Administrative Exhaustion and Class Actions: Rules, Rights, Requirements, Remedies, and the Prison Litigation Reform Act Issue Resolved

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The doctrine of administrative exhaustion requires that an individual exhaust all available administrative remedies before he or she may be entitled to judicial relief. Class actions pose a unique circumstance in which, pursuant to the requirements articulated in Federal Rule of Civil Procedure 23 ("Rule 23"), the exhaustion doctrine must translate to a class of individuals with the same complaint or complaints. Courts must take into consideration many issues when determining the exhaustion requirements for a prospective class. For example, what are the congressionally mandated statutory requirements for administrative exhaustion? Must all members of the class individually exhaust their respective administrative remedies? How might the purposes of the exhaustion doctrine be preserved when deciding whether or not to require class-wide exhaustion? How will either the requirement that remedies be exhausted or the waiver of exhaustion requirements affect the rights of individual class members?

Statutory administrative exhaustion requirements and their subsequent effect on class actions have raised difficult interpretive issues in agency regulation and judicial adjudication in the United States for decades. The doctrine of administrative exhaustion originates in common law and subsequently has been codified by Congress in various statutes, notably the Social Secu-

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1 A.B. 2001, University of Chicago; J.D. Candidate 2004, University of Chicago.
3 See generally id.
Security Act, the Civil Rights Act ("Title VII"), and the Prison Litigation Reform Act of 1995 ("PLRA"). Class actions arising under the Social Security Act and Title VII present different studies in how courts interpret administrative exhaustion requirements. In some cases, courts have interpreted these requirements to be unwaiveable under certain circumstances. In certain Title VII cases, it has been held that class-wide exhaustion is unnecessary. However, the exhaustion requirement for class actions brought under the PLRA has not yet been fully addressed and answered. The question still remains: does the PLRA's administrative exhaustion provision require that all members of a PLRA class action exhaust all individual administrative remedies before pursuing their claims collectively in federal court, or is it sufficient that only the representative plaintiff has done so?

This Comment argues that courts addressing the issue of administrative exhaustion in a class action brought under the PLRA must determine that the PLRA's exhaustion requirement does not mandate class-wide exhaustion. To make this determination, courts may use statutory interpretation techniques, invoking certain canons of construction to evaluate whether the PLRA demands that each and every class member exhaust his or her administrative remedies before pursuing legal action. Alternatively, a court may use traditional judicial tools to analyze factors such as the purpose of class actions and the interaction of the class action mechanism with the administrative exhaustion requirement. The best approach to resolving the question surrounding the PLRA's exhaustion requirement as applied in the

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4 42 USC § 405(g) (2000).
7 See, for example, Marcus v Sullivan, 926 F2d 604, 613 (7th Cir 1991) (discussing Johnson v Sullivan, 922 F2d 346 (7th Cir 1990)) ("[F]ailure of disability claimants to challenge an illegal procedure of the Secretary within the administrative process cannot be excused when those claimants have allowed the deadline for bringing an administrative appeal to lapse before the class action commenced.").
8 See, for example, Albemarle Paper Co v Moody, 422 US 405, 414 n 8 (1975) (holding that backpay may be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members).
9 See, for example, Romasanta v United Air Lines, Inc, 717 F2d 1140, 1157-58 (7th Cir 1983) (holding that class members in the present case need not all have exhausted administrative remedies because there was no danger of rewarding plaintiffs who have "slept on their rights," which is one purpose of the administrative exhaustion requirement).
class action context, however, is to analogize to similar statutes.\textsuperscript{10} By applying the rationale behind the waiver of administrative exhaustion requirements as codified in other statutes such as the Social Security Act and, most notably, Title VII, a court should find that class-wide exhaustion is not required under the PLRA.

Part I of this Comment will articulate the doctrine, its origins, and the policies and principles behind the concept of administrative exhaustion. Part II will discuss how courts have applied the doctrine in the context of class actions brought under both the Social Security Act and Title VII. Part III will analyze the unsettled issue regarding the exhaustion requirement and class actions under the PLRA and will argue that the PLRA does not require that all class members exhaust their individual administrative remedies before bringing a class action.

I. THE ADMINISTRATIVE EXHAUSTION DOCTRINE

The PLRA, like other statutes,\textsuperscript{11} contains an administrative exhaustion requirement.\textsuperscript{12} How a court applies such a requirement in both the individual and class contexts depends on what a court perceives as the underlying purpose of the doctrine.

A. The Administrative Exhaustion Requirement Articulated

The doctrine of administrative exhaustion requires an individual to pursue non-judicial remedies prior to seeking judicial review of agency action.\textsuperscript{13} This doctrine is one in a group of closely related doctrines—including abstention, finality, and ripeness—that govern the timing and availability of judicial review.\textsuperscript{14} The Supreme Court has demonstrated its respect for agency auton-

\textsuperscript{10} See Jonathan R. Macey and Geoffrey P. Miller, \textit{The Canons of Statutory Construction and Judicial Preferences}, 45 Vand L Rev 647, 649 (1992) (suggesting reasoning by analogy to similar statutes as an alternative basis upon which judges can interpret statutes).
\textsuperscript{11} See supra notes 4–6 and accompanying text.
\textsuperscript{12} See 42 USC § 1997e.
\textsuperscript{14} \textit{McCarthy v Madigan}, 503 US 140, 144 (1992). The judicial doctrine of exhaustion of administrative remedies is distinct from the doctrine of finality. See 2 Fed Proc, L Ed § 2:330 (2002) (noting that the doctrine of finality addresses whether the initial decisionmaker has arrived at a definite, or final position on the issue, while the administrative exhaustion doctrine's requirement refers to administrative and judicial procedures by which an injured party may seek review of a decision and seek remedy). The administrative exhaustion doctrine's requirement refers to administrative and judicial procedures by which an injured party may seek review of a decision and seek remedy. Id.
omy and its unwillingness to prematurely interfere with an agency’s decision-making process. In *McKart v United States*, the Court indicated that the rationale underlying exhaustion is to respect agency autonomy and to avoid premature intervention, saying that “[t]he administrative agency is created as a separate entity and invested with certain powers and duties.” As such, “[t]he courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction.”

The Court, however, also noted that because of the doctrine’s breadth, it may be subject to certain exceptions. Specifically, in *McCarthy v Madigan*, the Court stated that “[a]dministrative remedies need not be pursued if the litigant’s interests in immediate judicial review outweigh the government’s interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.” If an individual’s immediate access to the courts outweighs the importance of having an agency first evaluate that individual’s claims, the exhaustion of administrative review may not be required.

