



From Running Touchdowns to Running Away with the Casket: Thorpe v. Borough of Jim Thorpe

Madelaine Thomas

Follow this and additional works at: <https://via.library.depaul.edu/jatip>



Part of the [Computer Law Commons](#), [Cultural Heritage Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Intellectual Property Law Commons](#), [Internet Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Madelaine Thomas, *From Running Touchdowns to Running Away with the Casket: Thorpe v. Borough of Jim Thorpe*, 26 DePaul J. Art, Tech. & Intell. Prop. L. 55 (2019)

Available at: <https://via.library.depaul.edu/jatip/vol26/iss1/4>

This Case Notes and Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

FROM RUNNING TOUCHDOWNS TO RUNNING AWAY WITH THE CASKET: THORPE V. BOROUGH OF JIM THORPE

I. INTRODUCTION

Twenty-five years¹ after the introduction of the Native American Graves Protection and Repatriation Act, (NAGPRA)² the United States Court of Appeals for the Third Circuit issued an opinion on a very unique case, and what is a very important test case in determining the boundaries of NAGPRA. The story behind *Thorpe v. Borough of Jim Thorpe*³ is one of an American sports icon, Native American traditions, body snatching, and family drama of the kind seen only in movies. Yes, it is a strange story, but can it be described as absurd? The term “absurd” holds negative connotations, both in common and legal contexts. When something is described as absurd, it is automatically considered “wildly unreasonable, illogical, or inappropriate,”⁴ with a weakened status. Given the circumstances of the case, the Third Circuit found that to apply NAGPRA would be too far removed from the original intent of congress and invoked the absurdity doctrine.⁵

On June 2, 2014, the petitioners, Thorpe’s descendants joined by Sac and Fox Nation, filed a petition for Certiorari⁶ with The Supreme Court of the United States, seeking to overturn the Third Circuit’s holding and prevent the application of the absurdity doctrine to bar NAPGRA.

¹ Jack F. Trope Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36 (1992).

² 25 U.S.C §§ 3001-3013 (1984).

³ *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255 (3d Cir. 2014). See also *Thorpe v. Borough of Jim Thorpe*, 2013 U.S. Dist. LEXIS 56590 (M.D. Pa. Apr. 19, 2013).

⁴ *Oxford Dictionary of English* 7 (Angus Stevenson ed., 3d ed. 2010).

⁵ *Thorpe*, 770 F.3d at 257.

⁶ Matthew L.M. Fletcher, *Amicus Briefs in Support of Cert Petition in Sac & Fox Nation v. Borough of Jim Thorpe*, TURTLE TALK (July 1, 2015), <https://turtletalk.wordpress.com/2015/07/01/amicus-briefs-in-support-of-cert-petition-in-thorpe-v-borough-of-jim-thorpe/>.

Given that, on October 5th, 2015, The Supreme Court declined to allow Certiorari to hear the petitioner's appeal, the central argument of this note is that by denying Cert, NAGPRA as a result will be significantly impaired, and Native American communities will struggle to successfully lobby federal, or federally supported, organizations on issues of grave protection and repatriation.⁷

Such a result will effectively cut short the significant work of many Native American communities regarding repatriation efforts, and may seriously harm political relationships and the spiritual health of indigenous communities. Part I of this note presents quick backgrounds on the Native American Graves Protection Act and to the Absurdity doctrine. Part II discusses the saga of *Thorpe v. Borough of Jim Thorpe*, and examines the holdings of the District and Third Circuit courts. Part III analyzes the outcomes that may result from denial of Cert, and argues that because the Third Circuit's application of the absurdity doctrine was affirmed, it will negatively affect future cases involving the application of NAGPRA. Part IV concludes that while there is merit to the holding of the Third Circuit, it ignores the broader ramifications of applying the absurdity doctrine to NAGPRA here, and how it could significantly impair NAGPRA.

II. BACKGROUND

This section will first provide background information for the Native American Graves Protection and Repatriation Act,

⁷ Repatriation is defined as "the return of someone to their own country." See *Oxford Dictionary of English* 1505 (Angus Stevenson ed., 3d ed. 2010).

Repatriation in a broader sense means to return something to its place of origin. Cultural repatriation is not unique to NAGPRA and is commonly demonstrated internationally when countries claim ownership of objects housed in foreign museums, and act to have them returned. The most infamous example, where the fight for repatriation is ongoing, would be the Elgin Marbles (also known as the Parthenon Marbles), currently housed at the British Museum in London, England. See Natalie Haynes, *The Elgin Marbles: Could Returning them be the Thin Edge of the Repatriation Wedge?* INDEPENDENT (Oct. 14, 2014, 12:33 PM), <http://www.independent.co.uk/voices/comment/the-elgin-marbles-could-returning-them-be-the-thin-end-of-the-repatriation-wedge-9794529.html>.

followed by a discussion of the absurdity doctrine, including the history of its application by American courts.

