NOTE

Taliaferro v. Darby Township Zoning Board: Pretextual Recognition of § 1983 Standing to Mitigate Failure to Recognize Standing Under § 1981

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TABLE OF CONTENTS

INTRODUCTION 743
I. THE LAW: PERPETUATING THE UNJUSTICIABILITY OF CHALLENGING EXCLUSIONARY ZONING 745
  A. *The Politics of Local Land Use: NIMBYs and Exclusionary Zoning* 746
  B. *Justiciability Doctrines* 749
    1. Article III Standing 750
    2. The Ripeness Doctrine 753
  C. *Justiciability of Challenges to Exclusionary Zoning* 756
    1. Justiciability of § 1983 Claims Challenging Exclusionary Zoning 756
    2. Justiciability of § 1981 Claims Challenging Exclusionary Zoning 758
II. *TALIAFERRO V. DARBY TOWNSHIP ZONING BOARD* 759
  A. *Factual and Procedural Background* 760
  B. *Rationale* 763

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III. THE THIRD CIRCUIT ERRONEOUSLY FOUND § 1983 STANDING BUT NOT § 1981 STANDING 764
A. The Court Erred by Failing to Apply the Ripeness Doctrine to the § 1983 Claim 764
B. The Court Erred in Denying Appellants § 1981 Standing by Failing to Consider Appellants' Alleged Injuries of Diminished Property Values and Neighborhood Blight 768
C. The Court's Holding Provides Racist NIMBYs with a Key to Federal Court 771
CONCLUSION 773

INTRODUCTION

Despite the Township's failure to post a notice, Sandra arrived in time for the public hearing.[1] More than forty years ago, the Township promised to build homes on the huge empty lot next to Sandra's home. Sandra and other black community members relished in anticipation that those homes would create additional housing for black families. However, the Township's white-dominated political majority had discouraged all efforts to build homes on the lot. Tonight, despite the Township's previous promise to build housing on the lot, the Township was holding a hearing to consider whether to approve the construction of an 800-unit self-storage facility.

Sandra and her neighbors showed up in force to oppose the zoning variance required to build the self-storage facility. The Township's zoning board members, however, denied them an equal opportunity to voice their concerns. When Sandra tried to speak, a board member yelled at her to sit down and threatened to kick her out of the meeting. Fuming, Sandra complied, and began to notice that board members only yelled at black persons and refrained from similar conduct towards white persons. At the end of the hearing, the Township's zoning board approved the construction of the self-storage facility.

Sandra's experience illustrates discriminatory zoning, a phenomenon that occurs when a town approves an undesirable land use for discriminatory reasons.[2] Discriminatory zoning also occurs when discriminatory motivations underlie a town's refusal to approve a land use.[3] After the Civil War, Congress enacted 42 U.S.C. § 1981

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[1] The following hypothetical is based in part on facts in *Taliaferro v. Darby Township Zoning Board*, 458 F.3d 181 (3d Cir. 2006). It is also based in part on allegations in the *Taliaferro* complaint. *See* Amended Complaint at 1-16, Taliaferro v. Darby Twp. Zoning Bd., 2005 U.S. Dist. LEXIS 4717 (E.D. Pa. Mar. 23, 2005) (No. 03-3554), *aff'd in part* & *rev'd in part*, 458 F.3d 181 (3d Cir. 2006).

[2] Marsha Ritzdorf, *Locked Out of Paradise: Contemporary Exclusionary Zoning, the Supreme Court, and African Americans, 1970 to the Present*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 43, 54-55 (June Manning Thomas & Marsha Ritzdorf eds., 1997) (listing examples of exclusionary zoning practices, including placement of garbage dumps and drug detoxification centers in residential neighborhoods); *see, e.g.*, Amended Complaint, *supra* note 1, at 3, 12-13 (alleging that zoning board harbored racist motivations in approving variance for self-storage facility in predominantly residential neighborhood comprised mostly of black residents). *See generally* June Manning Thomas & Marsha Ritzdorf, *Introduction* to URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY, *supra*, at 4, 5-6 (explicating on use of zoning to effect segregation of social groups despite Supreme Court's holding that race-based zoning is unconstitutional).

[3] *See* Warth v. Seldin, 422 U.S. 490, 495 (1975) (describing petitioner's

and 42 U.S.C. § 1983 to eradicate the lingering vestiges of racial discrimination in the South.[4] Despite the existence of these laws, racially discriminatory land use practices remain largely unjusticiable.[5] The Third Circuit Court of Appeals attempted to alleviate this unjusticiability in *Taliaferro v. Darby Township Zoning Board*.[6] The *Taliaferro* court did so, however, at the expense of the purpose of § 1981 and § 1983.[7]

The *Taliaferro* appellants alleged injuries of diminished property values and neighborhood blight under § 1981.[8] The Third Circuit, however, only considered those alleged injuries in its § 1983 analysis.[9] Therefore, despite appellants' allegations of intentional racial discrimination, the *Taliaferro* court held that appellants, as black

complaint against town's use of zoning to exclude certain groups of persons); *see also* FRANK J. POPPER, THE POLITICS OF LAND-USE REFORM 54 (1981) (describing use of zoning to maintain exclusive white suburbs by prohibiting building of rental housing); Ritzdorf, *supra* note 2, at 51 (noting *Warth v. Seldin* plaintiffs' challenge to town's use of exclusionary zoning to thwart construction of affordable housing). *See generally infra* note 22 and accompanying text (listing examples of neighborhood groups opposing projects for allegedly discriminatory reasons).

[4] *See* George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 307-22 (articulating legislative history of § 1981 and noting its purpose mirrors § 1983's purpose).

[5] Several federal statutes purportedly provide rights and remedies against racial discrimination. *See, e.g.*, 42 U.S.C. § 1981 (2000) (providing all persons with same rights as white citizens); *id.* § 1982 (2000) (providing all persons with same property rights as white citizens); *id.* § 1983 (2000) (providing civil action for deprivation of rights). Critics discount the statutes' efficacy and consider discriminatory zoning unjusticiable because they believe courts are antagonistic toward the enforcement of public rights against government. *See, e.g.*, LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 65 (1994) (noting Rehnquist Court's alleged suspicion of lawsuits aimed to enforce rights against governmental actions); *see also* BLACK'S LAW DICTIONARY 1347 (8th ed. 2004) (defining term "public right" as "right belonging to all citizens"); June Manning Thomas, *Race, Racism, and Race Relations: Linkage with Urban and Regional Planning Literature*, 4 (Dec. 15, 1997), http://www.acsp.org/Documents/Race_LitReview.pdf (describing exclusionary zoning and noting that Supreme Court has indicated challenges to exclusionary zoning will not come from bench); *cf.* Posting of Paul Boudreaux to Land Use Prof Blog, http://lawprofessors.typepad.com/land_use/2006/09/no_standing_for.html (Sept. 5, 2006). A case is unjusticiable if it is not suitable for judicial adjudication. BLACK'S LAW DICTIONARY, *supra*, at 882 (defining "justiciability" as "quality or state of being appropriate or suitable for adjudication by a court").

[6] *See* Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 190-92 (3d Cir. 2006).

[7] *See id.* at 181, 190-92; *see also infra* Part III.C (criticizing Third Circuit's holdings in *Taliaferro* for allowing NIMBYs to use § 1983 in contravention of § 1981 and § 1983's purpose to provide racial equality).

[8] Amended Complaint, *supra* note 1, at 15-16.

[9] *See Taliaferro*, 458 F.3d at 190-92; Amended Complaint, *supra* note 1, at 15-16.

community members, failed to establish standing under § 1981.[10] Instead, the court held that appellants, as neighboring property owners, established standing under § 1983 based on appellants' alleged injuries of diminished property values and neighborhood blight.[11]

This Note criticizes the *Taliaferro* opinion for its pretextual recognition of § 1983 standing to mitigate its failure to recognize standing under § 1981.[12] Part I begins with a discussion of local land use, examining exclusionary zoning. Part I also provides a brief overview of justiciability, particularly the justiciability of § 1983 and § 1981 claims. Part II outlines the Third Circuit's opinion in *Taliaferro*. Part III argues the court improperly recognized standing under § 1983 instead of § 1981. Specifically, Part III argues the court erred by not applying the ripeness doctrine, resulting in an erroneous holding that appellants had only established § 1983 standing. Moreover, the court should have found that appellants established § 1981 standing because they satisfied all three prongs of the Article III standing analysis. Finally, finding standing under § 1983 but not § 1981 contravenes both sections' purpose of protecting against discrimination. In short, the Third Circuit should have recognized only § 1981 standing, furthering the sections' purpose to eradicate discrimination.

I. THE LAW: PERPETUATING THE UNJUSTICIABILITY OF CHALLENGING EXCLUSIONARY ZONING

Federal courts have failed to provide genuine remedies for victims of exclusionary zoning, which continues to plague cities and towns

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[10] *Taliaferro*, 458 F.3d at 186, 191-92. "Standing" is defined as a "party's right to make a legal claim . . . To have standing in federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the . . . constitutional guarantee in question." BLACK'S LAW DICTIONARY, *supra* note 5, at 1442; *cf. id.* at 960 (defining term "locus standi" as "right to bring an action or to be heard in a [judicial] forum").

[11] *Taliaferro*, 458 F.3d at 190-91. Possibly, the *Taliaferro* court chose to recognize pretextual standing under § 1983 given the inherent difficulty in challenging racially discriminatory zoning under § 1981. *See supra* note 5 and accompanying text; *see also infra* Part I.C.2 (noting difficulty of asserting § 1981 claim).

[12] *See* BLACK'S LAW DICTIONARY, *supra* note 5, at 1225 (defining term "pretext" as "false or weak reason or motive advanced to hide the actual or strong reason or motive"); *infra* Part III; *cf.* Whren v. United States, 517 U.S. 806, 809 (1996) (restating petitioner's characterization of police officer stopping car for traffic violation as pretextual when officer's true motivation was to investigate illegal drug activity).

throughout the United States.[13] The unjusticiability of exclusionary zoning challenges stems from the narrow manner in which federal courts have applied justiciability doctrines, particularly the Article III standing doctrine.[14] A thorough analysis of the Third Circuit's holding in *Taliaferro* requires an explanation of these doctrines as applied to exclusionary zoning challenges.[15]

A. The Politics of Local Land Use: NIMBYs and Exclusionary Zoning

Exclusionary zoning is the use of zoning to construct and preserve exclusionary enclaves by excluding certain populations.[16] The term

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[13] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 516-18 (1975) (upholding ordinances that effectively excluded poor persons because plaintiffs failed to establish standing); Hope, Inc. v. County of Du Page, 738 F.2d 797, 807 (7th Cir. 1984) (holding that plaintiffs failed to establish standing in challenge against County's allegedly discriminatory housing practices); Constr. Indus. Ass'n of Sonoma County v. Petaluma, 522 F.2d 897, 908-09 (9th Cir. 1975) (upholding town's housing permit limitation even though it excluded poor persons from living in town because it was not arbitrary); Ybarra v. Los Altos Hills, 503 F.2d 250, 254 (9th Cir. 1974) (finding that although town's ordinance excluded poor persons, it was justified by town's purpose to preserve town's rural character); *see* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 1013-14 (2000) (stating landowners and potential homeowners lose when towns promulgate exclusionary zoning ordinances); *infra* Parts I.C, III.C; *infra* note 22 (listing examples of NIMBYism).