B. Origins in Common Law Translate to Modern Application

The doctrine of administrative exhaustion finds its origins in common law federal equity jurisdiction, a source of judicial review of federal agency action. The doctrine is regarded as analogous to the general equity rule dictating that equity provides relief only when a plaintiff lacks an adequate remedy at law. This common law requirement is presently reflected in Section 704 of the Administrative Procedure Act (“APA”), which allows review

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16 Id at 193–94.
17 Id at 194.
18 Id.
19 *McKart*, 395 US at 193 (“The doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions.”).
21 Id at 146, citing *West v Bergland*, 611 F2d 710, 715 (8th Cir 1979). Although *McCarthy* involved administrative exhaustion before it was statutorily mandated by the PLRA, but the court’s analysis is still applicable to this Comment’s discussion.
22 Id.
23 See Funk, 18 Pace Envir L Rev at 1 (cited in note 3).
24 Id.
25 5 USC § 704 (2000)
only after final agency action "for which there is no other ade-
quate remedy in a court."26

The common law concept of federal equity jurisdiction has
been translated to modern notions of an agency's delegated deci-
sionmaking authority and purpose, in addition to concepts of
agency responsibility.27 The doctrine of administrative exhaustion
is grounded in the idea that, because Congress has delegated de-
cisionmaking authority to an agency, that agency—and not the
courts—must have the primary responsibility of reviewing appli-
cable claims.28 Consequently, the Supreme Court has held that
"[w]here Congress specifically mandates, exhaustion is required
... [b]ut where Congress has not clearly required exhaustion,
sound judicial discretion governs."29 Therefore, when lacking a
clear congressional mandate, courts must begin an administra-
tive exhaustion analysis with a "strong presumption that Con-
gress intends judicial review of administrative action."30

C. Purposes of Administrative Exhaustion

The purpose of the exhaustion doctrine underscores the func-
tion of judicial review of agency decisions. The Supreme Court
has articulated a two-fold purpose behind the administrative ex-
haustration requirement.31 First, the Court has held that agencies,
not courts, ought to have primary responsibility for the programs
that Congress has charged them to administer.32 The second un-
derlying purpose of the exhaustion doctrine, as recognized by the
Supreme Court, is judicial efficiency.33 In deciding whether ad-
ministrative exhaustion is required in any given case, a court
must take the two main purposes of the administrative exhaus-
tion requirement into account.34

A court applying the exhaustion doctrine should be mindful
of agency autonomy.35 Consequently, when considering the appli-

26 Id. See also Funk, 18 Pace Envir L Rev at 1 (cited in note 3).
27 Funk, 18 Pace Envir L Rev at 2 (cited in note 3).
28 See McCarthy, 503 US at 145.
29 Id at 144. See also Darby v Cisneros, 509 US 137, 144-45 (1993) (holding that the
imposition of an administrative exhaustion requirement is dependent on congressional
intent).
31 See McCarthy, 503 US at 145.
32 Id.
33 Id.
34 Id.
35 See Robert C. Power, Help Is Sometimes Close at Hand: The Exhaustion Problem
cation of the administrative exhaustion doctrine courts should adhere to several principles that promote this autonomy. First, the agency must be able to function efficiently and have an opportunity to correct its own errors. This position is based on a "commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is hauled into federal court." Second, the court and the parties will benefit from agency expertise and experience when the agency's processes are not threatened with interruption. Third, allowing the agency to proceed without the threat of premature interruption permits the agency to compile an adequate record for judicial review.

In addition to the furtherance of agency interests, judicial interests are also advanced by the doctrine of administrative exhaustion. Adherence to the doctrine aids judicial review and promotes judicial economy by creating a division of labor between the judiciary and administrative agencies. In McKart, the Supreme Court noted that an agency, like a trial court, is created for the purpose of applying a statute in the first instance when a complaint or claim is made. Allowing an agency to first follow its own review procedures when a claim is filed also allows for the development of a factual record. The Court stated that "it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based." Additionally, an agency's expertise could lead to better outcomes and further aid judicial review. Finally, efficiency interests support the Court's adherence to the doctrine of administrative exhaustion. In McKart the Supreme Court held that it is "generally more efficient for the administrative process to go forward without inter-

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36 See id at 554.
37 McCarthy, 503 US at 145.
39 See id.
41 395 US at 193–94.
42 Id at 194.
43 Id.
44 Id (holding that "since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise").
ruption than it is to permit the parties to seek aid from the courts at various intermediate stages.\footnote{McKart, 395 US at 194.}

D. Administrative Exhaustion Encompasses a Balancing Test

Although the doctrine of administrative exhaustion is firmly rooted in American common law and is additionally codified in the APA and other specific statutes, the doctrine is still subject to judicial discretion.\footnote{McCarthy, 503 US at 144.} Thus, the Supreme Court has articulated a balancing test a court should use to determine whether exhaustion is required. In \textit{McCarthy},\footnote{503 US 140 (1992).} the Court held that “[i]n determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.” \footnote{Id at 146.} The institutional interests are, namely, retaining agency responsibility and autonomy and promoting judicial efficiency.\footnote{Id at 145.}

Because the institutional interests must be balanced with the individual interests, courts must consider how the application of an administrative exhaustion requirement affects an individual claimant.\footnote{See id at 146 (noting that application of balancing requires close attention to the particular claim presented).} The Supreme Court has noted three major reasons why the interests of an individual may weigh heavily against requiring exhaustion.\footnote{See McCarthy, 503 US at 146–49.} First, requiring exhaustion may unduly prejudice an individual’s subsequent assertion of the claim in a court action.\footnote{See id at 146–49 (“Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action.”).} Second, if exhaustion is required, an individual’s administrative remedy “may be inadequate ‘because of some doubt as to whether the agency was empowered to grant effective relief.’”\footnote{Id, quoting \textit{Gibson v Berryhill}, 411 US 564, 575 n 14 (1973).} Third, the Court noted that “an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it.”\footnote{Id at 148, quoting \textit{Gibson}, 411 US at 575 (holding that exhaustion is not required where an Attorney General statement indicated that seeking administrative relief would be futile).} These concerns over an individual’s ability to be free from preju-
dice in an agency’s decision, as well as the adequacies of the agency’s remedy, must be considered in addition to the institutional concerns regarding administrative autonomy and judicial efficiency.

II. APPLICATIONS IN THE CLASS ACTION CONTEXT

Administrative exhaustion requirements are frequently codified as individual requirements, as in the PLRA. The individual requirement must be translated by courts into the class action context. In the class action context, courts must interpret these individual requirements to determine whether all individuals in a class must exhaust their individual administrative avenues before being able to proceed as members of a class. In making this determination, a court must consider the underlying purposes of the class action mechanism, in addition to the possible consequences of limiting the class action device.

A. A Clash Between Administrative Exhaustion and Class Actions

Administrative exhaustion requirements in the class action context are potentially in tension with the fundamental purposes underlying Rule 23 and the class action mechanism. The class action rule addresses four basic concerns: (1) it provides for efficient adjudication of issues that would otherwise require multiple adjudication; (2) it provides for judicial access in instances where individual cases would not or could not be brought; (3) it provides an opportunity for consistent adjudication; and (4) it reflects due process concerns through the adequacy of representation requirement. Administrative exhaustion requirements translated into the class action context have the effect of potentially limiting class actions. An exhaustion requirement mandating that all members of a prospective plaintiff class exhaust their individual administrative remedies prior to pursuing class action litigation

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55 See 42 USC § 1997e.
57 Id. See also Morgan v Laborers Pension Trust Fund for Northern California, 81 FRD 669, 679 (N D Cal 1979) (stating that the requirement of adequate representation ensures due process rights of absent class members).
58 See generally, Morawetz, 71 NYU L Rev at 403 (cited in note 56) (discussing the effects of limitations on class size).
burdens the prospective class and likely will have a diminishing effect on the size of the class. 59

The consequences of limiting class actions impact the purposes underlying Rule 23.60 Limiting the size of a class impacts the rights of both those who are included and those who are not included.61 A decision to limit the size of a class action because all of its members have not fulfilled the administrative exhaustion requirement is a decision to deny redress to persons who might have been included in the plaintiff class.62 Thus, the principal harm in narrowly defining a class is the potential of denying similarly situated persons the same opportunity for relief for similar claims.63