A. Native American Graves Protection and Repatriation Act

In 1990, the first President Bush signed into law the Native American Graves Protection and Repatriation Act (NAGPRA).⁸ The law, significant for Native American peoples, provides nationwide repatriation standards and procedures for the return of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony⁹ from federal agencies and federally funded institutions, such as universities or museums.¹⁰ In its text, NAGPRA directly addresses federally funded museums, universities and like institutions as the primary focus for the law;¹¹ case law since the 1990s mostly involves controversies with museums and universities¹² The law was highly contested when it was first introduced, and to a certain extent it remains controversial- especially for museums reluctant to surrender parts of its collection- but NAGPRA has settled in its role for the most part.¹³

Although NAGPRA is most often thought of as being a law concerned with cultural heritage preservation, its true intent is human rights legislation, seeking to empower Native American peoples so they may honor their dead as their traditions dictate.¹⁴ Congress viewed NAGPRA as part of its trust responsibility to Indian tribes and people, and stated specifically: it “reflects the

⁸ See *Trope* at 36.

⁹ *Id.* at 59.

¹⁰ *Id.* at 37.

¹¹ 25 U.S.C. § 3001 (8). “‘Museum’ means any institution or State or local government agency (including any institution of higher learning) that received Federal funds and has possession of, or control over, Native American cultural items. Such terms does not include the Smithsonian or any other Federal agency.”

¹² See *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397 (D. Haw. 1995). See also *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004)

¹³ See *Trope* at 59.

¹⁴ *Id.*

unique relationship between the Federal Government and Indian tribes and Native Hawaiian Organizations.”¹⁵ The trust responsibility mandates the United States to “adhere strictly to fiduciary standards in its dealings with Indians.”¹⁶ NAGPRA reflects this commitment and has foundation in agreements between museums, scientists, and Native American communities.¹⁷ NAGPRA tries to find balance between the needs of museums and Native American people by considering the importance of both western collection practices in today’s society, as well as the spiritual and cultural needs of Native American peoples.¹⁸ Furthermore, the law intends to “establish a process that provides the dignity and respect that [the] Nation’s first citizens deserve.”¹⁹

NAGPRA requires federal agencies²⁰ and museums²¹ to return human remains and associated funerary objects upon request by a lineal descendant, Native American tribe, or Native Hawaiian organization where the museum or agency itself identifies the cultural affiliation of the items.²² If no such affiliation is available, the claiming people can still repossess the object if they can prove,

¹⁵ *Id.* at 60 (citing 25 U.S.C. § 3010).

¹⁶ *Id.* (citing FELIX COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 485-608 Rennard Strickland et al. eds., 1982).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* (citing 136 CONG. REC. S17173 (daily ed., Oct. 26, 1990) (statement of Sen. John McCain)).

²⁰ *Id.* at 61. The Smithsonian Institution is explicitly exempted from NAGPRA due to the fact that it was already covered by the National Museum of the American Indian (NMAI) Act, which was passed by Congress in 1989. The NMAI Act required the Smithsonian to inventory and assess the cultural origins of collections potentially affiliated with Native American and Native Hawaiian peoples. Human remains and funerary objects for which cultural affiliation could be established were to be offered for return to the appropriate tribal group. See Tamara Bray, *A Clash of World Views*, ARCTIC STUDIES CENTER-THE SMITHSONIAN MUSEUM OF NATURAL HISTORY, <http://www.mnh.si.edu/arctic/html/repattb.html>, available at Tamara Bray, *Repatriation: A Clash of World Views*, 17 ANTHRONOTES 1 (1995).

²¹ *Id.*

²² *Id.*

by preponderance of the evidence, that they have a cultural affiliation with the item.²³

This overview of NAGPRA is only a brief discussion of what is a very complex piece of legislation. The focus here is on the repatriation of human remains, which is at issue in the claim presented in *Thorpe v. Borough of Jim Thorpe*.

B. *The Absurdity Doctrine*

The absurdity doctrine permits judges to deviate from even the clearest of statutory text when a given application would otherwise produce “absurd” results.²⁴ This practice is supported by Supreme Court precedent, as demonstrated when the Marshall Court made it clear that a court’s obligation to the text ended when “the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.”²⁵ Federal courts generally act as strict agents of Congress, and legislative intent is the foundation of a court’s statutory interpretation.²⁶ The text of a statute is the best evidence for legislative intent, but sometimes Congress does not always boil down its intentions to specifics and absolutes because legislators draft statutes within the constraints of time, foresight, resources, and unclear language.²⁷ The absurdity doctrine allows judges to determine whether a statute, applied as written, contradicts too sharply societal values.²⁸ If that is found to be case,

²³ *Id.* at 61-63. Cultural affiliation can be demonstrated through geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant opinion or expert opinion. Congress has recognized it may be extremely difficult, in many instances, for claimants to trace an item from modern [Native American] Tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. *See also* 25 U.S.C. § 3005(a)(4); S. Rep. No. 101-473, at 6 (1990). This is not the case here, as Thorpe’s descendants are informed of where their father’s remains are interred.

