion is now largely a creature of statute and rule, 149 and

146. McCarthy, 503 U.S. at 145.
147. Id.
149. In Bowles v. Blount, 359 U.S. 470, 154 (1959), the Supreme Court held that it cases in which the Administrative Procedure Act (APA), 5 U.S.C. § 554, "[t]here are no free to require an exhaustion requirement in a role of judicial administration." The APA does not explicitly impose an exhaustion requirement; instead, it leaves judicial review to "first" agency review. See 5 U.S.C. § 704 (2000). This allows agencies to require would-be plaintiffs to invoke further remedies by providing by rule that decisions are unalterable (and inoperative) until appealed. See id. Section 704 is not itself an exhaustion requirement, however; the Court's

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the precise contours of an exhaustion requirement will depend on the statutory language and the nature of the administrative proceeding under review. However, it is well established that when a statute requires presentation of claims to an agency, a reviewing court will not hear claims that have not been properly presented.130

The central question, however, is how failure to properly exhaust agency procedures bars subsequent judicial consideration. This question is harder, for the mechanism by which the bar is created is not easy to discern. Because administrative exhaustion is largely a creature of statute, courts that refuse to hear claims are in most cases simply following statutory direction.131 The Court has, however, explained that the ordinary rule by which failure to properly invoke agency procedures bars judicial review "is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.132 That is, it is a waiver rule designed to circumscribe judicial review of agency decisions. As the L.A. Tucker Court went on to explain, 'courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.'133 Thus, and this is the key point, waiver of a claim before an administrative agency can prevent judicial review because a lawsuit filed after administrative exhaustion seeks to "topple over administrative decisions." That is, it seeks judicial review of the agency's handling of the claim.134 Federal courts typically exercise appellate jurisdiction over federal agencies and affirm or reverse their decisions based on statutory criteria. The APA, for example,

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130 In Weathers & Romans Framing, Inc. v. NLRB, 456 U.S. 645, 656 (1982), for example, the Supreme Court held that a Court of Appeals lacked jurisdiction over an objection not presented to the Board, applying 29 U.S.C. § 160(e), which provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court . . . ."

131 42 U.S.C. § 402(a), for example, allows review only of agency action taken after a hearing, and thus excludes dismissal of entirely unfounded applications. See, e.g., Dietrich v. Schweiker, 700 F.2d 865, 867 (2d Cir. 1983).


133 Technically, this rule is probably more accurately described as forfeiture, rather than waiver. See supra note 70. I use the term "waiver" here in keeping with the Court's practice. See Sims, 530 U.S. at 105 (describing the question presented as "whether a claimant's prompting judicial review has waived any issue that he did not include in a request for review by the Social Security Appeals Council").


135 The text of the APA says as much. See 5 U.S.C. § 702 (2000) (providing that a person aggrieved by agency action "is entitled to judicial review thereof").
instructs courts to reverse agency decisions that are, inter alia, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."\(^{156}\)

Under these circumstances, failure to meet a procedural requirement will bar subsequent judicial merits review for much the same reason that it does in the habeas context: the court is being asked to review an agency decision that rests on a procedural ground.\(^{157}\) And a decision resting on a procedural ground can very seldom be attacked as "not in accordance with law" or otherwise infirm under the APA.

This is not to say that Congress could not create a different regime, in which would-be plaintiffs were required to make timely administrative filings on pain of forfeiture but would then be entitled to file an independent civil action essentially unrelated to the administrative proceeding. Indeed, it has done so: Title VII of the Civil Rights Act of 1964 requires federal employees to exhaust administrative remedies available from their employer before filing complaints with the Equal Employment Opportunity Commission (EEOC).\(^{158}\) If the EEOC declines to act on the complaint and issues a right-to-sue letter, the statute allows the plaintiff a "plenary judicial trial de novo," rather than merely a review of the administrative record.\(^{159}\) But despite the independence of the civil action from the administrative filing, courts frequently dismiss Title VII claims for failure to make the required EEOC filings on time, characterizing such failures as a lack of exhaustion that precludes subsequent suit.\(^{160}\)

I have said already that administrative exhaustion is largely a creature of statute, and Title VII's exhaustion scheme is quite unusual. Instead of employing the usual language of exhaustion, the statute uses language suggestive of a limitations period, providing that a complaint "shall be filed [with the EEOC] within one hundred and eighty days" of the alleged offense.\(^{161}\)

\(^{156}\) See id. § 706(G)(A).

