

ESSAY

BEYOND ABSURD: JIM THORPE AND A PROPOSED TAXONOMY FOR THE ABSURDITY DOCTRINE

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INTRODUCTION

The absurdity doctrine of statutory interpretation is something of a puzzle. Students of statutory interpretation are familiar with the typical judicial refrain that where a statute's plain language is clear, courts must apply it unless doing so would be unconstitutional. Yet courts often qualify this straightforward rule with a troubling caveat: if applying the plain language would lead to an absurd result, then the plain meaning may be nullified. But what counts as an absurd result? How can we square this rule with the traditional notion of courts being subordinate to legislators when interpreting statutes?

The jurisprudential challenges posed by the absurdity doctrine have led the Supreme Court to attempt to impose limits on its application. However, the Court has never offered a comprehensive account of the doctrine. As a consequence, lower courts have sometimes seized on the absurdity doctrine and extended it well beyond any defensible bounds.

The Third Circuit's recent decision in *Thorpe v. Borough of Jim Thorpe*¹ (*Thorpe*), concerning the treatment of the remains of the famous Native American athlete James (Jim) Francis Thorpe, is a case in point. There, the Third Circuit nullified a statute's plain language because the court apparently was troubled by the policy embodied in that plain language. The opinion exposes the dangers of the absurdity doctrine and illustrates the need for the Supreme Court to clarify its proper application.

This Essay offers the sad story of Jim Thorpe's remains as a case study in statutory interpretation and the hazards of the absurdity doctrine. It calls on the Supreme Court to clarify the doctrine and thereby impose limits on its application. Most importantly, the Essay examines the Court's piecemeal and sometimes conflicting accounts of the absurdity doctrine and finds that the doctrine encompasses several distinct kinds of cases and arguments. By offering a "taxonomy of absurdities" and demarcating the limits of each category, this Essay proposes a way to clarify and improve the absurdity doctrine.

I. THE LIFE AND DEATH OF JIM THORPE

Jim Thorpe came to be one of the country's most recognized Native Americans. His life and death are noteworthy on their own and are recounted briefly here to provide background to the decades-long dispute at the heart of the Third Circuit's recent decision.

A. *Jim Thorpe's Life*

Jim Thorpe was born in 1887 within the Sac and Fox Indian Reservation in what was then the Oklahoma Territory, near present-day Shawnee, Oklahoma.² Thorpe's father, a farmer, and mother, a Pottawatomie Indian and descendant of Black Hawk, a Sac and Fox chief, gave Thorpe the Native American name "Wa-tha-huk," meaning "the bright path the lightning makes as it goes across the sky."³ Thorpe came to be one of the best-known Native Americans of his time, though his life was one of both international acclaim and tragedy.

Thorpe attended the Carlisle Industrial Indian School beginning in 1904

1. 770 F.3d 255 (3d Cir. 2014), *cert. denied sub nom.*, Sac & Fox Nation of Oklahoma v. Borough of Jim Thorpe, 136 S. Ct. 84 (2015).

2. *Thorpe v. Borough of Jim Thorpe*, No. 3:10-CV-1317, 2011 WL 5878377, at *1 (M.D. Pa. Nov. 23, 2011); Pls.' Br. in Supp. of Mot. for Summ. J. at 4, *Thorpe v. Borough of Jim Thorpe* (No. 3:10-CV-1317-ARC), 2012 WL 7985648 (M.D. Pa. Dec. 31, 2012) [hereinafter Plaintiffs' Brief]; KATE BUFORD, *NATIVE AMERICAN SON* 6 (2010).

3. Plaintiffs' Brief, *supra* note 2, at 4; *Jim Thorpe: The World's Greatest Athlete*, CMGWW.COM, <http://www.cmgww.com/sports/thorpe/bio/bio.html> (last visited Jan. 22, 2016) [hereinafter *The World's Greatest Athlete*].

and began to gain recognition for his athletic talent; Thorpe played baseball and ran track, excelling at both.⁴ In 1909 and 1910, he was selected as a first-team All American in football.⁵ Two years later, Thorpe went on to represent the United States in the 1912 Olympics in Stockholm, Sweden, winning medals in both the pentathlon and decathlon.⁶

Those successes, however, were short-lived. In January 1913, the Amateur Athletic Union (AAU) learned that, for a short period of time, Thorpe had played two seasons of semi-professional baseball before competing in the Olympics.⁷ The AAU withdrew Thorpe's amateur status retroactively and asked the International Olympic Committee (IOC) to do the same.⁸ Later that year, the IOC unanimously decided to strip Thorpe of his Olympic titles, medals, and awards, and declared him a professional.⁹

Though stripped of his Olympic medals, Thorpe went on to play professional sports. He signed with baseball's New York Giants in 1913 and played with that club and others until 1919.¹⁰ Thorpe's football career took off at the same time. First playing for the Indiana-based Pine Village Pros in 1913, Thorpe then signed with the Canton Bulldogs, for whom he played until 1920.¹¹ Between 1921 and 1923, he helped organize and played for the Oorang Indians, an all-Native American football team.¹² Extraordinarily, it was recently discovered that from 1927 to 1928 Thorpe played basketball with the traveling "World Famous Indians" of LaRue.¹³ In 1950, the Associated Press named Thorpe "the greatest American football player" and the "greatest overall male athlete."¹⁴

Thorpe married three times and had eight children. With his first wife, Iva Miller, whom he married in 1913, Thorpe had four children.¹⁵ A year

4. Plaintiffs' Brief, *supra* note 2, at 3; *The World's Greatest Athlete*, *supra* note 3.

5. *The World's Greatest Athlete*, *supra* note 3.

6. *Id.*

7. Jack McCallum, *The Regilding of a Legend*, SPORTS ILLUSTRATED (Oct. 25, 1982), <http://www.si.com/vault/1982/10/25/625690/the-regilding-of-a-legend>.