1. Consistency and due process concerns.

In addition to the harm resulting when relief is denied to potential class members due to a narrow definition of the class, other harms impact the core purposes underlying the class action mechanism, such as consistent judicial adjudication and due process concerns.64 Limiting the size of a class action also raises questions regarding judicial inefficiencies because of the potential for multiple individual legal actions concerning the same or similar issues, instead of one single, coordinated action.65 Furthermore, disparities can result from different choices about how classes are defined or interpreted. If a single, unified action may not be brought, numerous adjudications of the same issue by different courts may produce conflicting results.66


Judicial efficiency is an essential consideration in determining how exhaustion requirements translate to the class action context. This concern is particularly relevant in the context of administrative exhaustion because an underlying purpose of the doctrine is to achieve increased judicial efficiency.67 Concerns re-

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59 Id at 420–26.
60 Id at 423–24.
61 Id at 403.
62 See Morawetz, 71 NYU L Rev at 403 (cited in note 56).
63 Id at 420.
64 Id at 424.
65 Id.
66 See Morawetz, 71 NYU L Rev at 425 (cited in note 56).
67 Id at 424.
Concerns regarding judicial inefficiencies arise when a narrow class definition will lead to subsequent litigation that will likely involve claims that could have or should have been part of the original case. Should a court decide that exhaustion is required of all class members, the class itself will certainly shrink to include only those members who have already exhausted their respective administrative remedies. Alternatively, the class may dissolve completely if most of the prospective plaintiffs have not pursued their respective avenues of administrative exhaustion. The result of mandatory class-wide exhaustion would be that the class action would proceed on a much smaller scale, or would not proceed at all, and the likelihood of future litigation regarding the same issues would increase.

Those individuals who were unable to seek redress from the court via the class action mechanism might then proceed through the channels of administrative exhaustion and return to court at a later time, most likely as individual plaintiffs. Depending on the number of individuals that return to court after exhausting their administrative remedies, courts could be awash in potentially duplicative litigation.

3. Equal protection concerns.

Another potential harm arising from the reduction of class size due to the administrative exhaustion requirement being applied in the class action context involves the issue of equal protection. Under Rule 23, the consequences of a narrow class definition merit increased judicial attention because the decision regarding who should and should not be included in the class is tantamount to a court-sanctioned determination of who should be treated equally. The Supreme Court has recognized this danger and held that in some circumstances, the interest of an individual in obtaining immediate review may weigh against requiring exhaustion. If individual interests are not considered, all prospective class members may have similar claims, but only some of those individuals—namely those included in the class—will have their claims adjudicated. Those who are excluded from class

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68 Id.
69 Id at 425.
70 See Morawetz, 71 NYU L Rev at 426 (cited in note 56).
71 Id.
72 Id at 425–26.
74 See Morawetz, 71 NYU L Rev at 425 (cited in note 56).
membership will have to bring separate suits in order to have their claims heard.

B. Whether to Require Class-Wide Administrative Exhaustion

Usually, exhaustion by one named representative of a class is sufficient to meet the exhaustion requirement. The D.C. Circuit has held that "[t]he doctrine requiring exhaustion of administrative remedies applies to class actions as well as individual actions . . . . It is generally agreed that exhaustion by at least one member of the class is a necessary prerequisite for a class action." Despite this generalization, courts have struggled to apply the administrative exhaustion requirement in numerous class actions brought under various statutes, such as the Social Security Act, Title VII, and the PLRA. These statutes all contain exhaustion requirements articulated for an individual, but are silent as to the requirements for exhaustion in the context of class actions.

Courts frequently have interpreted administrative exhaustion requirements codified in statutes such as the Social Security Act and Title VII as not requiring class-wide administrative exhaustion. By analogy, the rationale behind the waiver of the exhaustion requirement in Title VII and the Social Security Act contexts applies to an analysis of the PLRA's exhaustion requirement.

C. The Social Security Act

Lawsuits brought under the Social Security Act have addressed the issue of translating individual administrative exhaustion requirements into the class action context. Courts have articulated the requisite individual exhaustion requirement and

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75 See, for example, Albemarle Paper Co v Moody, 422 US 405, 414 n 8 (1975) (holding that if a named class member has exhausted administrative remedies, exhaustion is not required for other class members).

76 Phillips v Klassen, 502 F2d 362, 369 (DC Cir 1974) (emphasis added). See also Barela v United Nuclear Corp, 462 F2d 149, 153 (10th Cir 1972) (holding that once a basic complaint has been administratively processed, a class action can be maintained); Oatis v Crown Zellerbach Corp, 398 F2d 496, 499 (5th Cir 1968) (holding that it is not necessary that class members bring an administrative charge as a prerequisite to joining as co-plaintiffs but that it is sufficient that they are in a class and assert the same or some of the same issues).

77 See 42 USC § 405(g); 42 USC § 2000e-5; 42 USC § 1997e.

78 See, for example, Albemarle, 422 US at 414 n 8 (holding that unnamed class members in a Title VII case need not have filed charges with the EEOC); Califano v Yamasaki, 442 US 682, 699–700 (1977) (holding that there is no clear congressional intent to limit class relief under the Social Security Act).

79 See, for example, Marcus v Sullivan, 926 F2d 604, 613 (7th Cir 1991).
have also indicated that discretion should be exercised when addressing the issue of class relief.\textsuperscript{80}

1. The judicial treatment and review of administrative decisions under the Social Security Act.

Section 405(g) of the Social Security Act allows for judicial review of Social Security Administration decisions provided the claim first receives a “final” decision from the administrative agency.\textsuperscript{81} The Supreme Court held that, for the administrative decision to be considered “final,” the claimant must fulfill two requirements.\textsuperscript{82} The first requirement is strictly nonwaiveable and calls for a claimant to first present a claim for benefits to the Social Security Administration.\textsuperscript{83} The second requirement dictates that a claimant exhaust all administrative remedies before bringing his or her claim in federal district court.\textsuperscript{84} The Court explicitly found this second requirement was waiveable.\textsuperscript{85}

The Supreme Court has held that the traditional rationales and policies underlying the doctrine of administrative exhaustion are applicable in cases arising under the Social Security Act.\textsuperscript{86} The Court noted that congressional intent behind agency delegation should be respected; hence, the “doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue.”\textsuperscript{87} The Court also held that agency autonomy and efficiency should be taken into consideration when applying the doctrine, noting:

\begin{quote}
[e]xhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.\textsuperscript{88}
\end{quote}

\textsuperscript{80} See Califano, 442 US at 698–700.
\textsuperscript{81} 42 USC § 405(g).
\textsuperscript{82} See Mathews v Eldridge, 424 US 319, 328 (1976).
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{87} Id at 765, citing Parisi v Davidson, 405 US 34, 37 (1972).
\textsuperscript{88} Salfi, 422 US at 765.
Pursuant to the Social Security Act’s provisions, courts must give the Secretary of the Department of Health, Education, and Welfare appropriate deference, allowing him much leeway in determining under what circumstances full exhaustion of administrative remedies will be required. The Supreme Court, when examining the Social Security Act’s exhaustion requirement provisions, held that “[t]he term ‘final decision’ is not only left undefined by the Act, but its meaning is left to the Secretary to flesh out by regulation.” The Court subsequently held that “[t]he statutory scheme is thus one in which the Secretary may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration.” In deferring to the agency’s administrative judgment to further one of the underlying goals of the exhaustion doctrine, namely increased efficiency, the Court concluded that “it would be inconsistent with the congressional scheme [for a court] to bar the Secretary from determining in particular cases that full exhaustion of internal review procedures is not necessary for a decision to be ‘final’ within the language of § 405(g).”

