

Spring 2017

## Back to its Roots: How §1983 Must Return to its Origins to Provide a Remedy for the Inupiat Against Oil Drilling in Alaska's Arctic Circle

Julia Prochazka

---

### Recommended Citation

Julia Prochazka, *Back to its Roots: How §1983 Must Return to its Origins to Provide a Remedy for the Inupiat Against Oil Drilling in Alaska's Arctic Circle*, 12 Nw. J. L. & Soc. Pol'y. 130 (2017).  
<http://scholarlycommons.law.northwestern.edu/njlsj/vol12/iss3/5>

This Note or Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized editor of Northwestern University School of Law Scholarly Commons.

# Back to its Roots: How § 1983 Must Return to its Origins to Provide a Remedy for the Inupiat Against Oil Drilling in Alaska's Arctic Circle

Julia Prochazka\*

## ABSTRACT

*As demand for oil and gas grows, companies are looking to the Chukchi Sea in Alaska as a potential source of oil and wealth. However, the land along the Chukchi Sea is also home to the Native Alaskan community of the Inupiat. Drilling comes in direct conflict with the way of the life of the Inupiat. Considering this conflict, this Comment explores the difficulty of a § 1983 claim for the Inupiat. The failure of § 1983 to provide a remedy for the Inupiat provides a frame through which to view how § 1983 has deviated from its plain language and original purpose.*

## I. INTRODUCTION

The Chukchi Sea in northwestern Alaska is a new frontier of oil and gas development. As demand grows, the United States seeks greater energy independence, and oil companies, like Shell, are looking to the Chukchi Sea as a potential source of oil and wealth. The land along the Chukchi Sea has been the home to the Native Alaskan community of the Inupiat for hundreds of years. As Shell begins exploratory drilling in the Chukchi Sea, our nation's expanding drive for oil and gas puts the Native Alaskan culture, values, and tradition at risk. As the Inupiat's sources of subsistence and way of life come under attack, this paper explores whether the law provides a remedy for the Inupiat to protect from the effects of drilling on the Continental Shelf.<sup>1</sup>

I first establish background on environmental justice, 42 U.S.C. § 1983, Shell's history of drilling in the region, and the culture of the Inupiat. Second, I explore the potential arguments to support the Inupiat's claim and difficulties in bringing a § 1983 claim. Despite the expansive language in § 1983, the statute only protects rights derived from other laws, usually the Constitution or other federal statutes. These outside sources of law fail to provide a protectable right for the Inupiat. Given the purpose of anti-discrimination law, § 1983's failure to provide a remedy for Native Alaskans demonstrates how the jurisprudence has deviated from the statute's original promise for minority communities. I argue the court should return to the plain language and purpose of the statute in order to fulfill the goals of anti-discrimination law and protect the Inupiat.

---

\* J.D., Northwestern University School of Law, 2017; B.A., Emory University, 2013. I am extremely grateful to the editors of the *Northwestern Journal of Law and Social Policy* for their time, guidance, and invaluable edits. In addition, I would like to thank Professor Destiny Peery for her advice in developing this topic and her continuous support throughout the writing process.

<sup>1</sup> See John W. Carnahan, *Room at the Top: Inupiaq Eskimos Document Their History to Save Their Culture*, 35 HIST. NEWS 16, 16–19 (1980) (showing that Native Alaskans depend on hunting fish and sea mammals for survival).

## II. ENVIRONMENTAL JUSTICE — WHERE IS THE REMEDY?

Environmental justice “seeks to create equal access to ecological resources and equal protection from environmental hazards for all persons.”<sup>2</sup> The environmental movement asserts that health, clean air, water, and open space are a fundamental right.<sup>3</sup> Often low-income and minority communities are denied these fundamental rights due to pollution from industry sited near their homes. These communities often lack the political and financial clout necessary to prevent polluting facilities from building in their backyards.<sup>4</sup>

Environmental justice came to the forefront of the nation’s attention in the 1980s when protestors in North Carolina brought to light the co-location of minority communities and polluting facilities.<sup>5</sup> Civil rights and political leaders protested the placement of a landfill that contained polychlorinated-biphenyls (PCBs).<sup>6</sup> The company sited the landfill in this particular community because the residents, primarily African-American and low-income people, lacked the political clout to oppose the siting decision.<sup>7</sup> These protests prompted a United States General Accounting Office study in 1983, which found African-Americans disproportionately represent the populations near hazardous waste facilities.<sup>8</sup> Another 1987 study by the United Church of Christ’s Commission for Racial Justice highlighted that those low income and minority communities burdened with the nation’s pollution faced greater risks of exposure to environmental contamination, which will adversely impact the health and well-being of residents.<sup>9</sup> Throughout the 1980s and 1990s, studies repeatedly demonstrated the disproportionate burden of pollution on low-income and minority communities.<sup>10</sup>

The studies brought the plight of low-income and minority communities to the attention of the Environmental Protection Agency (EPA) and the President. In 1992, the EPA created the Office of Environmental Justice.<sup>11</sup> The Office of Environmental Justice seeks to provide equal protection for all communities from environmental and health hazards, as well as equal access to the decision-making process in promoting a healthy environment.<sup>12</sup> Subsequently, the EPA created the National Environmental Justice Advisory Council (NEJAC) to promote communication about environmental justice issues.<sup>13</sup> NEJAC is comprised of “representatives from various communities, academia, industry, environmental and indigenous groups, and state,

---

<sup>2</sup> Julia C. Rinne & Carol E. Dinkins, *Environmental Justice: Merging Environmental Law and Ethics*, 25 NAT. RES. & ENV'T 3, 3 (2011).

<sup>3</sup> Hilda L. Solis, *Environmental Justice: An Unalienable Right for All*, 30 HUM. RTS. 5, 5 (2003).

<sup>4</sup> *Id.*

<sup>5</sup> Eileen Gauna & Sheila Foster, *Environmental Justice: Stakes, Stakeholders, Strategies*, 30 HUM. RTS. 2, 2 (2003).

<sup>6</sup> Rinne & Dinkins, *supra* note 2, at 3.

<sup>7</sup> *Id.*

<sup>8</sup> Joseph Ursic, Note, *Finding a Remedy for Environmental Justice: Using 42 U.S.C. § 1983 to Fill in a Title VI Gap*, 53 CASE W. RES. L. REV. 497, 498 (2002).

<sup>9</sup> Rinne & Dinkins, *supra* note 2, at 3-5.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.*

<sup>12</sup> EPA: OFFICE OF ENVIRONMENTAL JUSTICE FACT SHEET, EPA’S COMMITMENT TO ENVIRONMENTAL JUSTICE (2009), <https://www.epa.gov/nscep> (search “environmental justice 2009” in search field; select first document in search results).

<sup>13</sup> Rinne & Dinkins, *supra* note 2, at 3.

local, and tribal governments.”<sup>14</sup> The comprehensive group sought to bring together varied perspectives to highlight environmental justice issues faced by local communities.

Congress responded to the new concern about environmental justice with the Environmental Justice Act. The Act sought to identify the 100 most polluted cities and make it more difficult to build pollution-producing facilities in these areas.<sup>15</sup> Another act proposed in 1993 and 1994 was ultimately unsuccessful to stop discrimination in the siting of polluting facilities.<sup>16</sup>

After a series of legislative failures, President Clinton passed an executive order that instructed federal agencies to make environmental justice a key initiative.<sup>17</sup> The Executive Order created a Federal Working Group on Environmental Justice (Working Group) to provide federal agencies guidance in identifying and remedying “disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.”<sup>18</sup> Part of the Working Group included a Native American Task Force (Task Force), which facilitated collaboration between the federal agencies and tribes to address unique problems for Native American communities.<sup>19</sup> However, the Executive Order’s environmental initiatives did not provide a legal remedy for plaintiffs suffering from injuries caused by pollution.<sup>20</sup>

Without a protected right from President Clinton’s Executive Order, plaintiffs sought relief under the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act of 1964.<sup>21</sup> The 14th Amendment states that “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>22</sup> The Supreme Court held in *Washington v. Davis* that in order to show a violation of the 14th Amendment’s Equal Protection Clause, the plaintiff must prove the state actor’s discriminatory intent or purpose.<sup>23</sup> The Equal Protection Clause cannot reach private actions; it only applies to official discriminatory actions.<sup>24</sup> Several cases attempted to demonstrate intent through evidence of a disparate impact, but they were rarely successful.<sup>25</sup> Most environmental justice cases are barred from succeeding under Equal Protection by the intent requirement—industry defendants rarely give definitive reasons, let alone intentionally discriminatory reasons, for siting a polluting facility.

Environmental plaintiffs instead turned to Title VI § 602. Title VI prohibits discrimination on the basis of race, color, or national origin in programs receiving federal financial assistance. Title VI avoids the intent requirement of Equal Protection by providing a

---

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994).

<sup>18</sup> *Id.*

<sup>19</sup> Quentin Pair & Bob Gough, *Tribal Partnership: Lessons Learned*, 30 HUM. RTS. 17, 17 (2003).

