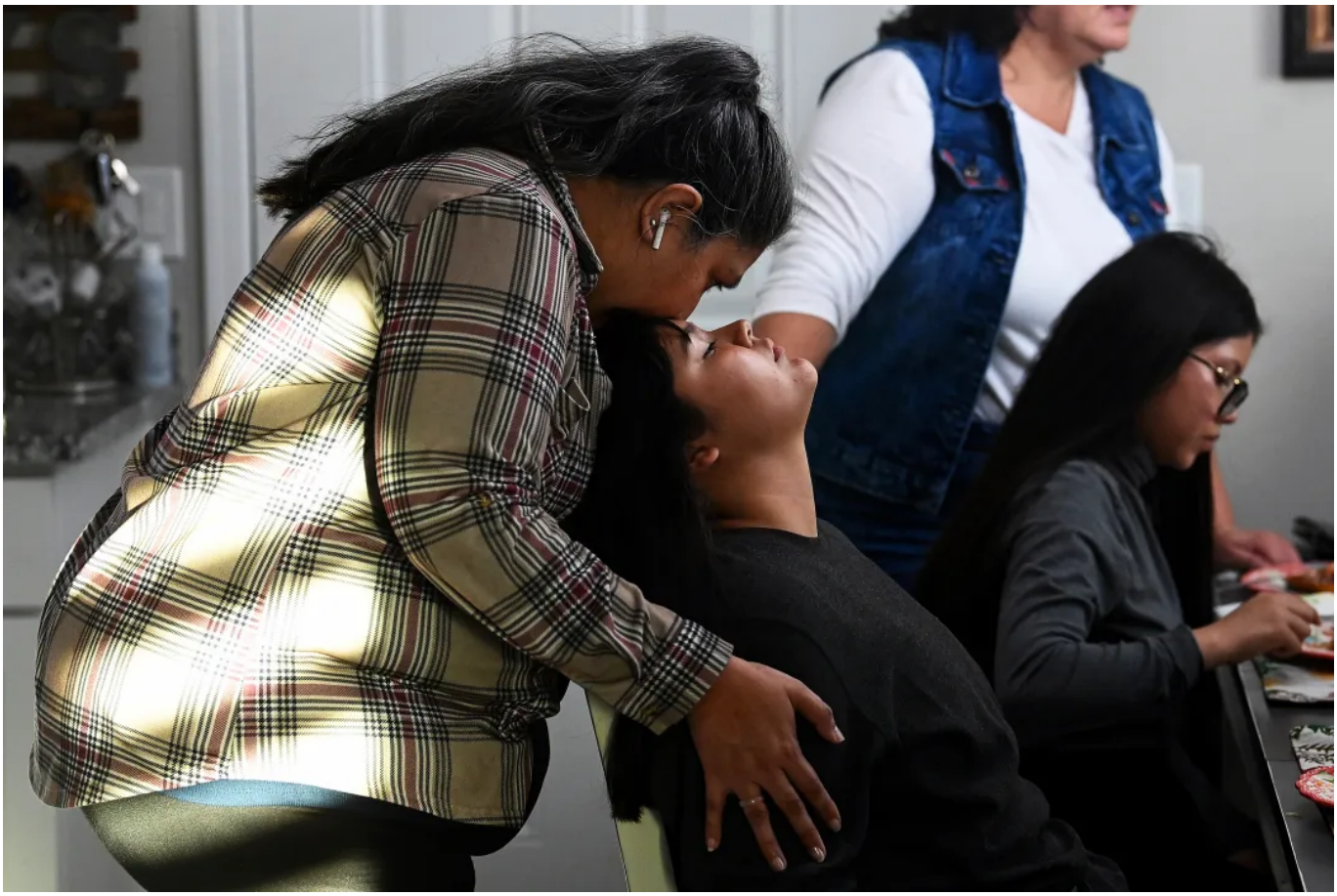
POLITICS

The high stakes in a Supreme Court case about American Indian children

Brackeen v. Haaland attacks a 44-year-old law enacted to halt cultural genocide.

by **Ian Millhiser**
Nov 8, 2022, 6:30 AM EST



Vox

Ian Millhiser is a senior correspondent at Vox, where he focuses on the Supreme Court, the Constitution, and the decline of liberal democracy in the United States. He received a JD from Duke University and is the author of two books on the Supreme Court.