The Secretary is entitled to make individual determinations regarding whether or not the exhaustion requirement need be fulfilled in each case. However, courts also may exercise discretion in determining when sufficient administrative avenues have been pursued. The Supreme Court held that “[o]nce a benefit applicant has presented his or her claim at a sufficiently high level of review to satisfy the Secretary’s administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest.” Courts do not have to require that the claimant exhaust his or her administrative remedies before seeking judicial review because this second prong of the “final decision” requirement is not jurisdictional and may be waived. Thus, the courts have the discretion to de-

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89 See id at 766-67.
90 Id at 766. See 42 USC § 405(a) (2000) (regarding the Secretary’s authority to promulgate regulations not inconsistent with the Act).
91 Salfi, 422 US at 766.
92 Id at 766–67.
93 See id.
94 Id at 765–66.
95 Salfi, 422 US at 765–67 (noting that this rationale is applicable to show why the administrative exhaustion requirement may be waived in class action circumstances). See also Part II B 2.
96 Eldridge, 424 US at 328.
termine whether the second element of the "final decision" requirement needs to be met in any given case.\textsuperscript{97}

2. The administrative exhaustion requirement and class actions under the Social Security Act.

For class actions brought under the Social Security Act, membership is limited to claimants who have exhausted their remedies, as well as those who still had an opportunity to do so when the suit was filed.\textsuperscript{98} Although administrative exhaustion is required under the Act to bring an action, the requirement that all class members fully exhaust their administrative remedies is waiveable by a court under certain circumstances.\textsuperscript{99} Waivability of the exhaustion requirement has the potential to largely impact the dynamic between the exhaustion requirement and class actions under the Act.

The Supreme Court has spoken directly to the issue of class relief and the need for discretion when applying the administrative exhaustion requirement of the Social Security Act.\textsuperscript{100} Class relief is appropriate under some circumstances.\textsuperscript{101} When analyzing the Act's exhaustion requirement provision, the Court noted that "[s]ection 205(g) [as amended by § 405(g)] contains no express limitation of class relief \ldots [and instead] prescribes that judicial review shall be brought by the usual type of 'civil action' brought routinely in district court in connection with the array of civil litigation."\textsuperscript{102} The Court went on to hold that the language of the statute may not be construed as limiting the class action mechanism under the Act.\textsuperscript{103} It "[did] not find in § 205(g) the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure."\textsuperscript{104}

The Seventh Circuit has held that cognizable class actions brought under the Social Security Act are limited to those class

\textsuperscript{97} See Bowen v City of New York, 476 US 467, 486 (1986) (holding that waiver of exhaustion of administrative remedies requirements as to those claimants whose time to pursue further administrative appeals had lapsed, as well as those claimants who still had time to seek review at time suit was filed was warranted).

\textsuperscript{98} See Marcus, 925 F2d at 613.

\textsuperscript{99} See id.

\textsuperscript{100} See Califano, 442 US at 699–700.

\textsuperscript{101} See id at 701.

\textsuperscript{102} Id at 699–700.

\textsuperscript{103} Id.

\textsuperscript{104} Califano, 442 US at 700.
members who have satisfied the first element of the statutory requirement, that a claim be filed with the Secretary, even if the claimants have not exhausted all possible administrative remedies.\textsuperscript{106} Noting that waiver of the exhaustion requirement is often preferable, the Seventh Circuit explained that if the traditional purposes underlying administrative exhaustion—including agency autonomy, the compilation of an adequate record, and providing the parties an opportunity to benefit from agency expertise—are not furthered by requiring class-wide exhaustion, waiver of the exhaustion requirement is favored.\textsuperscript{106}

In a pair of decisions regarding class actions filed pursuant to the Social Security Act, the Seventh Circuit established this modification of the Act’s exhaustion requirement.\textsuperscript{107} In \textit{Johnson v Sullivan},\textsuperscript{108} the court found that claimants who had already exhausted their administrative remedies and those claimants who still had an opportunity to do so when the class action was filed should remain in the plaintiff class.\textsuperscript{109} In a subsequent class action brought under the Social Security Act, \textit{Marcus v Sullivan},\textsuperscript{110} the Seventh Circuit again upheld waiver of exhaustion for all class members who had already filed claims with the Secretary but had not necessarily received a “final decision” on those claims.\textsuperscript{111} The court in \textit{Marcus} noted that “[b]ecause the plaintiff class in this case includes only claimants with live claims, \textit{Johnson} dictates that waiver of exhaustion is appropriate for all class members.”\textsuperscript{112} These decisions may be construed as having a limiting effect on class membership. However, these holdings also indicate that waiver of the exhaustion requirement is appropriate, even in instances where the exhaustion requirement is more broadly construed to encompass \textit{all} live claims, including the claims of individuals who have not completely exhausted their administrative remedies.

\begin{footnotes}
\item[106] See \textit{Johnson v Sullivan}, 922 F2d 346, 355 (7th Cir 1990). See also \textit{Marcus}, 926 F2d at 613 (noting that waiver of exhaustion is appropriate for all class members who have not allowed their appeals period to expire under \textit{Johnson}).
\item[107] See \textit{Marcus}, 926 F2d at 614, citing \textit{Salfi}, 422 US at 765.
\item[108] See \textit{Johnson}, 922 F2d at 346; \textit{Marcus}, 926 F2d at 604.
\item[109] Id at 355.
\item[110] Id.
\item[111] See \textit{Marcus}, 926 F2d at 604.
\item[112] Id at 613.
\end{footnotes}
D. Title VII

1. Title VII claims and class actions.

Title VII of the Civil Rights Act, like the Social Security Act, contains an exhaustion requirement stipulating that individuals must exhaust their administrative remedies before pursuing legal action. The interaction between the administrative exhaustion doctrine and class actions arises in suits for claims of employment discrimination brought under Title VII of the Civil Rights Act. Title VII was passed with the intent to promote equality in the workplace by prohibiting discriminatory employment practices based upon one's "race, color, religion, sex, or national origin." In *Kremer v Chemical Construction Corp*, the Supreme Court held that the adjudication of civil rights and other federal objectives by administrative agencies must be checked by judicial review. In *University of Tennessee v Elliott*, the Court also indicated that "Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims." The Court felt that the goal of prohibiting workplace discrimination was too important to allow agency decisions to go unchecked.

2. Title VII class action administrative exhaustion requirement.

The Supreme Court has held that the exhaustion requirement contained in Title VII does not require that all class members exhaust their individual administrative remedies before bringing a class action pursuant to Title VII. The Court held that under Title VII, if a single named class member has ex-
hausted his or her administrative remedies, then other class members need not do so to be included in the class, even in cases involving money damages rather than injunctive relief. The Court went on to explain that the legislative history of the statute clearly demonstrated that Congress ratified this construction of the Act in subsequent legislation.

The circuit courts have followed the Supreme Court's guidance in applying the administrative exhaustion doctrine to Title VII class actions. If the purpose of the exhaustion doctrine is not fulfilled by requiring complete administrative exhaustion for all class members, it would be senseless to require that each and every class member file an individual claim. Thus, the D.C. Circuit held that "[w]here the two claims are so similar that it can fairly be said that no conciliatory purpose would be served by filing separate [Equal Employment Opportunity Commission ("EEOC")] charges, then it would be 'wasteful, if not vain' to require separate EEOC filings." The Fifth Circuit has stipulated that the better approach to the exhaustion requirement in a class action context "would appear to be that once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated." Accordingly, the court held that "it is not necessary that members of the class bring a charge with the EEOC as a prerequisite to joining as co-plaintiffs in the litigation. It is sufficient that they are in a class and assert the same or some of the same issues."