<sup>20</sup> OFF. OF THE INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, INVESTIGATION OF ALLEGATIONS CONCERNING ENVIRONMENTAL JUSTICE ISSUES IN EPA REGION 4, at 3 (2010), [www.epa.gov/oig/reports/2010/20100614-10-N-0145.pdf](http://www.epa.gov/oig/reports/2010/20100614-10-N-0145.pdf).

<sup>21</sup> Ursic, *supra* note 8, at 501.

<sup>22</sup> U.S. CONST. amend. XIV, § 1.

<sup>23</sup> 426 U.S. 229, 247–50 (1976).

<sup>24</sup> *Id.* at 239; *See also* West v. Atkins, 487 U.S. 42, 49–50 (1988) (stating that the Equal Protection Clause cannot reach private actions).

<sup>25</sup> *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960), Yick Wo v. Hopkins, 118 U.S. 356 (1886).

private right of action for disparate impact.<sup>26</sup> In order to establish a disparate impact case under Title VI, a plaintiff must demonstrate a connection between a facially neutral policy and the adverse impact on a protected community.<sup>27</sup> The impact must be greater on a minority group than on the majority.<sup>28</sup> This requirement is often an impossible barrier for environmental justice plaintiffs. A siting decision in a minority community does cause a disparate impact on a minority group, however, if the facility had been sited in an area with majority group members there would be a disparate impact on that majority group in the same way. The siting of a facility brings environmental risks, including air pollution and water pollution, that equally impacts minority and majority groups near the facility. The impact of pollution is often disproportionate on minority groups due to systemic issues, such as racial segregation in cities; thus, it is difficult for minority groups to succeed in a disparate impact claim if the impact would be the same on a majority group located near the pollution source. The disparate impact model does not account for phenomena, like systemic racism or segregation. Pollution impacts each person living near to it equally. Yet, a majority group member would not and does not live in the contested location to bear the disproportionate burden. Once the connection has been established, the defendant can show a “substantial legitimate justification” for the discriminatory practice.<sup>29</sup> In environmental justice cases, the facilities often have an economic or public policy justification, such as the location of the oil reserves or the importance of creating more jobs in a certain region.<sup>30</sup> In response, the plaintiff bears the difficult burden of proving a less discriminatory means that would serve the same objective.<sup>31</sup> For many environmental plaintiffs, they are not able to demonstrate a less discriminatory means to achieve the goals of improved sanitation or tapping oil reserves.

In *Chester Residents Concerned for Quality Living v. Self*, a non-profit residents organization brought a claim under Title VI for the disparate impact of a waste processing facility on African-American residents.<sup>32</sup> The district court, as a matter of first impression, held that private plaintiffs could pursue an action under discriminatory effect regulations that were promulgated by federal agencies under Title VI.<sup>33</sup> This survived until 2001, when the Supreme Court in *Alexander v. Sandoval* held that § 602 does not afford a private right of action.<sup>34</sup> The Court stated that a regulation can only create a private right of action that Congress has already

---

<sup>26</sup> Ursic, *supra* note 8, at 505; Wyatt G. Sassman, *Environmental Justice as Civil Rights Symposium*, 18 RICH. J. L. & PUB. INT. 441, 452 (2015); *see* S. Bronx Coal. for Clean Air, Inc. v. Conroy, 20 F.Supp.2d 565 (S.D.N.Y. 1998) (alleging under Title VI that the transportation authority’s citing and transportation of hazardous waste disparately impacted minority communities).

<sup>27</sup> *N.Y. City Env’tl. Just. All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 1999).

<sup>28</sup> *Lucero v. Detroit Pub. Sch.*, 160 F.Supp.2d 767 (E.D. Mich. 2001).

<sup>29</sup> *N.Y. City Env’tl. Just. All.*, 214 F.3d at 70.

<sup>30</sup> *Id.*; *see also* *Lucero*, 160 F.Supp.2d at 795-97 (E.D. Mich. 2001) (discussing that a school successfully provided a business justification for building a new school in a location that previously had hazardous waste to meet the “substantial legitimate justification” requirement).

<sup>31</sup> *N.Y. City Env’tl. Just. All.*, 214 F.3d at 70.

<sup>32</sup> 132 F.3d 925, 927 (3d Cir. 1997), *vacated on other grounds*, 524 U.S. 974 (1998).

<sup>33</sup> *Id.* at 937; In 1984, the federal Environmental Protection Agency (EPA) adopted a standard to prohibit recipients of federal funds from using methods of administering a program that would lead to a disparate impact. Ursic, *supra* note 8, at 504.

<sup>34</sup> 532 U.S. 275, 293 (2001); *see also* John DiBari, Comment, *How the Sandoval Ruling will Affect Environmental Justice Plaintiffs*, 76 ST. JOHN’S L. REV. 1019, 1025-30 (2002) (discussing how the *Sandoval* ruling forecloses environmental plaintiffs from employing § 602 to allege discriminatory disparate impact).

established in a statute.<sup>35</sup> Despite the majority's blockade of Title VI as an avenue for environmental justice advocates, Justice Stevens suggested in his dissent that § 1983 could still be used to enforce disparate impact regulations.<sup>36</sup>

Tribal communities, like the Inupiat, have their cultural roots in the environment.<sup>37</sup> Native Alaskan's cultural focus on the environment is evident in their diet, religion, and daily lives. Due to this unique relationship with the environment, Indian communities are disproportionately impacted by the pollution problem, raising significant environmental justice concerns. The Inupiat, therefore, ought to be able to enforce disparate impact regulations to protect their culture, religion, community, and lifestyle.

### III. § 1983 POTENTIAL REMEDY FOR ENVIRONMENTAL RACISM

Under § 1983, plaintiffs must prove (1) a deprivation of a federal right and (2) that the person who deprived the plaintiff of that right acted "under [the] color of state law."<sup>38</sup> The state action element must be a "deprivation . . . caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible."<sup>39</sup> Title 42 of United States Code § 1983 sought "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights."<sup>40</sup> Congress intended the statute to override discriminatory state laws, to provide a remedy where state law was inadequate, and to offer a federal remedy where the state remedy, though adequate in theory, was not available in practice.<sup>41</sup>

Despite the expansive language and purpose of the statute, the Supreme Court has instituted strict requirements for plaintiffs to succeed under § 1983. Protectable rights do not stem from § 1983, but rather must derive from another law, usually the Constitution or other federal statutes.<sup>42</sup> Often plaintiffs point to protectable rights stemming from substantive due process in the Equal Protection Clause, including rights from the incorporated Bill of Rights or non-textual fundamental rights.<sup>43</sup> In the absence of an incorporated right or a non-textual fundamental right, plaintiffs can claim rights under substantive due process to allow courts to create a tort-like liability for state officials.<sup>44</sup>

The courts have limited § 1983 by constraining the scope of state action. Courts have interpreted "color of law" to include all actions taken by state and local officials, both those

---

<sup>35</sup> *Sandoval*, 532 U.S. at 290.

<sup>36</sup> *Id.* at 301; *see S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771, 780-98 (3d Cir. 2001)(Plaintiffs attempted to use § 1983 for a disparate impact claim based on § 602. The Third Circuit held, in light of *Sandoval*, § 602 could not create a right or private right of action so § 1983 could not serve as an enforcement mechanism).

<sup>37</sup> Dean B. Suagee, *Environmental Justice and Indian Country*, 30 HUM. RTS. 16, 16 (2003).

<sup>38</sup> *West v. Atkins*, 487 U.S. 42, 48 (1988).

<sup>39</sup> *West*, 487 U.S. at 49.

<sup>40</sup> *Wyatt v. Cole*, 504 U.S. 158, 161 (1992); *Monroe v. Pape*, 365 U.S. 167, 183 (1961), *overruled by Monell v. Dep't of Soc. Servs. Of City of N.Y.*, 436 U.S. 658 (1978) (explaining that § 1983 may provide a federal remedy for state abuses).

<sup>41</sup> *Monroe*, 365 U.S. at 183.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; *see, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *see generally* CHARLES F. ABERNATHY, *CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION: CASES AND MATERIALS* (5th ed. 2012).

<sup>44</sup> CHARLES F. ABERNATHY, *CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION: CASES AND MATERIALS* 87-88 (5th ed. 2012).

actions that are authorized and unauthorized, which violate state law.<sup>45</sup> A state actor is one “who carr[ies] a badge of authority of a State and represent[s] it in some capacity, whether they act in accordance with their authority or misuse it.”<sup>46</sup> In very limited circumstances a private party can be held as a state actor. For a plaintiff to prove state action, “the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible,” and the defendant “must be a person who may fairly be said to be a state actor.”<sup>47</sup>

To find the state responsible for a private party’s action there must be a sufficiently close nexus between the state and the challenged action such that the action appears to be an act of the state.<sup>48</sup> Courts have severely limited the reach of § 1983 to private parties. For a plaintiff to prove state action, “the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible,” and “the party charged with the deprivation must be a person who may fairly be said to be a state actor.”<sup>49</sup> State employees are the clearest example of a state actor. In *West*, the Supreme Court distinguished a doctor at a state-run prison from a public defender by emphasizing that for state action the relationship between the state and the private actor must be a cooperative or joint effort.<sup>50</sup> Unlike the public defender who is adverse to the state, the Court found the doctor was working collaboratively with the state.<sup>51</sup> A state employee must be working in conjunction with the state to satisfy the state action doctrine.

