"Haaland v. Brackeen and the Logic of Discovery" by Dana Lloyd

canopyforum.org/2023/03/18/haaland-v-brackeen-and-the-logic-of-discovery

March 18, 2023

Haaland v. Brackeen
and the Logic of Discovery

Dana Lloyd

This article is part of our "200 Years of Johnson v. M'Intosh: Law, Religion, and Native American Lands" series.
If you'd like to check out other articles in this series, click here.

In 1823, the U.S. Supreme Court handed down a decision in *Johnson v M'Intosh*, the first of the Marshall trilogy, infamous for its attack on Indigenous sovereignty. Two hundred years later, it seems as if things are different — indeed, it seems as if things are better — for Indigenous peoples in the United States. We have a Laguna Pueblo woman Secretary of the Interior, an investigation into the horrors of Native American boarding schools has resulted in a report for the first time in U.S. history, and the government has even acknowledged the

genocide of Indigenous peoples (8). However, some argue that *Haaland v. Brackeen*, which the Supreme Court is getting ready to decide this term, is threatening to inflict the biggest blow to Indigenous sovereignty since *Johnson*. What are they worried about?

This essay reads the *Brackeen* case as an integral part of the legacy of *Johnson*, and as following a logic of discovery, which *Johnson* pushed forward and into U.S. law. While the *Brackeen* case has not been decided yet at the time of this writing, the fact that the Supreme Court has granted certiorari is reason enough for me to offer this reading of the case.

In *Brackeen*, some white foster parents are asking the Court to rule the 1978 Indian Child Welfare Act (ICWA) unconstitutional, arguing that the law discriminates against them based on race. Native scholars and lawyers fear that if the Court rules in favor of those foster parents, it will be the end of Indigenous sovereignty in the U.S. As Cherokee journalist Rebecca Nagle explains: "A host of federal statutes — including on land rights, water rights, health care, gaming, criminal and civil jurisdiction, and tribal self-governance — treat Native Americans differently based on this political classification [as a sovereign nation].

> In this light, I fear that the *Brackeen* lawsuit is the first in a row of dominoes — if the Court strikes down ICWA, everything else could soon go with it." So is *Brackeen* a case about race or about sovereignty? A reading through the lens of *Johnson v. M'Intosh* suggests that it is about both.

In *Johnson*, a case that involved no Native American parties, Chief Justice John Marshall applied the doctrine of discovery (or the "Doctrine of Christian Discovery," as some would have it) to the secular state, reading papal bulls from the fifteenth century into international law, and then into U.S. law. Those papal bulls authorized European, Christian nations that arrived in the Americas and found there no Christians, to kill, enslave, and steal lands from the "pagans" they found there. What the pope was saying implied that if a European, Christian nation arrives in the Americas and finds other Christians there, it should respect their right to the land, as its "discoverers," and as sovereign. This is international law in the sense that it regulates the relationship between European nations, but at the same time, when Marshall applies it to the U.S., it relativizes Indigenous sovereignty and also racializes Indigenous peoples to whom Marshall refers not as pagans but as "savages."

The other cases in the Marshall Trilogy involve the Cherokee Nation and the State of Georgia, and in them Marshall defines Indigenous nations in the U.S. as "domestic dependent nations," thus, again, compromising their sovereignty, even if he doesn't completely "domesticate" them — they are neither states nor foreign nations. The attempt to "domesticate" Indigenous peoples did not end with this legal definition that aimed to diminish their sovereignty. It also involved a racializing discourse about civilizing the "savage Indian" — "kill the Indian and save the man." It also included attacks on Indigenous sovereignty

through the domestic sphere, including the practice of out-adoption, the forced removal of Indigenous children from their families to attend government-funded, often church-run boarding schools, and the allotment of reservation land in severalty.

Native American boarding schools and the 1887 Allotment Act, which broke up reservation lands, held communally, into 160-acre lots, to be owned privately, were some of the most devastating manifestations of the assimilation era. Assimilation also included the criminalization of Indigenous religiosity and the 1924 Citizenship Act. The era ended with the 1934 Indian Reorganization Act, which marked the beginning of a slow return to an Indigenous sovereignty model, the height of which, some would argue, was in 1978, with the American Indian Religious Freedom Act (AIRFA) and the Indian Child Welfare Act (ICWA). AIRFA was enacted in response to over half a century of criminalizing Indigenous religions; it promised to secure Indigenous access to Indigenous sacred sites and protection of Indigenous ceremony. But the law has no teeth, and all it really secures is consultation, a process that does not have to end with actual protection.

ICWA has been more meaningful. It was enacted in response to the attacks of the assimilation era on the Indigenous home and family. Between 1819 and 1969, the United States operated or supported 408 boarding schools across 37 states or territories. The schools were designed by General Richard Henry Pratt (1840-1924) with the goal to “kill the Indian to save the man,” and these are now widely considered as a tool of ethnocide, if not genocide. But even when the boarding school era ended, out-adoption and foster care were ubiquitous practices, as part of what is known as the “Indian adoption project” of the 1950s and 1960s. Survivors recount social workers coming into Native American homes and taking the children, claiming the children would be better off raised by white families. In those white adoptive homes, Native children were often abused, and their Indigenous identity was attacked, ridiculed, and weaponized against them. Decades of Native American activism led to the legislation of ICWA. In cases where Indigenous children must be taken out of their homes and enter the foster care system, ICWA prioritizes placing these children first with relatives, then with tribal members, and then with other Native families. Only if none of these is available to adopt the child can non-Native adoptive parents be considered.

Back to the *Brackeen* case.