[14] *See, e.g.*, *Warth*, 422 U.S. at 518 (upholding ordinances that effectively excluded poor persons because plaintiff failed to establish standing); Caswell v. City of Bloomington, 430 F. Supp. 2d 907, 912 (D. Minn. 2006) (finding that plaintiffs failed to establish standing to challenge zoning ordinance for lack of redressability); Colo. Mfd. Hous. Ass'n v. Bd. of County Comm'rs, 946 F. Supp. 1539, 1547 (D. Colo. 1996) (finding plaintiffs lacked standing to challenge denial of building permits for manufactured homes); Amended Complaint, *supra* note 1, at 10, 12, 15 (alleging Township introduced improper uses into predominantly black neighborhood); *see also* Debra Lyn Bassett & Rex R. Perschbacher, *The End of Law*, 84 B.U. L. REV. 1, 50-51 (2004) (arguing Supreme Court uses justiciability doctrines of standing, mootness, and ripeness to avoid adjudicating cases); discussion *infra* Part I.C (examining justiciability of § 1981 and § 1983 claims).

[15] *See Taliaferro*, 458 F.3d at 190-92 (applying standing doctrine to appellants' claims).

[16] Peter L. Abeles, *Planning and Zoning*, *in* ZONING AND THE AMERICAN DREAM 122, 124 (Charles M. Haar & Jerold S. Kayden eds., 1989); *see* Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 931-32 (1994) (noting municipality enacted exclusionary zoning ordinance against mentally disabled persons); Bailey H. Kuklin, *When Incommensurable Values Conflict — Thoughts on Mandelker's Environment and Equity: A Regulatory Challenge*, 49 BROOK. L. REV. 245, 253-55 (1983) (commenting on two models of exclusionary zoning and positing that one excludes groups based on income and race); Gregory D. Squires, *Demobilization of*

also refers to decisions authorizing the placement of undesirable land uses in certain neighborhoods.[17] Despite societal efforts to dispense with this form of discrimination, cities and towns continue to promulgate exclusionary ordinances.[18]

Municipal officials often adopt exclusionary zoning policies to appease NIMBYs.[19] NIMBY is an acronym for the phrase "Not In My Back Yard."[20] Generally, NIMBYs are neighbors who oppose certain

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the Individualistic Bias: Housing Market Discrimination as a Contributor to Labor Market and Economic Inequality, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 200, 206-07 (2007) (positing that exclusionary zoning reduces supply of affordable housing and causes disproportionate impact on blacks); *supra* note 3 and accompanying text. *But see* BLACK'S LAW DICTIONARY, *supra* note 5, at 1649 (defining phrase "exclusionary zoning" more narrowly as "zoning that excludes a specific class type of business from a district" as opposed to classes of people from certain areas or zones). *See generally* DAVID H. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION (1977) (analyzing pertinent exclusionary zoning issues to outline strategy for challenging exclusionary zoning practices).

[17] *See* Nadia I. El Mallakh, Comment, *Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?*, 89 CAL. L. REV. 1847, 1849 (2001) (listing examples of exclusionary tactics municipalities employ, including requiring minimum house or lot sizes and prohibiting anything but single family housing); *supra* note 2 and accompanying text.

[18] Melissa P. Stewart, *MI Court of Appeals Rules Township's Land Use Policy May Be Deemed Impermissibly "Exclusionary*," MICH. LAWS. WKLY., Jan. 8, 2007, http://www.accessmylibrary.com/coms2/summary_0286-29139817_ITM (discussing recent state court of appeals holding that town's zoning decision was impermissibly exclusionary); *see Stop Concentrating Affordable Housing in Cities*, COURIER-POST (Cherry Hill, N.J.), Jan. 14, 2007, § B, at 10G (noting municipalities' failure to comply with state supreme court ruling invalidating municipalities' zoning regulations designed to prevent building of affordable housing); *see also* Opinion, *Credits Preserve Town "Character*,*"* ASBURY PARK PRESS (N.J.), Jan. 12, 2007, *available at* http://www.app.com/apps/pbcs.dll/article?AID=/20070112/OPINION/701120386/1032 (criticizing state legislator's proposal for allowing municipalities to circumvent affordable housing requirements, thereby providing municipalities with exclusionary zoning tool). *See generally* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996) (exploring exclusionary zoning phenomenon, New Jersey Supreme Court's response to that phenomenon, and events leading up to that response).

[19] *See* Commonweal, Conversations with Advocates for Fair Growth: Introduction, http://www.commonweal.org/programs/fg_conversations.html (last visited Nov. 13, 2007) (claiming local municipal officials use zoning power to promulgate exclusionary ordinances); *cf.* Press Release, U.S. Dep't of Hous. & Urban Dev., Barriers to Minority Home Ownership (June 17, 2002), *available at* http://www.hud.gov/news/releasedocs/barriers.cfm (attributing low minority homeownership rates to exclusionary zoning caused by NIMBY syndrome, resulting in less affordable housing).

[20] Some sources limit the definition of NIMBY to a person who works toward preventing the introduction of a dangerous or unpleasant land use to her

developments in their neighborhood.[21] NIMBYs often protest certain land uses, such as affordable housing projects, based on discriminatory or racist motivations.[22]

Exclusionary zoning is not a new phenomenon; it has been in practice for at least sixty years.[23] After World War II, American cities engaged in urban renewal efforts that critics coined "Negro Removal."[24] To guide their renewal efforts, cities promulgated urban renewal plans, which articulated citywide land use policies for revitalization, preservation, and destruction.[25] The implementation of

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neighborhood. Word Spy, NIMBY, http://www.wordspy.com/words/NIMBY.asp (last visited Oct. 17, 2007). Others, however, use NIMBY to refer to persons or groups that oppose housing developments in their neighborhood, which all may not consider unwanted. *See* WordNet, http://wordnet.princeton.edu/perl/webwn (search "WordNet Search" for "NIMBY") (defining NIMBY as one who opposes placement of something in his or her own neighborhood but not in another's neighborhood).

[21] *See supra* note 20 and accompanying text.

[22] Racially motivated NIMBYism exists not only in the United States, but also worldwide. *See, e.g.*, Eric Berkowitz, *The Subway Mayor*, LA WKLY., Aug. 19, 2005, at 32 (noting accusations of politicians favoring NIMBYs in predominantly white neighborhood and referring to that neighborhood as "racist Westside NIMBYism"); Julia C. Mead, *Unlocking Affordable Housing*, N.Y. TIMES, May 15, 2005, at 14L (quoting local regional planning board chairman who stated NIMBYs sometimes oppose projects based on legitimate concerns, and other times on racism); Claudia Mel, *From Sweat Equity, A Real Community: Residents of Moro Cojo Had a Long Struggle Before Project Was Approved*, MONTEREY COUNTY HERALD (Cal.), Sept. 5, 2006, *available at* http://www.montereyherald.com/mld/montereyherald/ (describing difficulty in garnering approval for farmworker housing due to NIMBYs' protest that included racist statements made by opponents); Stewart Paterson, *Community Divided over Mosque Plan; Claims of NIMBYism over Project on Greenbelt Land*, HERALD (Glasgow), May 24, 2006, at 10 (quoting proponent of mosque's construction who implied NIMBYism is akin to racism and opponent who rebutted accusations by claiming they based opposition on planning grounds); *Social Housing Triggers Unsocial Fight*, TORONTO STAR, May 29, 2006, at B2 (quoting councilmember who described opposition to housing as opposition to undesirable people in neighborhood and analogizing councilmember's fights against racism to fight against racist NIMBYs).

[23] *See* sources cited *infra* notes 24-26 and accompanying text.

[24] Peter Hall, *The Centenary of Modern Planning*, *in* URBAN PLANNING IN A CHANGING WORLD: THE TWENTIETH CENTURY EXPERIENCE 20, 28 (Robert Freestone ed., 2000); Thomas & Ritzdorf, *supra* note 2, at 8.

[25] Sigmund C. Shipp, *Winning Some Battles but Losing the War?: Blacks and Urban Renewal in Greensboro, NC, 1953-1965*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY, *supra* note 2, at 187, 187. The Housing Act of 1937 called on cities to develop comprehensive plans for the entire city to clear slums and revitalize downtowns. *Id.* at 187-88 (discussing President Roosevelt's New Deal legislation, Housing Act of 1937, which provided federal funds for "urban renewal"). The Act further authorized awarding federal funds to cities that adopted these urban renewal plans. *Id.* Black neighborhoods constituted an overwhelming proportion of the Act's targeted areas of slums and downtowns. *Id.* For this reason, blacks became the

these plans marginalized minorities, producing urban concentrations of minorities "ringed by white suburbia."[26]

Today's urban renewal efforts and their exclusionary effects have shifted in form but not substance.[27] Technically, urban renewal efforts no longer target or exclude specific racial groups.[28] Substantively, however, modern urban renewal efforts expand the pool of exclusionary zoning victims, disproportionately affecting disenfranchised populations such as low-income persons.[29] Unfortunately, the unjusticiability of exclusionary zoning claims exacerbates these victims' frustrations with this form of discrimination.[30]

B. Justiciability Doctrines

Justiciability constitutes a threshold determination of whether a case is suitable for judicial adjudication.[31] Before a federal court exercises its judicial power, a case must comply with several justiciability

disproportionate victims when cities implemented these plans. *Id.*

[26] Hall, *supra* note 24, at 28-29; *supra* text accompanying note 24. The inequitable consequences of these urban renewal efforts spurred a backlash movement for public participation in the local planning processes. Hall, *supra* note 24, at 30. Prior to the 1970s, professional planners dominated the city planning process. *See id.* at 29-30. However, citizenry empowered by the civil rights and anti-war movements became skeptical of the traditional "expert, top-down planning" perpetuated by an untrustworthy government. *Id.* The inception of public participation paved the road for modern day NIMBYs. See sources cited *supra* notes 19-22 and accompanying text for an exploration of the downfalls of NIMBYs' participation in the public planning process.

[27] *See, e.g.*, Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 185-87 (3d Cir. 2006) (describing Township approving self-storage facility but not low-income affordable housing).

[28] *See* Hall, *supra* note 24, at 32-33.

[29] *Id.* Modern victims of urban renewal include poor people, such as single parents, refugees, unemployed persons, seniors on fixed incomes, and people inhibited by disabilities. *Id.*

[30] *See* John J. Delaney, *Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation: Do Land Use Regulations That Preclude Reasonable Housing Opportunity Based upon Income Violate the Individual Liberties Protected by State Constitutions?*, 33 U. BALT. L. REV. 153, 156 (2004) (noting that even when courts look into merits of challenge against exclusionary zoning, claim nevertheless fails because court applies deferential standards of review); discussion *infra* Part I.B (providing overview of justiciability doctrines of Article III standing and ripeness); *infra* Part I.C (discussing justiciability of § 1981 and § 1983 claims).