For much of its history, the United States pursued a kind of cultural genocide against American Indians. American Indian children were often rounded up and sent to boarding schools, where Native children were forced to abandon their language and customs and to learn to behave like white Americans. Often, the architects of this policy were quite explicit about their goals — as the founder of one of these boarding schools said in 1892, "all the Indian there is in the race should be dead. Kill the Indian in him, and save the man."

Some of these boarding schools continued to operate well into the 20th century. There are people alive today who attended them.

In response to this history, and 20th-century policies by state governments that also separated American Indian children from their culture, Congress enacted the Indian Child Welfare Act (ICWA) in 1978. Among other things, this law provides that, if a state court determines that a child who is either "a member of an Indian tribe" or "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe" must be removed from their home, then the child should be placed with an American Indian family — and, if possible, a member of the child's extended family or, at least, their own tribe.

(Federal law uses the term "Indian" to refer to Indigenous nations and their citizens, and this term has a distinct meaning that is different than the definition of the term "Native American." This piece includes quotes and legal references that also use the former terminology.)

Nearly half a century after the ICWA became law, the Supreme Court is now hearing four cases, all consolidated under the name *Haaland v. Brackeen*, which claims that this anti-genocidal law is unconstitutional. The law is being challenged by non-Indian families who wish to adopt American Indian children, along with the state of Texas.

unnoticed for the law's first four decades of existence. Indeed, the *Brackeen* plaintiffs make one argument so aggressive that it could potentially invalidate much of the last century of federal law — including landmark statutes such as the Affordable Care Act, the ban on whites-only lunch counters, and the federal ban on child labor. And, while their other arguments do not go that far, most of these plaintiffs' arguments call for a wholesale rethinking of the United States' relationship with Indigenous nations and their people.

That said, it is far from clear that even this Supreme Court will sign on to this attempt

partisan judge best known for his failed efforts to repeal the entire Affordable Care Act and to insert himself into the top of the military's chain of command.

Even the archconservative Fifth Circuit Court of Appeals believed that O'Connor went too far, and a majority of its judges voted to reinstate several key provisions of the ICWA.

It's also worth noting that Justice Neil Gorsuch, a Trump appointee who typically votes with the Court's most reactionary members in politically charged cases, tends to vote with the Court's liberal minority in cases involving federal Indian law. Assuming Gorsuch continues that pattern in *Brackeen*, that most likely means the plaintiffs need to hold on to all five of the Court's other Republican appointees to prevail.

It is possible, in other words, that at least five justices will vote to uphold the Indian Child Welfare Act in its entirety.

Nevertheless, the stakes in *Brackeen* are high. They speak to whether Congress is allowed to take steps to cure grave past injustices — a project this Court has been hostile toward in the past.

The *Brackeen* plaintiffs' most aggressive arguments are completely unhinged

Since the very earliest days of the American republic, the Constitution has been understood to give Congress the broadest authority to set the United States' policy toward American Indians, and to regulate its relationship with the tribes. As Secretary of War Henry Knox wrote to President George Washington in 1789, "the United States have, under the constitution, the sole regulation of Indian affairs, in all matters whatsoever."

The Supreme Court, meanwhile, has repeatedly said that this power derives from the Constitution's commerce clause, which permits Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (although

Indian affairs is "plenary," or absolute.

That said, one oddity of the Supreme Court's jurisprudence is that it has often read the scope of Congress's power to "regulate commerce ... with the Indian tribes" more broadly than its power to "regulate commerce ... among the several states."

The interstate commerce clause — the provision allowing congressional regulation of commerce among the states — is arguably the single most consequential provision of the Constitution because it gives Congress broad authority over domestic economic affairs. The interstate commerce clause is what permits federal lawmakers to enact a minimum wage, to protect workers' right to unionize, and to prohibit discrimination by private businesses, among many other things.