Extensive regulation does not create a significant nexus between the state and the private actor.<sup>52</sup> However, the state action doctrine is satisfied if the private entity is performing a function traditionally reserved to the government.<sup>53</sup> Another way to satisfy the state action doctrine is to show the state “exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”<sup>54</sup> The requirements of state action place many barriers in front of plaintiffs seeking to enforce their federally protected rights against private actors, which therefore must be overcome with creative lawyering.

---

<sup>45</sup> *Id.* at 132.

<sup>46</sup> *Monroe*, 365 U.S. at 172.

<sup>47</sup> *West*, 487 U.S. at 49.

<sup>48</sup> *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999).

<sup>49</sup> *West*, 487 U.S. at 49.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); compare *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723-24 (1961) (holding that a restaurant in a state parking facility was a state actor because the land and building were publicly owned, the building was dedicated to public uses, upkeep of the building was paid by public funds).

<sup>53</sup> Christopher R. Edgar, “*The ‘Traditional State Function’ Doctrine: A Comparative Institutional Perspective*,” 1 N.Y.U. J. L. & LIBERTY 857, 860-61 (2005); *Rendell-Baker v. Kohn*, 457 U.S. 830, 849 (1982) (Marshall, J., dissenting). (“[P]erformance of a public function is by itself sufficient to justify treating a private entity as a state actor only where the function has been ‘traditionally the exclusive prerogative of the State.’”).

<sup>54</sup> *Blum*, 457 U.S. at 1004.

## IV. BACKGROUND: HOW THE INUPIAT'S SACRED LAND BECAME SHELL'S OIL OASIS

A. *Background on Inupiat Indians and Tribal Rights*

The Inupiat Eskimos have occupied the northernmost part of Alaska for more than a century and a half.<sup>55</sup> The community near the Chukchi Sea is known as the *Kivalliñigmiut* Nation as part of the larger Inupiat Natives' community in Northern Alaska.<sup>56</sup> The Inupiat people have survived the harsh climate of the Arctic by adapting to the permafrost and sunless winters.<sup>57</sup> The average winter temperatures range from negative fifteen to negative ten degrees Fahrenheit.<sup>58</sup> The Inupiat adapted by following the migratory patterns of their sources of food, such as caribou, fish, whales, and seals.<sup>59</sup> By adapting to the Arctic cycles the Inupiat were able to create a life in this difficult environment.

The Inupiat hunt from whaling camps miles from the shore.<sup>60</sup> Using skin boats from walrus hide, the Inupiat people harvest whales and other sea mammals.<sup>61</sup> A major source of food is the bowhead whale, which represents "the most visible manifestation of their age-old culture remaining in the technological rush" of modern life.<sup>62</sup> The Inupiat language reflects the primacy of the bowhead whale because there are twenty different words for bowhead whale, depending on if a hunter has sighted a young female, young male, fat male, or an entire family of whales.<sup>63</sup> The Chukchi Sea is the only place where spring whaling of bowhead whales is possible.<sup>64</sup> The spring Whaling Feast represents the importance of hunting sea mammals in Inupiat culture.<sup>65</sup> Whale meat serves as the base for many traditional dishes and the bones are used for structural supports in their communities.<sup>66</sup> A successful bowhead whale hunt supports an entire community of Inupiat for many months.<sup>67</sup> Skill in whaling defines a person's status in the community.<sup>68</sup> Sea mammals are more than just food for the Inupiat; the bones of the whales are used as supports in buildings; jaw bones become sled runners; blubber fuels oil lamps; and beluga oils are used as medicines.<sup>69</sup> Each part of the whale plays a role in the life and endurance of the Inupiat people. The Inupiat's subsistence way of living defines their culture, religion, and value system.

The oil companies' investment in the region brings to light the conflict between Inupiat tradition and the benefits of modern industry. The taxes paid by the companies enabled the Inupiat to build schools, government buildings, and the Inupiat History, Language, and Culture

---

<sup>55</sup> ERNEST S. BURCH, JR., *THE INUPIAQ ESKIMO NATIONS OF NORTHWEST ALASKA* 3 (University of Alaska Press 1998).

<sup>56</sup> *Id.* at 23.

<sup>57</sup> Carnahan, *supra* note 1, at 16.

<sup>58</sup> BURCH, *supra* note 55, at 26.

<sup>59</sup> Carnahan, *supra* note 1, at 16.

<sup>60</sup> *Id.*

<sup>61</sup> Thomas F. Johnston, *Community History and Environment as Wellspring of Inupiat Eskimo Songtexts*, 83 *ANTHROPOS* 162, 162 (1988).

<sup>62</sup> Carnahan, *supra* note 1, at 16.

<sup>63</sup> Johnston, *supra* note 61, at 165.

<sup>64</sup> BURCH, *supra* note 55, at 28.

<sup>65</sup> Johnston, *supra* note 61, at 165.

<sup>66</sup> *Id.*

<sup>67</sup> Jonathan D. Greenberg, *The Arctic in World Environmental History*, 42 *VAND. J. TRANSNAT'L L.* 1307, 1333 (2009).

<sup>68</sup> Johnston, *supra* note 61, at 163.

<sup>69</sup> *Id.*; Edith Turner, *From Shamans to Healers: The Survival of an Inupiat Eskimo Skill*, 31 *ANTHROPOLOGICA* 3, 13 (1989).

Commission.<sup>70</sup> The benefits derived from the taxes of oil drilling are not necessarily viewed as negative despite the environmental impacts by all Native Alaskans. Tara Sweeney from the Inupiat of the Arctic Slope is quoted as saying “[t]o the Inupiat, the revenue derived from [oil drilling] will enable the Arctic Slope communities to continue living outside of Third World conditions.”<sup>71</sup> The quality of life in these regions has improved at the expense of their traditional lifestyle.

### *B. Background on Shell’s Oil Drilling in the Arctic Circle*

Currently, the United States imports twenty-one percent of its oil, increased from the ten percent imported in 1990.<sup>72</sup> The U.S. economy, industry, and military are dependent upon oil production. In recent years there have been calls by politicians and citizens for greater energy independence as unrest afflicts the Middle East.<sup>73</sup> The growth of the global population will bring a doubling of the demand for energy.<sup>74</sup> Companies, like Shell, are scrambling to be the first to meet this increasing demand by searching for domestic sources of oil, including Alaska.<sup>75</sup> Arctic waters cover roughly thirteen percent of the world’s undiscovered petroleum, which could provide the United States energy independence for more than a decade.<sup>76</sup>

After years of the permitting process in 2015 the Bureau of Ocean Energy Management (BOEM) approved Shell’s plan for exploratory drilling.<sup>77</sup> Shell began the regulatory process of gaining approval for exploratory drilling in 2011.<sup>78</sup> Over those four years Shell invested \$4.5 billion in the Alaska project.<sup>79</sup> In 2008 Shell paid \$2.1 billion for the rights to 2 million acres of land below the sea in the Arctic.<sup>80</sup> Notably, Shell is currently the only major oil company investing in the Arctic Circle because other companies cited the risks and uncertain nature of the

<sup>70</sup> Carnahan, *supra* note 1, at 17; *see also* *Inupiat History Language and Culture*, N. SLOPE BOROUGH, <http://www.north-slope.org/departments/inupiat-history-language-and-culture> (last visited Nov. 20, 2015).

<sup>71</sup> Brian Stockes, *Arctic Refuge Remains at Center of Energy Debate: Alaska Natives Split over Development, Environment*, 21 INDIAN COUNTRY TODAY A1, A1 (2001).

<sup>72</sup> Barbara Hollingsworth, *Forecast: In 2015, Imported Oil will Make Up Just 21% of US Consumption*, CNSNEWS.COM (Sept. 26, 2014, 12:55 PM), <http://cnsnews.com/news/article/barbara-hollingsworth/forecast-2015-imported-oil-will-make-just-21-us-consumption>.

<sup>73</sup> INT’L ENERGY AGENCY, WORLD ENERGY OUTLOOK 2014: EXECUTIVE SUMMARY 1-2 (2014), [https://www.iea.org/publications/freepublications/publication/WEO\\_2014\\_ES\\_English\\_WEB.pdf](https://www.iea.org/publications/freepublications/publication/WEO_2014_ES_English_WEB.pdf).

<sup>74</sup> Paul Barrett & Benjamin Elgin, *Inside Shell’s Extreme Plan to Drill for Oil in the Arctic*, BLOOMBERG: BLOOMBERGBUSINESSWEEK (Aug. 5, 2015), <http://www.bloomberg.com/news/features/2015-08-05/inside-shell-s-extreme-plan-to-drill-for-oil-in-the-arctic>.

<sup>75</sup> *See* INT’L ENERGY AGENCY, *supra* note 73; *Unlocking Energy from Deep Water*, SHELL GLOBAL, <http://www.shell.com/global/future-energy/deepwater/unlocking-energy-deep-water.html#iframe-L3dlYmFwcHMvZGVlcF93YXRlci92Mi9pbmRleC5odG1s> (last visited Nov. 20, 2015).