8. *Id.*

9. *Id.*

10. *Jim Thorpe Statistics and History*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/t/thorpji01.shtml> (last visited Feb. 6, 2016); *Jim Thorpe is Dead on West Coast at 64*, N.Y. TIMES (Mar. 29, 1953), <http://www.nytimes.com/learning/general/onthisday/bday/0528.html>.

11. *The World's Greatest Athlete*, *supra* note 3.

12. *Id.*

13. Bill Pennington, *Jim Thorpe and a Ticket to Serendipity*, N.Y. TIMES (Mar. 29, 2005), http://www.nytimes.com/2005/03/29/sports/othersports/jim-thorpe-and-a-ticket-to-serendipity.html?_r=0.

14. *The World's Greatest Athlete*, *supra* note 3.

15. Sally Jenkins, *Why Are Jim Thorpe's Olympic Records Still Not Recognized?*, SMITHSONIAN MAG. (July 2012), <http://www.smithsonianmag.com/history/why-are-jim-thorpes-olympic-records-still-not-recognized-130986336/?all>; *The World's Greatest Athlete*, *supra* note 3.

after his divorce from Miller, Thorpe married Freeda V. Kirkpatrick, with whom he had four sons: Carl, William, Richard, and John.¹⁶ The couple divorced after fifteen years, and Thorpe was again married in 1945 to Patricia (Patsy) Gladys Askew.¹⁷ Patsy was married to Thorpe at the time of his death in 1953; they had no children.¹⁸ According to Thorpe's son, Carl, "[Patsy] was a very assertive person. She was able to get Dad money for personal appearances and things that he was doing for free."¹⁹ This assertiveness came to play an important role in a half-century-long dispute regarding the proper resting place of Thorpe's remains.

B. Jim Thorpe's Death and Burial

Thorpe died in 1953 at the age of sixty-five.²⁰ Patsy, to whom Thorpe was married at the time of his death, was responsible for deciding how he would be buried.²¹ It is unclear whether Patsy had sufficient income to afford a burial.²² However, it was members of the community, and not Patsy, who first contributed money and facilitated the arrangements for Thorpe's burial.²³

Initially, Thorpe was to be buried in the Garden Grove cemetery in his native Oklahoma. A committee raised \$2,500 to bring his body from California to Oklahoma, where it lay in state.²⁴ On April 12, 1953, Sac and Fox Thunder clan members and Thorpe's Native American family members convened at an Oklahoma farm for the beginning of "a two-day funeral conducted in accordance with Sac burial customs and traditions."²⁵ As the ceremonies commenced, however, Patsy, accompanied by law enforcement officers, arrived at the farm, interrupted the ceremonies, and had Thorpe's body transported to a crypt she had rented in another Shawnee cemetery.²⁶

Patsy then commenced a process of locating a final resting place for Thorpe's remains. At some point, she settled on Mauch Chunk and East Mauch Chunk, Pennsylvania—two towns that were facing financial hardship and looking to reinvent themselves. Patsy and the towns reached

16. *The World's Greatest Athlete*, *supra* note 3.

17. McCallum, *supra* note 7.

18. *Id.*

19. *Id.*

20. BUFORD, *supra* note 2, at 363.

21. Thorpe v. Borough of Jim Thorpe, No. 3:CV-10-1317, 2013 WL 1703572, at *2 (M.D. Pa. Apr. 19, 2013).

22. McCallum, *supra* note 7.

23. Plaintiffs' Brief, *supra* note 2, at 4; McCallum, *supra* note 7.

24. McCallum, *supra* note 7.

25. Plaintiffs' Brief, *supra* note 2, at 5; *see also* McCallum, *supra* note 7.

26. Plaintiffs' Brief, *supra* note 2, at 5–6; McCallum, *supra* note 7.

an agreement in May 1954—over a year after Thorpe’s death—that set forth terms and conditions for renaming the towns and interring Thorpe’s remains.²⁷ Under the agreement, the towns were consolidated into one borough under the name “Jim Thorpe,” while Patsy, her heirs, administrators, and executors were not to cause Thorpe’s body to be removed.²⁸ Pursuant to the agreement, Thorpe’s remains were interred in 1957 in a mausoleum housed and maintained on land owned by the newly formed Borough.²⁹

II. THE AFTERLIFE OF JIM THORPE: *SAC AND FOX NATION V. BOROUGH OF JIM THORPE*

Since the interment, the Thorpe family members have quarreled regarding the proper disposition of Thorpe’s remains. Decades ago, William Thorpe and his brothers considered bringing suit to return their father’s remains to Native American lands in Oklahoma. However, the suit was never commenced due to disagreement with their half-sisters, who thought the remains should remain in the Borough of Jim Thorpe.³⁰ In the 1990s, William Thorpe also considered bringing an action under the Native American Graves and Repatriation Act (NAGPRA or the Act), but did not do so at the time.³¹

In June 2010, however, Thorpe’s youngest son, John Thorpe, filed suit in the Middle District of Pennsylvania against the Borough, asserting claims under 42 U.S.C. § 1983 and NAGPRA.³² The suit requested that Thorpe’s remains be removed from their resting place in Jim Thorpe, Pennsylvania, and that the Borough be ordered to comply with NAGPRA’s requirement that they be repatriated to the Sac and Fox Nation.³³ After John Thorpe died, Richard and William Thorpe—Thorpe’s only surviving sons—and the Sac and Fox Nation were added as Plaintiffs in an amended

27. Thorpe v. Borough of Jim Thorpe, No. 3:CV-10-1317, 2013 WL 1728012, at *3 (M.D. Pa. Apr. 19, 2013).

28. *Id.*

29. *Id.* At the time of the agreement, many plans were made to revitalize the struggling towns. For instance, there were thoughts that the Pro Football Hall of Fame might be located in the newly-formed Borough. Additionally, the Jim Thorpe Memorial Heart and Cancer Foundation was to build a hospital in the town, and there was discussion of a Jim Thorpe museum. McCallum, *supra* note 7. Patsy even considered opening a tourist hotel called “Jim Thorpe’s Teepees.” Petition for Writ of Certiorari at 10–11, *Sac & Fox Nation of Oklahoma v. Borough of Jim Thorpe*, 136 S. Ct. 84 (2015) (No. 14–1419), 2015 WL 3486600, at *11. None of these plans ever came to fruition.