[31] BLACK'S LAW DICTIONARY, *supra* note 5, at 882; *see* Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 677 (1990).

doctrines, including Article III standing and the ripeness doctrine.[32] Even if a plaintiff meets Article III's standing requirements, a court may nevertheless find ripeness lacking.[33]

1. Article III Standing

Before a federal court will adjudicate a case on its merits, the plaintiff must demonstrate she satisfies the threshold requirement of Article III standing.[34] Article III of the Constitution limits federal courts' jurisdiction to the consideration of cases and controversies.[35] Thus, a plaintiff only has standing to sue in federal court if her claim constitutes a case or controversy.[36] If her claim fails to meet this requirement, she lacks standing and thus her claim is unjusticiable.[37]

The Constitution provides no formula for determining whether a claim meets Article III's standing requirements — it defines neither cases nor controversies.[38] To resolve this ambiguity, courts formulated a three-prong test to determine whether a plaintiff has Article III standing.[39] This test requires: (1) an injury, (2) a causal

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[32] Chemerinsky, *supra* note 31, at 677; *see* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 153-54 (1987).

[33] Coliseum Square Ass'n v. Dep't of Hous. & Urban Dev., No. 02-2207, 2003 U.S. Dist. LEXIS 3367, at *17 (E.D. La. Feb. 27, 2003).

[34] DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1868 (2006) (holding lower court erred in considering case's merits where no standing existed); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975) (stating party bringing suit must establish standing to prosecute action)); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 227 (2003) (clarifying that standing does not depend on claim's merits, but rather claim's nature and source); *cf.* Virginia v. Hicks, 539 U.S. 113, 120-21 (2003) (finding first that plaintiffs established standing before proceeding to adjudication of merits); John C. Reitz, *Standing to Raise Constitutional Issues*, 50 AM. J. COMP. L. 437, 445 (2002) (noting commentators' concern that courts may cite lack of causation as excuse to dismiss claims courts disfavor on merits). *Contra* Kurt S. Kusiak, Note, *A Brief Review of Current Standing Doctrine*, 71 B.U. L. REV. 667, 682 (1991) (explicating that modern standing doctrine necessarily allows some review of merits before deciding standing and noting commentators' criticism of that as premature review).

[35] U.S. CONST. art. III, § 2; *see also* JAMES E. RADCLIFFE, THE CASE-OR-CONTROVERSY PROVISION 20 (1978) (stating that Article III courts may use their judicial power only when there exists case or controversy).

[36] *See* RADCLIFFE, *supra* note 35, at 20.

[37] *See* U.S. CONST. art. III, § 2; *see also* RADCLIFFE, *supra* note 35, at 20.

[38] U.S. CONST. art. III, § 2; RADCLIFFE, *supra* note 35, at 2-3.

[39] *See* Law Offices of Curtis v. Trinko, L.L.P., 305 F.3d 89, 97 (2d Cir. 2002); Doe v. Blue Cross Blue Shield of Md., Inc., 173 F. Supp. 2d 398, 403 (S.D. Md. 2001); Fair Employment Council v. BMC Mktg. Corp., 829 F. Supp. 402, 403-04 (D.D.C. 1993); *see also* Joan Leary Matthews*, Restrictive Standing in State NEPA and Land Use Cases:*

connection between the injury and the complained-of conduct, and (3) redressability of the claim.[40]

In order to satisfy the injury prong, a plaintiff must demonstrate harm to a legal right provided by the common law, the Constitution, or a statute.[41] The plaintiff must show either: (1) she suffered actual harm to that right or (2) the defendant threatened her with imminent harm to that right.[42] The harm may arise as an economic injury or an injury in another form.[43] If a plaintiff alleges a legally protected interest, the injury prong only requires a smidgen of harm.[44]

The causation prong of the Article III standing inquiry requires a plaintiff to show the challenged action likely caused the alleged injury.[45] If one link in the causal chain is contingent on a third party's actions, courts will find that the challenged action did not cause the injury.[46] In some cases involving allegations of racism, the Supreme Court has imposed more rigorous burdens of proof to establish causation.[47] Some speculate that the Court imposes such burdens

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Have Some States Gone Too Far?, 26 ZONING & PLAN. L. REP. 1, 1 (2003) (listing three prongs of standing test: (1) injury, (2) injury caused by defendant, and (3) redressable injury).

[40] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004); Bennett v. Spear, 520 U.S. 154, 162 (1997); Matthews, *supra* note 39, at 1.

[41] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 225 (2003) (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951).

[42] Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 188 (3d Cir. 2006); *see* Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (stating that alleging speculative, prospective injury is insufficient to establish standing and only definitely impending injury satisfies injury for standing). The potential for a swarm of lawsuits brought by activists who want to use courts as soapboxes to express their view justifies standing's injury requirement. YACKLE, *supra* note 5, at 69.

[43] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000) (recognizing harm to recreational, aesthetic, and economic interests as sufficient injury).

[44] United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14 (1973) (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968) (stating that smidgen of harm is enough to invoke court's judicial power and such harm is foundation for standing)); *see also* Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 177 (3d Cir. 2001).

[45] *McConnell*, 540 U.S. at 225. The Warren Court intertwined the causation and redressability prong analyses and did not conduct separate analyses. YACKLE, *supra* note 5, at 70. After showing injury, plaintiffs established standing if a favorable decision would redress the injury. *Id.* The Court presumed causation. *Id.*

[46] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 498 n.10 (1982); *see also* YACKLE, *supra* note 5, at 71.

[47] *See, e.g.*, Allen v. Wright, 468 U.S. 737, 753 (1984) (finding IRS's refusal to deny tax exemptions to schools that discriminate did not cause injury to black

because it is hostile to claims based on public rights — rights enjoyed by all citizens — against the government.[48] Conversely, in cases where economic rights are at stake, economic harm that is merely likely to occur satisfies the causation prong.[49]

The redressability prong of the Article III standing inquiry focuses on the link between the injury and the requested relief.[50] The plaintiff's requested relief must likely, not speculatively, remedy the injury.[51] As with the causation prong, courts require more to satisfy the redressability prong when public rights are at stake.[52]

The Supreme Court's holding in *City of Los Angeles v. Lyons* illustrates the difficulty plaintiffs encounter in asserting public rights.[53] In *Lyons*, the plaintiff sought an injunction against the use of chokeholds by the police after an officer's chokehold rendered him

children's interest in desegregated education); Warth v. Seldin, 422 U.S. 490, 505-07 (1975) (finding link between challenged ordinance that allegedly prevented construction of housing for blacks and injury of denial of housing were too weak to establish standing); *see* YACKLE, *supra* note 5, at 72 (providing examples of Supreme Court cases where Court found causation unmet); *cf.* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 44-46 (1976) (finding IRS regulation that removed tax benefits hospitals had received for providing non-emergency services to poor did not cause poor people injury due to hospitals refusing to provide non-emergency services).

[48] *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 586 (1985) (clarifying definition of public rights doctrine); BLACK'S LAW DICTIONARY, *supra* note 5, at 1347 (defining "public rights"); YACKLE, *supra* note 5, at 72.

[49] Clinton v. City of N.Y., 524 U.S. 417, 432-33 (1998) (holding that plaintiff established standing because challenged action caused high chance of economic injury); Arnold Tours, Inc. v. Camp, 400 U.S. 45, 46 (1970); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970) (finding plaintiffs established causal connection between competition and prospective loss of profits); *cf.* Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 510 (1998) (finding economic interest insufficient to satisfy standing because injury did not fall within relevant statute's zone of interest, not because injury was economic).

[50] *See Clinton*, 524 U.S. at 432-33.

[51] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (holding that paying penalties to government, not plaintiffs, had sufficient deterrent effect to satisfy redressability prong such that penalties would redress plaintiffs' injuries).

[52] *See, e.g.*, *Allen*, 468 U.S. at 757-58 (holding plaintiffs' requested relief did not redress alleged injury of segregated education); City of L.A. v. Lyons, 461 U.S. 95, 105-06 (1983) (finding requested injunction against police's chokehold use would not redress plaintiff's injury because plaintiff could not prove police would employ chokehold on him again); Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 191-92 (3d Cir. 2006) (finding appellants' requested relief of injunction insufficient to satisfy redressability prong); *see* YACKLE, *supra* note 5, at 73 (characterizing Supreme Court's approach to analyzing standing's redressability as analogous to its approach to causation).

[53] *See Lyons*, 461 U.S. at 105-06; *see also* YACKLE, *supra* note 5, at 74.

unconscious.[54] The Court held that the injunction failed to satisfy redressability because Lyons could not prove the police would apply the chokehold on him again.[55] As *Lyons* demonstrates, satisfying the three-prong test for Article III standing can be difficult in circumstances where public rights are at stake.[56] Even if a plaintiff successfully establishes Article III standing, the court may nonetheless find the claim unjusticiable for lack of ripeness.[57]

2. The Ripeness Doctrine

In addition to Article III's standing requirements, plaintiffs must also satisfy the ripeness doctrine.[58] While standing asks who may bring an action, ripeness asks when a plaintiff may bring an action.[59] By requiring ripeness, courts avoid entangling themselves in abstract disagreements with undeveloped facts, thereby preserving judicial resources for real controversies.[60]

In a ripeness inquiry, courts consider two factors in determining whether a case is ripe for adjudication.[61] First, courts ask whether the issue is fit for judicial review, considering whether facts are developed

[54] *Lyons*, 461 U.S. at 105-06.

[55] *See id.*

[56] *See Friends of the Earth*, 528 U.S. at 180-81; sources cited *supra* note 47 and accompanying text (noting and illustrating difficulties in satisfying causation prong of Article III standing); *supra* text accompanying notes 53-55 (providing example of difficulty in satisfying redressability prong of standing).

[57] *See* discussion *supra* Part I.B.1 (detailing Article III standing requirements, specifically, three-prong test); *infra* Part I.B.2 (describing ripeness doctrine).

[58] *See* Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 174 (3d Cir. 2001) (stating Article III's case and controversy requirement constitutes origins of ripeness doctrine like standing doctrine). The ripeness doctrine originates from both constitutional and prudential limitations. *See* Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003) (quoting Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993)) (stating ripeness doctrine stems from Article III of Constitution and listing prudential reasons for not exercising jurisdiction); *see also* DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1867 (2006) (stating that ripeness doctrine originates in Article III's language like standing); Nichol, *supra* note 32, at 174.

[59] *Joint Stock*, 266 F.3d at 174 (citations omitted).

[60] *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201 (1983) (citing Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967)); Wyatt v. Gov't of the V.I., 385 F.3d 801, 806 (3d Cir. 2004); McCarthy v. Ozark Sch. Dist., 359 F.3d 1029, 1037 (8th Cir. 2004).