\(^{157}\) Likewise, failure to comply with an administrative process, usually described as failure to exhaust, will bar judicial review because there has been no final agency decision that can be the subject of judicial review, not because of anything intrinsic to the exhaustion requirement. See, e.g., Int'l Union v. Baskin, 550 U.S. 107 (2007) (noting that if a claimant fails to request review from the Social Security Appeals Council, "there is no final decision and, as a result, no judicial review in most cases. In administrative law, such a claimant may not obtain judicial review because he has failed to exhaust administrative remedies").


\(^{160}\) See, e.g., Kastappy v. Potter, 31 Fed. Appx. 344, 344 (9th Cir. 2002).

\(^{161}\) 42 U.S.C. § 2000e-5(b)(1). And indeed, courts have described this as a "statute of limitations." E.g., Newbold v. Wis. State Pub. Defender, 310 F.3d 1013, 1015 (7th Cir. 2002).
Title VII turns out to be an exception that proves the rule—the statute explicitly makes proper timing, and not just exhaustion, a precondition to suit. The PLRA, by contrast, uses language similar to that of AEDPA, invoking exhaustion by name and keying the analysis to the question of whether administrative remedies remain “available” at the time of suit. Nothing in the statute indicates an intent to bar plaintiffs who do not meet administrative time requirements; so if such failures are to produce a bar, the general waiver rule of administrative exhaustion is the only plausible mechanism by which they might do so.\(^\text{163}\)

\(^{163}\) It is not the only such exception. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(d) (2006), authorizes a civil cause of action not possible if “[a]ny civil action may be commenced … until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]” and that “[a]ny charge shall be filed … within 180 days” of the alleged discrimination. Again, the language makes no reference to the general concepts of exhaustion but instead demands compliance with peculiar time limits. Nor does the Supreme Court appear to have treated the ADEA’s similar requirement to present claims to state agencies before filing suit, 29 U.S.C. § 629(b), does not require timely presentation under § 1983. See O’Connor v. Corning, 414 U.S. 19, 22 (1973) (citing regulations between the ADEA and PLRA).

\(^{164}\) Another possibility might be preclusion doctrine. Normal preclusion rules apply to § 1983 suits. See Migra v. Warren City Sch. Dist., 465 U.S. 75 (1984) (per curiam); Allen v. McCurry, 466 U.S. 73 (1984) (per curiam). And in University of Tennessee v. Elliott, 478 U.S. 788 (1986), the Supreme Court held that state administrative proceedings could create preclusive effect on § 1983 suit. There are two main reasons, however, to think that prior administrative proceedings resolved on narrow grounds should not create any preclusive effect on § 1983 suits. First, although it is clear that any claim that was or could have been brought in the prior proceeding, and prior administrative proceedings are sufficiently judicial in nature to warrant preclusive effect at all. In Clisinger v. Senter, 474 U.S. 193, 203-04 (1985), the Court held that a judgment of a prior disciplinary committee was not entitled to the absolute immunity accorded judges because they were not “procedural” officials. The Court noted further that disciplinary hearings were not required to observe judicial due process norms. Id. Prior administrative hearings differ from judicial proceedings in that they are not subject to any specific adjudicative procedures or decisions. Thus, if such proceedings do not meet the technical requirements for judicial immunity, they should not be entitled to the same immunity. See 28 U.S.C. § 226(c). The preclusive effect of a prior administrative proceeding is not reviewed and can be subject to judicial review. Id. (Review of a prior administrative proceeding is not subject to judicial review.) The preclusive effect of a prior administrative proceeding is not necessarily subject to judicial review. Id. (Review of a prior administrative proceeding is not subject to judicial review.)
The question of whether administrative-style exhaustion, and its accompanying waiver rule, are appropriate models for the PLRA thus comes down to the question of whether Congress intended to convert the § 1983 action into appellate judicial review of prison grievance proceedings. And now it is time to examine the PLRA exhaustion requirement in closer detail.