30. Thorpe v. Borough of Jim Thorpe, No. 3:CV-10-1317, 2013 WL 1728012, at *3 (M.D. Pa. Apr. 19, 2013).

31. *Id.* at *3–4.

32. *Id.* at *4.

33. *Id.* at *4–5.

complaint.³⁴ The only claims surviving from the initial lawsuit were those under NAGPRA.³⁵

A. The Purpose, Passage, Structure, and Provisions of NAGPRA

NAGPRA was enacted in 1990 “as a way to correct past abuses to, and guarantee protection for, the human remains and cultural objects of Native American tribal culture.”³⁶ The Act was an effort to remedy the digging up and removal of the contents of Native American graves for profit or curiosity.³⁷ For example, after instructions from the Surgeon General in 1868 for the Army to collect and send “Indian skeletons,” so that he could determine if Native American inferiority was “due to the size of the Indian’s cranium,” the Army obtained 4,000 Native American skulls from battlefields and graves.³⁸ This order, along with a general disregard for sanctity of Native American gravesites, resulted in 100,000 to two million Native American remains and funerary objects being sold or housed “for storage or display by government agencies, museums, universities and tourist attractions.”³⁹

NAGPRA was passed “to strengthen federal protection of Native American burial sites and to enable tribes to pursue the recovery of sensitive materials in museum collections.”⁴⁰ The Act protects Native American “cultural items,” defined to include human remains, funerary objects, sacred objects, and objects of cultural patrimony.⁴¹ To achieve its goals, NAGPRA creates rights of repatriation in certain Native American cultural items. First, it creates “a right to repatriation of Native American cultural items—including human remains—that are excavated or discovered on federal or tribal lands” after November 16, 1990.⁴² Second, it creates a “right of repatriation” when cultural items are “possessed or

34. *Id.* at *4.

35. *Id.* at *4–5.

36. *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255, 259–60 (3d Cir. 2014), *cert. denied sub nom.*, *Sac & Fox Nation of Oklahoma v. Borough of Jim Thorpe*, 136 S. Ct. 84 (2015) (citing 173 A.L.R. Fed. 585).

37. H.R. REP. NO. 101–877, at 11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4367–68.

38. *Thorpe*, 770 F.3d at 260; Petition for Writ of Certiorari at 4, *Sac & Fox Nation of Oklahoma v. Borough of Jim Thorpe*, 136 S. Ct. 84 (2015) (No. 14–1419), 2015 WL 3486600, at *4.

39. *Thorpe*, 770 F.3d at 260.

40. *Thorpe v. Borough of Jim Thorpe*, No. 3:CV-10-1317, 2013 WL 1728012, at *14 (M.D. Pa. Apr. 19, 2013) (citing Martin Sullivan, *A Museum Perspective on Repatriation: Issues and Opportunities*, 24 ARIZ. ST. L.J. 283, 283 (1992)).

41. *Thorpe*, 2013 WL 1728012, at *14; *see also* 25 U.S.C. § 3001(3)(A)–(D) (2012).

42. *Thorpe*, 2013 WL 1728012, at *14, *15 n.7 (citing H.R. REP. NO. 101–877, at 8–9 and 25 U.S.C. § 3002).

controlled by museums or federal agencies.”⁴³ The Thorpe litigation concerns the provisions governing this second right of repatriation, also referred to as the “museum provisions.”⁴⁴

As defined in § 2 of the Act, a “museum” is “any institution or State or local government agency . . . that receives Federal funds and has possession of, or control over, Native American cultural items,” but the definition “does not include the Smithsonian Institution or any federal agency.”⁴⁵ However, NAGPRA categorizes cultural objects into two groupings: (1) human remains and associated funerary objects; and (2) unassociated funerary objects, sacred objects, and objects of cultural patrimony.⁴⁶ Qualifying entities that have possession or control over Native American human remains and associated funerary objects (the first grouping) are required to compile an inventory of these items.⁴⁷ Where the museum or agency is able to determine the cultural affiliation of particular Native American human remains or associated funerary objects, it must notify the appropriate “Indian Tribe or Native Hawaiian organization.”⁴⁸ Once the requisite inventory and notification procedures have been completed and where a museum or agency holds the human remains of a Native American or associated funerary objects, “a known lineal descendant of the Native American or of the tribe or organization” can demand the return of the remains for proper handling and burial on ancestral lands.⁴⁹ The museum or agency, in turn, “shall expeditiously return such remains and associated funerary objects.”⁵⁰

The different treatment of cultural items, depending on the grouping into which they fall, plays an important role in NAGPRA’s statutory scheme. For example, NAGPRA recognizes that an agency or museum may have a right of possession to either type of item. It defines a “right of possession” as “possession obtained with the voluntary consent of an individual or group that had authority of alienation.”⁵¹ A right of possession in Native American cultural items confers benefits that differ depending on the object’s category. Under § 7 of the Act, if the agency or museum can “prove that it has a right of possession” to “unassociated

43. *Id.* at *14–15.

44. *Id.* at *15.

45. 25 U.S.C. § 3001(8).