<sup>76</sup> GEOLOGY, <http://geology.com/articles/arctic-oil-and-gas/> (last visited March 29, 2017) Barrett & Elgin, *supra* note 74 (showing Shell’s Chief Executive Officer emphasized the great prospects in Alaska).

<sup>77</sup> Letter from David W. Johnston, Reg’l Supervisor, Off. of Leasing & Plans, Bureau of Ocean Energy Mgmt., to Susan Childs, Alaska Venture Support Integrator/Manager, Shell Gulf of Mexico Inc. (Aug. 12, 2015), *available at* [http://www.boem.gov/uploadedFiles/BOEM/About\\_BOEM/BOEM\\_Regions/Alaska\\_Region/Leasing\\_and\\_Plans/PPlans/2015-08-12-Shell-Condition2-deviation-denial.pdf](http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Leasing_and_Plans/PPlans/2015-08-12-Shell-Condition2-deviation-denial.pdf).

<sup>78</sup> BUREAU OF OCEAN ENERGY MGMT., SHELL: CHUKCHI SEA EXPLORATION PLAN, <http://www.boem.gov/shell-chukchi/> (last visited Nov. 20, 2015).

<sup>79</sup> Jon Birger, *Why Shell is Betting Billions to Drill for Oil in Alaska*, FORTUNE (May 24, 2012), <http://fortune.com/2012/05/24/why-shell-is-betting-billions-to-drill-for-oil-in-alaska/>.

<sup>80</sup> Barrett & Elgin, *supra* note 74.

oil reserves as reasons for holding off devoting resources in the region.<sup>81</sup> As oil prices have been on the decline, critics wonder how Shell can invest in the Arctic Circle to the detriment of their bottom line.<sup>82</sup>

However, this is not Shell's first exploration in Alaska. In the 1990s Shell began exploring and drilling in Cook Inlet outside of Anchorage.<sup>83</sup> While Shell worked in Cook's Inlet, they also explored in the Chukchi Sea, but this was terminated in favor of easier drilling opportunities in the Gulf of Mexico. The Gulf's more temperate climate made drilling less dangerous and more likely to be profitable.

In May 2015 BOEM approved Shell's permit for exploratory drilling, however, shortly after Shell halted their exploration. Two rigs, the Polar Pioneer and the Noble Discoverer, settled into the Chukchi Sea. However, BOEM ruled that Shell cannot drill wells simultaneously because of the impact of noise pollution on marine mammals.<sup>84</sup>

A few months after BOEM's approval of drilling Shell unexpectedly stopped their exploration.<sup>85</sup> Shell cited the "disappointing" results as the reason for stopping activity in the Chukchi Sea for the foreseeable future.<sup>86</sup> Nonetheless, Shell still holds 100 percent working interest in the Chukchi Sea and this does not mark the end of oil exploration in the northwestern region of Alaska. Shell's (former) President, Marvin Odum, emphasized the continued strategic importance of the region despite the disappointing outcome of exploratory tests.<sup>87</sup> Industry experts state that when the oil prices improve, offshore exploration in Alaska will restart.<sup>88</sup> The concerns for the Inupiat continue despite Shell's recent halt in exploratory drilling.

### *C. Potential Environmental Impacts of Drilling*

The Chukchi Sea is a pristine habitat for many of the world's unique Arctic animals. Environmentalists and Native Alaskans have raised many concerns about the devastating and irreparable impacts of drilling in the Chukchi Sea. The Arctic Circle and Chukchi Sea are home to seventeen different species of whale, including ninety percent of the narwhal population.<sup>89</sup> Most marine mammals, including the endangered bowhead whales, live in the Chukchi Sea during the summer months and move south to the Bering Strait for the winter time, making the

---

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* ("Shell must anticipate an enormous find—and future oil prices much higher than they are today," says Nick Butler, a former senior strategy executive at BP who does energy research at King's College London. "It's a dangerous wager.").

<sup>83</sup> *Id.*

<sup>84</sup> Letter from David W. Johnston to Susan Childs, *supra* note 77.

<sup>85</sup> *Shell Updates on Alaska Exploration*, SHELL GLOBAL, <http://www.shell.com/global/aboutshell/media/news-and-media-releases/2015/shell-updates-on-alaska-exploration.html> (last visited Nov. 20, 2015).

<sup>86</sup> *Id.*

<sup>87</sup> *Shell Stops Arctic Activity After 'Disappointing' Tests*, BBC NEWS (Sept. 28, 2015), <http://www.bbc.com/news/business-34377434>.

<sup>88</sup> Clifford Krauss & Stanley Reed, *Shell Exits Arctic as Slump in Oil Prices Forces Industry to Retrench*, N.Y. TIMES (Sept. 28, 2015), [http://www.nytimes.com/2015/09/29/business/international/royal-dutch-shell-alaska-oil-exploration-halt.html?\\_r=0](http://www.nytimes.com/2015/09/29/business/international/royal-dutch-shell-alaska-oil-exploration-halt.html?_r=0).

<sup>89</sup> *The Dangers of Arctic Oil*, GREENPEACE, <http://www.greenpeace.org/international/en/campaigns/climate-change/arctic-impacts/The-dangers-of-Arctic-oil/> (last visited Nov. 20, 2015); *Audubon Alaska Works to Protect Habitat for Eiders, Walrus, and Other Wildlife in the Chukchi Sea*, AUDUBON ALASKA, <http://ak.audubon.org/chukchi-sea> (last visited Nov. 20, 2015).

Chukchi Sea an important migration area.<sup>90</sup> “Almost the entire population of bowhead whales travels along the Chukchi Sea coast . . . during the spring months, from April through June.”<sup>91</sup> Additionally, this is an important habitat for beluga whales, who are uniquely sensitive to human disturbance in the form of noise.<sup>92</sup> Grey whales feed in the Chukchi Sea during the summer months.<sup>93</sup> Whales are central to the Inupiat culture and form the foundation of their community.<sup>94</sup> In addition to whales, the Chukchi Sea serves as the habitat for walruses, seabirds, and roughly half of America’s polar bears.<sup>95</sup> The presence of ice allows for the development of phytoplankton, which is the base of the food chain.<sup>96</sup> The Chukchi Sea is uniquely shallow, allowing for wildlife to develop on the ocean floor.<sup>97</sup>

Shell’s drilling will create noise pollution which greatly impacts marine mammals, especially cetaceans like whales and dolphins. Marine mammals are vocal and dependent on sound for finding food, reproduction, communication, and navigation.<sup>98</sup> Oil exploration, including explosions and numerous boats, creates seismic noise underneath the water that can travel for extended distances.<sup>99</sup> Noise can impact whales by changing their vocalizations, respiration, swim speed, foraging behavior, and also by causing shifts in migration paths.<sup>100</sup> Beluga whales have been shown to be particularly sensitive to noise and surveys have demonstrated large disturbances from drilling have caused a decline in the number of whales spotted in their native region.<sup>101</sup> The impact of the noise pollution during the summer drilling season could cause devastating effects for the migration and reproduction of beluga whales, bowhead whales, and other mammals that the Inupiat depend upon for survival.

Second, the remoteness and unpredictable weather in the Chukchi Sea greatly increase the risks of a spill. The Arctic drilling season is confined to the summer months, but many difficulties remain because of the unpredictable weather and the impact of floating ice.<sup>102</sup> Opponents of drilling in the Arctic Circle fear that if a spill occurred in this remote area the time

---

<sup>90</sup> See Letter from Mike Daulton et al., VP/Dir. of Policy, Nat’l Audubon Soc’y, to Tommy P. Beaudreau, Dir., Bureau of Ocean Energy Mgmt. Headquarters, 7 (Dec. 3, 2013), [http://ak.audubon.org/sites/default/files/documents/chukchi\\_call\\_comments\\_and\\_appendices\\_3dec2013.pdf](http://ak.audubon.org/sites/default/files/documents/chukchi_call_comments_and_appendices_3dec2013.pdf) (discussing that summer months serve as the feeding grounds for grey whales and a habitat for beluga whales).

<sup>91</sup> *Id.*; see also Robert S. Suydam & John C. George, *Subsistence Harvest of Bowhead Whales (Balaena Mysticetus) by Alaskan Eskimos: 1974 to 2003*, DEP’T OF WILDLIFE MGMT., 2-3 [http://www.north-slope.org/assets/images/uploads/1974-2003%20Village\\_harv%20BRG12.pdf](http://www.north-slope.org/assets/images/uploads/1974-2003%20Village_harv%20BRG12.pdf) (mentioning that summer is also whale hunting season for the Inupiat).

<sup>92</sup> Letter from Mike Daulton et al. to Tommy P. Beaudreau, *supra* note 90, at 8.

<sup>93</sup> *Id.* at 9.

<sup>94</sup> Birger, *supra* note 79.

<sup>95</sup> Audubon Alaska Works to Protect Habitat for Eiders, Walrus, and Other Wildlife in the Chukchi Sea, *supra* note 89.

<sup>96</sup> Letter from Mike Daulton et al. to Tommy P. Beaudreau, *supra* note 90, at B-42.