²⁴ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003).

²⁵ *Id.* (citing *Sturges v. Crownshield*, 17 U.S. 122, 203 (1819)).

²⁶ *Id.* at 2389.

²⁷ *Id.*

²⁸ *Id.*

the absurd results are understood to reflect imprecise drafting that Congress could and would have corrected had the issue arose during the enactment process, and the court is permitted to adjust a clear statute in a rare case in which court finds that the statutory text diverges from the legislature's true intent.²⁹ In essence, the absurdity doctrine rests on the notion that some outcomes are so unthinkable that the federal courts may safely presume that the legislators do not foresee those particular results, and if they had, they could and would have revised the legislation to avoid such absurd results.³⁰

III. SUBJECT OPINION: THORPE V. JIM THORPE'S BOROUGH

A. Facts

Jim Thorpe was born "Wa-tha-huk," a member of the Sac and Fox Nation, in 1889 in what is now Oklahoma.³¹ A legend in his own right, Thorpe was a world-class athlete talented at many sports; he was an Olympian and an inaugural inductee of the Pro Football Hall of Fame.³² Using his fame from athletics, Thorpe advocated for Native American rights and was very influential in affecting change in public perception of Native American peoples.³³

Throughout his lifetime, Thorpe was outspoken about his desire to be buried on tribal land as required by Sac and Fox religious tradition.³⁴ Following illness, Thorpe told his son, petitioner

²⁹ *Id.* at 2394. Courts can look to sources such as the legislative history, other case law, or the purpose of the statute as a whole.

³⁰ *Id.* at 2394.

³¹ Fletcher, *supra* note 6.

³² *Id.* at 7-8. At the 1912 Stockholm Olympics, Thorpe won gold in both the pentathlon and decathlon. *Jim Thorpe Medals*, OFFICIAL WEBSITE OF THE OLYMPIC MOVEMENT, <http://www.olympic.org/jim-thorpe>. In Recognition of his great football career, he was inducted into the Hall of Fame in its inaugural year (1963). *Hall of Famers-Jim Thorpe*, PRO FOOTBALL HALL OF FAME, http://www.profootballhof.com/hof/member.aspx?PLAYER_ID=213.

³³ *Id.* at 8. Thorpe campaigned against non-Native peoples posing as Native American extras in Hollywood films.

³⁴ *Id.*

William Thorpe, that he wanted his body “returned to sac and fox country” for his “last rites and burial.”³⁵ Thorpe died in 1953.³⁶ At the time of his death, his sons were serving in the military, and he was estranged from his third wife, Patsy, who was non-Native American.³⁷

Two weeks after Thorpe’s death, members of the Sac and Fox Nation and other members of Thorpe’s family gathered in Shawnee, Oklahoma for the traditional Sac and Fox two-day funeral.³⁸ The funeral, an important religious and social ceremony, began with the traditional evening feast, but the ritual was never completed.³⁹ Patsy Thorpe arrived with law enforcement officers and removed the casket.⁴⁰ This incident is still remembered, over sixty years later, “as a serious injustice and affront to the Sac and Fox people.”⁴¹

Patsy, after her intrusion upon the funeral and shocking act of removing Thorpe’s remains, then began negotiating with several institutions and municipalities, exploring possible places to bury Thorpe’s body.⁴² These places, seeking fame by proxy of the honor of housing Thorpe’s remains, began a bidding war.⁴³ The top bidders included two economically distressed coal-mining towns in eastern Pennsylvania, Mauch Chunk and East Mauch Chunk, that wanted to use Thorpe’s body to generate a tourism industry in the area.⁴⁴ In exchange, Patsy received \$500.⁴⁵ Neither Thorpe’s children nor the Sac and Fox Nation were ever consulted during this period.⁴⁶

³⁵ *Id.* (citing William K. Thorpe Aff. ¶ 7.) Thorpe had three sons; John (deceased), William and Richard, all of who were/are petitioners in this case.

³⁶ *Id.*

³⁷ *Id.* Patsy is also referred to as Patricia in case opinions

³⁸ *Id.* at 9.

³⁹ *Id.*

⁴⁰ *Id.* Because of the interruption to Thorpe’s funeral ceremony, it is understood that Thorpe’s soul has not completed its journey to the “other side.”