46. *See id.* § 3001(3) (defining “cultural items”).

47. *Id.* § 3003(a) (2012).

48. *Id.* § 3003(d). Separate summary and inventory provisions detail the steps to be taken with respect to “unassociated funerary objects, sacred objects or objects of cultural patrimony.” *Id.* § 3004.

49. *Id.* § 3005.

50. *Id.* § 3005(a)(1).

51. *Id.* § 3001(13).

funerary objects, sacred objects [or] objects of cultural patrimony,” then it may retain them and need not return them to the claimant—in other words, they are exempt from the repatriation requirement.⁵² But NAGPRA, on its face, does not extend this exemption to human remains or associated funerary objects.⁵³ Instead, it provides that an agency or museum holding a right of possession to such objects merely escapes criminal prosecution for illegal trafficking.⁵⁴ That is, unlike cases where the museum had no right of possession to the human remains, it will not be subject to criminal penalties. Yet the repatriation requirement still obligates the museum or agency to return this category of objects to lawful claimants.

B. A District Court Win for the Plaintiffs

As previously noted, the plaintiffs in the suit against the Borough of Jim Thorpe and others ultimately were Thorpe’s surviving sons as well as the Sac and Fox Nation. The plaintiffs sought “permanent injunctive relief requiring the Borough to comply with . . . NAGPRA, declarations that the Borough is a ‘museum’ as defined by NAGPRA and in violation of the statute’s requirements, and a judgment for attorney’s fees and costs.”⁵⁵ The district court granted the plaintiffs’ motion for summary judgment and granted their requested relief.

In reaching that decision, the district court concluded that the Borough is a “museum” under NAGPRA. Specifically, the court noted that the Borough did not dispute that “it has possession or control over the remains of Jim Thorpe,” or that “Jim Thorpe was a Native American or a member of the Sac and Fox Nation.”⁵⁶ Thus, the only matter to resolve was whether the Borough had received federal funds as required by the definition of “museum” set forth in 25 U.S.C. § 3001(8). On that score, the court concluded that the Borough was the recipient of federal funds because it had entered into agreements for federal funds available under the American Recovery and Reinvestment Act of 2009 (ARRA).⁵⁷ The

52. *Id.* § 3005(c) (2012).

53. *See* Native American Graves Protection and Repatriation Act (NAGPRA) Regulations, 60 Fed. Reg. 62,134, 62,153 (Dec. 4, 1995) (to be codified at 43 C.F.R. pt. 10) (“The right of possession basis for retaining cultural items in an existing collection does not apply to human remains or associated funerary objects, only to unassociated funerary objects, sacred objects, and objects of cultural patrimony.”).

54. *See* 18 U.S.C. § 1170.

55. *Thorpe v. Borough of Jim Thorpe*, No. 3:CV-10-1317, 2013 WL 1728012, at *5 (M.D. Pa. Apr. 19, 2013).

56. *Id.* at *16.

57. *Id.*

court also rejected the Borough's arguments that the doctrine of laches precluded the plaintiffs' claims because they had waited fifty-five years after Thorpe's burial in the Borough, and twenty-five years from the enactment of NAGPRA, before bringing suit.⁵⁸

The district court's opinion appeared to resolve the decades-long dispute over the proper disposition of Thorpe's remains. However, that proved not to be the case.

C. A Third Circuit Win for the Borough

The Third Circuit did not disagree with the district court's conclusion that the Borough qualified as a "museum" under NAGPRA. It nevertheless ruled against the plaintiffs, based on an unusually assertive application of the absurdity doctrine.

1. The Third Circuit's Plain Meaning Analysis

In its opinion, the Third Circuit did not dispute the district court's conclusion that under NAGPRA's plain language, the Borough qualified as a "museum."⁵⁹ Under § 7 of the Act, where a "museum" holds the human remains of a Native American, the Native American descendants can demand the return of the remains for proper handling and burial on ancestral lands.⁶⁰ Section 2 of the Act, in turn, defines "museum" to mean "any institution or State or local government agency . . . that receives Federal funds and has possession of, or control over, Native American cultural items."⁶¹ As the Third Circuit noted, "the Borough has 'possession of, or control over,' Jim Thorpe's remains"; "he is of Native American descent"; and "the Borough received federal funds after the enactment of NAGPRA."⁶² Consequently, the Borough necessarily was a "museum" under NAGPRA's plain language.⁶³

In most cases, this would be the beginning and end of the court's analysis, and Jim Thorpe's remains would be headed back to his ancestral home. The Third Circuit concluded otherwise.

2. Additional Support for the Plain Meaning Interpretation

Although the point went unstated in the Third Circuit's decision, the

58. *Id.* at *28–31.

59. *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255, 262–64 (3d Cir. 2014), *cert. denied sub nom.*, *Sac & Fox Nation of Oklahoma v. Borough of Jim Thorpe*, 136 S. Ct. 84 (2015).

60. 25 U.S.C. § 3005 (2012).

61. *Id.* § 3001(8).

62. *Thorpe*, 770 F.3d at 262–63.

63. 25 U.S.C. § 3001(8).

plain language interpretation is also consistent with NAGPRA's broader structure, purpose, and legislative history.⁶⁴ Furthermore, other textual and substantive canons of interpretation also support this reading.