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121 See id.
122 Id.
123 See, for example, Romasanta v United Air Lines, Inc, 717 F2d 1140, 1157 (7th Cir 1983) ("[I]t is well established that, in a Title VII class action, unnamed plaintiffs are not precluded from class membership merely because they did not individually file timely [Equal Opportunity Employment Commission] charges."); Foster v Gueory, 655 F2d 1319, 1322 (DC Cir 1981) (finding that the critical factor in determining whether an individual Title VII plaintiff must file an EEOC charge, or may escape the requirement by joining with another plaintiff who has already filed such a charge, is the similarity of the two complaints).
124 Foster, 655 F2d at 1322.
125 Id, citing Oatis, 398 F2d at 498.
126 Oatis, 398 F2d at 498.
127 Id at 499. See also Allen v Amalgamated Transit Union Local 788, 554 F2d 876, 882 (8th Cir 1977) (holding that Title VII relief could not be denied to thirteen class plaintiffs who had not pursued administrative remedies); Wheeler v American Home Products Corp, 563 F2d 1233, 1238-39 (5th Cir 1977) (holding that wherever similarly situated persons intervene in an action and one or more of the original plaintiffs has satisfied the requisite exhaustion requirement, the class action may proceed).
This approach is similar to the approach taken in cases brought under the Social Security Act and Title VII. In class actions under the Social Security Act, modification of statutory exhaustion requirements is often preferable when furthering the traditional purposes underlying the doctrine. Similarly, the purpose of the exhaustion doctrine is not fulfilled by requiring complete class-wide exhaustion in the Title VII context. However, the standard under Title VII is broader than the standard under the Social Security Act because Title VII does not require class members to file an administrative claim. Because PLRA claims more closely resemble Title VII claims in that one claim sufficiently represents the claim of every other similarly situated individual, class-wide exhaustion should be similarly waived under the PLRA.

III. THE PLRA: THE UNANSWERED QUESTION

The PLRA was signed into law on April 26, 1996. The two goals of the PLRA are to curb frivolous prisoner lawsuits and to discourage courts from micromanaging prison systems. Various provisions of the PLRA substantially restrict prisoner litigation, affecting class action lawsuits challenging conditions of confinement and individual civil actions. Section 1997e(a) of the PLRA states that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” The exhaustion requirement contained in the PLRA is similar to the exhaustion requirements in both the Social Security Act and Title VII. Section 1997e(a) of the PLRA has been interpreted by courts as clearly barring suits by individual

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128 See Johnson, 922 F2d at 352–55.
129 See Foster, 655 F2d at 1322.
130 See Oatis, 398 F2d at 498.
132 See Zehner v Trigg, 952 F Supp 1318, 1324 (S D Ind 1997), citing legislative history.
inmates who have not yet exhausted their administrative remedies.\(^{135}\)

A. Cases Raising Section 1997(e)(a)’s Exhaustion Requirement but Decided on Different Grounds

Courts have not yet had occasion to address directly whether all class members need exhaust their administrative remedies under the PLRA. Cases that have raised the issue of class actions under the PLRA and the implication of the exhaustion requirement contained in Section 1997e(a) have all been decided on different grounds.\(^{136}\) For example, in *Jones v Goord*,\(^{137}\) the issue of the PLRA’s exhaustion requirement for a class in which every member failed to exhaust administrative remedies was raised but the court allowed the original four plaintiffs to amend their complaint under Rule 15 to avoid addressing the issue in the context of a class action.\(^{138}\)

In *Handberry v Thompson*,\(^{139}\) inmates ages sixteen to twenty brought an action against New York City for failure to provide educational services while they were incarcerated in a juvenile facility.\(^{140}\) The court held that it need not address the issue of administrative exhaustion and class certification because “[t]he Prison Litigation Reform Act of 1995 does not require prospective plaintiffs to avail themselves of the grievance procedure for issues outside the jurisdiction of the Department of Corrections.”\(^{141}\) Because the plaintiffs’ class claims for educational services fell beyond the power of the New York Department of Corrections, the class action was not affected by the PLRA’s exhaustion requirement.\(^{142}\) The court concluded that “[b]ecause the nature of relief sought by plaintiffs makes the exhaustion requirement inapplicable in this case, the court need not address the broader issue of whether the PLRA’s exhaustion requirement applies to

\(^{135}\) See, for example, *Perez v Wisconsin Department of Corrections*, 182 F3d 532, 534–35 (7th Cir 1999).

\(^{136}\) See, for example, *Jones ’El v Berge*, 172 F Supp 2d 1128, 1131 (W D Wis 2001) (holding that defendants waived affirmative defense that the case must be dismissed until every class member has exhausted administrative remedies).


\(^{138}\) See id at *4–5 (noting that the original four plaintiffs’ claims were filed before the passage of the PLRA and therefore were not subject to the Act).

\(^{139}\) 92 F Supp 2d 244 (S D NY 2000).

\(^{140}\) Id at 245.

\(^{141}\) Id at 248.

\(^{142}\) Id.
bona fide class actions in general. Since cases potentially raising the issue have been decided on other grounds, one might conclude there is a hesitancy or unwillingness on the part of the courts to affirmatively address the issue of administrative exhaustion and class actions under the PLRA.

B. Dicta Discussing Section 1997(e)(a)'s Exhaustion Requirement

Although no court has yet decided the question of whether all plaintiffs in a class action under the PLRA need satisfy Section 1997e(a)'s administrative remedy exhaustion requirement, several courts have discussed the issue in dicta. Such discussion has not resulted in a clear consensus among courts.

In *Hawker v Consovoy*, a New Jersey district court evaluated a proposed settlement to a prisoner class action suit. In ruling that the settlement agreement was both fair and reasonable, the court noted that “there is a significant risk that this class action would be barred by the PLRA because the Named Plaintiffs and class members may not have sufficiently exhausted administrative remedies.” This risk created an incentive for the plaintiff class to settle its claims.

Although the *Hawker* court implied that all class members, or at least all named plaintiffs, must exhaust their administrative remedies before filing a lawsuit, a federal district court in Wisconsin recently espoused a differing view. In *Jones 'El v Berge*, inmates at a high security prison brought a class action challenging the conditions of their confinement. The court denied the defendants' motion to dismiss because the defendants had “waived a defense that the case must be dismissed until every class member has exhausted his administrative remedies on the claims certified for class action” by failing to raise this issue in their initial response to the plaintiffs' complaint.
Although the *Jones ‘El* court dismissed the defendants’ claims on other grounds, it discussed in dicta the issue of whether or not each class member needed to exhaust his administrative remedies under the PLRA.\(^\text{152}\) The court believed that, because the overarching objective of the legislation was to afford prison officials the opportunity to resolve disputes internally and to limit judicial management of prisons, as long as prison officials have received a “single complaint addressing each claim in a class action,” the goal of the PLRA has been accomplished.\(^\text{153}\) Thus, the court concluded that “even if defendants had not waived the affirmative defense of failure to exhaust administrative remedies as to every member of the class, the exhaustion requirement would be satisfied by a showing that one or more class members had exhausted his administrative remedies with respect to each claim raised by the class.”\(^\text{154}\)

Other courts, also commenting in dicta on the issue of the PLRA’s administrative exhaustion requirement and its effect on the filing of class action lawsuits, seem to agree with the *Jones ‘El* court. The D.C. Circuit, in *Jackson v District of Columbia*,\(^\text{155}\) noted the strength of the plaintiffs’ argument that each individual plaintiff in the class need not have pursued available administrative remedies if at least one member of the class meets the filing prerequisite.\(^\text{156}\)

C. The Doctrine of Vicarious Exhaustion and the PLRA

The doctrine of vicarious exhaustion holds that “exhaustion of administrative remedies by one member of the class satisfies the requirement for all others with sufficiently similar grievances.”\(^\text{157}\) This doctrine has been espoused in various cases brought under Title VII.\(^\text{158}\)

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\(^{152}\) Id at 1131–33.