C. PLRA Exhaustion

In imposing an exhaustion requirement on inmate civil rights suits, the PLRA did not write on a clean slate. The earlier Civil Rights of Institutionalized Persons Act (CRIPA), enacted "primarily to ensure that the United States Attorney General has 'legal standing to enforce existing constitutional rights and Federal statutory rights of institutionalized persons,"" also authorized (but did not require) federal courts to demand exhaustion of administrative remedies as a prerequisite to some § 1983 suits brought by adult inmates. Specifically, § 1997e(b)(1) instructed the Attorney General to promulgate minimum federal standards for state prison grievance procedures, and § 1997e(a) authorized courts to require exhaustion of procedures determined to be in compliance with those minimum standards if such a requirement would be "appropriate and in the interests of justice." Even if the exhaustion requirement were imposed, the drafters of CRIPA evidently did not contemplate that it could bar a federal action, for § 1997e(b)(1) did not authorize courts to dismiss unexhausted claims, but only to continue the action for up to ninety days in order to allow exhaustion.

Nonetheless, there is some authority for the proposition that federal courts had the power under CRIPA to impose forfeiture as a sanction for willful neglect of prison procedures. In Rocky v. Vitorie, the Fifth Circuit held that if, following the ninety-day continuance, the inmate still had not made a good faith attempt to exhaust administrative remedies, a district court had the power to dismiss the suit. Marsh v. Jones went further, finding that dismissal with prejudice was a proper sanction for the failure to observe administrative filing.

148 813 F.2d 734, 735-736 (5th Cir. 1987).
deadlines, on the reasoning that as the plaintiff’s “administrative remedies were foreclosed, . . . a continuance would have served no purpose.” Marsh’s assumption that administrative remedies can be “foreclosed” but simultaneously “available” within the meaning of § 1997e(a) is obviously hard to square with the habeas jurisprudence interpreting similar language, which holds uniformly that foreclosed remedies are unavailable. But Marsh is hardly scrupulous in its adherence to the text of the statute; § 1997e(a) under CRIPA did not even authorize dismissal. Marsh is instead motivated by its understanding of the practical requirements of prison litigation—namely that inmates who failed to observe administrative filing deadlines must be punished to preserve the efficacy of the deadlines. The same policy concerns persist under the PLRA, of course, and will be addressed in Part IV.C. What is significant about Marsh for present purposes is that it shows that under CRIPA, dismissal without prejudice was not understood to flow naturally from the statutory scheme; it was instead a judiciously created supplement without a basis in the statutory text.

The PLRA added bite to CRIPA’s permissive exhaustion regime in two primary ways. First, it broadened the application of the exhaustion requirement. Where CRIPA’s requirement had been discretionary, to be applied only if the court found it “in the interests of justice,” PLRA exhaustion is mandatory and applies to essentially all inmate suits. Likewise, CRIPA exhaustion had applied only to suits by adult inmates, and only in circumstances where prison grievance procedures met minimum federal standards and offered remedies that were “plain, speedy, and effective”; the PLRA removed both these restrictions. Second, the PLRA changed the consequences of failure to exhaust. CRIPA did not authorize courts to dismiss unexhausted claims, but only to stay the action for “a period not to exceed ninety days.” The PLRA not only authorized dismissal but required it.

The effect of these changes has been partially clarified by two recent Supreme Court decisions, Booth and Porter. In the first, the Court held that the exhaustion requirement applies even if the administrative process cannot

107 53 F.3d 707, 710 (5th Cir. 1995).
108 See supra Part III.A. It is likewise in accordance with the approach of most circuits under the PLRA, which dismiss without prejudice on the apparent assumption that prisoners will invoke the foreclosed remedies and then return to court.
110 Id.
111 Id.
award the inmate the relief sought, and in the second it held that the requirement applies to claims of excessive force, which had been thought by some courts not to be suits related to prison conditions. By Confirming the near-universal scope of the exhaustion requirement, these decisions make more significant the question of what consequences attend a failure to properly exhaust. But they do nothing to answer it. Nor are earlier cases especially helpful. Last, little guidance can be gleaned from the sparse legislative history. The most relevant statement simply notes that an exhaustion requirement would bring § 1983 actions "more into line with administrative exhaustion rules that apply in other contexts—by generally prohibiting prisoner § 1983 suits until administrative remedies are exhausted."

What I have said thus far about the two models of exhaustion used by Pocatello does not answer the question either. But it does tell us what an answer would look like. If PLRA exhaustion is assimilated to habeas exhaustion, procedural error will create forfeiture if the § 1983 suit is understood as a collateral attack on the prison grievance proceeding. Likewise, if it is assimilated to administrative exhaustion, the possibility of forfeiture depends on whether the § 1983 suit asks a federal court for appellate review of the grievance proceeding. And last, if the PLRA exhaustion requirement is considered sui generis, we need to examine the policy implications of the forfeiture rule and its alternative.