<sup>97</sup> *Id.*

<sup>98</sup> See Linda S. Weilgart, *A Brief Review of Known Effects of Noise on Marine Mammals*, 20 INT’L J. COMP. PSYCHOL. 159, 159 (2007); Richard Schiffman, *How Ocean Noise Pollution Wreaks Havoc on Marine Life*, YALE ENVIRONMENT 360 (March 31, 2016), [http://e360.yale.edu/features/how\\_ocean\\_noise\\_pollution\\_wreaks\\_havoc\\_on\\_marine\\_life](http://e360.yale.edu/features/how_ocean_noise_pollution_wreaks_havoc_on_marine_life).

<sup>99</sup> *Id.* at 161–62.

<sup>100</sup> *Id.* at 160.

<sup>101</sup> See Letter from Mike Daulton et al. to Tommy P. Beaudreau, *supra* note 90, at 8 and B-10-B-14.

<sup>102</sup> Birger, *supra* note 79.

it would take for a response crew would result in complete devastation of ecosystem.<sup>103</sup> In addition, the World Wildlife Fund has warned that there is no “proven effective method for containing and cleaning up an oil spill in icy water.”<sup>104</sup> The Exxon Valdez spill in 1989 demonstrated that the low temperatures and limited sunlight can lead to an oil spill causing mortality in the ecosystem in the Arctic Circle. It is unclear if Shell is prepared for the potentially devastating effects of a spill on the Inupiat who depend upon the ecosystem for survival.<sup>105</sup>

## V. DISCUSSION – OPPORTUNITIES AND BARRIERS FOR A § 1983 CLAIM

### A. *Shell’s Deprivation of the Inupiat’s Constitutionally Protected Interests*

First, to succeed under § 1983 the Inupiat must prove that they have a constitutionally protected interest sufficient to trigger a remedy. The interest must be encompassed by the 14th Amendment’s protection of liberty and property because § 1983 is exclusively a mechanism for enforcing constitutional and statutory rights.<sup>106</sup> Section 1983 does not create any substantive rights.<sup>107</sup> To demonstrate a protectable property interest “a person must have more than an abstract need or desire for it or a unilateral expectation of it . . . it is a purpose . . . to protect those claims upon which people rely in their daily lives.”<sup>108</sup> The property interest does not come directly from the Constitution, but rather it stems from an independent source, such as state law.<sup>109</sup> A liberty interest may derive from the Constitution itself because the word “liberty” confers implicit guarantees or may arise from an expectation drawn from state laws.<sup>110</sup>

The doctrine is not intended to protect individuals from every government action, but only “prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.”<sup>111</sup> The Supreme Court focuses on the need to find a congressional intent to create a federally protected right.<sup>112</sup> The “plaintiff must assert a violation of a federal right, not merely a violation of federal law.”<sup>113</sup> The Supreme Court outlined three factors to determine if a statutory provision produces a federal right:<sup>114</sup> (1) Congress must have intended the provision to benefit the plaintiff; <sup>115</sup> (2) the plaintiff bears the burden to show

<sup>103</sup> Haley McKey, *In Alaska, An Accident Waiting to Happen: Drilling in the Chukchi Sea*, DEFS. OF WILDLIFE BLOG (Sept. 13, 2012), <http://www.defendersblog.org/2012/09/in-alaska-an-accident-waiting-to-happen-drilling-in-the-chukchi-sea/>; Letter from Mike Daulton et al. to Tommy P. Beaudreau, *supra* note 90, at 11 & 18.

<sup>104</sup> *Arctic Oil and Gas*, WORLD WILDLIFE FUND, [http://wwf.panda.org/what\\_we\\_do/where\\_we\\_work/arctic/what\\_we\\_do/oil\\_gas/](http://wwf.panda.org/what_we_do/where_we_work/arctic/what_we_do/oil_gas/) (last visited Nov. 20, 2015).

<sup>105</sup> Birger, *supra* note 79; Bibeka Shrestha, *GAO Warns of Risks in Shell’s Arctic Drilling Plans*, LAW 360 (March 30, 2012), <https://www.law360.com/projectfinance/articles/325274/gao-warns-of-risks-in-shell-s-arctic-drilling-plans>.

<sup>106</sup> *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (stating § 1983 is a mechanism for enforcing other statutory rights).

<sup>107</sup> *Albright*, 510 U.S. at 271.

<sup>108</sup> *Bd. of Regents of St. Colls.*, 408 U.S. at 577.

<sup>109</sup> *Id.*

<sup>110</sup> *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

<sup>111</sup> *Castro Rivera v. Fagundo*, 310 F.Supp.2d 428, 429 & 435 (D. Puerto Rico 2004).

<sup>112</sup> *Suter v. Artist M.*, 503 U.S. 347, 356–57 (1992).

<sup>113</sup> *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (citing *Golden St. Transit Corp. v. Los Angeles*, 403 U.S. 103, 106 (1989)).

<sup>114</sup> *Id.*

<sup>115</sup> *Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 428 (1987); *see also Suter*, 503 U.S. at 356–57.

the right is not “so ‘vague and amorphous’ that its enforcement would strain judicial competence;”<sup>116</sup> and (3) the statute must clearly impose a “binding obligation on the States.”<sup>117</sup> Due process is a flexible concept intended to mirror and evolve with the varying situations confronting groups of citizens.<sup>118</sup> The Court’s interpretation of a protected right often narrows the scope of § 1983’s protection and leaves certain minority plaintiffs without a remedy. The Court’s balancing and narrowing of the protected interest moves away from the plain language and expansive purpose of § 1983 to protect minority groups from abusive state practices.

### 1. Property Interest in the Form of Aboriginal Title

First, Native Alaskans could argue they have a property interest in the region in their continued hunting abilities stemming from aboriginal title. The right would derive from the Inupiat’s continued occupation and subsistence in the Arctic Circle for several thousand years. The Inupiat have long been some of the world’s most marine-oriented hunters.<sup>119</sup> They would assert that tribes have the right to hunt and fish on the reservation as the normal incidents of Indian life.<sup>120</sup> The historical roots of the Inupiat’s occupancy extend prior to the foundation of the United States; such longstanding property rights should be protected from infringement. Shell’s drilling not only occupies the Inupiat’s territory, but also significantly limits access to one of their main sources of food. Shell’s permit makes clear that they can “take” whales in the process of drilling.<sup>121</sup> The “taking” in the permit is non-lethal, but includes disrupting the animals with noise pollution, breaking the ice that serves as the habitat for seals and polar bears, and an influx of ocean traffic due to drilling activities.<sup>122</sup> The disruption of these animals will mean that the Inupiat’s source of food will be driven from the region. The breaking up of sea ice also destroys the Inupiat hunting camp locations, making it impossible for the Inupiat to hunt from those areas, which they used to make base camps on the ice. Hunting and fishing are traditional parts of Native Alaskan life and Shell’s drilling will inhibit the continuation of this tradition. In addition, Shell’s occupation of the region infringes upon the ocean traditionally occupied by the Inupiat. The Inupiat occupy the Chukchi Sea for whaling camps and hunting.

Despite the strong normative concerns for the continuation of the Inupiat’s occupancy, the jurisprudence surrounding Native Alaskan property claims creates a complicated landscape for a plaintiff to navigate. First, the type of property right given to Native Americans is known as Indian Title. The Supreme Court in *Johnson v. M’Intosh* decided that the federal government owned title to a disputed piece of land and limited the Indian’s stake in the land to merely a title of occupancy, known as Indian Title.<sup>123</sup> Only the federal government can extinguish the indigenous people’s occupation, however Native Tribes have no vendible interest in the land.<sup>124</sup>

---

<sup>116</sup> *Blessing*, 520 U.S. at 340 (citing *Wright*, 479 U.S. at 431–32).

<sup>117</sup> *Id.*

<sup>118</sup> *Matthews v. Eldridge*, 424 U.S. 319, 321 (1976).

<sup>119</sup> Peter Whitridge, *The Prehistory of Inuit and Yupik Whale Use*, 16 J. AM. ARCHAEOLOGY 99, 101 (1999).

<sup>120</sup> *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405 (1968).

<sup>121</sup> SHELL GULF OF MEX. INC., APPLICATION FOR INCIDENTAL HARASSMENT AUTHORIZATION FOR THE NON-LETHAL TAKING OF WHALES AND SEALS IN CONJUNCTION WITH PLANNED EXPLORATION DRILLING ACTIVITIES DURING 2015: CHUKCHI SEA, ALASKA 6-1 (2015), [http://www.nmfs.noaa.gov/pr/permits/incidental/oilgas/shell\\_2015iha\\_drilling\\_app.pdf](http://www.nmfs.noaa.gov/pr/permits/incidental/oilgas/shell_2015iha_drilling_app.pdf).

<sup>122</sup> *Id.*

<sup>123</sup> 21 U.S. 543, 587-88 (1823).

<sup>124</sup> *Edwardsen v. Morton*, 369 F.Supp. 1359, 1372 (D.D.C. 1973).