First, the familiar *expressio unius* canon of construction dictates, "When Congress includes particular language in one section of a statute but omits it in another section of the same Act . . . it is generally presumed that [it] acts intentionally and purposely in the disparate inclusion or exclusion."⁶⁵ In other words, the canon reflects "the common sense language rule that the expression of one thing suggests the exclusion of another thing."⁶⁶ In NAGPRA, Congress explicitly provided that, under certain conditions, a "right of possession" negates the obligation to repatriate cultural items.⁶⁷ Yet this carve-out is expressly limited to "Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony."⁶⁸ The presence of retention provisions applicable to certain cultural items—but not to human remains such as those at issue in the *Thorpe* case—establishes that Congress knew how to preserve a museum's ability to retain human remains rightfully in its possession, yet chose not to do so.⁶⁹ In circumstances such as these, the *expressio unius* canon precludes a court from reading into the statute what Congress declined to include.⁷⁰

Relatedly, the plain meaning is buttressed by the principle that, "an exception . . . [to] a general statement of policy is usually read . . . narrowly in order to preserve the primary operation of the provision."⁷¹ As the Supreme Court has explained, "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."⁷² Congress provided a right of possession exception to the general policy of repatriation of cultural items.⁷³ It limited that exception, however, to encompass only "unassociated funerary objects, sacred objects or objects of

64. See *supra* Part II.A.

65. *Clay v. United States*, 537 U.S. 522, 528 (2003).

66. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L. J. 341, 351 (2010).

67. 25 U.S.C. § 3005(c) (2012); see also *supra* Part II.A.

68. § 3005(c).

69. See *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010) ("Congress knows how to impose express limits. . .").

70. See, e.g., *Clay*, 537 U.S. at 528; *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally. . .").

71. *Comm'r v. Clark*, 489 U.S. 726, 739 (1989).

72. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

73. 25 U.S.C. § 3005(c) (2012); see also *supra* Part II.A.

cultural patrimony.”⁷⁴ In addition, Congress included other exceptions to NAGPRA’s requirements, none of which would apply to the *Thorpe* case.

Indeed, Congress’s varied approach to different types of cultural items when crafting exceptions to the repatriation requirement was hardly accidental. The initial version of the bill introduced in the House treated all objects identically.⁷⁵ The enacted bill changed this, however, expressly providing those entities with a right of possession an exception from the repatriation requirement, while excluding human remains and associated funerary objects from this exception. Although it is not entirely clear whether the initial bill would have required repatriation of objects where the entity in possession holds a right of possession, the point is that the statute as enacted clearly makes this distinction. Consequently, in addition to the *expressio unius* canon of interpretation and the principle that statutory exceptions are to be narrowly construed, the plain meaning of the statute finds additional support in the “rejected proposal” rule, which provides that courts should not read back into statutes those provisions that appeared in earlier versions of a bill but were changed prior to enactment.⁷⁶

Finally, the Court has long endorsed the substantive canon of interpretation that statutes meant to benefit Native Americans are to be construed in their favor.⁷⁷ Although this substantive canon has not received sustained attention from the Court in recent years, causing some to question its continued viability, it has never been rejected by the Court.⁷⁸ Further, it is consistent with a broader strain of interpretation that provides that statutes should be interpreted in favor of small minority groups.⁷⁹

74. § 3005(c).

75. See H.R. 5237, 101st Cong. § 6(a) (1990); see also *supra* Part II.A; *infra* Part IV.A.

76. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69, 84–89 (1988) (explaining the “rejected proposal” rule and discussing cases applying the doctrine).

77. See, e.g., *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767–68 (1985).

78. See generally Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64 (2008) (discussing the conflict between *Chevron* deference and the rule that statutes are to be interpreted favorably to Native Americans).

79. *United States v. Santos*, 553 U.S. 507, 514 (2008) (noting that the rule of lenity “places the weight of inertia upon the party that can best induce Congress to speak more clearly,” i.e., the politically powerful, who can more easily change the law through the legislative process than can criminal defendants); see also Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 769, 771–72 (2013) (proposing the rule of lenity as a partial response to the problem of overcriminalization); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2166 (2002) (viewing the rule of lenity as a way to protect politically powerless groups).

3. *The Third Circuit's Application of the Absurdity Doctrine to Nullify the Statute's Plain Meaning*

Despite NAGPRA's plain language, structure, and history, as well as the additional arguments favoring this reading, the Third Circuit nevertheless concluded that the Borough of Jim Thorpe could not be a "museum" under the statute because to treat it as such would lead to an absurd result. Consequently, the court held in favor of the Borough. In support of this conclusion, it identified two supposed absurdities in applying NAGPRA's plain language: first, that the plain language would require repatriation even where—as in Thorpe's case—the original burial was “in accordance with the wishes of the decedent's next-of-kin;”⁸⁰ and, second, that NAGPRA would be used “to settle familial disputes within Native American families.”⁸¹ In other words, the court nullified the plain language of the statute because it concluded that the legislature could not have intended such a purportedly outlandish result.

III. THE USE AND MISUSE OF THE ABSURDITY DOCTRINE

Writing in a dissenting opinion in 1943, Justice Jackson referred to the absurdity doctrine as “ill-defined.”⁸² What was true then remains true today, more than seventy years later.⁸³ On what basis and in what kinds of cases can a judge declare the plain language of a statute absurd? When does doing so violate the principle of legislative supremacy and become judicial policymaking? Legal scholars and judges continue to grapple with these questions.

A major source of the problem in defining the doctrine is that courts and scholars have conflated several different kinds of absurdity arguments, some of which are decidedly uncontroversial, while others are subject to substantial debate. The different kinds of absurdity arguments have different justifications, resonate with different interpretive theories, and have different applications. Courts have sowed confusion by invoking the same rhetoric to different ends in different kinds of cases. By teasing out these differences and identifying categories of cases, we can better understand how and when invoking the absurdity doctrine is justified and

80. *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255, 264 (3d Cir. 2014), *cert. denied sub nom.*, *Sac & Fox Nation of Oklahoma v. Borough of Jim Thorpe*, 136 S. Ct. 84 (2015).

81. *Id.* at 265.

82. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 557 (1943) (Jackson, J., dissenting).

83. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2486 (2003) (“The Court should permit such displacement only when the legislature’s action violates the Constitution, rather than an ill-defined set of background social values identified on an ad hoc basis by the Court.”).

evaluate its application in a given case.

A. Scholarly and Judicial Debates: A Brief Primer

The justifications for and boundaries of the absurdity doctrine are controversial and subject to substantial scholarly and judicial debate. After all, if the absurdity doctrine allows judges to nullify the plain text of a statute, is the doctrine simply an invitation to judicial activism?

Traditionally, the Supreme Court's invocation of the absurdity doctrine resonates most with Intentionalist and Purposivist approaches to statutory interpretation.⁸⁴ The idea is that judges, as faithful servants of the legislature, must sometimes nullify the plain language of a statute in order to carry out the legislature's true will.⁸⁵ Where giving effect to the plain language would lead to a manifest absurdity, judges should instead assume that the legislature is not foolish, and therefore did not intend for the statute to apply as written in a specific case.⁸⁶ Of course, Intentionalists and Purposivists may disagree with one another about whether a given application of the plain language of a statute would be consistent with, or at odds with, legislative intent.⁸⁷ In other words, absurdity is sometimes in the eye of the beholder, which raises real questions about the viability of the doctrine as a neutral tool of judicial decisionmaking.

Moreover, with the rise of modern Textualism, the traditional justification for the absurdity doctrine has come under even more scrutiny. Textualist scholars challenge the Intentionalist justification for the absurdity doctrine as incompatible with the rule-of-law principles upon which Textualism is founded.⁸⁸ Consequently, John Manning, perhaps the leading Textualist in the legal academy, has argued for a radically constrained use of the absurdity doctrine. He suggests that the doctrine is

84. See *id.* at 2400 (discussing the background of the absurdity doctrine and how it fits in with statutory interpretation); Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 127–29 (1994) (discussing the definition of absurdity and its implications for theories of statutory interpretation); Linda D. Jellum, *But That Is Absurd!: Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917, 917–18 (2011) (analyzing the absurdity doctrine and statutory interpretation).

85. Manning, *supra* note 83, at 2388.

86. *Id.* at 2390.

87. Compare *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 203 (1979) (“It plainly appears from the House Report accompanying the Civil Rights Act that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving the problem.”), with *id.* at 254 (Rehnquist, J., dissenting) (arguing that Congress intended to outlaw all racial discrimination, which would include affirmative action).

88. Manning, *supra* note 83, at 2391; see Jellum, *supra* note 84, at 919 (“In my view, absurdity and textualism are simply incompatible. . .”).

defensible only where applying the plain meaning of the statute would cause the statute to be deemed irrational under constitutional rational basis scrutiny.⁸⁹ However, Veronica Dougherty suggests that the absurdity doctrine reflects and encodes important rule-of-law values, such as protection of reliance interests, that are not captured in Textualist theory and traditional notions of legislative supremacy, but that are nevertheless critical to our system of law.⁹⁰ In contrast, Linda Jellum maintains that the concept of specific absurdity—where a statute is declared absurd as applied to a specific case—is wholly incompatible with Textualism.⁹¹

These academic debates echo in judicial rhetoric. Perhaps surprisingly, even Textualist judges sometimes embrace the absurdity doctrine.⁹² Justice Scalia has gone so far as to sanction consultation of legislative history—anathema to him in other contexts—in the context of absurdity arguments for certain purposes.⁹³ That said, he sometimes fulminates against the doctrine’s use,⁹⁴ because he views it as leading down a “slippery slope” to judicial policymaking.⁹⁵ He argues that the absurdity doctrine can be properly invoked only where *both* no rational person could have intended the statute’s plain language to apply *and* the text can be “fixed” by replacing or adding a small number of words such that it appears that the statute as written simply contains a drafting error.⁹⁶

Similarly reflective of the debates over the absurdity doctrine are the dueling opinions between Judges Richard Posner and Frank Easterbrook in the Seventh Circuit’s case *United States v. Marshall*.⁹⁷ In that case, a statute’s plain language apparently required a defendant convicted of possessing LSD to be sentenced according to the weight of the drugs in his possession, *including* the carrier substance. In his opinion for the majority, Judge

89. Manning, *supra* note 83, at 2445–46.

90. See Dougherty, *supra* note 84, at 162–63 (arguing that the absurdity doctrine serves the reliance interest); see also Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1123 (2012) [hereinafter Levin, *Contemporary Meaning and Expectations*] (stating that it would be unfair for a court to hold liable someone relying on a previous ruling); Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1038 (2013) (arguing that the public has reliance interests, so even erroneous precedent should be adhered to).

91. Jellum, *supra* note 84, at 919 (“In my view, absurdity and textualism are simply incompatible. . .”).

92. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527–28 (1989) (Scalia, J., concurring) (applying the absurdity doctrine to find an alternative meaning to the word “defendant” in Federal Rule of Evidence 609(a)(1)).

93. *Id.*

94. See *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ. (DOE)*, 550 U.S. 81, 108 (2007) (Scalia, J., dissenting) (arguing against the Court’s use of the absurdity doctrine).

95. ANTONIN SCALIA & BRYAN GARNER, *READING LAW* 237 (2012).

96. *Id.* at 237–38.

97. 908 F.2d 1312 (7th Cir. 1990).

Easterbrook, a leading Textualist jurist, conceded that this could lead to anomalous results in some cases, but he nevertheless applied the statute's plain text.⁹⁸ In his view—and in classical Textualist fashion—if the policy encoded in the statute was problematic, it would be up to the legislature to fix it.