\(^{153}\) *Jones ‘El*, 172 F Supp 2d at 1133, citing *Smith v Zachary*, 255 F3d 446, 449 (7th Cir 2001).

\(^{154}\) Id at 1133.

\(^{155}\) *Jackson v District of Columbia*, 254 F3d 262 (DC Cir 2001).

\(^{156}\) Id at 269, citing *Foster v Gueory*, 655 F2d 1319, 1321–22 (DC Cir 1981).

\(^{157}\) *Hartman v Duffey*, 88 F3d 1232, 1235 (DC Cir 1996).

\(^{158}\) See, for example, *Foster*, 655 F2d at 1322–23 (“[T]he EEOC charge filed by one of the original plaintiffs served the principal functions of the EEOC requirement . . . . If it was impossible for the EEOC to effectuate a settlement of the original plaintiffs’ claim, there is no reason to believe that the EEOC would be successful in settling [the other members’] claims.”).
In cases addressing the issue of the exhaustion requirement under Section 1997e(a) of the PLRA, courts have indicated that the doctrine of vicarious exhaustion might be available to plaintiffs in a prisoner class action. For example, in Doe v Cook County, a case in which four juveniles housed in a temporary juvenile detention center sought declaratory and injunctive relief against certain practices and conditions of the center, an Illinois district court raised the idea that the doctrine of vicarious exhaustion might be viable under the PLRA. Similarly, in Rahim v Sheahan, another Illinois district court pointed out that the vicarious exhaustion doctrine has been applied in the Title VII context to class claims in which only the named plaintiff satisfied the statutory administrative exhaustion requirement. The court stated that it saw "no reason why this analysis should not apply equally to claims under the PLRA." An Ohio district court, however, suggested that "vicarious exhaustion" might be available to plaintiffs in a Rule 23(b)(2) class action lawsuit, but will not satisfy the PLRA's exhaustion requirement for plaintiffs in other cases.

D. Congressional Intent and the Legislative History of the PLRA

The legislative history of the PLRA has been examined in several non-class action cases in an attempt to ascertain congressional intent behind the exhaustion requirement. Congress made clear its intent to quell the "flood" of prison litigation in the courts. In Booth v Churner, the Supreme Court decided that

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159 See Doe v Cook County, 1999 US Dist LEXIS 18191, *12 n 5 (N D Ill) (noting that if, as plaintiffs argued, not all class members qualified as "prisoners" under the PLRA, the possibility of the doctrine of vicarious exhaustion could be raised); Rahim v Sheahan, 2001 US Dist LEXIS 17214, *23 (N D Ill) (noting that "[t]here are strong analytical analogies between vicarious waiver of the PLRA's exhaustion requirement and the doctrine of vicarious exhaustion of administrative remedies which has been recognized in the Title VII context").

160 1999 US Dist LEXIS 18191 (N D Ill).

161 Id at *12 n 5.

162 2001 US Dist LEXIS 17214 (N D Ill).

163 Id at *24.

164 Id.

165 Rule 23(b)(2) class actions are those where final injunctive relief with respect to the class as a whole is sought. See FRCP 23(b)(2).


167 See Zehner, 952 F Supp at 1324-25, citing legislative history. On an individual basis, courts have not had difficulty applying congressional intent (and exploiting the language in the PLRA) to decide that individuals bringing inmate lawsuits must exhaust
the PLRA requires procedural exhaustion "regardless of the fit between a prisoner's prayer for relief and the administrative remedies possible" based on an evaluation of congressional intent. In Booth, a state prisoner alleged that prison guards had used excessive force against him in violation of the Eighth Amendment of the Constitution. While the grievance system available to prisoners addressed the alleged complaints, it did not provide for recovery of money damages. The Supreme Court reasoned that Congress mandated a broad exhaustion requirement in enacting Section 1997e(a) of the PLRA. Consequently, an inmate seeking only money damages must first complete a prison administrative complaint process.

A court has commented that the clear intent of the PLRA, "as reflected in its title, is to curtail meritless prisoner litigation." In Cooper v Garcia, the court ascertained that "Congress intended to discourage 'frivolous and abusive prison lawsuits'... and to prevent convicted criminals from receiving 'preferential treatment' to that of 'average law-abiding citizens.'" Despite these analyses of legislative history, no court has yet addressed the issue of Congress's intent regarding § 1997e(a)'s exhaustion requirement in the class action context. Although the clear intent of Congress when passing the PLRA was to stem the tide of frivolous prison lawsuits, requiring class-wide exhaustion for prisoner lawsuits is not necessarily a means of achieving this end. The requirement that at least one class member exhaust his or her administrative remedies should be enough to accomplish Congress's goal. Rule 23 requires that all class members share a

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all available administrative remedies before proceeding to court. See, for example, Perez, 182 F 3d at 534–35. However, application of this intent to quell the increasing flow of prisoner lawsuits does not clearly translate to the class action context.


Id at 734.

Id.

Id at 739.

Booth, 532 US at 734.

Cooper v Garcia, 55 F Supp 2d 1090, 1094 (S D Cal 1999).

55 F Supp 2d 1090 (S D Cal 1999).

Id at 1094–95, citing 141 Cong Rec S7525 (May 25, 1995) (statement of Sen Dole).

It should be noted that in recent years, Congress has adopted a strategy of passing increasingly broad and ambiguous legislation that delegates controversial matters to administrative agencies. In doing this, Congress insulates itself from the political fallout associated with dealing directly with such issues. See Macey and Miller, 45 Vand L Rev at 666 (cited in note 10).

Cooper, 55 F Supp 2d at 1094, citing legislative intent.
common claim.\textsuperscript{178} If the claim has merit and proceeds through appropriate administrative channels before being litigated, then having one individual rather than a class of individuals pursuing that particular claim in an administrative context will not implicate the claim's merits.

IV. RESOLVING THE PLRA ISSUE

Class actions brought under the PLRA present an unsolved problem. No court has formally considered whether the exhaustion requirement contained in the PLRA extends to all individuals in the plaintiff class. This Comment argues that in the class action context, courts should subject the PLRA's exhaustion requirement to judicial interpretation and discretion in order to further the purposes of the doctrine. Given the underlying goals of the exhaustion doctrine and the analogies to both the Social Security Act and Title VII that may be drawn, courts should favor waiver of the PLRA's exhaustion requirement in the class action context.\textsuperscript{179}

A. Purposes of the PLRA

The issue of administrative exhaustion in the prison litigation context raises several unique concerns. First, unlike either the Social Security Act or Title VII, there are no uniform administrative procedures for inmates. Rather, these procedures vary from state to state.\textsuperscript{180} Second, administrative mechanisms are not necessarily equipped to handle all types of inmate claims.\textsuperscript{181}

When analyzing the PLRA's exhaustion requirement in the context of class actions, the unique issues presented by prison administrative exhaustion mechanisms must be recognized. First, one must address the issue of what constitutes an effective mechanism for prison administrative remedies.\textsuperscript{182} Studies have identified at least five principles an effective in-prison administrative mechanism must have: (1) some form of independent re-

\textsuperscript{178} See FRCP 23(a)(2) (mandating that "there are questions of law or fact common to the class").