176 The bulk of the academic commentary, perhaps not surprisingly, runs counter to the positions the Court ultimately took on these issues. See, e.g., BROWN v. COURT OF REVIEW 12.
177 The Supreme Court hasstrictly interpreted the issue, once identifying it as a difficult question to be resolved by Congress, and once warning to ensure that the normal result would be a forfeiture. See supra note 22.

178 In McCay v. Cline, 270 F.3d 503, 510 n.4 (7th Cir. 2001), pass it, "the legislative history offers particular little insight. . . . The PLRA was a substantive change to an already appropriations bill. Its provisions were not merely verbatim duplicates, were seen as subject to a Senate Judiciary Committee mark-up, and were never explained to any committee report."

179 See Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. S. 38, S. 400, S. 660, S. 705, S. 107 Before the Senate Committee on the Judiciary, 106th Cong., 20-21 (1999) (statement of Associate Attorney General John R. Schmidt), reprinted in 2 HERBARD D. REAMS & WILLIAM H. MANTIE, LAWSUIT HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1995: H. DOCUMENTS 55 (1997). Schmidt's language suggests a deference, not a bias, which is indeed the "unwritten effect of an exhaustion requirement. But the Supreme Court has already given the PLRA exhaustion requirement more bite than it has in other contexts by eliminating some of the traditional exceptions, such as an agency's inability to provide the relief requested. See Booth, 532 U.S. at 741.
The basic question to which this Article is addressed can thus be stated quite simply. Before the PLRA, a § 1983 suit was quite clearly an independent federal cause of action, with no relation to any state judicial or administrative proceeding. What must be decided is whether Congress intended the PLRA exhaustion requirement to convert this independent action into either an appellate review of prison grievance proceedings (the administrative model) or a collateral attack on such proceedings (the habeas model).

So stated, the question is relatively easy to answer. Nothing in the PLRA suggests that federal courts hearing § 1983 suits should review or defer to the results of prison grievance proceedings, a feature that one would expect to find on either a collateral attack or an appellate review approach. The only court to address the issue has explicitly stated that § 1983 plaintiffs are entitled to a trial de novo after exhausting administrative remedies. And the following discussion will point out significant difficulties with the idea that Congress intended to make § 1983 suits into appellate or collateral review of prison grievance proceedings.

A. The Habeas Analogy

The problems with the theory that the PLRA has converted § 1983 suits into collateral review of prison grievance proceedings go beyond the absence of any language either indicating such an intent or instructing courts how to treat administrative findings. The more significant issue is that the administrative proceeding may produce no reviewable findings, or no relevant ones; moreover, there is no guarantee that whatever findings do result will be the product of a procedure that comports with federal due process standards.

The reason for this is that the PLRA places no constraints on what sort of grievance procedures trigger the exhaustion requirement. Where CRIPA required exhaustion of only "plain, speedy, and effective" administrative remedies offered by grievance procedures that met federal standards, the

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I. V. Exhaustion Rationalized

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PLRA requires a prisoner to exhaust all "available" remedies, regardless of the nature of the proceeding or the sort of relief offered. 69 Grievance proceedings may be nonadversarial; they may not observe rules of evidence in creating a record; they may create no record at all. 70 And as already mentioned, they are insufficiently judicial in nature to warrant preclusive effect. Deferential review of proceedings that do not comply with due process standards may itself be constitutionally doubtful.

The fact that exhaustion is required even in cases in which the grievance process does not offer the relief sought in a § 1983 suit poses another conceptual barrier to understanding the PLRA as converting § 1983 suits into collateral attacks. In the habeas context, the prisoner has sought from the state courts the same relief he requests in federal court: liberty. Determining whether the state courts erred in their disposition of his claims, as AEDPA instructs federal courts to do, thus resolves whether he is entitled to that relief. But where grievance proceedings cannot result in the award of damages, a suit conceptualized as a collateral attack on those proceedings should not be able to win damages either. In sum, if the PLRA converted § 1983 suits into collateral attacks on prison grievance proceedings, it created a truly daunting set of problems with no hint as to how they should be resolved. In the absence of any language indicating that this was Congress's intent, this is not a reasonable interpretation of the statute.