In a blistering dissent, Judge Posner, today's most outspoken judicial Pragmatist, argued that the statute's plain language was patently absurd as applied to LSD, which is typically sold by the dose, in a form where the carrier of the drug far outweighs the drug itself.⁹⁹ Consequently, under the plain language of the statute, someone with a single dose of LSD applied to a carrier could be subjected to a much harsher sentence than a producer of the drug in possession of hundreds of doses.¹⁰⁰ As a result, he maintained that the plain language should not be applied, and the sentence should depend on the number of doses rather than its weight.¹⁰¹ In short, scholars and judges alike struggle with the absurdity doctrine's boundaries, with debates often tracking differences in interpretive methodologies.

B. A Proposed Taxonomy of Absurdities

In this Section, we suggest that one reason for the continued uncertainty concerning the absurdity doctrine and its proper use is that the doctrine really includes several different kinds of cases. Because the Supreme Court has never clearly articulated these differences—typically conflating them under a single rubric—confusion reigns, and it is difficult to assess a particular case in which the absurdity doctrine is invoked. Below, we identify several different categories of cases in which the Supreme Court invokes the doctrine. In offering this taxonomy of absurdities, we also consider the justifications for each kind of absurdity argument, how contentious each is, and how the Supreme Court has limited its use.

We note at the outset that a litigant or court may invoke more than one type of absurdity in any given case. Indeed, cases in which the plain text appears absurd for several different reasons may have stronger claims for invoking the doctrine than those in which only one kind of argument applies. Conceptually, however, the different kinds of absurdity arguments are sufficiently distinct that they require differentiation.

98. *Id.* at 1317.

99. *Id.* at 1331–32 (Posner, J., dissenting).

100. *Id.* at 1332–33 (Posner, J., dissenting).

101. *Id.* at 1337 (Posner, J., dissenting).

1. *Avoiding Absurd Results in Order to Resolve Ambiguities*

The absurd results doctrine is most commonly deployed where a statute's text is ambiguous. After determining that a statute's plain meaning is unclear, judges often consider the policy implications of the various plausible interpretations and adopt one that comports with common sense and the statute's broader purpose rather than one that defies it.¹⁰² In such cases, the absurdity doctrine is typically used alongside various other "tie-breakers" in determining a statute's proper interpretation and application, such as substantive canons of interpretation and legislative history. This limited use of the absurdity doctrine is hardly controversial and is acceptable even among Textualists. As the influential Textualist Judge Frank Easterbrook put it, "Knowing the purpose behind a rule may help a court decode an ambiguous text, but first there must be some ambiguity."¹⁰³

A typical example of this use of the absurdity doctrine appears in *United States v. DBB, Inc.*¹⁰⁴ There, the Eleventh Circuit was confronted with a statute that allowed a court to issue "a restraining order to . . . prohibit any person from . . . disposing of any . . . property [obtained through healthcare fraud] or property of equivalent value."¹⁰⁵ The question in the case was whether this statute permitted the government to obtain a *preliminary injunction* preventing a defendant from disposing of "property of equivalent value," or whether such asset disposal could be enjoined only in a proceeding for a *temporary restraining order*.¹⁰⁶

The court first concluded that the statute's use of the word "restraining order" was ambiguous. On the one hand, that term often—including in Black's Law Dictionary—refers specifically to temporary restraining orders, and not to injunctive relief more broadly, thus supporting the defendants' claim that a motion for a preliminary injunction was not the proper vehicle for such an order.¹⁰⁷ On the other hand, other dictionaries use the term to include preliminary injunctions. Moreover, some other sections of the U.S. Code refer specifically to "*temporary* restraining orders," thus suggesting that the absence of the term "temporary" in this section indicates that the

102. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

103. *Nat'l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 707 (7th Cir. 1994) (internal citations omitted).

104. 180 F.3d 1277 (11th Cir. 1999).

105. *Id.* at 1280.

106. *Id.* at 1281.

107. *Id.* at 1281 n.4, 1282.

phrase “restraining order” is used in a more general sense.¹⁰⁸

Having concluded that the statute was ambiguous, the court then turned to other factors to determine the proper interpretation. As the court put it, “When interpreting an ambiguous statute, a court should consider the purpose, the subject matter and the condition of affairs which led to its enactment, and so construe it as to effectuate and not destroy the spirit and force of the law and not to render it absurd.”¹⁰⁹ After reviewing the legislative history and considering other factors, it concluded that the “defendants’ interpretation would frustrate the congressional intent and lead to absurd results.”¹¹⁰ To avoid such results, the court held that the statute was best interpreted to permit the government to obtain a preliminary injunction.

Indeed, the Supreme Court has sometimes suggested that the absurdity doctrine *only* applies in cases of statutory ambiguity. For example, in its per curiam opinion in *Commissioner v. Asphalt Products Co.*,¹¹¹ the Court reversed the decision of the Sixth Circuit that limited certain tax penalties imposed on the defendant due to the absurd results that would follow from applying the plain language of the statute. In rejecting the Sixth Circuit’s approach, the Court held that “judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided.”¹¹² Some lower courts have seized on this language to explicitly reject the application of the absurdity doctrine whenever the plain language of the statute is clear. For example, the Ninth Circuit has written that “the absurd result doctrine applies where a court must pass upon an ambiguous statute. The doctrine has no application where a statute is clear.”¹¹³

However, most courts—including the Supreme Court—occasionally use the absurdity doctrine to nullify even clear statutory text.

2. Nullifying Statutory Text

The *Thorpe* case does not implicate the typical and uncontroversial use of the absurdity doctrine because, as the Third Circuit acknowledged, the Borough satisfied every element of the plain language of NAGPRA’s “museum” definition. Instead, the court deployed the absurd results rule in a much more aggressive and controversial manner—to nullify the statute’s

108. *Id.* at 1282.

109. *Id.* at 1283 (quoting *Lambur v. Yates*, 148 F.2d 137, 139 (8th Cir. 1945)).