[61] *See Nat'l Park*, 538 U.S. at 808, 814; *see also* Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1131 (9th Cir. 1998); Hinrichs v. Whitburn, 975 F.2d 1329, 1333 (7th Cir. 1992).

and sufficiently complete for meaningful judicial review.[62] Courts find a claim unfit for lack of finality if the claim hinges on contingent events.[63] For instance, claims against government entities usually remain unripe until the plaintiff has exhausted all available administrative reviews.[64] This is because unexhausted administrative reviews may resolve or negate the basis of the plaintiff's complaint.[65]

Second, courts ask whether the plaintiff will suffer hardship if the court dismisses the claim.[66] For example, in *Peake Excavating, Inc. v. Town Board of Hancock*, a landfill developer challenged a town's ordinance prohibiting landfills.[67] The Second Circuit found the plaintiff would suffer two substantial hardships if the court refused to determine the ordinance's constitutionality.[68] First, the plaintiff would have to pay hefty fees in applying for permits to comply with the potentially unconstitutional ordinance.[69] Second, the plaintiff would have to subject itself to the ordinance's criminal penalties in order to meet ripeness's finality requirement before qualifying for judicial review.[70] Because of these substantial hardships, the *Peake Excavating* court concluded the plaintiff's claim satisfied the ripeness doctrine.[71]

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[62] *See* cases cited *supra* note 61; *see also* Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1281 (D.C. Cir. 2005).

[63] *See, e.g.*, Brown v. City of Royal Oak, No. 05-1238 & No. 05-1483, 2006 U.S. App. LEXIS 26123, at *15 (6th Cir. Oct. 18, 2006) (noting "requisite finality"); County Concrete Corp. v. Twp. of Roxbury, 442 F.3d 159, 164 (3d Cir. 2006) (describing "finality rule" in zoning case and its application to substantive due process and equal protection claims); Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1292 (3d Cir. 1993) (stating that plaintiff must allow Township opportunity to reach final determination on how it will apply its zoning laws); *see* Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1237 (10th Cir. 2004).

[64] *See* Peachlum v. City of York, 333 F.3d 429, 434 (3d Cir. 2003); *see also Brown*, 2006 U.S. App. LEXIS 26123, at *15 (finding that plaintiff failed to meet ripeness's finality requirement because he could not show that pursuing further administrative action would not resolve his complaint).

[65] *See Brown*, 2006 U.S. App. LEXIS 26123, at *15; *Skull Valley*, 376 F.3d at 1237.

[66] *See Nat'l Park*, 538 U.S. at 808, 814; Khodara Envtl., Inc. v. Blakey, 376 F.3d 187, 197 (3d Cir. 2004); Peake Excavating, Inc. v. Town Bd. of Hancock, 93 F.3d 68, 72 (2d Cir. 1996); *see also Natural Res. Def. Council*, 146 F.3d at 1131; *Hinrichs*, 975 F.2d at 1333.

[67] 93 F.3d at 72.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *See id.*; *cf.* David Floren, *Pre-Enforcement Ripeness Doctrine: The Fitness of Hardship*, 80 OR. L. REV. 1107, 1125 (2001) (assessing courts' continual reevaluation of what hardships constitute sufficient hardship to satisfy ripeness).

Peake Excavating exemplifies courts' willingness to find a claim justiciable when economic rights are at stake.[72]

In some instances, courts have willingly found a particularly strong showing of hardship overcomes an issue of questionable fitness.[73] Scholars and courts sometimes fail to distinguish ripeness from the injury prong of the Article III standing analysis because these analyses are often indistinguishable.[74] For example, an anticipated injury that is speculative fails to satisfy both ripeness and the injury prong.[75] Given this overlap, one commentator has advocated for the need to maintain a distinction between a ripeness analysis and an injury prong analysis.[76] He argues that maintaining a distinction preserves the ripeness doctrine's effectiveness as a judicial tool to limit court involvement in abstract, unsettled disagreements.[77] More importantly, courts will also benefit because ripeness, unlike Article III standing,

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[72] *See Peake Excavating*, 93 F.3d at 72; *see also* Clinton v. City of N.Y., 524 U.S. 417, 432-33 (1998); Arnold Tours, Inc. v. Camp, 400 U.S. 45, 46 (1970); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970); Khodara Envtl., Inc. v. Blakey, 376 F.3d 187, 197-98 (3d Cir. 2004); *cf.* Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 510 (1998) (exhibiting Court's refusal to find claim asserting economic rights justiciable because claim failed to satisfy zone of interest justiciability doctrine, not because injury was economic).

[73] Airline Prof'ls Ass'n of the Int'l Bhd. of Teamsters, Local Union No. 1224 v. Airborne, Inc., 332 F.3d 983, 988 n.4 (6th Cir. 2003) (noting that unlike standing's injury prong where small injury is sufficient, size of harm is important for ripeness's hardship inquiry); McInnis-Misenor v. Me. Med. Ctr., 319 F.3d 63, 70 (1st Cir. 2003) (stating that in ripeness review, strong showing of hardship could overcome weak showing of fitness for review); Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir. 1995) (acknowledging possibility that strong showing of hardness may overcome questionable fitness for review).

[74] *See* Sabre, Inc. v. DOT, 429 F.3d 1113, 1120 (D.C. Cir. 2005) (acknowledging possibility of overlap between injury prong of standing and ripeness's hardship requirement); Women's Emergency Network v. Bush, 323 F.3d 937, 946-47 (11th Cir. 2003) (noting case represented prototypical example of ripeness and injury prong overlap); Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 174 (3d Cir. 2001) (quoting Nichol, *supra* note 32, at 172) (stating that in determining whether plaintiff asserted sufficient injury, ripeness and standing analysis virtually merge); *see also* Sarah Helene Duggin & Mary Beth Collins, "*Natural Born" in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 116 (2005) (noting overlap in analyses between ripeness and standing's injury prong). *But see* Chemerinsky, *supra* note 31, at 682 (suggesting that ripeness doctrine is unnecessary given overlap with standing's injury requirement).

[75] *See Joint Stock*, 266 F.3d at 174; *see also* Nichol, *supra* note 32, at 172-73.

[76] Nichol, *supra* note 32, at 174-75, 180-83.

[77] *Id.*; *see* Nkthtaqmikon v. Impson, No. CV-05-168-B-W, 2006 U.S. Dist. LEXIS 83720, at *17 (D. Me. Nov. 16, 2006); *see also* Hinrichs v. Whitburn, 975 F.2d 1329, 1333 (7th Cir. 1992).

allows substantive inquiries into a claim's merits.[78] When courts consider whether plaintiffs would suffer a hardship without judicial review, courts indirectly evaluate the claim's viability at trial.[79]

In sum, justiciability is the threshold determination in any case.[80] The Article III standing and ripeness doctrines guide courts in deciding whether to adjudicate a case on its merits.[81] In addition to applying these justiciability doctrines, however, courts sometimes impose additional pleading requirements for certain kinds of claims, including exclusionary zoning claims.[82]

C. Justiciability of Challenges to Exclusionary Zoning

A plaintiff seeking judicial review of alleged exclusionary zoning tactics must establish standing for each claim.[83] Therefore, exclusionary zoning victims asserting a § 1983 claim and a § 1981 claim must establish standing for each claim.[84] Courts apply varying pleading requirements to these claims involving exclusionary zoning challenges.[85]

1. Justiciability of § 1983 Claims Challenging Exclusionary Zoning

Section 1983 provides a remedy, or a right of action, for persons deprived of legal rights provided by statute or the Constitution.[86] Partly in response to the Ku Klux Klan's political influence in the

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[78] Nichol, *supra* note 32, at 180; *see also* cases cited *supra* note 73.

[79] *See* Nichol, *supra* note 32, at 180; *see also* Ky. Press Ass'n v. Kentucky, 454 F.3d 505, 509 (6th Cir. 2006) (noting ripeness inquiry considers whether trial record is sufficiently developed for adjudication on merits); New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995) (noting ripeness inquiry considers whether facts are sufficiently developed); *cf.* Ticor Title Ins. Co. v. Fed. Trade Comm'n, 814 F.2d 731, 741 n.16 (D.C. Cir. 1987) (reiterating holding in *Better Government Ass'n v. Department of State*, 780 F.2d 86, 94 (D.C. Cir. 1986), that in assessing hardship, court assumes plaintiff will prevail on merits).

[80] BLACK'S LAW DICTIONARY, *supra* note 5, at 882; *see* Chemerinsky, *supra* note 31, at 677.

[81] *See* discussion *supra* Part I.B.

[82] *See* discussion *infra* Part I.C.

[83] *See* Libertad v. Welch, 53 F.3d 428, 436-41 (1st Cir. 1995) (proceeding with standing analysis for each claim); Dienese v. McKenzie Check Advance of Wis., L.L.C., No. 99-C-50, 2000 U.S. Dist. LEXIS 20389, at *17 n.4 (E.D. Wis. Dec. 11, 2000) (stating that class representatives must have standing as to each claim).

[84] *Cf.* Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 186-87 (3d Cir. 2006) (listing appellants' claims against Township).

[85] *See* discussion *infra* Part I.C.

[86] *See* 42 U.S.C. § 1983 (2000).

South, Congress passed § 1983 as a means to enforce the Fourteenth Amendment.[87] Standing alone, § 1983 confers no rights; it only provides for a remedy against discriminatory acts by state actors.[88]

A plaintiff challenging a government entity's exclusionary zoning decisions under § 1983 faces a twofold pleading hurdle.[89] First, as in any case, she must establish Article III standing.[90] Second, she must properly allege the right's constitutional or statutory source.[91]

Because exclusionary zoning is an inconspicuous practice promulgated under the guise of legitimate zoning decisions, legal challenges under § 1983 are difficult.[92] Even if plaintiffs establish standing, the effects of exclusionary zoning practices are usually impossible to reify into coherent statistical facts for use as probative evidence.[93] For this reason, victims face more difficult pleading and

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[87] *See* Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape*, and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965), *reprinted in* A SECTION 1983 CIVIL RIGHTS ANTHOLOGY 4, 4 (Sheldon H. Nahmod ed., 1993) [hereinafter SECTION 1983 ANTHOLOGY]; Eric H. Zagrans, *"Under Color Of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499 (1985), *reprinted in* SECTION 1983 ANTHOLOGY, *supra*, at 19, 25-26, 29; *see also* 15 AM. JUR. 2D *Civil Rights* § 63 (2006).

[88] *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979) (stating that § 1983 fails to protect civil rights because it does not grant any substantive rights); *id.* at 617-18 (noting violation of § 1983 is impossible because § 1983 merely represents vehicle to remedy violation of citizen's rights); *see also* Steven H. Steinglass, *An Introduction to State Court Section 1983 Litigation*, *in* SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983, at 85, 89 (Mary Massaron Ross ed., 1998) [hereinafter SWORD & SHIELD] (stating that § 1983 provides remedy and confers no substantive rights). Section 1983's language limits remedies to circumstances where the defendant acted under the guise of a law. *See* 42 U.S.C. § 1983; *see also* Shapo, *supra* note 87, at 4; Zagrans, *supra* note 87, at 25-26, 29.

[89] YACKLE, *supra* note 5, at 65 (stating that in § 1983 action, plaintiff must show standing and right of action); *see also infra* note 91 and accompanying text (discussing pleading requirements for § 1983 action).

[90] *See* YACKLE, *supra* note 5, at 65-66; *see also supra* Part I.B.1 (discussing Article III standing doctrine).