The federal government does not have to provide compensation upon terminating the right to occupancy; however, if there has been congressional recognition of legal rights to the land the federal government may compensate for the land.<sup>125</sup> States cannot take title from the Native Alaskans, unless it is ratified by the federal government.<sup>126</sup> The Inupiat's continued right to occupancy is contingent upon Congress's inaction to extinguish. Indian Title is a vulnerable property right that is subordinate to federal interests.

The Alaska Native Claims Settlement Act extinguished many indigenous property rights. In *Inupiat Community of Arctic Slope v. United States*, Native Alaskans sued to enjoin oil development off the shore of the North Slope based upon a claim of aboriginal title due to occupancy and use of the sea ice for subsistence hunting and fishing.<sup>127</sup> The Ninth Circuit held that the Alaska Native Claims Settlement Act extinguished the Inupiat's aboriginal rights.<sup>128</sup> The Alaska District Court held the Inupiat have no claim to Indian title for off-shore oil drilling because the federal government has exclusive sovereignty over the ocean and mineral rights in the sea.<sup>129</sup> Tribal rights and tribal sovereignty are subordinate to the federal government and the Court held the tribe cannot make a claim at odds with those rights entrusted to the federal government.<sup>130</sup> Based upon this line of precedent, the Inupiat's claim for Indian title as a property right has been extinguished.

Yet, the Inupiat's claim for hunting and fishing rights could still possibly succeed. In 1989, after *Inupiat Community*, the Supreme Court and the Ninth Circuit recognized that the phrase "in Alaska" from the Native American Claim Settlement Act extinguishes only aboriginal titles within the boundaries of the state and does not include the area of the Outer Continental Shelf.<sup>131</sup> Therefore, Native Alaskan hunting and fishing rights in the Outer Continental Shelf are not extinguished.<sup>132</sup> The Inupiat's strongest claim is their protected property right in the continuation of their hunting and fishing practices because this right is not extinguished and Shell's taking of the whales and other animals in the Chukchi Sea could constitute an infringement of this protected right. This right will be weighed against the federal government's interest in the region to determine if those interests extinguish the Inupiat's rights of occupation and use of the Sea.<sup>133</sup> The federal government will cite the nation's need for increased energy independence and the United States' military demand for oil. Nonetheless, despite these federal interests, the Inupiat may have a protected property interest in their hunting and fishing rights in the Chukchi Sea.

---

<sup>125</sup> *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284-85 (1955).

<sup>126</sup> *City of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 248-49 (1985).

<sup>127</sup> 746 F.2d 570, 571 (9th Cir. 1984).

<sup>128</sup> *Id.*; see also *Native Vill. of Eyak v. Trawler Diane Marie, Inc.*, 154 F.3d 1090, 1096 (9th Cir. 1998) (holding "Native Villages are barred from asserting exclusive rights to use and occupancy of the OCS based on unextinguished aboriginal title").

<sup>129</sup> *Inupiat Cmty. of the Arctic Slope v. United States*, 548 F.Supp. 182, 185 (D. Alaska 1982).

<sup>130</sup> *Inupiat Cmty. of the Arctic Slope*, 548 F.Supp. at 187.

<sup>131</sup> *People of Vill. of Gambell v. Hodel*, 869 F.2d 1273, 1278-79 (9th Cir. 1989); *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 547-48 (1987).

<sup>132</sup> *People of Vill. of Gambell*, 869 F.2d at 1278-79; *Amoco Prod. Co.*, 480 U.S. at 547-48.

<sup>133</sup> *People of Vill. of Gambell*, 869 F.2d at 1277.

## 2. First Amendment Free Exercise Clause

Another potential avenue for the Inupiat to establish a federally protected interest is through the Free Exercise Clause of the First Amendment.<sup>134</sup> The right to practice religion is one of the foundational and most zealously guarded rights in American society.<sup>135</sup> Courts have continuously protected the right of free exercise from being “trammelled by the state.”<sup>136</sup> The Supreme Court has explained that the Free Exercise Clause prohibits the government from coercing people into violating their religious beliefs or penalizing them by denying them the rights, benefits, and privileges given to other citizens.<sup>137</sup> Although the Inupiat’s belief system is a minor religion with fewer followers than major religions such as Christianity, courts cannot determine that a set of beliefs are not religious just because they do not agree with their views or find them peculiar.<sup>138</sup> To determine if a religion is afforded protection under the First Amendment, courts must determine the beliefs “are (1) sincerely held, and (2) religious in nature.”<sup>139</sup>

The Inupiat’s claim would rest upon their religious beliefs and ceremonies revolving around their subsistence upon whales in the Chukchi Sea. The plaintiffs would have to demonstrate that the specific area Shell occupies in the Chukchi Sea has religious significance and that drilling will interfere with their exercise of religion.<sup>140</sup> The Free Exercise Clause prohibits religious observers from unequal treatment.<sup>141</sup> To satisfy the court’s requirements to demonstrate unequal treatment the Inupiat could argue that Shell’s new rigs interfere with the locations of their whaling outposts for their hunting expeditions. Whaling often occurs many miles from shore, near the location of Shell’s new drilling operations, just beyond the three-mile mark from the shore near the Inupiat settlement of Borrow.<sup>142</sup>

Once the Inupiat demonstrate the overlap of Shell’s exploratory drilling with their hunting locations, the Inupiat would need to prove the religious significance of these sites. One of the strongest arguments involves the influence of whaling and whales on the traditional religious ceremonies; without the whales the Inupiat religion would cease to exist. The Inupiat

---

<sup>134</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (finding liberty in the Fourteenth Amendment embraces the Free Exercise Clause of the First Amendment); *see also* *City of Sacramento v. Lewis*, 523 U.S. 833 (1998) (holding where a particular Amendment provides an explicit textual source for a constitutional protection, that Amendment itself should be used as an analysis guide for courts).

<sup>135</sup> U.S. CONST. amend. I, § 1; *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (“The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high importance.”).

<sup>136</sup> *Ward v. Walsh*, 1 F.3d 873, 876 (1993).

<sup>137</sup> *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988).

<sup>138</sup> *United States v. Meyers*, 906 F.Supp. 1494, 1499 (D. Wyo. 1995); *Africa v. Commonwealth of Pa.*, 662 F.2d 1025, 1030 (3d Cir. 1981) (“Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy.”); *Prince v. Massachusetts*, 321 U.S. 158, 176 (1944) (noting religious minorities test the court’s “devotion to the ideals and constitutional guarantees of religious freedom”).

<sup>139</sup> *Africa*, 662 F.2d at 1030 (citing *United States v. Seeger*, 380 U.S. 163 (1965)).

<sup>140</sup> *Inupiat Cmty.*, 548 F.Supp. at 188 (holding that the Inupiat’s religious claim failed because of the lack of specificity of how oil drilling would directly impact their free exercise of religion).

<sup>141</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-33 (1993).

<sup>142</sup> SHELL GULF OF MEX. INC., REVISED OUTER CONTINENTAL SHELF LEASE EXPLORATION PLAN: CHUKCHI SEA, ALASKA 1-8 (2015),

[http://www.boem.gov/uploadedFiles/BOEM/About\\_BOEM/BOEM\\_Regions/Alaska\\_Region/Leasing\\_and\\_Plans/Plans/2015-03-31-EP-Revision-2.pdf](http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Leasing_and_Plans/Plans/2015-03-31-EP-Revision-2.pdf).

believe that their land was once a sacred whale and the whale served as the foundation of their community.<sup>143</sup> Ceremonies throughout the year, including the Spring Whale Distribution, Whaling Festival, Fall Whale Distribution, and the Bladder Festival, seek to bring together spiritually the animals and humans.<sup>144</sup> Each whale hunt brings forth sacrifice rituals celebrating the animal spirits who sacrificed themselves to sustain the Inupiat. The sacrifice rituals include shaman healers who connect the community with the dead and the gods, and after the ceremony healers are often honored with the whale's flipper.<sup>145</sup> The Inupiat could argue that BOEM's approval of Shell's plan which outlines the "taking" of whales deprives the indigenous people of the ability to practice their religion.<sup>146</sup> The "taking" includes the disruption of whales' migration paths, which will decrease the number of whales in the region.<sup>147</sup> If the noise pollution causes significant changes in migration and mating patterns, the Inupiat will not be able continue their religious traditions.

The Supreme Court addressed a similar issue in *Lyng*, where three Native American tribes challenged the construction of a road and timbering in an area that was an "integral and indispensable part of Indian religious conceptualization and practice."<sup>148</sup> The Native American tribes argued that the road would diminish the sacredness of the area, create distractions, and destroy the environmental conditions necessary for their religious practices.<sup>149</sup> The Supreme Court majority invalidated the injunction against the government's construction of the road, reasoning that the road did not coerce conduct inconsistent with the Native American's religious belief or penalize them for their religious practice.<sup>150</sup> The majority compared measures taken by the government to avoid disrupting the sacred places with the interests of the Native Americans.<sup>151</sup> The Court reasoned if the injunction were upheld it would be essentially giving the tribes ownership over the federal land.<sup>152</sup> The dissent countered that the majority leaves the Native Americans no constitutional protections against a grave threat to their religious practices in the area that have continued for 200 years.<sup>153</sup>

It will be difficult for the Inupiat to overcome the precedent of *Lyng*. To support a § 1983 claim, the Inupiat must convince the court that the Inupiat's religious beliefs outweigh the government's interest in developing the area for oil and gas.<sup>154</sup> This is difficult because the region in the Chukchi Sea has the potential to be a huge source of oil, which could provide the United States energy independence for many years.<sup>155</sup> Further, Shell will counter that the exploratory drilling does not deprive the Inupiat of every form of religious exercise, but rather

---

<sup>143</sup> Chie Sakakibara, "Our Home is Drowning": *Inupiat Storytelling and Climate Change in Point Hope, Alaska*, 98 GEOGRAPHICAL REV. 456, 456 (2008).