B. The Administrative Analogy

The idea that the PLRA has made a § 1983 suit into appellate review of prison grievance proceedings suffers from the same defects discussed above, with an additional one: appellate review of state administrative proceedings falls outside the original jurisdiction of federal district courts. In a number of cases dealing with state administrative proceedings, the Supreme Court has held that a federal court will have jurisdiction over a suit related to the administrative action only if it is an action de novo, conducted "wholly without reference to what may have been decided by the [state agency]." 66 Federal

60 The Pennsylvania system considered by the Court in Fouch, for example, featured an initial requisitie step, under which an inmate's complaint "was referred to a grievance officer for investigation and resolution." 532 U.S. at 734.
66 Hones v. Liberty Mut. Ins. Co., 367 U.S. 348, 354-55 (1961). The fact that a suit in district court must be entirely independent of administrative proceedings also often poses a policy reason to doubt that noncompliance with administrative filing deadlines should have any effect. Administrative deadlines are geared to the administrative process and the remedies it offers. There is no reason to think that they are
district courts have only original jurisdiction; they do not "sit to review on appeal action taken administratively or judicially in a state proceeding." In City of Chicago v. International College of Surgeons, the Court rejected the apparent suggestion that district court jurisdiction over such claims was constitutionally proscribed and held that they could be heard via supplemental jurisdiction as "claims" relating to a properly filed civil action. It did not, however, dispute the proposition that such claims by themselves would not constitute a civil action appropriate for original district court jurisdiction. Consequently, converting the § 1983 action into appellate review of a prison grievance proceeding would apparently have the result that such claims could be heard only as a matter of district court supplemental jurisdiction, something no court has come near to suggesting.

C. Policy Arguments

What the preceding two sections demonstrate is that it is extremely unlikely that Congress intended to, or could without expanding district court original jurisdiction, convert § 1983 suits into appellate or collateral review of prison grievance proceedings. The § 1983 suit remains what it was originally: an independent federal cause of action unrelated to any state proceeding. And what that means is that a failure to observe procedural niceties in the course of exhausting administrative remedies should not, logically, have any effect on a state prisoner's subsequent § 1983 suit. Resolution of a grievance against a prisoner on the merits has no preclusive effect and is accorded no deference, and there is no reason that a nonmerits resolution should have any more impact.

This conclusion is, as I admitted earlier, counterintuitive. And if its application defeated congressional purpose in imposing the exhaustion requirement, a court might well be justified in supplementing the statutory text

appropriate for a § 1983 cause of action, which of course has its own limitations period. In the Title VII context, in contrast, Congress explicitly put specific timing requirements into the statute creating the cause of action.


134 322 U.S. 156, 164-65 (1944). At the time Congress enacted PLRA, of course, International College of Surgeons was no more than a grain in the Court's eye, so by interpretive purposes the framework established by Harmon and Stude is the backdrop against which Congress legislated.

with some kind of sanction for inmates who failed to observe prison procedures. Perhaps the strongest point of the *Pozo* opinion is its warning that failure to do so will thwart congressional intent and "leave [the exhaustion requirement of] § 1997e(a) without any content." If this were true, federal courts would presumably have the power to impose forfeiture as a sanction on inmates who fail to comply with procedural requirements, even in the absence of any statutory direction to do so. But a closer look at the policy arguments reveals that the conclusion is in fact sound: the purposes behind the PLRA exhaustion requirement do not require a forfeiture penalty to be imposed on inmates who make procedural errors in prison grievance proceedings.

The policy argument starts with the premise that Congress could not have intended to allow prisoners to exhaust available remedies by spurring them. The assertion is all but undeniable. The counterargument, presented most forcefully by Justice Brennan in *Fay v. Noia*, is that prisoners have no incentive to withhold claims from a process that might give them some relief. But the *Wainwright* Court rejected this argument in the habeas context, and it is perhaps even less convincing with respect to the PLRA. A prisoner might well spurt a process that could not provide the relief requested, or even hear his claim. And if Congress agreed with Brennan that the prospect of some relief was a sufficient incentive for prisoners to file and pursue administrative complaints, it would presumably not have imposed an exhaustion requirement

188 Comparison of the PLRA with other statutes, like Title VII and the ADEA, in which Congress has specified that failure to comply with timing deadlines with a forfeiture, makes clear that imposing such sanctions would be judicial usurpation. The Supreme Court has indicated skepticism about judicial attempts to beef up exhaustion requirements beyond what Congress has directed. See *Dubuy v. Clemente*, 559 U.S. 117, 145 (2009). The Sixth Circuit relied quite heavily on the analogy to Title VII and the ADEA in rejecting *Pozo*. See *Johnson v. Woolum*, 337 F.3d 220, 277-33 (6th Cir. 2003). But I am perfectly willing to concede that this would be appropriate if the alternative were an exhaustion requirement that could simply be ignored.