[91] *See* YACKLE, *supra* note 5, at 65. The requirements of "deprivation of rights" and "color of law" constitute the two primary parts of § 1983. Jane K. Swanson, *Procedural Guide to § 1983 Litigation in Federal Court*, *in* SWORD & SHIELD, *supra* note 88, at 91, 91-94. The deprivation of rights phrase requires a plaintiff to cite "[a]ny rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The Supreme Court has construed the deprivation of rights requirement in such a way as to limit § 1983's remedy for federal rights violations. Swanson, *supra*, at 92-94. The color of law requirement requires that a defendant was acting "under color of any statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983. The Supreme Court has broadly construed this requirement to include authorized and unauthorized conduct under state and federal law. *See* Swanson, *supra*, at 91.

[92] *See supra* note 13 and accompanying text.

[93] *See Warth*, 422 U.S. at 505-07; *cf.* Lew Sichelman, *Does Low-Density Zoning*

evidentiary hurdles in exclusionary zoning suits asserted under § 1983.[94]

2. Justiciability of § 1981 Claims Challenging Exclusionary Zoning

Exclusionary zoning victims often couple § 1983 challenges with § 1981 challenges.[95] Unlike remedial § 1983, § 1981 provides a substantive right against racial discrimination.[96] Section 1981's legislative history suggests Congress intended to promote racial equality by providing a civil action against unequal treatment based on race.[97] In the exclusionary zoning context, § 1981 provides residents with a cause of action against a municipality for discriminatory zoning practices.[98]

A properly pleaded § 1981 claim alleges that the defendant deprived the plaintiff of a right that was available to a person of another race.[99] Only an action motivated by a discriminatory purpose that produces a

Affect Low Minority Populations?, REALTY TIMES, June 5, 2000, http://realtytimes.com/rtcpages/20000605_zoning.htm (crediting study with providing first definitive proof that low density zoning produces exclusionary effects).

[94] *Warth*, 422 U.S. at 505-07.

[95] *See, e.g.*, Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 186-87 (3d Cir. 2006) (recounting § 1983 and § 1981 claims against Township for allegedly discriminatory zoning practices); Cox v. City of Dallas, 430 F.3d 734, 736 (5th Cir. 2005) (reiterating plaintiffs' asserted racial discrimination claims under § 1981 and § 1983 for city's failure to control illegal dump); Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2006 U.S. Dist. LEXIS 37747, at *2-4 (N.D. Tex. May 24, 2006) (noting plaintiffs' asserted § 1981 and § 1983 claims against city for zoning decision which resulted in fewer city services in their neighborhood); Farrar v. Grochowiak, No. 03-C-6193, 2005 U.S. Dist. LEXIS 9511, at *33-39 (N.D. Ill. May 4, 2005) (analyzing plaintiff's § 1981 and § 1983 claims and finding them invalid challenges to city ordinance regarding zoning for businesses); Miller v. City of Dallas, No. 3:98-CV-2955-D, 2002 U.S. Dist. LEXIS 2341, at *14 (N.D. Tex. Feb. 14, 2002) (dividing plaintiffs' claims under § 1981 and § 1983 for city's discriminatory zoning into five categories, including zoning against industrial uses, floods, and landfills).

[96] *See* 42 U.S.C. § 1981 (2000) (providing all persons with same substantive rights as white citizens); *see also* Runyon v. McCrary, 427 U.S. 160, 168-69 (1976) (stating that § 1981 prohibits racial discrimination); *cf.* 15 AM. JUR. 2D, *supra* note 87, § 33 (characterizing § 1981 as remedial because it fails to confer federal courts with jurisdiction, which 42 U.S.C. § 1343 (2000), § 1981's jurisdictional counterpart, provides).

[97] Georgia v. Rachel, 384 U.S. 780, 791 (1966) (interpreting § 1981's legislative history as providing limited rights, namely racial equality); *see also* 15 AM. JUR. 2D, *supra* note 87, § 28.

[98] *See* Hall v. Pa. State Police, 570 F.2d 86, 91 (3d Cir. 1978); *see also* 15 AM. JUR. 2D, *supra* note 87, §§ 27, 31, 38.

[99] Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390-91 (1982).

discriminatory impact on a racial minority group violates § 1981.[100] Courts may infer a discriminatory purpose from the surrounding circumstances and the challenged action's impact.[101] The purposeful discrimination requirement generally makes prevailing under § 1981 more difficult than under § 1983.[102]

II. *TALIAFERRO V. DARBY TOWNSHIP ZONING BOARD*

In *Taliaferro*, the Third Circuit narrowly applied the Article III standing doctrine to find no standing under § 1981.[103] In recognizing § 1983 standing, the Third Circuit protected appellants' constitutional rights where violation of those rights produced economic harm.[104] By refusing to recognize § 1981 standing, however, the Third Circuit

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[100] *Id.* at 390 (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979)); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977)) (stating neutral law that disproportionately impacts one racial group is unconstitutional only if there was also discriminatory intent); *see also* Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 966 (D. Md. 1977) (noting that plaintiff may establish discriminatory intent for § 1981 by demonstrating that discriminatory purpose was motivating factor of challenged action); 15 AM. JUR. 2D, *supra* note 87, § 32. *Contra Gen. Bldg. Contractors*, 458 U.S. at 408 (Marshall, J., dissenting) (accusing majority of ignoring § 1981's purpose of countering racial discrimination and positing that courts should not require higher burden for proving purposeful discrimination).

[101] Amini v. Oberlin Coll., 440 F.3d 350, 358 (6th Cir. 2006) (stating that courts may directly or inferentially find intent element of § 1981 claim); Chambers v. Omaha Girls Club, 629 F. Supp. 925, 932-33, 947 (D. Neb. 1986) (citing *Arlington Heights*, 429 U.S. at 264-68) (interpreting *General Building Contractors*, 458 U.S. at 383, as allowing courts to infer discriminatory intent from challenged action's impact and circumstantial evidence); *Bethlehem Steel*, 440 F. Supp. at 966 (suggesting court may infer discriminatory intent from historical events). *But cf.* cases cited *supra* note 100 (stating that neutral law is unconstitutional only if accompanied by discriminatory purpose).

[102] *See* United States v. Nosrati-Shamloo, 255 F.3d 1290, 1292 (11th Cir. 2001) (noting difficulty in ascertaining intent and need for circumstantial evidence to prove intent); Guske v. Guske (*In re* Guske), No. 99-6070SI, 2000 U.S. App. LEXIS 392, at *8-9 (8th Cir. Jan. 13, 2000); *see also* Young Motor Co. v. Comm'r, 32 T.C. 1336, 1345 (1959) (stating that determining person's state of mind is always difficult); *cf.* United States v. Ollie, 442 F.3d 1135, 1142 (8th Cir. 2006) (noting difficulty in ascertaining officer's mindset); *supra* note 101 and accompanying text.

[103] *See* Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 190-92 (3d Cir. 2006) (applying standing doctrine narrowly to find § 1983 standing but not § 1981 standing); *see also* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 309 (1998) (asserting Burger and Rehnquist Courts have constricted standing doctrine, exacerbating difficulties in establishing standing); *infra* Part II.B.

[104] *See infra* Part II.B. *But see infra* Part III.

declined to extend appellants similar protection against immeasurable racial discrimination.[105]

A. Factual and Procedural Background

Taliaferro embodies the culmination of a forty-year racially and politically charged clash between the white majority and black minority in a small Pennsylvania township.[106] Darby Township is a racially divided community with a predominantly white neighborhood to the North of a predominantly black neighborhood.[107] Black residents of the Township often felt repressed by the white-dominated political majority, particularly with respect to a nine-acre parcel in their neighborhood ("Property").[108]

In 1960, Delaware County acquired the Property in the Darby Township and adopted a twenty-year Urban Renewal Plan ("Plan").[109] In 1967, consistent with the Plan, the County entered into an agreement with a redeveloper.[110] Despite the agreement, however, the Property remained undeveloped for over thirty years.[111]

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[105] *See infra* Part II.B. *But see infra* Part III.

[106] Taliaferro v. Darby Twp. Zoning Bd., No. 03-3554, 2005 U.S. Dist. LEXIS 4717, at *2 (E.D. Pa. Mar. 25, 2005).

[107] Amended Complaint, *supra* note 1, at 3.

[108] *See id.* at 6-9.

[109] Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 185 (3d Cir. 2006). In 1980, a Redevelopment Agreement superseded the Urban Renewal Plan. *See id.* at 186. No distinctions relevant to this Note's analysis exist between the Redevelopment Agreement and Urban Renewal Plan. Therefore, this Note synonymously refers to that Agreement and the original Plan as "the Plan."

[110] *Id.* at 185. The 1967 Agreement contained two real covenants, or covenants running with the land, which bound successors in land to promises made by previous owners of the land. *Id.*; *see* BLACK'S LAW DICTIONARY, *supra* note 5, at 393 (citing ROGER BERNHARDT, REAL PROPERTY IN A NUTSHELL 212 (3d ed. 1993)) (stating that courts will grant rights and impose duties of real covenants on subsequent owners). One covenant, which expired in 1980, restricted the Property's use to residential purposes. *Taliaferro*, 458 F.3d at 185. The other covenant, unlimited in duration, prohibited the Property's use for discriminatory purposes. *Id.* Arguably, this indefinite covenant bound Maureen Healy, as a subsequent owner of the land, not to use the property for discriminatory purposes. *See, e.g.*, Bob Layne Contractor, Inc. v. Bartel, 504 F.2d 1293, 1294 (7th Cir. 1974) (finding property covenants binding on subsequent owner). The court did not determine whether this covenant had any binding effect. *Taliaferro*, 458 F.3d at 190-92 (providing standing analysis on claims without addressing covenants).

[111] *See Taliaferro*, 458 F.3d at 185 (stating no development occurred from 1969 to 2002).

In 2002, Maureen Healy, a white woman, succeeded in ownership of the Property.[112] Because the Property's zoning limited development to residential use, Healy applied for a variance to build an 800-unit self-storage facility.[113] This shocked appellants, neighboring property owners and black community members, who thought the Plan only allowed the Township to approve housing.[114] They desired housing instead of a self-storage facility, hoping it would provide affordable homes for black families.[115]

Despite the Township's failure to properly give notice of the hearing on the variance, appellants attended the hearing and lobbied against Healy's variance request.[116] Consistent with the Plan, appellants believed the Township should only approve housing on the Property.[117] According to appellants, the Darby Township Zoning Hearing Board ("Board") exhibited racial bias at the hearing.[118] Specifically, the Board discriminatorily "shouted down" the black appellants and threatened to expel them, but never threatened Healy or others who were white.[119]

Despite appellants' protests, the Board granted the variance on May 8, 2003.[120] This infuriated appellants, who believed the Township's white-dominated majority approved the variance to perpetuate their political domination.[121] Appellants construed the variance's approval as a continuation of efforts to suppress the Township's black population, and consequently, the black vote.[122]

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[112] *Id.* at 185.

[113] *See id.*; *cf.* BLACK'S LAW DICTIONARY, *supra* note 5, at 1588 (defining "use variance" as "variance that permits deviation from zoning requirements for [land] use"); *id.* at 1588 (defining "variance" as "license or official authorization to depart from a zoning law").