<sup>144</sup> Greenberg, *supra* note 67, at 1334; Turner, *supra* note 69, at 6.

<sup>145</sup> *Id.* at 11.

<sup>146</sup> SHELL GULF OF MEX. INC., *supra* note 121, at 6-1.

<sup>147</sup> *Id.*

<sup>148</sup> *Lyng*, 485 U.S. at 442.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 449.

<sup>151</sup> *Id.* at 454.

<sup>152</sup> *Id.* at 453.

<sup>153</sup> *Id.* at 459.

<sup>154</sup> *Inupiat Cmty.*, 548 F.Supp. at 188 (demonstrating the balancing the court will engage in between the economic interests of the government and the religious beliefs of the Inupiat).

<sup>155</sup> Adam Hadhazy, *Drilling the Arctic for Energy: Does Tapping Alaskan Oil to Increase Energy Independence Come at Our Peril?*, SCIENTIFIC AMERICAN (March 24, 2009), <https://www.scientificamerican.com/article/drilling-the-arctic-for-energy/>.

only infringes upon their ability to hunt whales and explore the sea.<sup>156</sup> Courts will look into the extent to which the “spiritual practices would become ineffectual” from Shell’s drilling.<sup>157</sup> The number of people who practice the Inupiat religion will implicitly be taken into account in the courts’ weighing of interests. The Inupiat represent a minority religion, which poses a unique challenge for the courts.<sup>158</sup> Despite the plain language of the First Amendment and § 1983 as a means to enforce the religious right, the Supreme Court’s precedent narrows the broad language through balancing tests and cases like *Lyng*, which makes it extraordinarily difficult for plaintiffs to succeed.

Additionally, as the Court acknowledged in *Lyng*, the religious interest cannot essentially confer ownership of the Chukchi Sea to the Inupiat.<sup>159</sup> The federal government has ownership over all of the mineral rights in that ocean region, meaning that inhibiting drilling would in some ways give the Inupiat ownership and control.<sup>160</sup> Due to the Court’s balancing of interests, it is unlikely that the Inupiat’s religious freedom argument will succeed.

Granted, *Lyng* was decided prior to the passage of the Religious Freedom Restoration Act (RFRA), which changed the landscape for religious freedom claims. RFRA provides that the

Government shall not substantially burden a person’s exercise of religion . . . [except the] Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.<sup>161</sup>

RFRA defines religious exercise as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>162</sup> Additionally, RFRA clarifies that the “use . . . of real property for the purpose of religious exercise” also falls within the definition of religious exercise.<sup>163</sup>

However, RFRA does not substantially change the hurdles facing the Inupiat in bringing a religious freedom claim that *Lyng* highlighted. In *Navajo Nation v. United States Forest Service*, Indian tribes and environmental groups brought a claim against the Forest Service for their authorization of the use of recycled wastewater to make artificial snow for a ski resort on a mountain considered sacred by the tribes.<sup>164</sup> The Ninth Circuit held that the action did not “substantially burden” the petitioner’s religious exercise.<sup>165</sup> The court explained that “[u]nder RFRA, a ‘substantial burden’ is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act

---

<sup>156</sup> *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 343 (1987) (finding prison regulations did not entirely limit Muslim inmate’s practice of religion and served an important governmental need, thus the plaintiff’s § 1983 claim failed).

<sup>157</sup> *Lyng*, 485 U.S. at 450.

<sup>158</sup> See *supra* note 135 and accompanying text.

<sup>159</sup> 485 U.S. at 453.

<sup>160</sup> *Inupiat Cmty.*, 548 F.Supp. at 182; see also *Edwardsen*, 369 F.Supp. at 1378.

<sup>161</sup> 42 U.S.C. § 2000bb-1(a)–(b) (2012).

<sup>162</sup> § 2000cc-5(7)(A).

<sup>163</sup> § 2000cc-5(7)(B).

<sup>164</sup> 535 F.3d 1058, 1062–63 (9th Cir. 2008).

<sup>165</sup> *Id.* at 1067.

contrary to their religious beliefs by the threat of civil or criminal sanctions.”<sup>166</sup> The tribes in *Navajo Nation* were not forced to choose or coerced, but rather the use of recycled water was “offensive to the Plaintiffs’ religious sensibilities.”<sup>167</sup> The Ninth Circuit cited *Lyng* to support the proposition that “the diminishment of spiritual fulfillment . . . is not a ‘substantial burden’ on the free exercise of religion.”<sup>168</sup> Therefore, the passage of RFRA does not impact the incredible difficulty for the Inupiat to prove a religious freedom claim against drilling in the Chukchi Sea.

Nonetheless, religious freedom is a fundamental right in the United States, which conveys some traction to the Inupiat’s argument. “The right to the free exercise of religion is a precious American invention, distinguishing our Constitution from all prior national constitutions.”<sup>169</sup> The Court will have to balance the interests in increasing the United States’ energy independence with the preservation of Native Alaskan religion and culture. The Court’s balancing approach to protected rights moves away from the broad language of the First Amendment; instead the balancing approach suggests protecting only those religious freedoms that the Court deems to outweigh the government interest in the action. This kind of balancing moves away from the expansive purpose of § 1983 to protect minority individuals from abusive state action. A balancing approach leads to outcomes the Court finds beneficial, but those often do not align with the protections intended by § 1983.

### B. State Action

For a § 1983 claim to be successful, the plaintiff must demonstrate that the complained-of action can be attributed to the state. The Inupiat must prove that Shell acted “under color of state law.” Under § 1983, to find that a defendant acted under the color of state law, the Court must find “such a ‘close nexus between the State and the challenged action’ that the challenged action ‘may be fairly treated as that of the State itself.’”<sup>170</sup> Under *San Francisco Arts & Athletics, Inc.*, extensive regulation by the government does not transform the actions of a regulated entity into those of the government.<sup>171</sup> The government “can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert that the choice must in law be deemed that of the government.”<sup>172</sup>

Although Shell is a private actor, the state encouraged their drilling actions and granted permits under state law. The Inupiat’s claim will have to be framed in a way that emphasizes the connections between Shell and the Alaskan government. The Inupiat will not succeed by solely demonstrating that Shell received permits and leases from the state of Alaska and BOEM. The entwinement must go beyond extensive regulation and transform into coercive power or encouragement.

The economy of Alaska has become increasingly influenced by the ebbs and flows of the oil industry.<sup>173</sup> The energy industry, including leaders like Shell, accounts for a large portion of

---

<sup>166</sup> *Id.* at 1069–70.

<sup>167</sup> *Id.* at 1070.

<sup>168</sup> *Id.* at 1070–71.

<sup>169</sup> *Ward*, 1 F.3d at 876.

<sup>170</sup> *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 823 (7th Cir. 2009) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

<sup>171</sup> 483 U.S. at 544.

<sup>172</sup> *Blum*, 457 U.S. at 1004.

<sup>173</sup> Heesun Wee, *Amid Oil Price Plunge, Alaska’s Economy Braces for Losers and Survivors*, CNBC (Apr. 21, 2016, 10:03 AM), <http://www.cnbc.com/2016/04/21/amid-oil-price-plunge-alaskas-economy-braces-for-losers-and-survivors.html>.

United States business investment and Standard & Poor's (S&P) spending. The S&P 500 is an index of 500 stocks that is a leading indicator of the United States' economy.<sup>174</sup> The energy industry accounts for one third of the S&P 500's net capital expenditure or capex spending in the United States.<sup>175</sup> Therefore, the energy industry, due to its impact on spending in the U.S. market, greatly impacts overall economic growth and recovery.<sup>176</sup> Further, over thirty-three percent of Alaska's jobs are tied to oil and gas.<sup>177</sup> The oil industry provides much needed revenue, taxes, and jobs to Alaska, a state with one of the country's highest unemployment rates.<sup>178</sup> Money derived from the oil industry makes up ninety percent of Alaska's budget and provides dividend checks to Alaskans.<sup>179</sup> Uniquely, Alaska owns its oil reserves, meaning the state is entitled to royalties on production.<sup>180</sup> As the oil prices fall or companies stop drilling in Alaska, the state's income also drops leading to cuts in school funding, health care, and law enforcement.<sup>181</sup> The Inupiat could convincingly argue that Shell and Alaska are inextricably connected through the income derived from drilling. The local economy, as well as many public benefits, are contingent upon the continued successful drilling of Alaska's oil reserves.