189 *Pozo* v. *McCaughey*, 286 F.3d 1022, 1025 (7th Cir. 2002).

190 See supra text accompanying note 169-70 (discussing Marks). This sanction would, however, presumably be sensitive to the facts of the individual case, including some sort of federal equity analysis and adopting a standard similar to Miller *et al.*'s "deliberate bypass" or *Wainwright*’s "cause and prejudice." *Pozo*, it should be noted, does not seem to contemplate either an equity analysis or the possibility of any excuse for procedural error. The dissenting approach is largely a consequence of the reasoning of *Byrnside*: the PLRA did not alter the CRIPA adequacy analysis, and if failure properly to exhaust is equivalent to failure to exhaust simpliciter, cause and prejudice, which pertain to procedural default and not exhaustion, cannot apply.
at all. Indeed, if exhaustion by neglect suffices, the requirement does next to nothing.\(^{109}\)

In fact, however, this argument relies on a mistaken understanding of how the exhaustion requirement operates. Under most state laws, prison officials have the power to hear untimely complaints.\(^{110}\) Thus, administrative remedies remain available even after filing deadlines have passed, and inmates, to satisfy the exhaustion requirement, must make untimely filings and appeal their denial all the way through the prison administrative process. In short, exhaustion by neglect is simply impossible.

And now the incentive structure starts to look quite different. Without the possibility of exhaustion by neglect, prisoners have no ability to circumvent the administrative process by not filing a grievance. Nor do they have any plausible incentive to withhold claims or seek procedural resolution rather than a decision on the merits. Habeas petitioners, if they could, might want to reserve their federal claims for federal courts, preferring a de novo trial to the deferential review that AEDPA prescribes.\(^{111}\) But § 1983 plaintiffs get a de novo trial no matter what happens to their claims on the merits; nothing in the PLRA insures federal courts to defer to the findings or legal conclusions of prison administrators.\(^{112}\) Withholding a claim or sandbagging in the administrative proceeding offers inmates no strategic benefit. But if an inmate did for some reason want to sabotage his grievance, he could do so without penalty—so long as he lost on substantive grounds. In short, deliberate bypass of the administrative system may be possible—but through a merits resolution, not a procedural one. A rule that keys on procedural error, then, will not stop clever inmates who do not wish to give the grievance proceedings a fair shake; it will simply redirect their efforts into substantive issues. What it will do is catch the less sophisticated and less informed who are unable to satisfy complex and demanding procedural requirements.\(^{113}\)

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\(^{109}\) Not nothing, though, because it would at least require prisoners to wait until their administrative remedies expired. And if prison officials set the administrative time limits equal to the § 1983 deadlines, the § 1983 statute would not obviate the administrative claim, and failure to file would be a de facto bar.

\(^{110}\) See, e.g., Wash. Admin. Code §§ DOC 310-060(2), DOC 310-132(1)(d) (2003). This appears to be a universal characteristic of prison grievance systems, and if it is not, prison administrators could certainly create it. And for those systems in which time limits cannot be waived, requiring inmates to file an untimely grievance and have it denied on substantive grounds still achieves the result identified in the text. The conclusion, then, is simply that exhaustion by neglect should not be allowed—or it turns out that exhaustion by neglect is impossible in most cases anyway.


\(^{113}\) Cf. McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ("As a practical matter, the filing deadlines, of
Thus, imposing forfeiture as a sanction is not necessary to steer inmates into the administrative grievance process; they must file grievances anyway, timely or not. But it was not only the fear of strategic bypass that drove the Court’s analysis in \textit{Wainwright}. \textit{Wainwright} relied also on a vision of the proper balance in state-federal relations and the role of state courts in administering state criminal justice systems. That vision was one in which state court proceedings were the “main event” in the determination of whether a defendant might be deprived of his liberty and not a mere “triangle on the road” to a federal habeas hearing. Trials in state courts, \textit{Wainwright} noted, were the appropriate place for such decisions to be made: “Society’s resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.”