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 10. (citing McCallum, *Jack, The Regilding of a Legend*, SPORTS ILLUSTRATED (Oct. 25, 1982)).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

The two towns of Mauch Chunk and East Mauch Chunk, as a condition of sale, merged into a single municipality named the Borough of Jim Thorpe.⁴⁷ An above ground mausoleum was built to house Thorpe's body and, the towns hoped, to attract tourists.⁴⁸ Unsurprisingly, things did not go as planned and the anticipated tourist mecca of the Borough of Jim Thorpe was never realized. The people of the town were unimpressed, a former Borough councilman summarized the Borough's attitude: "[a]ll we saw were dollar signs, but all we got was a dead Indian."⁴⁹

B. District Court Holding

John Thorpe, Thorpe's youngest son, filed suit against the Borough of Jim Thorpe in the United District Court for the Middle District of Pennsylvania.⁵⁰ The complaint sought a declaration that the Borough of Jim Thorpe is subject to NAGPRA and therefore must inventory Jim Thorpe's Remains.⁵¹ Upon the death of John Thorpe in 2011, the Sac and Fox Nation, Richard Thorpe and William Thorpe joined the suit as plaintiffs.⁵²

The plaintiffs and the Borough cross-motivated for summary judgment regarding the claim at issue: whether the Borough is a "museum" under NAGPRA and thus subject to the Act's inventory, notice, and repatriation provisions.⁵³ According to the District Court, the Borough's status as a "museum" for purposes of NAGPRA depended on whether it "receive[d] federal funds."⁵⁴ The plaintiffs claimed that the Borough was the recipient of

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 12.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 25 U.S.C. A. § 3001(8): "'museum' means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items." *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255 (3d Cir. 2014), *cert. denied*, No. 14-1419, 44a (U.S. June 2, 2015), *available at* Fletcher, *supra* note 6.

“federal funds” in at least four instances, including: (1) a federal grant under the American Recovery and Reinvestment Act of 2009 to replace water meters within the Borough; (2) federal relief grants from the Federal Emergency Management Agency; (3) yearly grants funded by the United States Department of Housing and Urban Development’s Community Development Block Grant; and (4) a Bond Purchase Agreement administered by PENNVEST (Pennsylvania’s Infrastructure body) to finance improvements to the Borough’s public water system facilities.⁵⁵ Although this funding was not directly related to the mausoleum housing Jim Thorpe’s body, the court found the plaintiff’s assertions that the NAGPRA “federal funds” requirement can be satisfied by direct or indirect⁵⁶ receipt of funds from the Federal government to be persuasive.⁵⁷

The district court ruled in the plaintiff’s favour and held that the Borough was a local government agency that received federal funding and possessed cultural items and thus was a “museum” under NAGPRA.⁵⁸ The court determined that the body of Jim Thorpe should be returned to his children and to Sac and Fox Nation.⁵⁹ The Borough appealed.

C. Circuit Court Holding

The Third Circuit reversed the holding of the District Court.⁶⁰ It acknowledged that the District Court’s result was required by the

⁵⁵ Petition for Writ of Certiorari at 45a, *Thorpe v. Borough of Jim Thorpe*, 136 S. Ct. 84 (2015) (No. 14-1419).

⁵⁶ The term “museum” is broad. It means any institution receiving federal funds after November 16, 1990 which has possession or control over Native American cultural items. NAGPRA applies even if the museum itself has not directly received federal funding as long as the museum is part of a larger entity (such as a local government or college) which has received federal funds. See *NAGPRA Compliance*, Association on American Indian Affairs, <http://www.indian-affairs.org/nagpra-compliance.html>

⁵⁷ Petition for Writ of Certiorari, *supra* note 55, at 46a.

⁵⁸ *Id.* at 12-13

⁵⁹ *Thorpe v. Borough of Jim Thorpe*, 2013 U.S. Dist. LEXIS 56590 at *54 (M.D. Pa. Apr. 19, 2013).

⁶⁰ Petition for Writ of Certiorari, *supra* note 55, at 13.