At least one of the *Brackeen* plaintiffs, the state of Texas, argues that the interstate and Indian commerce clauses should instead be read to "mean substantially the same thing." They then propose a definition of the word "commerce" so narrow that it would erase much of the last 100 years of US law.

In its now-discredited decision in *Hammer v. Dagenhart* (1918), the Supreme Court held that Congress was forbidden from banning child labor in the workplace, on the theory that the word "commerce" permits Congress to regulate the "transportation" and "sale" of persons and goods, but not the production of those same goods.

At least some parts of the *Brackeen* plaintiffs' briefs appear to argue that *Hammer* was correctly decided. Texas's brief, for example, claims that the word "commerce" was "originally understood" to only encompass "buying, selling, and transporting goods." Meanwhile, a second brief filed on behalf of individual plaintiffs who "sought to foster or adopt children with Indian ancestry" makes a similar argument, claiming that "Congress's Indian Commerce Clause power confers only authority to regulate trade with tribes."

This is, of course, the exact same definition of the word "commerce" that the Court embraced in its long-since-overruled decision in *Hammer*.

and federal child labor laws, it would abolish huge swaths of federal laws governing the workplace, prohibiting discrimination, and regulating entire industries such as health insurers. It would be as if the Supreme Court picked up the entire United States Code, and just started randomly crossing out huge swaths of it with a black marker.

That said, it is unlikely that the Court would go that far. Of the Court's current members, only Justice Clarence Thomas has openly suggested that *Hammer* was correctly decided. Most of the justices appear to have made peace — albeit often an uneasy peace — with the fact that Congress may enact economic regulation on a broad range of subjects.

But the sheer audacity of the *Brackeen* plaintiffs' commerce clause arguments should give you a sense of just how little regard they pay to existing law.

The *Brackeen* plaintiffs attack one of the most foundational concepts underlying the United States' relationship with tribes

One of the fundaments underlying US relations with American Indian tribes is that those tribes are distinct nations — although the Court has, at times, described Indigenous nations as "domestic dependent nations" or "quasi-sovereign tribal entities" whose citizens are subject to far more US governmental control than, say, a citizen and resident of France.

Like any nation, tribes generally may decide who they wish to admit as citizens. Some tribes, for example, extend citizenship to the descendants of Black people who were enslaved by members of the tribe, even though these Black tribal citizens may not be blood descendants of the tribe's Indigenous citizens.

Indeed, the reason why I've largely avoided using the term "Native Americans" to describe the class of people protected by the ICWA is because doing so could conflate the difference between a Native American racial identity and someone's membership in an American Indian tribe. The ICWA does not apply to all people of Native descent.

Indian tribe."

Which brings us to the *Brackeen* plaintiffs' next argument: that the ICWA is unconstitutional because it discriminates on the basis of race by treating Native children differently than non-Native children.

The problem with this argument is that the statute emphatically does no such thing. Again, it does not apply to all children of Native American descent. It applies to children who are either members of a tribe or who are eligible for tribal citizenship and have a parent who is a tribal citizen. Under the ICWA, a non-tribal citizen with four Native American grandparents is not governed by the law if their parents were not tribal citizens. Meanwhile, a Black child whose parents are two Black citizens of the Cherokee Nation would fall within the statute unless they were somehow ineligible for tribal citizenship themselves.

As the Supreme Court held in *Morton v. Mancari* (1974), federal law may give special treatment to American Indians, so long as that treatment "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities."

The *Brackeen* plaintiffs also want to rework the balance of power between the federal government and the states

The *Brackeen* plaintiffs' strongest legal argument rests on a legal doctrine known as "anti-commandeering."