\textsuperscript{179} Id.


\textsuperscript{181} Id at 643--45 (noting that cases not concerning conditions of confinement, cases seeking money damages, and cases seeking to overturn state statutes or regulations are all examples of claims in-prison administrative mechanisms cannot reach).

\textsuperscript{182} Id at 642.
view by persons outside of the correctional structure; (2) participation from both line staff and inmates in the design and operation of the mechanism; (3) short and enforceable time limits; (4) written responses with reasons for adverse decisions; and (5) advanced planning, leadership training, orientation, and evaluation of the mechanism.

Second, the availability of viable administrative remedies for inmates is an important concern given the exhaustion requirement codified in the PLRA. There are some jurisdictions in which the absence or inadequacies of an in-prison mechanism compels prisoner reliance on the courts for dispute resolution. The absence of remedies does not seem to imply a problem of equity or justice under the PLRA; if no mechanism exists for administrative exhaustion of claims, then one assumes that the inmate, or inmates, would proceed directly to court. However, requiring inmates to proceed through useless or inadequate in-prison administrative mechanisms may be futile and time-consuming.

Third, well-functioning in-prison mechanisms may not be sufficient for some prisoner claims. In-prison mechanisms cannot reach certain kinds of prisoner complaints, such as those unrelated to actions of prison officials or those where the officials are powerless to remedy the problems. The PLRA seems to recognize that prison administrative mechanisms are not designed for suits that might, for example, challenge the inmate's conviction or sentence. Thus, the PLRA ought only to apply to inmate suits challenging conditions of confinement and other claims of a similar nature.

Finally, requiring inmates incarcerated in jails to exhaust administrative remedies before pursuing litigation presents a unique problem. Inmates in local jails may not be incarcerated long enough to permit the exhaustion of administrative remedies. Under these circumstances, the class action mechanism is
perhaps the sole device which is able to address jail inmate concerns.\textsuperscript{192}

B. Using Canons of Construction to Interpret the PLRA's Exhaustion Requirement in the Class Action Context

Congress has become increasingly involved in the rulemaking dialogue, as seen in statutes such as the PLRA, Title VII, and the Social Security Act, by expressly mandating which persons may and may not litigate their claims in court.\textsuperscript{183} In the class action context, such exhaustion requirements and Rule 23 seem to have potentially competing interests.\textsuperscript{194}

1. Applying the canon disfavoring implied repeal.

In the past, courts have used the canon disfavoring implied repeal to rectify situations in which a Federal Rule was in tension or direct conflict with a more recently enacted statute.\textsuperscript{185} Given the increasing tendency of courts to use the canon in order to resolve conflicts between federal rules and statutes,\textsuperscript{196} a court might evaluate the utilization of the canon disfavoring implied repeal when determining whether or not the PLRA's exhaustion requirement extends into the class action context.

The first line of inquiry under the canon is to determine whether there is an irreconcilable conflict between a federal statute and a federal rule.\textsuperscript{197} The canon instructs that it is a "cardinal principle of statutory construction that repeals by implication are

\textsuperscript{192} See id ("An exhaustion requirement in these circumstances almost guarantees mootness. The solution for courts dealing with allegations of serious jail maladministration is not diversion of individual cases to administrative channels, but rather a class action under rule 23 . . . [A] class action permits the underlying issues to be resolved despite the release of the named plaintiff and makes systemic relief more appropriate. It also conserves judicial resources by resolving multiple claims in one proceeding."). Turner conducted his study at the Harvard Law School Center for Criminal Justice in the late 1970s—well before the enactment of the PLRA.


\textsuperscript{194} Compare Morawetz, 71 NYU L Rev at 423–24 (cited in note 56) (listing four basic purposes of class action) with McKart, 395 US at 193–94 (explaining the purposes of the administrative exhaustion doctrine).

\textsuperscript{195} See Genetin, 51 Emory L J at 701 (cited in note 193).

\textsuperscript{196} See id at 703 (referring to frequent lower court reliance on the canon disfavoring implied repeal).

\textsuperscript{197} Id.
disfavored. Courts have created stock exceptions to the canon disfavoring repeal. The most important exception is the "irreconcilable conflict" exception: when two provisions are irreconcilable, and a conflict exists, the latter constitutes an implied repeal of the former, to the extent of the actual conflict. Under this approach, if the two statutes are capable of co-existing, the courts must harmonize the statutes.

2. Potential conflict in rules: Rule 23 and the administrative exhaustion requirement under the PLRA.

The PLRA's exhaustion requirement is potentially in tension with Rule 23; however, there does not appear to be an irreconcilable conflict between the two rules. Under Rule 23, individuals with common questions of law or fact may join together as a class to adjudicate their cause of action. The purpose of class actions includes, among other things, the promotion of efficient and consistent adjudication. If the PLRA exhaustion requirement is applied to a case in which an individual is pursuing legal action, Rule 23 is not implicated. By holding that the PLRA's exhaustion requirement in the class action context calls for only one member of the class to satisfy the requirement before bringing a class action lawsuit, a court would be reconciling the purpose of Rule 23 with Congress's desire to demand that administrative remedies be exhausted before litigation by inmates is pursued.

3. "Opting out" of the decisional framework provided by the canons of construction.

Canons of construction provide a useful guide for judges when deciding cases, but judges can always "opt out" of the decisional framework provided by the canons and decide a particular case without invoking any canons of construction. As alternatives to using canons, judges can decide cases based on precedent.

So and Miller, 45 Vand L Rev at 649 (cited in note 10).
reasoning by analogy from a similar statute, or on grounds such as public policy, intrinsic fairness, or economic efficiency.\(^{206}\) It should be noted that not all of these justifications are equal.\(^{207}\) For example, policy justifications may trump other rationales in the judicial values espoused by the courts.\(^{208}\)

If judges can ascertain the policy implications of a decision or use reasoning by analogy from a similar statute, they might favor such approaches when the utilization of a canon of construction would produce competing and less desirable results.\(^{209}\) It does not make sense for a court to invoke nonpolicy justifications, such as canons of construction, when judges are able to determine the policy implications of a particular decision.\(^{210}\) In the context of the PLRA, a court is unlikely to reach a competing or less desirable result by using a statutory construction approach rather than a public policy approach. Both approaches would likely result in a judicial determination that the PLRA does not require class-wide administrative exhaustion.

Courts likely can ascertain the policy implications of requiring class-wide administrative exhaustion, or alternatively, of not requiring class-wide exhaustion of administrative remedies. Requiring class-wide administrative exhaustion would severely burden a potential plaintiff class.\(^{211}\) Concerns regarding fairness, equity, and judicial efficiency would be weighed with competing interests of administrative autonomy and possibly with congressional intent. Similarly, the reasoning by analogy approach is readily available to judges in the context of the PLRA. Because courts can easily utilize the public policy and reasoning by analogy approaches when addressing the issue of administrative exhaustion in class actions under the PLRA, judges will most likely favor these methods over the utilization of the statutory construction approach, reserving it for cases in which nonpolicy justifications are the only available methods of analysis.\(^{212}\)

\(^{206}\) Id.