“literal application of the text of NAGPRA” and that courts should ordinarily “look to the text” to interpret a statute, but according to the Third Circuit, applying NAGPRA “regardless of the circumstances surrounding possession” would contravene “Congress’s intent to exclude situations such a Thorpe’s burial in the Borough,” where the next of kin (albeit estranged) had chosen the body’s resting place.⁶¹ The court determined that the mausoleum was not a museum because it was not holding or collecting the remains for the purposes of display⁶² or study, but were instead serving as an original burial site.⁶³ Furthermore, NAGPRA requires that remains be “returned;” this assumes that the human remains were removed from their intended final resting place. The circuit court emphasized that Thorpe was buried in the Borough by his wife, and she had the legal authority to decide where he would be buried. Therefore, there was nowhere for Thorpe to be “returned.”⁶⁴

The Third Circuit found that allowing the Sac and Fox Nation and Thorpe’s children to remove Thorpe’s remains, with the intent of burying him elsewhere according to religious tradition, was “such a clearly absurd result and so contrary to Congress’s intent” that the Borough was not a museum “for the purposes of Thorpe’s Burial.”⁶⁵

D. Petition for Certiorari

The petition for writ of Certiorari presents several relevant arguments to The Supreme Court of the United States for why it should reconsider and dismiss the Third Circuit’s holding. The petitioners’ assertions state that a) NAGPRA’s definition of “museum” does not turn on how an entity acquired possession of Native American Remains,⁶⁶ and b) the Third Circuit court

⁶¹ *Id.*

⁶² Given the acknowledged intent behind the creation of the mausoleum, and the surrounding space, it’s arguable that the mausoleum was intended to display Thorpe’s remains- although they are not visible to the public.

⁶³ Petition for Writ of Certiorari, *supra* note 55, at 22a.

⁶⁴ *Id.*

⁶⁵ *Id.* at 13.

⁶⁶ *Id.* at 15.

misapplied the absurdity doctrine.⁶⁷ The assertion that is the primary focus of the legal argument of this Note is that the Third Circuit's misuse of the absurdity doctrine threatens NAGPRA's future, and raises federalism concerns.⁶⁸ The Supreme Court denied to comment on the holding of the lower courts, and thereby affirmed the judgment of the Third Circuit. This has likely left many Native American organizations and supporters concerned for the future application and effectiveness of NAGPRA, and many Federally supported institutions relieved that their burden under NAGPRA has arguably been lessened.

IV. ANALYSIS

This section assesses the holding and rationale of the Third Circuit decision and its inevitable impact, and possible consequences, on future NAGPRA cases and the repatriation efforts of Native American communities.⁶⁹ First, the statutory language of NAGPRA will be examined to argue that although a mausoleum is not expressly included into the text, it is not precluded from status as a "museum" especially as it is maintained with federal funds and attracts visitors much like a museum housing only one object, Jim Thorpe's body. Secondly, the application of the absurdity doctrine by the Third District here will be compared with other, more appropriate, applications of the doctrine, to demonstrate why, based on the facts of the case, the doctrine is inappropriate. Finally, this Note will suggest that by applying the absurdity doctrine, the court is manipulating the legislature to an extent not intended by congress and is negatively affecting the future validity of the law by degrading it in the minds of both those most reliant on the law, and those most opposed to it.

⁶⁷ *Id.* at 16.

⁶⁸ *Id.* at 22.

⁶⁹ While the primary focus of the this note is to discuss the legal ramifications, it is also important to acknowledge the immense social and spiritual ramifications that could occur should NAGPRA in this case be upheld as absurd. It could work to invalidate people's perception of the legislature, thereby weakening its strength as an enabler for Native American communities and break down relationships, or prevent future relationships, between Native American communities and federally funded museums or like institutions.

A. *Is a Mausoleum a “Museum” under NAGPRA?*

NAGPRA defines “museum” very broadly as “any institution or state or local government agency (including any institution of higher learning) that receives federal funding and has possession of, or control over, Native American cultural items,⁷⁰ including human remains.⁷¹ The legislation does not mandate that the museum must be a certain size or quality to be subject to NAGPRA’s provisions, nor must it necessarily operate under the title of a museum as long as it functions as such. Simply because “mausoleum” is not expressly included as an example of a “museum,” this does not mean it is prohibited. A basic, and well recognized, definition of “museum” is a “building in which objects of historical, scientific, artistic, cultural interest are stored and exhibited.”⁷² It is very clear that the mausoleum where Jim Thorpe is interred functions as a “museum” under both the common understanding and the NAGPRA definition, and treating entities such as the Borough as a “museum” comports with the ordinary understanding of that term.⁷³

Jim Thorpe’s remains continue to be interred in an above ground mausoleum surrounded by decorative motifs dedicated to his history as an athlete, and intended to attract travellers to the area.⁷⁴ Throughout history, the remains of Native American individuals have been considered objects and have been valued for their historical, scientific, and cultural value. The Borough, when they purchased Thorpe’s body, did so with the express purpose of harnessing Thorpe’s cultural interest and exploiting his body for financial gain by creating a public and permanent exhibition of his remains.

The Borough is a local government that maintains Jim Thorpe’s burial site.⁷⁵ The District Court found that the Borough is a

⁷⁰ 25 U.S.C. § 3001(8).

⁷¹ § 3001(3).