Again, this policy concern has very little weight in the context of an inmate’s § 1983 claim. Prison officials are not given the primary responsibility for enforcing constitutional norms and awarding damages to inmates whose rights have been violated. They are not judges; they have no constitutional expertise; and in many cases, they cannot award damages at all. Nor, of course, must their hearing process conform to the constitutional standards governing a § 1983 suit in state or federal court. There is simply no way that an administrative grievance proceeding can be the “main event” in a prisoner’s attempt to win damages to redress a constitutional violation. A § 1983 claim belongs in court, not before an administrator who cannot decide it.

The policy aims served by the procedural default doctrine in the habeas context, then, are generally irrelevant to suits under the PLRA. Exhaustion via neglect is impossible; deliberate bypass could be achieved by other means, given the lack of collateral consequences; and the federalism concern that drove the \textit{Wainwright} Court to identify state courts as preferred forums is absent. The habeas analogy is simply not a very good one.

The administrative model remains, and indeed the Supreme Court’s articulations of the policies behind the PLRA exhaustion requirement tend to hew closer to those underlying administrative exhaustion. In \textit{Porter}, the Court explained that Congress intended § 1997e(a) “to reduce the quantity and
improve the quality of prisoner suits.197 Corrective action taken in response to complaints, the Court explained, might satisfy inmates and avert a federal suit; the internal review might filter out frivolous claims; and for suits that did make it to court, an administrative record might facilitate review.198

How realistic these policy aspirations are is another matter. The enacting Congress knew, or should have known, that prison grievance proceedings tended not to meet the federal standards prescribed by CRIPA; that Act’s incentive system (demanding exhaustion only of such remedies as met federal standards) was largely a failure.199 Removing the incentive made it even less likely that administrative process would create a record on which judicial review could be based. And a Congress that saw inmate litigation as largely recreational would be unlikely to believe that administrative remedies would satisfy inmates, or that frivolous suits could be “filtered out” by an administrative process. Indeed, in rejecting an exhaustion requirement for Bivens actions, the Court treated these policy arguments skeptically.200

Still, these are the policy bases the Court has given us.201 The question is how they are affected by the presence or absence of forfeiture as a sanction for failure to observe administrative deadlines. The answer is that a forfeiture regime promotes them very little, if at all. The impossibility of exhaustion by neglect means that inmates must file grievances before filing a federal suit, and administrators therefore have the ability to take action in response. It is true, of course, that the absence of a forfeiture penalty reduces the incentive to make a timely filing, but we have seen, conversely, that inmates have no incentive to delay. (In a number of cases, inmates held to have failed to exhaust tripped up not in their initial filing but at some higher level of review.202) Nor does it seem likely that a delay that leaves the inmate within the § 1983 limitations period will materially hamper administrators’ ability to take corrective action if they desire.203 Likewise, administrators are free to create a record if they

198 Id. at 524-25.
199 See Mark Tushnet, General Principles of the Revision of Federal Jurisdiction: A Political Analysis, 22 CONN. L. REV. 621, 641 (1990) (stating that only a few prison systems have obtained § 1983 retaliation certification of grievance procedures).
200 See McCurry, 503 U.S. at 153-54 (concluding that interest supporting exhaustion are insufficient).
201 Again, not without some skepticism. In Bivens, the Court referred to its earlier estimation of these policy concerns, and then conceded that Congress “may well have thought that we were shortsighted.” Booth v. Churnet, 532 U.S. 731, 737 (2001).
202 See, e.g., Porto v. McCaughey, 266 P.3d 1032 (10th Cir. 2012) (failure to take a timely appeal); Thomas v. Doyle, 39 Fed. Appx. 373, 373 (7th Cir. 2002) (same).
203 The Court has commented that it is not clear why prison filing deadlines tend to be so short.
choose. Last, the imposition of a forfeiture sanction is not an effective means of filtering out frivolous suits. It will certainly filter out some suits, perhaps many. But as Justice Blackmun noted in 