Briefly, this doctrine provides that, if the federal government wants to implement a particular federal policy, it cannot order a state government to do so. For example, while the Trump administration could order federal law enforcement officers to crack down on immigrants, it could not order state and local police to do the same. Similarly, while marijuana possession remains illegal under federal law, states where marijuana is legal are under no obligation to enforce this law. If the feds want to arrest someone for smoking a joint in one of these states, they need to send a federal agent to make the arrest.

federal policy. As Texas argues in its brief, the ICWA effectively forces state officials to "provide notices, keep records, locate and retain expert witnesses, and track down Indian families" in order to comply with federal rules governing child placement disputes involving American Indian children.

But there are a number of problems with this argument. The first is that, to the extent the ICWA requires state family court judges to rule in certain ways, the Constitution explicitly permits Congress to impose these kinds of obligations on state judges. Article VI of the Constitution states that federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."

The Court, moreover, placed some important limits on the anti-commandeering doctrine in *Reno v. Condon* (2000), which held that this doctrine is not triggered if a law merely requires state officials to "take administrative and sometimes legislative action to comply with federal standards." Under *Reno*, the doctrine only has force when the federal government requires "the States in their sovereign capacity to regulate their own citizens."

Think of it this way: the federal government can't order a state police officer to arrest an individual for violating federal marijuana law, because that would amount to ordering a state to use its own resources to regulate the state's own citizens. But, once a state has made the decision to arrest someone for violating a marijuana law, the federal government can regulate how that arrest goes down and how the criminal suspect is treated without running afoul of the anti-commandeering principle.

Similarly, the ICWA does not require any state government to remove any child from their home. It merely provides that, *if* the state decides to bring a custody proceeding involving an American Indian child, then this custody proceeding must comply with the rules laid out in federal law. That's the very sort of federal law which *Reno* said was permissible.

All of which is a long way of saying that the plaintiffs' legal arguments in *Brackeen* are quite aggressive, and they call for the Supreme Court to make several departures from

This Supreme Court does not feel particularly bound by existing law. And it has shown particular skepticism toward federal laws enacted to cure past injustices against marginalized groups — hence the Court's declaration in *Shelby County v. Holder* (2013) that much of the Voting Rights Act should be deactivated because "things have changed in the South" since the Act was originally enacted to eliminate Jim Crow restrictions on voting.

That said, there are some reasons for proponents of the ICWA to remain optimistic. Thus far, the lower court judges who've attacked the ICWA have largely been drawn from the most reactionary voices on the federal bench. And a majority of the current Supreme Court does sometimes run out of patience for Judge Reed O'Connor's especially partisan approach to interpreting federal law.

But no one can be truly confident that any precedent is safe in this Supreme Court until a majority of the Court's current members vote to uphold it. So we won't know for sure whether the ICWA is itself safe until the Court rules in *Brackeen*.

SEE MORE: POLITICS SUPREME COURT

POLITICS | 7:30 AM EDT

The Trump administration's fundamental misunderstanding about deportations

The economic logic of deporting undocumented workers doesn't add up.

By NICOLE NAREA

ON THE RIGHT | 7:00 AM EDT

Why Trump betrayed his base on Jeffrey Epstein

And why he'll get away with it.

By ZACK BEAUCHAMP

POLITICS | 6:30 AM EDT

The lie at the heart of Trump's entire economic agenda

The White House wants to send Medicaid recipients to the mines.

By ERIC LEVITZ

FUTURE PERFECT | 6:00 AM EDT

Trump just handed China a major advantage on AI

The obscure chip policy that could reshape US-China competition.

By DYLAN MATTHEWS

THE LOGOFF | JUL 14

Trump's new Ukraine plan, briefly explained

NATO countries will buy weapons from the US — and deliver them to Ukraine.

By CAMERON PETERS

SUPREME COURT | JUL 14

The Supreme Court just handed Trump his biggest victory of his second term

And they didn't even bother to explain themselves.

By IAN MILLHISER

Recommended For You

JUL 14
Can’t sleep? It’s not totally your fault

JUL 14
Will we ever know why Bryan Kohberger murdered the Idaho Four?

JUL 14
Scientists are trekking into the heart of a hurricane disaster zone — to save these rare creatures

JUL 13
Why doctors are finally taking IUD pain seriously

JUL 12
America is finally moving past its post-9/11 security theater

Vox