⁷² *Oxford Dictionary of English* 1167 (Angus Stevenson ed., 3d ed. 2010).

⁷³ Petition for Writ of Certiorari, *supra* note 55, at 15.

⁷⁴ Greg Brown, *Grave of Jim Thorpe*, ROADSIDE AMERICA (March 24, 2001), roadsideamerica.com.

⁷⁵ *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 262 (3d Cir. 2014).

museum because the record showed the Borough received federal funds after the enactment of NAGPRA.⁷⁶ The Circuit court, however, found that the Borough was not a “museum” as intended by NAGPRA.⁷⁷ The court’s opinion, while considering both the literal reading of the text and the guiding intentions of the drafters, failed to explain what the Borough lacked to prevent it from aligning with NAGPRA’s definition of “museum.”⁷⁸

Although cities can and do qualify as “museums” under NAGPRA, perhaps instead of addressing whether the Borough itself constituted a museum, the Third Circuit should have instead focused on the site of the mausoleum, or the mausoleum itself, as a museum. There is very little case law addressing contested views on what can be defined as a “museum” for the purposes of NAGPRA, nor are there test cases that push the boundaries of the textual definition, such as we find here. In *Brown v. Hawaii*, the plaintiff asserted that the Hawaiian State Historic Preservation Department (SHPD) qualified as a “museum” given that the SHPD receives two federal grants in connection with its programs, and through the administration of its historical preservation program, the SHPD of Hawaii is in possession of Native Hawaiian human remains.⁷⁹ This was sufficient for the court to find that the SHPD was subject to NAGPRA and was required to meet NAGPRA’s notification and content requirements for inventories.⁸⁰ It has already been determined that under NAGPRA, federal funding does not need to be directly given to the “museum” in question,⁸¹ but instead must merely be awarded to the managing state, town or in this case, a Borough.

⁷⁶ *Id.* at 263.

⁷⁷ *Id.*

⁷⁸ *Id.* at 265

⁷⁹ *Brown v. Hawaii*, No. 07-00556, 2009 WL 3818233, at *2 (D. Haw. Nov. 13, 2009)

⁸⁰ *Id.* at 3.

⁸¹ *Thorpe v. Borough of Jim Thorpe*, 2013 U.S. Dist. LEXIS 56590, at *43 (M.D. Pa. Apr. 19, 2013)

B. Misapplied Absurdity Doctrine Issue

The Third Circuit applied the absurdity doctrine to the facts of the case because it determined that the “rule of statutory construction is not an inviolable commandment that we must blindly enforce regardless of surrounding circumstances or the practical results of rigidly applying the text a given situation”⁸² and that “courts may look behind a statute only when the plain meaning produces a ‘result that is not just unwise but is clearly absurd.’”⁸³

The court concluded that it was confronted with an unusual situation in which the literal application of NAGPRA would “produce a result demonstrably at odds with the intentions of its drafters.”⁸⁴ The court then looked beyond the text of NAGPRA to identify the intentions of the drafters of the statute,⁸⁵ and held that because Thorpe’s remains were located at their final resting place and had not been disturbed,⁸⁶ applying NAGPRA to his burial in the Borough was “such a clearly absurd result and so contrary to Congress’s intent to protect Native American burial sites” that the Borough could not be held to the requirements of NAGPRA as a museum.⁸⁷

Are the circumstances of this case truly exceptional from other NAGPRA cases where plaintiffs fight for a court’s recognition of remains as those of lineal ancestors? Or fight to have the courts protect ancestral burial land from urban development? Is the case of *Thorpe v. Borough of Jim Thorpe* so exceptional that following the text of NAGPRA would clearly “thwart” legislative intent and that the courts may invoke the absurdity doctrine to set aside a statute’s plain meaning?⁸⁸ It is apparent that the Third Circuit

⁸² *Thorpe*, 770 F.3d at 263.

⁸³ *United States v. Terlingo*, 327 F. 3d 216, 221 (3d Cir. 2003).

⁸⁴ *Thorpe*, 770 F.3d at 264.

⁸⁵ *Id.*

⁸⁶ Cert petition details numerous occasions where Thorpe’s remains had been disturbed- including one such occurrence where the mausoleum was opened and it was found that Thorpe’s head had a plastic bag wrapped around it. See Petition for Writ of Certiorari, *supra* note 55, at 11.

⁸⁷ *Thorpe*, 770 F.3d at 266.

⁸⁸ *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (U.S. 1982)

thought so, but their account does not consider the fact that the history of collecting Native American remains is itself convoluted and rife with inhumane, unethical and illicit behavior.⁸⁹ So in that way, the fact that there were and are any Native American remains in museum collections is arguably absurd, at least under the common understanding of the term. Nor should it be surprising that there will be Native American human remains located in places that fall outside of NAGPRA's definition of "museum," which was intended by congress to be read broadly. In 1819, Chief Justice Marshall observed that a court should invoke the absurdity doctrine only if the text-based results were "so monstrous, that all mankind would, without hesitation," reject it.⁹⁰ That is not the case here.