Chad and Jennifer Brackeen fostered a Navajo boy. Having been told from the start that they would not be able to adopt him because of ICWA (the idea was that they would give the child a home until a Native family is found for him), the Brackeens fought to adopt him anyway, even when his tribal nation claimed him. When they heard that the boy’s mother had another baby, they fought to adopt her, too, in order for the siblings to grow up together. The language that surrounded the fight was that the Christian Brackeens were called by God to save those kids. The question raised is that of flourishing: Can Native children flourish in non-Native homes? Are Native parents and communities “good enough” to provide their children what they need to flourish? The same language and questions were used to justify

the boarding school system in the nineteenth and twentieth centuries. In the twenty-first century, the question of flourishing is used by the Brackeens to argue in front of the U.S. Supreme Court that ICWA is unconstitutional, because it discriminates against white adoptive parents.

From the perspective of federal Indian law, or with a western framework of sovereignty in mind, *Brackeen* is understood as an attack on sovereignty because it wants to take away Indigenous peoples' authority to decide where and how their children would live. Sovereignty, in this framework, means the right to rule — that is, to decide the fate of a place and of a people. Indigenous frameworks understand sovereignty differently. With an Indigenous framework of sovereignty in mind, *Brackeen* is seen as an even more severe attack on sovereignty.

As scholar and artist Leanne Betasamosake Simpson (Michi Saagiig Nishnaabeg) writes, "children learn sovereignty at home in the context of family, and they carry themselves in a sovereign way into the community, the nation, and ultimately in relations with other nations. Children also teach us about sovereignty and the importance of having agency over one's own life" (21). "I know that individual and collective sovereignty begins at home because the family — the people we live with, love, and carry with us through our lives — is the microcosm of the nation," Simpson continues (22). Sovereignty, according to her, is not the right to decide the fate of a place and its people, but the ability to live according to our obligations to our families, including our children and our land.

> How has *Brackeen*, then, become a case about race? How has ICWA become a law about race? I think it all begins with the logic of discovery, forcefully inserted into U.S. federal law in *Johnson v. M'Intosh*, which conflated nationhood with race. Indeed, Native peoples have been racialized *in order to* erase their nationhood and sovereignty.

Literary scholar Mark Rifkin writes that "If measured against a 'race' versus 'politics' binary, ICWA would seem firmly in the second category, but the law also relies on an understanding of Native identity figured in reproductive terms" (172). However, he continues, "ICWA produces a vision of Indigenous belonging still based on calculating 'Indian' descent, segregating the content and determination of such genealogical relation from the sphere of politics proper, and excluding 'non-Indians'" (173). For their part, the white foster parents argue that "when ICWA is applied, the preservation of Native culture, not the best interest of the child, is the primary concern. Sometimes, that means doing something other than what is best for the child. This, they say, is an unfair distinction, made on the basis of race. All other children get what is best for them; Native kids get what is best for Native tribes, they contend."

The conflation of race and sovereignty is very clear here. Nez Perce scholar Beth Piatote explains that "assimilation-era policies … were driven by the notion that the tribal-national polity, as a competing national sovereignty, must be destroyed. And the way to break up the tribe was to break up the Indian family and to cultivate children's allegiance to the United States rather than to the tribe" (4). But as with *Johnson*, in *Brackeen,* too, religion, along with race and sovereignty, plays a role.

Religion scholar Tisa Wenger argues that Christianity is still very much present in *Johnson* but concealed in later cases that rely on *Johnson* that apply its logic without mentioning the doctrine of discovery. According to this reading, Marshall lays the groundwork for secularizing sovereignty in *Johnson*, and it is actually in later cases that it is secularized (113-114).

If the question that *Brackeen* raises is about home and its centrality to flourishing, then I think we should ask how the Native American homes and the Christian homes are constituted in relation to one another. The theological roots of the home as a site of oppression seem important to the connection between empire and patriarchy that needs to be examined here. The ideology of separate spheres and the confinement of white women to the private or domestic sphere rely on a theological image of the heavenly family. Likewise, policies that aimed to domesticate the Indigenous American rely on the transformation of the Indigenous person from a religious other (pagan) into a racial other (savage) who needs to be domesticated. But the home must also be thought of as a site of resistance — to empire and to patriarchy — and here, perhaps, flourishing lies. Piatote shows "the resilience of the tribal-national domestic by centering the intimate domestic . . . as the primary site of struggle against the foreign force of U.S. national domestication" (4).

The triad religion-race-sovereignty is at the heart of the logic of discovery. It has been so since *Johnson v. M'Intosh*. Is knowing this enough for ICWA to win this time? I don't know. What I do know is that Indigenous peoples in the U.S. survived two hundred years of federal Indian law and have been flourishing despite it. I trust that they will continue to do so, regardless of the outcome of *Brackeen*. ♦

For more, see the videos "Doctrine of Declaration Workshop" and "Creating a Human Rights Culture: A Look into Indigenous Peoples' Rights" featuring Peter d'Errico and "The Doctrine of Discovery: Unmasking the Domination Code" based on Pagans in the Promised Land (2008) by Steven T. Newcomb.

The research on which this essay is based is supported by the John T. McLaughlin, MD Faculty Fellowship in the Ethics Program at Villanova University. I also thank Elisha Chi and her students at Haverford College for an enlightening discussion that led to the writing of this post.

Dana Lloyd is an Assistant Professor of Global Interdisciplinary Studies at Villanova University. Her first book, *Land is Kin: Sovereignty, Religious Freedom, and Indigenous Sacred Sites*, is forthcoming with University Press of Kansas this Fall.

Recommended Citation

Lloyd, Dana. “Haaland v. Brackeen and the Logic of Discovery.” *Canopy Forum*, March 18, 2023. https://canopyforum.org/2023/03/18/haaland-v-Brackeen-and-the-logic-of-discovery/