\(^{207}\) Id at 556.

\(^{208}\) Id.

\(^{209}\) Macey and Miller, 45 Vand L Rev at 656 (cited in note 10).

\(^{210}\) Id.

\(^{211}\) See Morawetz, 71 NYU L Rev at 403, 424 (cited in note 56) (arguing that limiting a class can deny redress to persons who might have been included and can be a lost opportunity to reduce litigation costs).

\(^{212}\) Macey and Miller, 45 Vand L Rev at 659 (cited in note 10).
C. Parallels Between Class Actions Brought Under the Social Security Act and Title VII

1. Social Security Act class actions.

The Supreme Court's interpretation of the Social Security Act's exhaustion requirement for class actions assists in interpreting the PLRA's exhaustion requirement. The Supreme Court held that the Social Security Act provision could not be construed to limit the class action mechanism.213 Similarly, in the interests of judicial efficiency and protecting the rights of those involved, the exhaustion requirement under the PLRA should not be interpreted as limiting class actions.

Preliminarily, it should be noted that the first prong of the Social Security Act's "final decision" requirement requires a filing of a claim with the Secretary.214 In the context of the PLRA's exhaustion requirement, this would parallel an inmate's filing of a grievance or undertaking whatever initial administrative action is dictated by prison or state department of corrections policy. This parallel between the Social Security Act's exhaustion requirement and the PLRA § 1997e(a) exhaustion requirement helps address the question of whether individuals who have undertaken, but not completed, the process of exhausting his or her administrative remedies may join a class. If multiple individuals have the same complaint or grievance, administrative review of each and every administrative claim would be time-consuming and redundant. At the very least, if an inmate has filed an initial complaint with the proper prison officials or other appropriate administrative body but has not yet completed the entire process of the administrative review of the complaint, the inmate should not necessarily be precluded from joining a class action seeking to litigate a similar claim. In this scenario, the proper agency authorities are alerted to the complaint prior to litigation and have already had the opportunity to address the issue through the appropriate administrative channels. If this were the case, Section 1997e(a)'s parallel to the Social Security Act seems to indicate that an individual with "live" claims would be able to join such a class under Section 1997e(a).215

214 See Johnson v Sullivan, 922 F2d 346, 352 (7th Cir 1990).
215 See Marcus v Sullivan, 926 F2d 604, 613 (7th Cir 1991).
Like the exhaustion requirement for class actions brought pursuant to the Social Security Act, the Section 1997e(a) exhaustion requirement should be waived by a court in appropriate circumstances.\textsuperscript{216} A parallel between the second element of the Social Security Act's exhaustion requirement and Section 1997e(a) of the PLRA also exists. The exhaustion requirement under the Social Security Act is nonjurisdictional and may be waived.\textsuperscript{217} Similarly, the Sixth Circuit, in \textit{Wright v Morris},\textsuperscript{218} held that the exhaustion requirement under Section 1997e(a) seems not to be jurisdictional, but rather operates as an affirmative defense.\textsuperscript{219} Certainly the rationale used by the Seventh Circuit for the waiver of the exhaustion requirement in Social Security Act class actions is applicable to PLRA class actions as well.\textsuperscript{220} The purposes of requiring exhaustion under the PLRA are the same as the rationales underlying the exhaustion requirement in the Social Security Act.\textsuperscript{221} Both exhaustion requirements seek to maintain agency autonomy and promote agency efficiency, among other things.\textsuperscript{222} Giving effect to these policies and goals of the exhaustion requirement is of primary concern. Following the rationale used by the Seventh Circuit in \textit{Marcus},\textsuperscript{223} waiver of the exhaustion requirement in PLRA class actions would be appropriate.

\section*{2. Title VII class actions.}

In \textit{Jones v El}, the court indicated that PLRA class actions are analogous to employment discriminations class actions brought pursuant to Title VII.\textsuperscript{224} Because the exhaustion requirements under Section 1997e(a) of the PLRA and Title VII are so similar, the reasoning used in analyzing the Title VII exhaustion requirement can logically be extended to class actions brought pursuant to the PLRA. For Title VII cases, courts have found class-

\begin{footnotesize}
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\item \textsuperscript{216} Id.
\item \textsuperscript{217} \textit{Bowen v City of New York}, 476 US 467, 483 (1986).
\item \textsuperscript{218} 111 F3d 414 (6th Cir 1997).
\item \textsuperscript{219} Id at 420–21.
\item \textsuperscript{220} See \textit{Marcus}, 926 F2d at 614–15, as an example of the application of the Social Security Act's exhaustion requirement to a class action case.
\item \textsuperscript{221} See, for example, id at 614 (stating the purposes of exhaustion include allowing the agency to correct its own errors, compiling an adequate record, and affording parties the benefit of attorney's expertise).
\item \textsuperscript{222} See \textit{Weinberger v Salft}, 422 US 749, 765 (1975).
\item \textsuperscript{223} 926 F2d at 614–15.
\item \textsuperscript{224} 172 F Supp 2d at 1132.
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wide exhaustion senseless, unless the purpose of the doctrine is fulfilled by such a requirement. Thus, if one class member has exhausted his or her administrative remedies, other class members may not be required to exhaust their administrative remedies in order to be included in the class action.

Both Title VII and the PLRA involve the adjudication of civil rights and, therefore, the administrative proceedings and remedies addressing Title VII claims readily available for check by judicial review should apply to the PLRA as well. Waiting for an entire class of plaintiffs to exhaust their individual administrative remedies would frustrate the goal of efficient and timely judicial review. In class actions under the PLRA, as in class actions under Title VII, it would be wasteful to require individual exhaustion of administrative remedies for each class member in the class. Thus, the far better approach to the application of Section 1997e(a)'s exhaustion requirement would follow the Title VII model so that once an aggrieved person has raised a particular issue or set of issues through administrative procedure, he may bring an action on behalf of himself and others similarly situated pursuant to Rule 23.

CONCLUSION

The consequences of imposing administrative exhaustion requirements on class actions depend on numerous factors. Congress's intent when codifying the doctrine in a particular statute, the governmental and individual interests involved, and the underlying goals of the exhaustion doctrine, such as administrative autonomy and judicial efficiency, are all issues courts weigh in determining whether class-wide administrative exhaustion is required.

Judicial discretion permeates this area of the law. Courts have found waiver of exhaustion requirements appropriate under some circumstances. The Social Security Act's exhaustion re-

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222 See, for example, Foster v Gueory, 655 F2d 1319, 1322 (DC Cir 1981).
223 Id.
224 University of Tennessee v Elliott, 478 US 788, 796 (1986) ("Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims.").
225 See Romasanta v United Air Lines, Inc, 717 F2d 1140, 1157 (7th Cir 1983).
226 See Oatis v Crown Zellerbach Corp, 398 F2d 496, 498 (5th Cir 1968) ("It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC.").
227 Id.
requirement appears, facially, to limit class actions to classes in which all individuals have exhausted other administrative remedies; however, courts have held that judicial discretion may be exercised when policy concerns favor waiver. In Title VII class actions, courts consistently have held that the civil rights of the class at issue are sufficiently important as to favor expediting judicial review and thus waiving further exhaustion requirements. Similarly, a court addressing Section 1997e(a) of the PLRA in a class action context will weigh issues such as the class’s rights, concerns of judicial efficiency, and the adequacy of administrative remedy for individual class members. By employing this test, courts should exercise judicial discretion to waive the exhaustion requirement for each class member.

231 See Part II B 2.
232 See Part II C 2.