McCarthy, it is precisely the frivolous litigant whose experience with the system allows him to navigate whatever procedural maze administrators may construct. The inmates whose claims are forfeited are likely to be those who are not filing lawsuits as recreation. Thus, a forfeiture regime will not winnow out frivolous suits. It will not even bar suits randomly; it is more likely to affect nonreligious inmates presenting legitimate grievances.\(^\text{204}\)

In short, the policy argument turns out to be a good deal more complex than the Seventh Circuit assumed. A forfeiture rule is not necessary to protect the policies behind the PLRA, and there are few reasons to think that it is even significantly helpful. Against whatever incremental effect it might have must be weighed the serious impact on prisoners with legitimate claims who are unrepresented, unschooled in litigation, and often ill-equipped to negotiate an administrative system far harsher in its procedural requirements than state or federal courts.\(^\text{205}\) To take just one example, the current limitations period for § 1983 actions in Wisconsin is six years.\(^\text{206}\) But if the plaintiff is a Wisconsin inmate who will forfeit his § 1983 claim unless he complies with prison filing rules, his filing time shrinks to fourteen days, the time permitted under Department of Corrections regulations.\(^\text{207}\) A forfeiture regime takes an unusually vulnerable group of § 1983 plaintiffs and subjects them to an unusually heavy burden.

Again, this is not to say that Congress could not have created such a regime. But if the intent behind the PLRA was simply to make things harder

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\(^\text{204}\) See McCarthy, 502 U.S. at 132 ("Why have not been apprised of any urgency or exigency justifying this circumstance."). This is affected because no reason that prison filing deadlines are so short is obvious; they are set by the same administrators who set the targets of grievances. The § 1983 limitations period, which is drawn from state law, reflects the state’s judgment of how quickly each claim must be brought to prevent evidence from going stale and to prompt defendants’ interest in repose. See Wilson v. Gough, 471 U.S. 261, 279(1985) (noting that drafting § 1983 limitations period from state law prevents discrimination against federal rights because of the number and variety of state law plaintiffs).

\(^\text{205}\) See McCarthy, 502 U.S. at 133.

\(^\text{206}\) As the Senate Report on CRIPA put it, "[p]enal institutionalization process are institutional, and some are unduly penal . . . . The prevention of legal rights . . . is compromised by the physical isolation in which noninstitutionalized persons live." S. REP. NO. 95-106, at 17 (1977). A 1994 study found that seven out of ten inmates performed at the lowest literacy level. See Brown, supra note 11, at 330 n.221 (citing K. D. HASKELL ET AL., U.S. DEP’T OF EDUC., LITERACY AMONG PRISON INMATES: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY XVI, 17-19 (1994)).

\(^\text{207}\) See Wallace v. Dade, 158 F.3d 1077, 1081 (11th Cir. 1997).
for inmates, irrespective of the merits of their claims, that intent was well hidden. No legislator made such an assertion, and Senator Orrin Hatch explicitly denied it.298 Last, in assessing the intent of Congress, we should recall Justice Breyer’s words about what he called “our human rights tradition.”299 Depriving inmates of access to the federal courts for reasons unrelated to the merits of their claims or the good faith of their attempts to comply with procedural requirements is harsh, even unfair. If our legislators desire such a result, the least federal courts can do is demand that they say so. The policy argument is simply not clear enough to justify judicial conversion of a rule governing the timing of lawsuits into one that bars them entirely.

CONCLUSION

The question of whether the PLRA’s exhaustion requirement should be construed to create a bar to § 1983 suits presents courts with a stark choice. Such a rule would be extremely effective in reducing the number of such suits that courts must decide on the merits. Prison administrative procedures are difficult to comply with as things stand, and if prison administrators can use them to defeat § 1983 suits before they are filed, we should expect the procedures to become even more complex and unforgiving. But there is no reason to think that this approach would pick out frivolous suits, and some reason to think that it would not. The PLRA has other provisions that do target frivolous suits and the inmates who file them, and the evidence suggests that these have worked. The question, then, is whether we are willing to deem inmates’ claims of constitutional violations so insignificant that their § 1983 suits should be deterred wholesale, without any reference to their merits. That is a choice that Congress did not make, and it is not one that federal courts should lightly take upon themselves.

298 See 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (“Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised.”); see also 142 CONG. REC. S2219-20 (daily ed. Mar. 18, 1996) (statement of Sen. Reid) (“If somebody has a good case, a prisoner, let him file it.”)

299 Breyer, supra note 29, at 298.