In addition to the general economic benefits for Alaska and Shell from the drilling, Alaska has tax incentives for oil companies to develop in the North Slope region to "encourage exploration and development of Alaska's oil and gas resources."<sup>182</sup> Alaska provides tax credits, subsidies, and tax incentives for oil companies.<sup>183</sup> The tax credits focus on investment in drilling expenditures and seek to counter the risks and expenses companies fear when investing in Alaska.<sup>184</sup> In 2014, Alaska's largest tax break of \$492 million was split between companies based upon oil production in the North Slope.<sup>185</sup> The tax benefit for oil companies in Alaska has been compared to receiving free money and has encouraged oil development in the region.<sup>186</sup> The Inupiat in their § 1983 claim could use these tax breaks and credits as evidence of the state's encouragement of Shell, a private actor, to satisfy the state action doctrine.<sup>187</sup> This argument would demonstrate that Alaska encourages oil companies through incentives in the hope that it will boost their economy. These actions lead to an inference that Shell's actions are readily attributable to the state of Alaska.

---

<sup>174</sup> The Standard and Poor's Index, INVESTOPEDIA, (Apr. 2, 2017), <http://www.investopedia.com/terms/s/sp500.asp>.

<sup>175</sup> Sam Ro, *This Chart Shows why America Should be Nervous About Crashing Oil Prices*, BUS. INSIDER (Nov. 7, 2014, 12:43 PM), <http://www.businessinsider.com/energy-capex-and-rd-2014-11>.

<sup>176</sup> *Id.*

<sup>177</sup> MCDOWELL GRP., THE ROLE OF THE OIL AND GAS INDUSTRY IN ALASKA'S ECONOMY: FINAL REPORT AT 4 (2014), [http://www.aoga.org/sites/default/files/news/aoga\\_final\\_report\\_5\\_28\\_14\\_0.pdf](http://www.aoga.org/sites/default/files/news/aoga_final_report_5_28_14_0.pdf).

<sup>178</sup> ST. OF ALASKA: DEP'T OF LAB. & WORKFORCE DEV., <http://live.laborstats.alaska.gov/labforce/> (Apr. 2, 2017) (showing Alaska's current unemployment rate is 6.4% which is over 1% higher than the national average).

<sup>179</sup> Timothy Puko, *Oil's Plunge Puts Alaska Budget in Deep Hole*, WALL ST. J. (Nov. 1, 2015, 9:11 PM), <http://www.wsj.com/articles/alaska-weighs-curtailing-oil-tax-perk-1446427016>.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> ST. OF ALASKA: ALASKA DEP'T OF NAT. RES., <http://dog.dnr.alaska.gov/programs/FinancialIncentives.htm> (last visited Nov. 20, 2015).

<sup>183</sup> Puko, *supra* note 179.

<sup>184</sup> ALASKA OIL & GAS ASS'N: OIL TAX CREDITS, <http://www.aoga.org/positions/oil-tax-credits> (last visited Dec. 11, 2015).

<sup>185</sup> Puko, *supra* note 179.

<sup>186</sup> *Id.*

<sup>187</sup> *Blum*, 457 U.S. at 1004 (noting encouragement can be overt or covert).

The Inupiat's potential argument that Shell satisfies the state action doctrine based upon the benefits to Alaska's economy and tax incentives could be successful. Several courts have considered tax-exempt organizations as state action, especially when racial discrimination is at issue.<sup>188</sup> However, the Supreme Court ruled that funding is not enough because a private actor who receives money from the government can be viewed as a contractor and therefore not a state actor.<sup>189</sup> In *Burton v. Wilmington Parking Authority*, the Supreme Court found that when the state is working for a mutually beneficial goal and leases the space to a private actor the state action requirement is satisfied.<sup>190</sup> In *Crissman v. Dover Downs Entertainment Inc.*, the Third Circuit distinguished their case from *Burton* by stating that even though a state agency subsidized a private business's facilities, the owner and state were not conducting the operation together in a mutually beneficial manner.<sup>191</sup> The court emphasized that the location of the business was not owned or leased by the state to hold there was no state action.<sup>192</sup>

The Inupiat's claim against Shell is analogous to *Burton*.<sup>193</sup> Alaska needs Shell's revenue, the drilling takes place on government property on lease to a private actor, and the state financially benefits from Shell's discriminatory conduct. These three factors demonstrate that the drilling in the Chukchi Sea is mutually beneficial for Shell and Alaska. Based upon the substantial benefits to Alaska from drilling, the fact that Shell drills on Alaskan land, and the tax incentives, the Inupiat could succeed in arguing that Shell's action can be fairly attributable to the state to fulfill the state action doctrine.

In the alternative, the Inupiat could sue the state of Alaska or the BOEM for the issuance of permits to Shell. Alaska was clearly acting "under the color of state law," and therefore would satisfy the state action requirement of § 1983.

## VI. CONCLUSION

For Native Alaskans, achieving a remedy under § 1983 is a difficult battle. Similar to many discrimination suits, the claim likely would be dismissed early in the litigation under Rule 12(b)(6) for failure to state a claim.<sup>194</sup> Unfortunately, many normative concerns do not align with the law's purview. As a society, many are concerned about the historical significance of destroying Native Alaskan culture and communities. Many people see a fundamental unfairness in the disproportionate impact these communities bear because of our dependence on natural resources. In addition, a growing concern for climate change and the environmental impacts of human consumption leaves those communities most at risk without a remedy in the law.

We are left to wonder if discrimination law is not helping the Inupiat, some of our nation's first people, then who is it here to help? The legislative intent and original purpose

---

<sup>188</sup> *Jackson v. Statler Found.*, 496 F.2d 623, 628 (2d Cir. 1973) (discussing the jurisprudence of tax-exempt organizations as state action).

<sup>189</sup> *Rendell-Baker*, 457 U.S. at 842-43 (1982) (holding a private school who received most of its funding from the government was not a state actor).

<sup>190</sup> 365 U.S. 715 (1961).

<sup>191</sup> 289 F.3d 231, 242—43 (3d Cir. 2002).

<sup>192</sup> *Id.*

<sup>193</sup> 365 U.S. at 723—24 (holding that a restaurant in a state-owned building constituted joint participation to satisfy the state action doctrine).

<sup>194</sup> ABERNATHY, *supra* note 43, at 122-29 (discussing the difficulties faced by plaintiffs in bringing and winning discrimination claims due to the high bar for proving the elements under many discrimination statutes).

behind a statute like § 1983 was to provide a remedy for abusive state policies that disproportionately burden minority groups.

One purpose of anti-discrimination law is anti-balkanization.<sup>195</sup> Reva Siegel argues that anti-discrimination law seeks to prevent racial divisiveness.<sup>196</sup> She contends that Justices affirm racially-neutral policies as long as they do “not make race so salient as to affront dignity and threaten divisiveness.”<sup>197</sup> In light of anti-balkanization, the case for Native Alaskans is paramount to this goal. Shell’s actions in the Arctic Circle threaten to destroy a culture that has persisted for thousands of years. The actions of Alaska, Shell, and the Nation in approving of these exploratory drilling projects sends a message that Native Alaskan dignity and culture is worth less than our drive for oil. If we continue to allow the potential for profits to overrun the value of human dignity, we are left to ask: what is the value of life, liberty, and property in the United States?

Another purpose of anti-discrimination law is to remedy group inequalities, prevent dignitary harm, and stigmatize discrimination.<sup>198</sup> The dignitary harm caused to all Native Alaskans by Shell’s destruction of the Inupiat’s home reduces the personhood of the Native Alaskans to something that can be bought and traded. Shell’s action takes away the Inupiat’s property, destroys their source of subsistence, and inhibits their religious practice. If taking away a person’s property, source of food, and religion does not constitute a dignitary harm then it is not clear what does. Shell’s actions essentially eliminate the Inupiat’s dignity and personhood by leaving them without the fundamental building blocks of their culture and way of life. As the impacts of drilling and climate change intensify the Northern Alaskan region will be uninhabitable due to rising seas and loss of sources of food. Section 1983 has failed to protect the Inupiat from this devastating harm and fulfill its purpose.

In order for § 1983 to live up to its purpose, courts need to interpret the statute based upon its original language. The plain language of the statute is broad to support the Inupiat’s claim against Shell, but the jurisprudence creates insurmountable obstacles. Because § 1983 does not provide an independent protectable right, plaintiffs, like the Inupiat, are forced to search for an outside source of law to support their claim. As discussed, often these outside sources do not align with the goals of § 1983 and fail to protect minority interests. In order for § 1983 to succeed courts must interpret outside sources, such as the First Amendment, broadly to allow plaintiffs like the Inupiat to litigate their claims. The Court’s continued limitation of § 1983’s reach through outside sources of law contravenes the purpose and plain language of the statute. Courts should return to the clear language and purpose behind § 1983 to allow environmental justice claims to survive. Advocates and courts need to use the statute as it was originally intended to remedy environmental discrimination. By returning to the roots of § 1983, it will begin to provide the strong protection for minorities that the drafters intended.

---

<sup>195</sup> Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1300 (2011).

<sup>196</sup> *Id.* at 1301-02.

<sup>197</sup> *Id.* at 1357.

<sup>198</sup> Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 627 (2015).