[114] *Taliaferro*, 458 F.3d at 186; Taliaferro v. Darby Twp. Zoning Bd., No. 03-3554, 2005 U.S. Dist. LEXIS 4717, at *8 (E.D. Pa. Mar. 25, 2005).

[115] *Cf. Taliaferro*, 458 F.3d at 186-87, 191.

[116] *Taliaferro*, 2005 U.S. Dist. LEXIS 4717, at *5-6.

[117] *Id.* at *8.

[118] Amended Complaint, *supra* note 1, at 10.

[119] *Id.*

[120] *See Taliaferro*, 458 F.3d at 186 (noting Delaware County Court of Common Pleas remanded variance appeal to zoning board for additional testimony and evidence followed by final variance grant on remand).

[121] *Id.*

[122] *See id.*; Amended Complaint, *supra* note 1, at 8-9 (alleging that Township continually discouraged residential development by imposing unnecessary conditions on building on Property).

Appellants unsuccessfully sued appellees, including Healy, the Township, and the Board, in Pennsylvania state courts.[123] Appellants then filed a complaint in federal district court on June 9, 2003, challenging the variance's approval on two relevant counts.[124] First, appellants asserted a claim under § 1983 pursuant to constitutional equal protection, property, and due process rights (substantive and procedural).[125] Second, appellants asserted a claim under § 1981 for intentional racial discrimination, alleging two injuries.[126] One, the introduction of improper land uses in their neighborhood would lower property values.[127] Two, appellees suppressed the Township's black vote by shouting at and threatening to expel appellants who were black, but not white persons.[128] To remedy their alleged injuries, appellants sought permanent injunctive relief to prevent the Property's use for nonresidential purposes in contravention of the Plan.[129]

The district court dismissed appellants' complaint, holding that appellants failed to establish standing under both § 1981 and § 1983 because the requested relief failed the redressability prong.[130] Appellants sought review by the Third Circuit, which affirmed in part and reversed in part.[131] Despite allegations of intentional racial discrimination, the court affirmed that appellants failed to establish standing under § 1981.[132] However, the court reversed in part, finding that appellants established standing under § 1983 as neighboring property owners.[133]

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[123] *Taliaferro*, 458 F.3d at 186.

[124] *Id.* at 186-87 (articulating five counts in appellants' complaint). Count I requested injunctive relief. *Id.* at 186. The district court dismissed Counts IV and V, which are irrelevant to this Note's analysis. *Id.* at 187. The court also dismissed the injunction claim against appellee Healy. *Id.* at 186 n.3.

[125] *Id.* at 186.

[126] *Id.* at 186-87.

[127] *Id.*; Amended Complaint, *supra* note 1, at 3, 15-16.

[128] *Taliaferro*, 458 F.3d at 186-87; Amended Complaint, *supra* note 1, at 3.

[129] *Taliaferro*, 458 F.3d at 186.

[130] *See id.* at 185.

[131] *See id.*

[132] *See infra* note 133 and accompanying text.

[133] *See Taliaferro*, 458 F.3d at 185, 190-92. The court failed to specify explicitly under which statute or claim appellants failed to establish standing. *Id.* at 190-92. From the court's statement of the issue, one may infer that appellants established standing under § 1983. *See id.* at 185, 190-92 (positing issue as determining if appellants established § 1983 standing).

B. Rationale

The Third Circuit held that appellants, as black community members, failed to establish § 1981 standing.[134] In its standing analysis, the court reasoned that an injunction would not redress the alleged injury of suppression of the black vote.[135] Specifically, enjoining the Property's use to housing only would not bring about housing that would attract black families to increase the number of black voters.[136]

Appellants had also asserted injuries of diminished property values and neighborhood blight caused by the self-storage facility's construction.[137] Notably, the court neglected to address these alleged injuries with regard to § 1981 standing, but rather only considered them in finding § 1983 standing.[138] Thus, the court reached a different conclusion as to appellants' standing under § 1983.[139]

The court held that appellants, as neighboring property owners, established § 1983 standing because they satisfied all three prongs of the Article III standing analysis.[140] First, the court found the injury prong satisfied because appellants alleged sufficient injuries of decreased property values, reduced aesthetics, and excess noise and traffic.[141] Next, the court found the causation prong satisfied because the alleged injuries would result directly from the construction of the self-storage facility.[142] Finally, the court found the redressability prong satisfied because granting the injunction against the variance prevented the alleged injuries.[143]

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[134] *Id.* at 191.

[135] *Id.*

[136] *Id.* at 192.

[137] *Id.* at 187.

[138] *Id.* at 191; Amended Complaint, *supra* note 1, at 15-16.

[139] *See Taliaferro*, 458 F.3d at 185, 190-92.

[140] *Id.* at 185, 190-91.

[141] *Id.*

[142] *Id.* at 191. In the section articulating its legal framework for analysis, the *Taliaferro* court referenced *Warth v. Seldin*, 422 U.S. 490, 506 (1975). *Taliaferro*, 458 F.3d at 190. In *Warth*, the Supreme Court found a neighboring town's zoning practices did not cause the low-to-moderate income plaintiffs' inability to afford homes in that town. *Warth*, 422 U.S. at 506. Instead, the Court held the *Warth* plaintiffs' injuries resulted from the local housing market. *Id.*

[143] *Taliaferro*, 458 F.3d at 191. The *Taliaferro* court used *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 130 (3d Cir. 1977), to provide the legal framework for analysis under the redressability prong. *Taliaferro*, 458 F.3d at 190. *Rizzo* held that satisfying the redressability prong requires that there existed a substantial likelihood that the requested relief would redress the alleged injury. *Rizzo*, 564 F.2d at 139.

Despite its recognition of § 1983 standing, the Third Circuit expressed wariness about the genuineness of appellants' alleged injuries of diminished property values and neighborhood blight.[144] Specifically, the court noted that it had "some doubts," stemming from appellants' focus on the alleged injury of decreased black political power in the Township.[145] Nevertheless, the court found that appellants' § 1983 claim was not so frivolous as to preclude the establishment of standing.[146]

III. THE THIRD CIRCUIT ERRONEOUSLY FOUND § 1983 STANDING BUT NOT § 1981 STANDING

The Third Circuit erroneously held that appellants established § 1983 standing but not § 1981 standing.[147] First, the court failed to apply the ripeness doctrine, resulting in its erroneous holding that appellants established § 1983 standing.[148] The court also erred in not finding § 1981 standing because the injunction would redress appellants' alleged injuries that the court neglected to consider.[149] Because of its erroneous holdings, the court provided NIMBYs with the opportunity to employ § 1983 to challenge housing they oppose for racist reasons.[150] For these reasons, the Third Circuit should have recognized § 1981 standing, adhering to § 1981 and § 1983's original intent.[151]

A. The Court Erred by Failing to Apply the Ripeness Doctrine to the § 1983 Claim

The Third Circuit should have applied the ripeness doctrine to appellants' § 1983 claim.[152] The ripeness inquiry, unlike the Article III

[144] *Taliaferro*, 458 F.3d at 191.
[145] *See id.*
[146] *Id.*
[147] *See* discussion *infra* Part III.
[148] *See* discussion *infra* Part III.A.
[149] See discussion *infra* Part III.B.
[150] *See* discussion *infra* Part III.C.
[151] *See* discussion *infra* Part III.
[152] *See* Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 174 (3d Cir. 2001) (stating that Article III's case-or-controversy requirement includes ripeness and standing); Hinrichs v. Whitburn, 975 F.2d 1329, 1333 (7th Cir. 1992) (discussing ripeness and standing as separate justiciability doctrines); discussion *infra* Part III.A (arguing *Taliaferro* court erred in failing to apply ripeness); *cf.* Scott v. Pasadena Unified Sch. Dist., 306 F.3d 646, 662 (9th Cir. 2002) (noting that because applying ripeness is more important when constitutional rights are at issue, court should

standing analysis, allows courts to consider a claim's merits.[153] The Third Circuit expressed doubts as to the merits of appellants' § 1983 claim.[154] In particular, because appellants emphasized the injury to the black vote, the court questioned the genuineness of the alleged injuries to property values and the neighborhood.[155] Implicit in these expressed doubts was the premise that if appellants fabricated those injuries, appellants' § 1983 claim would fail on its merits at trial.[156] The court should have acted on its concerns about the § 1983 claim's merits by undertaking a ripeness analysis.[157]

If the court had applied ripeness, it would have found appellants' § 1983 claim unfit for judicial review because appellants based their alleged injuries on contingencies.[158] Appellants alleged that the self-storage facility's construction would cause injuries of decreased property values, reduced neighborhood aesthetics, and excess noise and traffic.[159] When appellants filed this lawsuit, however, there was

dismiss when plaintiff does not present fully developed facts).

[153] *See* Nichol, *supra* note 32, at 180; *see also* Airline Prof'ls Ass'n of the Int'l Bhd. of Teamsters, Local Union No. 1224 v. Airborne, Inc., 332 F.3d 983, 988 n.4 (6th Cir. 2003); McInnis-Misenor v. Me. Med. Ctr., 319 F.3d 63, 70 (1st Cir. 2003); Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir. 1995); *Hinrichs*, 975 F.2d at 1333; Nkthtaqmikon v. Impson, No. CV-05-168-B-W, 2006 U.S. Dist. LEXIS 83720, at *17 (D. Me. Nov. 16, 2006).

[154] Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 190-92 (3d Cir. 2006) (analyzing standing but not directly addressing discrimination underlying appellants' claims); *id.* at 191 (expressing doubts about appellants' § 1983 claim).

[155] *Id.* at 191.

[156] *Id.* The court expressed its doubts about the genuineness of the alleged injuries, which it found established § 1983 standing. *Id.* It failed to elaborate, however, on the implications of those doubts. *Id.* The court likely chose not to elaborate on its doubts because it did not want to delve into the merits, which a standing analysis does not involve. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 227 (2003) (clarifying that standing does not depend on claim's merits, but rather claim's nature and source); *supra* note 34 and accompanying text.

[157] *See* Nextel Partners of Upstate N.Y., Inc. v. Town of Canaan, 62 F. Supp. 2d 691, 694 (N.D.N.Y. 1999) (requiring showing of likely success on merits at trial); *infra* Part III.A; *cf.* Ticor Title Ins. Co. v. Fed. Trade Comm'n, 814 F.2d 731, 741 n.16 (D.C. Cir. 1987) (stating that in assessing hardship, court assumes plaintiff will prevail on merits).

[158] *See* Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 808, 814 (2003); Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1131 (9th Cir. 1998); *Hinrichs*, 975 F.2d at 1333; *see also* Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1237 (10th Cir. 2004); *infra* text accompanying notes 158-64 (arguing *Taliaferro* appellants § 1983 claim is unfit for judicial adjudication).