The appropriate use of the absurdity doctrine is best exemplified by clear examples of improper use of a statute to a scenario unforeseen by the drafters or obviously beyond the scope of the text. Such examples include an ordinance "providing whoever [draws] blood in the streets should be punished with utmost severity" could not have been intended to condemn a doctor who must perform emergency surgery in public.⁹¹ Nor could a federal statute that prescribes criminal punishment for anyone who "shall, knowingly and willfully, obstruct . . . the passage of mail,"⁹² have intended to punish a police officer for arresting a homicidal postal carrier in the midst of his rounds.⁹³

The Third Circuit, rather than seriously analyze NAGPRA's text, or the reasons Congress might have drafted the text as it did, immediately presents the absurdity doctrine as the best means to resolve the plaintiff's claim.⁹⁴ The Third Circuit misapplied the absurdity doctrine. Applying NAGPRA to entities that acquired remains from a relative of a deceased person does not thwart

⁸⁹ Jack F. Trope Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 39 (1992).

⁹⁰ *Sturges v. Crowninshield*, 17 U.S. (4 Wheat). 122, 202-203 (1819).

⁹¹ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2402 (2003) (citing *United States v. Kirby*, 74 U.S. 482, 487 (1868)).

⁹² *Id.* (citing Act of Mar. 3, 1825, ch. 64, §9, 4 Stat. 102, 104.)

⁹³ *Id.* (citing *United States v. Kirby*, 74 U.S. 482, 487 (1868)).

⁹⁴ Petition for Writ of Certiorari, *supra* note 55, at 26.

Congress's purposes behind the legislature.⁹⁵ Instead, if upheld, the Third Circuit's decision that will thwart Congress's goal of aiding Native American peoples as they seek to repatriate their ancestors.⁹⁶ By not adhering to the statutory text and Congress's goal in enacting it, the Third Circuit substituted its own views about NAGPRA's purposes and rested its decision on two misunderstandings.⁹⁷ First, NAGPRA was not designed to ensure the equal treatment of all human remains, but was intended to champion Native American remains.⁹⁸ Second, although Patsy Thorpe was legally authorized to determine where her (estranged) spouse would be buried, NAGPRA does not generally support the wishes of non-Native next-of-kin to trump the expressed interests of the Native American deceased, his Native American descendants, or tribal leaders in choosing the final resting place of their tribal members.⁹⁹ Congress gave lineal descendants and Native American tribes, through NAGPRA, priority to make those decisions.¹⁰⁰ Therefore, under NAGPRA, a next-of-kin's state-law ability to determine the disposition of the body is irrelevant to NAGPRA's repatriation process.¹⁰¹

C. Creating Future Issues for NAGPRA

While NAGPRA is not perfect,¹⁰² since its enactment in 1990 it is generally regarded as a very successful piece of legislature that

⁹⁵ *Id.* at 19.

⁹⁶ *Id.*

⁹⁷ *Id.* at 20.

⁹⁸ See 25 U.S.C. § 3003

⁹⁹ Petition for Writ of Certiorari, *supra* note 55, at 21.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² The issues with NAGPRA legislation depends on who you talk to. The overarching problem areas seem to be 1) cultural affiliation by multiple tribes, 2) culturally unidentifiable human remains, and 3) the need for scientific inquiry. These points can be interpreted from various different viewpoints, resulting in different outcomes. Native American communities, Western scientific organizations, and Museum institutions have sought clarification at to the three areas at issue in NAGPRA. See Keith Kintigh, *Request for Legal Review of Critical Issues in the Implementation of NAGPRA*, SOCIETY FOR AMERICAN ARCHAEOLOGY, <http://www.saa.org/AbouttheSociety/>

has lead to the recovery of over 16,000 sets of human remains by Native American tribes.¹⁰³ The Third Circuit's holding, as affirmed by The Supreme court, will endanger NAGPRA's continuing viability and lend support to institutions which already resist cooperating with Native American tribes on issues of repatriation, and search for loopholes to their compliance to NAGPRA.

