

Religion plays a role in Native American adoption case before Supreme Court

by [Emily McFarlan Miller](#)

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The US Supreme Court building in Washington on June 27. (AP Photo/Patrick Semansky, File)

As the Supreme Court heard the case of *Brackeen v. Haaland* on November 9, what was at stake for most interested parties was the decades-old Indian Child Welfare Act, [considered by many](#) to be the “gold standard” of child welfare policy. Passed by Congress in 1978, the act was meant to stop Native American families from being separated by state child welfare agencies and private adoption services and instead seek placement for children within a federally recognized tribe.

But some also see *Brackeen v. Haaland* as a case about religious liberty, and not only because at its heart is, [as the New York Times put it](#) earlier this week, “the Solomonic fight over the fate of a child.”

“This absolutely is about culture/religion,” said Robert Miller, a professor of law at the Sandra Day O’Connor College of Law at Arizona State University.

“It’s about raising your citizens for the future to preserve your language, your cultural practices. You and I could easily put the category of religion on that,” said Miller, an enrolled citizen of the Eastern Shawnee Tribe and tribal judge.

The plaintiffs in the Supreme Court case, Jennifer and Chad Brackeen, are a White couple living in Texas who want to adopt a now 4-year-old girl whose birth mother is Navajo. The couple had already adopted the girl’s brother, who shares the same birth mother, and when the girl was born in 2018 and fostered by another family, the couple filed for custody of her, too.

But [ICWA establishes](#) that children in foster care who are eligible for tribal membership should be placed with extended family, another member of their tribe, or another Native American family whenever possible. And a relative—a great-aunt who lives in the Navajo Nation in Arizona and visits regularly with the children’s older siblings—also wants to adopt the girl.

In 2017, the Brackeens became the lead plaintiffs in a federal lawsuit brought by the state attorneys general of Texas, Louisiana, and Indiana as well as other families [challenging the law](#).

In 2019, a Texas judge ruled that the two families would share custody, with the girl living primarily with the Brackeens and spending time each summer with her great-aunt in the Navajo Nation.

The Brackeens’ case argues the Indian Child Welfare Act is unconstitutional, explained Ana Eveleigh, a Barnard College student who worked with Columbia Law School’s Law, Rights, and Religion Project this summer to analyze the religious dynamics in *Brackeen v. Haaland*. The argument lies in part in the idea that the law constitutes racial discrimination by determining the placement of children based on race, Eveleigh said.

But federal law has long viewed Native Americans not as a racial group, but as members of sovereign nations, said Miller. If the Supreme Court were to decide the law is “race based,” it would undo hundreds of years of European and American interactions with tribal governments, he said.

“Every power that tribes have—sovereignty, their own territory, they can have police, they can jail people, they have court systems—I mean, all that would be in question if the court goes this far. I think it won’t, and I certainly hope it won’t, but this case has people worried.”

Eveleigh, who is non-Native, agrees the case “really hits at the heart of how we define tribal sovereignty in the United States.”

But it’s impossible to ignore religion, she said.

Eveleigh and others draw a line from *Brackeen v. Haaland* to past efforts by the United States to remove Native American children from their homes—along with their cultures and spiritual practices—that stretch back to the federal Indian boarding school system started in the 1800s.

“Religion was at the center of all of this because, you know, by getting rid of religious tradition, you get rid of a culture,” she said.

Many of the people who participated in those efforts were motivated by religion as well, namely Christianity, she added.

The Brackeens have said they attend an evangelical Church of Christ church twice a week and cited their Christian faith as part of their motivation to adopt in [a 2019 interview](#) with the *New York Times*.

The US is only now reckoning with the history of its boarding schools, which separated generations of children from their families and prohibited them from speaking Native languages, dressing and wearing their hair in traditional styles, and taking part in traditional spiritual practices in an effort to assimilate them into the dominant White Christian culture.

Half of boarding schools likely were supported by Christian institutions, [according to a report](#) released earlier this year by the US Department of the Interior. A [number of denominations](#) are now researching and repenting for their past involvement

Then in 1958, the US Bureau of Indian Affairs began working with the nonprofit Child Welfare League of America on the Indian Adoption Project, according to Misty Flowers, executive director of the Nebraska Indian Child Welfare Coalition and a member of the Santee Sioux Nation. The project encouraged non-Native families to adopt Native American children.

Canada and Australia had similar policies of adopting Indigenous children away from their families, cultures and spiritual practices in what's known as the "Sixties Scoop" in Canada and the "Lost Generation" in Australia.

By the time Congress approved ICWA in 1978, as many as 25 percent to 35 percent of Native American children had been removed from their families, Flowers said. Most were placed in non-Native homes.

The law aimed to put a stop to that, said Flowers, with Congress [describing](#) the rate of removals as "alarmingly high" and "often unwarranted." That forced acculturation caused trauma that then "creates more trauma and more trauma and more trauma," according to Flowers.

Many Native Americans have argued that the key to healing from acculturation is enculturation, according to Eveleigh—providing access to one's own culture and giving a child the choice to participate in traditional spiritual practices, she said. It builds pride in their culture and connections to their community.

And it cannot happen if a child is adopted away from that culture and community.

"Though the Brackeens provide a loving home for ALM," as their son is named in court documents, Eveleigh said, "they cannot provide that enculturation that Native American communities have called for and have argued is important for the healing of their people in the long run." —Religion News Service