[159] *Taliaferro*, 458 F.3d at 190. Note that the court based its finding of § 1983 standing on injuries caused by the construction of the self-storage facility, not the resulting structure of the self-storage facility in the neighborhood. *Id.*

no guarantee that construction would actually take place.[160] After the Board approved the variance, Healy faced a plethora of other obstacles before construction could begin.[161] Following the approval of a variance, developers often face considerable hurdles before actual construction can begin, including the submission and approval of architectural plans and financing.[162] Sometimes even after receiving a variance, developers may abandon a land development project because the costs associated with additional steps render the project financially infeasible.[163] Because appellants' injuries depended on such contingencies, their § 1983 claim was unfit for judicial review.[164]

Critics may argue that appellants' claim was fit because they had exhausted all available reviews in their claims against the Township.[165]

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[160] *Cf.* National Association of Homebuilders, Development Regulations & Approval Process, http://www.nahb.org/reference_list.aspx?pageNumber=1&pageSize=0§ionID=629 (last visited Nov. 13, 2007) (stating that land developers face challenges of confusing, lengthy, and conflicting approval processes between different municipalities).

[161] *Cf. id.*

[162] *See, e.g.*, Chris Mazzolini, *City Council Votes Tuesday on Center's New Plan, Financing*, STARNEWSONLINE.COM, Feb. 5, 2007, http://www.starnewsonline.com/article/20070205/NEWS/702050337 (noting developer must overcome certain obstacles, including local opposition and financing issues, before construction may begin); *see* National Association of Homebuilders, *supra* note 160; *cf.* Tennessee.gov, TDEC: Environmental Permits Handbook: Plans Review and Approval for Public Water Systems, http://www.state.tn.us/environment/permits/pubh2o.shtml (last visited Nov. 13, 2007) (noting that 30 days before construction may begin, developer must submit fee, worksheet, and all construction and engineering forms).

[163] *See, e.g.*, Brad Berton, *Developer Abandons Option on Redwood City Marina Site*, SILICON VALLEY/SAN JOSE BUS. J., Dec. 17, 2004, *available at* http://www.bizjournals.com/sanjose/stories/2004/12/20/story7.html (describing developers' abandonment of development project after receiving approval on plan from city, but failing to garner enough votes for approval on ballot measure); Press Release, JD Invs., Pine Run Motorsports Park Developer Abandons Build Site Over Soil, Environmental Issues (Jan. 3, 2006), *available at* http://www.roadracingworld.com/news/article/?article=24768 (announcing that developers abandoned building facility to avoid soil problems and requirement for environmental impact report); *cf.* Al Heavens, *Cooling Market Taking Toll on Housing Projects*, REALTY TIMES, Sept. 7, 2006, http://realtytimes.com/rtcpages/20060907_coolingmarket.htm (reporting that some developers stopped construction because costs had escalated significantly from initial costs when construction began).

[164] Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1281 (D.C. Cir. 2005); *see also supra* text accompanying notes 162-63.

[165] Miller v. Brown, 462 F.3d 312, 319 (4th Cir. 2006) (noting that case is fit for adjudication when controversy is final and future uncertainties no longer exist); Friends of Marolt Park v. DOT, 382 F.3d 1088, 1093-94 (10th Cir. 2004) (noting that ordinarily, plaintiffs' claims must challenge final decisions); Bensenville v. Fed. Aviation Admin., 376 F.3d 1114, 1120 (D.C. Cir. 2004) (stating that claim is fit

They would argue that appellants met the finality requirement of judicial fitness by pursuing claims against the Township in Pennsylvania state courts.[166] Thus, appellants exhausted all avenues of review that could have resolved or negated appellants' complaint.[167] Accordingly, critics would contend that appellants' claim was fit for review.[168]

Even if the claim were fit for adjudication, appellants' claim was nonetheless unripe because appellants would not suffer sufficient hardship from lack of review.[169] Given the secondary and disingenuous nature of appellants' alleged injuries, appellants would not suffer any hardship if the court dismissed their § 1983 claim.[170] Appellants' concern with their alleged injuries of diminished property values and neighborhood blight was minimal, if not nonexistent.[171]

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because it challenges final order).

[166] *See Miller*, 462 F.3d at 319; *Friends of Marolt Park*, 382 F.3d at 1093-94; *cf.* Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 186 (3d Cir. 2006) (noting that appellants sued in Pennsylvania state court).

[167] *See Taliaferro*, 458 F.3d at 185-88; *see also* Brown v. City of Royal Oak, No. 05-1238 & No. 05-1483, 2006 U.S. App. LEXIS 26123, at *15 (6th Cir. Oct. 18, 2006); County Concrete Corp. v. Twp. of Roxbury, 442 F.3d 159, 164 (3d Cir. 2006); Peachlum v. City of York, 333 F.3d 429, 434 (3d Cir. 2003); Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1292 (3d Cir. 1993).

[168] *See Miller*, 462 F.3d at 319; *Taliaferro*, 458 F.3d at 185-88, 190-92; *Friends of Marolt Park*, 382 F.3d at 1093-94; *Bensenville*, 376 F.3d at 1120; *Peachlum*, 333 F.3d at 434; *cf. Brown*, 2006 U.S. App. LEXIS 26123, at *15.

[169] *See* Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 811 (2003) (Stevens, J., concurring); Khodara Envtl., Inc. v. Blakey, 376 F.3d 187, 197 (3d Cir. 2004); Airline Prof'ls Ass'n of the Int'l Bhd. of Teamsters, Local Union No. 1224 v. Airborne, Inc., 332 F.3d 983, 988 n.4 (6th Cir. 2003); McInnis-Misenor v. Me. Med. Ctr., 319 F.3d 63, 70 (1st Cir. 2003); Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir. 1995); *see also* Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1131 (9th Cir. 1998); Hinrichs v. Whitburn, 975 F.2d 1329, 1333 (7th Cir. 1992); *cf.* Hawaiian Elec. Co. v. EPA, 723 F.2d 1440, 1445 (9th Cir. 1984) (stating that plaintiff's hardship was insufficient to overcome unfitness of claim for judicial review); Floren, *supra* note 71, at 1125 (asserting that courts vary their interpretation of what constitutes sufficient hardship to satisfy ripeness).

[170] *See supra* notes 66-71 and accompanying text (providing background information on ripeness's hardship requirement). *Compare Khodara Envtl.*, 376 F.3d at 197 (finding that requiring plaintiff to subject himself to criminal penalties of potentially unconstitutional ordinance constitutes hardship satisfying ripeness requirement), *with Taliaferro*, 458 F.3d at 191 (expressing doubts about injuries of diminished property values and neighborhood blight).

[171] *See Taliaferro*, 458 F.3d at 191 (characterizing appellants' concern with decreased black political power as their main concern); *see also id.* at 189-90 (quoting Soc'y Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168, 176-77 (3d Cir. 2000)) (noting that *Society Hill* plaintiffs did not fabricate injuries to establish standing, thereby, suggesting that *Taliaferro* plaintiffs had fabricated injuries).

Appellants emphasized injuries stemming from the Township's discriminatory acts.[172] Withholding judicial review under § 1983 would not cause appellants to suffer hardship because judicial review would not address that discrimination.[173] In sum, the questionable fitness of appellants' § 1983 claim, compounded with the deficiency in demonstrated hardship, rendered appellants' § 1983 claim unripe.[174]

B. The Court Erred in Denying Appellants § 1981 Standing by Failing to Consider Appellants' Alleged Injuries of Diminished Property Values and Neighborhood Blight

The Third Circuit also erred in holding that appellants failed to establish § 1981 standing. By limiting its § 1981 analysis to curtailment of the black vote, the court failed to recognize another alleged injury gave rise to standing.[175] Specifically, granting the variance caused an imminent injury — a *discriminatory impact* on property values and the aesthetics in appellants' neighborhood.[176]

Appellants sued under § 1981, alleging that based on racist motivations, the Township approved an improper land use that would lower their property values.[177] Lowered property values in appellants' black neighborhood, without comparable effects in the Township's white neighborhood, is the type of discriminatory impact Congress designed § 1981 to prevent.[178] The Third Circuit never addressed this

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[172] *See id.* at 187 (articulating appellants' complaint against Township's "racially discriminatory policies" and denial of equal treatment to appellants).

[173] *See* Swanson, *supra* note 91, at 91-94 (discussing pleading requirements for § 1983 claims).

[174] *Airline Prof'ls Ass'n*, 332 F.3d at 988 n.4; *McInnis-Misenor*, 319 F.3d at 70; *Ernst & Young*, 45 F.3d at 535.

[175] *Taliaferro*, 458 F.3d at 187 (noting that *Taliaferro* appellants alleged injuries of diminished property values and neighborhood blight); *see id.* at 190-91 (finding that injuries of diminished property values and neighborhood blight constitute sufficient injuries to establish standing).

[176] *See id.* at 185-86, 191; Amended Complaint, *supra* note 1, at 15-16; *see also supra* text accompanying note 138.

[177] *See Taliaferro*, 458 F.3d at 187. From this point forward, references to appellants' property value injuries shall also include injuries of neighborhood blight, excess noise, and traffic, if not explicitly referenced.

[178] *See* 42 U.S.C. § 1981 (2000) (providing all persons with same substantive rights as white citizens); *see also* Runyon v. McCrary, 427 U.S. 160, 168-69 (1976) (stating that § 1981 prohibits racial discrimination); Georgia v. Rachel, 384 U.S. 780, 791 (1966) (interpreting § 1981's legislative history as providing limited rights, namely racial equality).

injury when conducting its § 1981 standing analysis.[179] However, the court did hold that the allegation of lowered property values satisfied the injury prong for standing under § 1983.[180] The court also recognized that construction of the storage facility would cause that injury, thereby satisfying the causation prong.[181] Having found that lowered property values satisfied the injury and causation prongs for § 1983, the court should have found the same for § 1981.[182]

The Third Circuit should have also found that appellants' requested relief satisfied the redressability prong.[183] The court correctly observed that an injunction prohibiting the self-storage facility would not result in housing in conformance with the Plan.[184] Also, the court correctly held that an injunction would not redress injuries of unequal treatment.[185] However, an injunction would have prevented the project's construction, thereby preventing a discriminatory impact of reduced property values and neighborhood aesthetics.[186] The court could have prevented this discriminatory impact by denying the variance, thereby preventing Healy from constructing the self-storage facility.[187] Thus, contrary to the Third Circuit's conclusion, appellants' allegations satisfy Article III's requirements for establishing standing under § 1981.[188]

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[179] *See Taliaferro*, 458 F.3d at 190-92.

[180] *See id.* at 190-91.

[181] *Id.* at 191.

[182] *See id.*; Rozar v. Mullis, 85 F.3d 556, 562 (11th Cir. 1996) (noting that plaintiffs' allegation that acts motivated by racism caused discriminatory impact by harming black plaintiffs' property values).

[183] *See Rozar*, 85 F.3d at 562; *infra* text accompanying notes 186-88.

[184] *See Taliaferro*, 458 F.3d at 192.

[185] *Id.*

[186] Because appellants' neighborhood is predominantly black, the injuries of diminished property values and neighborhood blight are effectively a discriminatory impact. *Cf. id.* at 181 (finding that court redresses injuries of diminished property values and neighborhood blight if it denies variance). Furthermore, if an indirect deterrent effect is sufficient to satisfy redressability, directly preventing a discriminatory impact should also satisfy redressability. *Cf.* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (holding that paying penalties to government, not plaintiffs, had sufficient deterrent effect to satisfy redressability prong such that penalties would redress plaintiffs' injuries).