There are institutions that openly disagree with NAGPRA's fundamental principles and seek to dismantle it.¹⁰⁴ The most prevalent argument presented by these universities or museums is that they need the remains for scientific, or archaeological inquiry and that should take precedent over the burial traditions of the claiming Native American community. Between 1990 and 2014, the Department of the Interior's NAGPRA division found twenty-four instances of non-compliance by federally funded museums, universities or similar institutions.¹⁰⁵

By exempting the Borough from museum status and setting a determination for how Native American bodies need to have been obtained in order for the statute to apply, the Third Circuit created a broad exception to NAGPRA, providing an easy means of abuse for institutions seeking to resist compliance.¹⁰⁶ The Third Circuit has exempted museums based on the circumstances surrounding their acquisition of remains.¹⁰⁷ Now, if a museum has acquired remains under seemingly legal circumstances, they can rely on the Third Circuit opinion to unilaterally exempt itself from NAGPRA's inventory and notice provisions.¹⁰⁸ This would mean that Native American tribes would not have knowledge of potential ancestral remains located in federally funded institutions, and would not be able to challenge those museums for repatriation of the remains.

RepatriationIssues/CriticalIssuesNAGPRA033104/tabid/220/Default.aspx

¹⁰³ Petition for Writ of Certiorari, *supra* note 55, at 23.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 23-24.

¹⁰⁶ *Id.* at 24.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 25.

It is the human repercussions that will be the gravest if the court of appeal's decision is not overturned. Many communities rely on NAGPRA to reconnect family members and to give the deceased the honor they deserve. By creating a loophole by which museums can choose not disclose their collections of human remains, based on how they were acquired, the Third Circuit is throwing a wrench into what is already a very difficult task. The repatriation of human remains, funerary objects, and sacred cultural items is emotionally and spiritually taxing to Native American communities, and federally funded institutions should be respectful of this, even in light of their own reservations or indigence to complying with NAGPRA standards.

V. CONCLUSION

It is unclear why The Supreme Court declined to grant Certiorari to the petitioners as the decision was handed down without comment. However, one can speculate on the many possible reasons that the petition was denied. The argument for denial that seems most persuasive, and most disheartening when considering the broad ramifications of The Supreme Court's deference to the Third Circuit, is that the Justices agreed with the sentiment of the Third Circuit that "NAGPRA was not intended to be wielded as a sword to settle familial disputes within Native American Families."¹⁰⁹ In reality, this viewpoint is too simplistic in the face of the much more complicated history of Western collecting of Native American human remains. *Thorpe v. Borough of Jim Thorpe* is a demonstration of this collecting practice that the general population does not know how to respond to because its an unusual situation; in that Jim Thorpe's remains have been commoditized and been made to be an attraction, removed from the sterile and scientific confines of a traditional museum. The Supreme Court chose to lose an excellent opportunity for The Court to clarify the meaning and application of NAGPRA in unusual or uncommon circumstances.¹¹⁰ The very least that can be hoped for is that The Supreme Court was able to see beyond the

¹⁰⁹ *Thorpe*, 770 F.3d at 265.

¹¹⁰ Petition for Writ of Certiorari, *supra* note 55, at 26.

family history and did find a compelling reason for upholding the Third Circuit's holding, without dismissing the claim for its personal complications. An interesting question to consider is how The Supreme Court would respond if this case occurred today, without the 50 years of family drama, and whether that would affect their response to the Third Circuit's application of NAGPRA.

What options are available to the Sac and Fox Nation and the Thorpe family? They are now without federal judicial remedy, and given that cooperation from the Borough after all these years is highly unlikely, Jim Thorpe's body will have to remain interred where it currently lies.¹¹¹ Going forward, these cases may be very rare, but there is the possibility that other such cases will crop up where the situation of Native American remains possessed in circumstances outside of the textual limitations of NAGPRA is revisited.¹¹² This is especially true as Native American peoples look overseas to international repositories to search for their ancestors.¹¹³ Concurrently, while communities and organizations¹¹⁴ assert their rights abroad, the highest American court has, by upholding the Third Circuit's interpretation of NAGPRA, made repatriation more difficult to realize domestically. In the coming years, it will be valuable to note whether this decision causes the number of NAGPRA claims brought forward to Federally funded institutions to decline in number.

Madelaine Thomas*

¹¹¹ *Id.* at 27.

¹¹² In this instance, if the claims are brought before other federal District and Circuit Courts other than the Third Circuit, the judgments on the matter may result in a circuit split—prompting The Supreme Court to reconsider its position on granting Cert, should a proposal be put forth sometime in the future.

¹¹³ NAGPRA, although it is a domestic law, carries significant weight internationally. Many Native American communities are looking to repatriate from European collections, and although NAGPRA does not apply in those circumstances, it is used by communities to exemplify the forward-thinking of the United States, and how other countries should engage with indigenous peoples and their ancestral remains.

¹¹⁴ Association on American Indian Affairs International Repatriation Project

* J.D. Candidate 2017, DePaul University College of Law. The author would like to thank Andrew Wood for his comments and guidance, and Margaret Haupt, Paul Thomas, and Jake Archbell for their unwavering support.