[187] *Cf. Taliaferro*, 458 F.3d at 191 (finding appellants satisfied causation prong because denying variance prevented construction that would have caused injuries of diminished property values and neighborhood blight).

[188] *See supra* note 186 and accompanying text; *see also Rozar*, 85 F.3d at 562.

Critics may argue that if ripeness bars appellants' § 1983 claim, ripeness should also bar appellants' § 1981 claim.[189] However, applying ripeness fails to render appellants' § 1981 claim unripe — appellants' claim remains ripe for adjudication.[190] First, appellants' § 1981 claim was judicially fit for review because appellants exhausted all available reviews in state court.[191] The only unresolved issue remaining was whether the variance violated appellants' constitutional rights.[192]

Even if appellants' claim was not sufficiently fit for judicial review, however, appellants' § 1981 claim remains ripe.[193] Although ripeness requires that a claim meet both the fitness and hardship requirements, a strong showing of one may overcome a weakness in the other.[194] Appellants would suffer substantial hardship if the court dismissed their § 1981 claim because they would lack any legal recourse against appellees' discriminatory conduct.[195] Even if the court recognized § 1983 standing, appellees' discriminatory conduct would remain unaddressed because discrimination is not an element of a § 1983

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[189] *See* discussion *supra* Part III.A (arguing that ripeness doctrine should apply to appellants' § 1983 claim); *see also* Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 174 (3d Cir. 2001) (stating that Article III's case-or-controversy requirement includes ripeness and standing); Hinrichs v. Whitburn, 975 F.2d 1329, 1333 (7th Cir. 1992).

[190] *See* Airline Prof'ls Ass'n of the Int'l Bhd. of Teamsters, Local Union No. 1224 v. Airborne, Inc., 332 F.3d 983, 988 n.4 (6th Cir. 2003); McInnis-Misenor v. Me. Med. Ctr., 319 F.3d 63, 70 (1st Cir. 2003); Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir. 1995); *see also infra* text accompanying notes 191-98 (arguing that *Taliaferro* appellants § 1981 claim was ripe).

[191] *See, e.g.*, Brown v. City of Royal Oak, No. 05-1238 & No. 05-1483, 2006 U.S. App. LEXIS 26123, at *15 (6th Cir. Oct. 18, 2006); County Concrete Corp. v. Twp. of Roxbury, 442 F.3d 159, 164 (3d Cir. 2006); Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1292 (3d Cir. 1993); *see Taliaferro*, 458 F.3d at 186. *But see* discussion *supra* Part III.A (arguing that appellants' § 1983 claim was unfit for judicial review). However, appellants' § 1983 claim is unripe because even if it was fit, it failed ripeness's hardship requirement. *See* discussion *supra* Part III.A; *see also Airline Prof'ls Ass'n*, 332 F.3d at 988 n.4; *McInnis-Misenor*, 319 F.3d at 70; *Ernst & Young*, 45 F.3d at 535 (acknowledging possibility that strong showing of hardness may overcome questionable fitness for review).

[192] *See Taliaferro*, 458 F.3d at 181.

[193] *Airline Prof'ls Ass'n*, 332 F.3d at 988 n.4; *McInnis-Misenor*, 319 F.3d at 70; *see also Ernst & Young*, 45 F.3d at 535.

[194] *See supra* note 193.

[195] *See* Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 814 (2003); *see also* Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1131 (9th Cir. 1998); *Hinrichs*, 975 F.2d at 1333.

claim.[196] In this case, the substantial hardship — the discrimination — that appellants would suffer if the court dismissed their § 1981 claim compelled a finding that the claim was ripe for adjudication.[197] Thus, because appellants alleged sufficient injuries to establish § 1981 standing and withstood a ripeness analysis, the court erred in not recognizing § 1981 standing.[198]

C. *The Court's Holding Provides Racist NIMBYs with a Key to Federal Court*

The *Taliaferro* court also failed to address the undesirable policy implications inherent in finding § 1983 standing, but not § 1981 standing, in exclusionary zoning cases.[199] The court's holding allows NIMBYs to contravene § 1983's purpose by asserting § 1983 claims against housing they oppose for racist reasons.[200] Moreover, the court's holding contravenes § 1981's purpose of fostering racial equality because it prevents victims of discrimination from asserting challenges under § 1981.[201]

The court's recognition of § 1983 standing provides racist NIMBYs with a legal tool for challenging proposed development.[202] Citing *Taliaferro*, NIMBYs may launch § 1983 challenges against any zoning decision NIMBYs speculatively consider adverse to their property

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[196] *See supra* Part I.C.1 (discussing justiciability of § 1983 exclusionary zoning claims). A § 1983 claim does not address racism or redress any complained-of conduct caused by racism. Shapo, *supra* note 87, at 4; Zagrans, *supra* note 87, at 19, 25-26, 29. Although Congress enacted § 1983 to provide all persons with the same rights as white persons, discriminatory intent is not an element of a § 1983 claim. *See* Shapo, *supra* note 87, at 19, 25-26, 29; *see also* 15 AM. JUR. 2D, *supra* note 87, § 63.

[197] *See supra* notes 193-96 and accompanying text (describing what substantial hardship *Taliaferro* appellants would suffer if court refused to review their § 1981 claim); *see also* Shapo, *supra* note 87, at 19, 25-26, 29; *see also* 15 AM. JUR. 2D, *supra* note 87, § 63.

[198] *See* discussion *supra* Part III.B; *see also infra* Part III.C (articulating how failure to recognize § 1981 standing leads to undesirable implication that NIMBYs will use § 1983 to facilitate discrimination).

[199] *See* Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 190-92 (2006); *infra* text accompanying notes 200-02.

[200] *See infra* text accompanying notes 204-06 (providing example of how NIMBYs may use § 1983 in contravention of its purpose); *see also* Hous. Assistance Counsel, *Overcoming Exclusion in Rural Communities: NIMBY Case Studies* (Nov. 1994), http://www.ruralhome.org/pubs/development/nimby/sandersblack.htm.

[201] *See* 15 AM. JUR. 2D, *supra* note 87, § 28; discussion *infra* Part III.C.

[202] *See* Hous. Assistance Counsel, *supra* note 200; *see also infra* text accompanying notes 204-06.

values.[203] For example, suppose a town with a predominantly white population was considering an affordable housing project, which would likely house low-income blacks.[204] Suppose further neighbors to the project's proposed site protested the project because of its likely occupants.[205] In such a situation, those neighbors could assert a § 1983 claim, alleging injuries to the neighborhood and diminished property values.[206] Furthermore, those NIMBYs would likely succeed in establishing § 1983 standing under the Third Circuit's holding in *Taliaferro*.[207] This enables NIMBYs to use § 1983 in direct contradiction of § 1983's purpose of protecting against discrimination.[208]

In exclusionary zoning cases, courts should opt to find § 1981 standing over § 1983 standing because doing so precludes § 1983's use by racist NIMBYs.[209] An essential element of a § 1981 claim is intentional racial discrimination.[210] By requiring a discriminatory purpose and impact, § 1981 deters and possibly prevents NIMBYs from asserting a pretextual § 1981 claim challenging zoning decisions.[211] Conversely, when NIMBYs, such as the *Taliaferro* appellants, are victims of discriminatory zoning, they may continue to

[203] *See, e.g.*, *Taliaferro*, 458 F.3d at 190-91 (holding that appellants established § 1983 standing); *cf.* Andrew Noyes, *Antitrust: Backers of Media-Ownership Limits Lobby FCC*, TECH. DAILY, Oct. 23, 2006, http://www.njtelecomupdate.com/lenya/telco/live/tb-OVWC1161802632366.html (recounting survey finding blacks perceive media bias against blacks and feel media fails to address issues affecting blacks, such as lack of affordable housing).

[204] This example is adapted from the description of one county's fight against racist NIMBYs. Hous. Assistance Counsel, *supra* note 200 (stating that NIMBYs based their opposition on desire to keep blacks from moving into their city).

[205] *Id.*; *cf.* Noyes, *supra* note 203.

[206] *See, e.g.*, *Taliaferro*, 458 F.3d at 190-91.

[207] *Id.*

[208] *See* Shapo, *supra* note 87, at 4; Zagrans, *supra* note 87, at 19, 25-26, 29; *see also* 15 AM. JUR. 2D, *supra* note 87, § 63.

[209] *See Taliaferro*, 458 F.3d at 190-91; *supra* text accompanying notes 204-06 (providing example of how NIMBYs may use § 1983 to contravene its purpose).

[210] Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390-91 (1982) (stating neutral law that disproportionately impacts one racial group is unconstitutional only if there was discriminatory intent); *see also* Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 966 (D. Md. 1977) (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977)) (noting plaintiff may establish discriminatory intent for § 1981 by demonstrating that discriminatory purpose was motivating factor of challenged action).

[211] *See supra* Part I.C.2; *supra* note 100 and accompanying text.

assert § 1981 claims when racist motivations underlie zoning decisions.[212]

CONCLUSION

In conclusion, the Third Circuit erred by finding § 1983 standing but not § 1981 standing.[213] First, the court erroneously found § 1983 standing because it failed to apply the ripeness doctrine.[214] Second, the court erred in not finding § 1981 standing because appellants asserted a cognizable injury that the court neglected to address.[215] Unfortunately, the court's holding contravenes § 1983's purpose by allowing racist NIMBYs to employ § 1983 to challenge zoning decisions they oppose for discriminatory purposes. Moreover, the court's holding directly contravenes § 1981's purpose by precluding the assertion of such claims by exclusionary zoning victims like the *Taliaferro* appellants. The court could have better served the purposes of § 1981 and § 1983 by only recognizing standing under § 1981. Thus, the Third Circuit created an avenue for racist NIMBYs, contravening the § 1981 and § 1983's purposes, by only recognizing standing under § 1983.[216]

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[212] *See Gen. Bldg. Contractors*, 458 U.S. at 390; Chambers v. Omaha Girls Club, 629 F. Supp. 925, 933 (D. Neb. 1986); *supra* notes 99-100 (detailing discriminatory elements required to state § 1981 claim); discussion *supra* Part I.C.2.

[213] *See* discussion *supra* Part III (discussing how Third Circuit erred in *Taliaferro*).

[214] *See* discussion *supra* Part III.A (detailing how application of ripeness doctrine precludes finding § 1983 standing).

[215] *See supra* Part III.B (discussing how Third Circuit ignored appellants' asserted injury, which if recognized would have resulted in establishing § 1981 standing).

[216] While I empathize with the *Taliaferro* appellants' racially discriminatory experiences, and advocate in this Note that exclusionary zoning victims deserve standing to seek remedy against racial injustice, I nevertheless harbor reservations as to their ultimate success on the merits. *See* sources cited *supra* note 102 and accompanying text (noting difficulty of prevailing on merits of § 1981 claim); *see also Recent Case: Federal Courts — Standing — Third Circuit Denied Standing to Bring Claim of Racial Discrimination in Zoning. —* Taliaferro v. Darby Township Zoning Board*, 458 F.3d 181 (3d Cir. 2006)*, 120 HARV. L. REV. 1105, 1111 (2007).