110. *United States v. DBB, Inc.*, 180 F.3d 1277, 1283 (11th Cir. 1999).

111. 482 U.S. 117 (1987).

112. *Id.* at 121.

113. *Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 468 (9th Cir. 1996).

plain text.

This is not implausible on its face, for despite the Supreme Court's occasional insistence on limiting the absurdity doctrine's applicability to ambiguous statutes, in rare circumstances it has nevertheless applied the doctrine to nullify the unambiguous plain language of a statute.¹¹⁴ Still, it is these circumstances in which legal scholars and judges have expressed deep concern about the rule-of-law implications of the doctrine and its dangerous potential to become a tool for judicial policymaking.¹¹⁵ As a result, virtually any time the Court has invoked the absurdity doctrine in the context of unambiguous statutory language, it has cautioned against the doctrine's expansive use.¹¹⁶ In particular, it has warned that the absurdity doctrine must never be used to substitute a court's policy preferences for those expressed by the legislature in the language of the statute.¹¹⁷

Unfortunately, the Court has never been explicit about when and how the absurdity doctrine may be properly applied to nullify unambiguous statutory language. This has led to confusion among the lower courts, with some nearly rejecting it altogether, and others relying on it extensively.¹¹⁸ However, it is possible to identify four categories of cases in which the Court has ostensibly endorsed its use. By identifying and interrogating these categories, it is possible to articulate the limits of the doctrine and better guide lower courts' application of it.

114. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("In rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling.").

115. See *supra* Part III.A; see also *Zuni Pub. Sch. Dist. No. 89 v. DOE*, 550 U.S. 81, 105 (2007) (Stevens, J., concurring) ("A judicial decision that departs from statutory text may represent 'policy-driven interpretation.'"); *Dodd v. United States*, 545 U.S. 353, 359 (2005) ("Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted."); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008) ("We reiterate that it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress.").

116. See, e.g., *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("An application of the [absurdity] principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter."); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459 (2002) ("The Court rarely invokes [the absurdity principle] to override unambiguous legislation.").

117. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 196 (1978) ("It is not our province to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public interest."); see also *supra* note 64 and accompanying text.

118. Compare *Peabody Coal*, 75 F.3d at 468 (stating that the absurdity doctrine should not be used because the word 'proceeds' was not ambiguous), with *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255, 266 (3d Cir. 2014), *cert. denied sub nom.*, *Sac & Fox Nation of Oklahoma v. Borough of Jim Thorpe*, 136 S. Ct. 84 (2015) (using the absurdity doctrine so that the NAGPRA does not apply to Thorpe's burial in the Borough).

a. Contextual Absurdities: Avoiding Tension in the Broader Law

The first category of cases in which the Court has endorsed the use of the absurdity doctrine to nullify clear statutory text is where the statute's text conflicts with the broader statutory structure and the law more generally. Essentially, it is where the literal meaning of statutory language, either in general or as applied to the facts of a particular case, makes no sense in light of the law as a whole.

Some kinds of scrivener's or drafting errors fit into this category of contextual absurdity. For example, in *United States v. Coatoam*,¹¹⁹ the Sixth Circuit held that a statutory provision that referenced the wrong subsection was an obvious drafting error¹²⁰ based on the broader structure and context of the statutory scheme.¹²¹ But not all contextual absurdities are traceable to such obvious errors. Sometimes there is an irreconcilable conflict between the language of a statutory provision in isolation and that of the broader statutory context, due either to a lack of legislative foresight or careless drafting. For an example of this sort of contextual absurdity, consider *Clinton v. City of New York*,¹²² the well-known "line item veto" case. Prior to deciding the constitutional question as to whether the line item veto violated the Constitution, the Court addressed a jurisdictional question. The plaintiffs in the case—the City of New York and others—invoked jurisdiction based on a statutory provision that permitted "individuals" to seek expedited review of constitutional questions.¹²³ However, as a technical matter, the plaintiffs were not "individuals," and so the defendant asserted that there was no jurisdiction for courts to hear the matter. Nevertheless, the Court invoked the absurdity doctrine because "the structure of [the statute]" precluded applying the plain meaning of the term "individuals."¹²⁴ Rather, based on "the context of the entire [statutory] section,"¹²⁵ the Court concluded that the statute was better understood to refer to the broader term "persons," which included the plaintiffs.¹²⁶

119. 245 F.3d 553 (6th Cir. 2001).

120. *See id.* at 559 ("There can be no doubt that the reference to § 3563(a)(4) in this amendment is an error.").

121. *See id.* at 558 ("We may properly examine the structure of the legislation passed in 1994 for interpretive assistance in deciphering Congress's meaning [even where the plain language is clear].").

122. 524 U.S. 417 (1998).

123. *Id.* at 428.

124. *Id.* at 429 n.14.

125. *Id.* at 428.

126. *Id.*; *see also* *United States v. Coatoam*, 245 F.3d 553, 558 (6th Cir. 2001) (determining that the literal meaning of a statute led to an absurd result based on the broader statutory structure).

In many cases, the nullification of statutes due to contextual absurdity is consistent with even a Textualist approach to statutory interpretation. Although these cases *are* instances of such nullification, they often rely on the application of textual interpretive tools to justify doing so. After all, Textualists are not pedantic literalists.¹²⁷ They care about the use of language in its context, and not primarily about individual statutory phrases. Thus, Textualist judges *always* consider how a particular statutory provision relates to the rest of the statute, and even to other, related statutes. Where they find a true incompatibility between a single provision and the surrounding law, they may reasonably conclude that the isolated provision in question does not mean what it appears to say, either as a result of a scrivener's error or a lack of foresight or care in drafting on the part of the legislature.¹²⁸

This application of the absurdity doctrine is also consonant with a larger group of interpretive tools that serve to impose consistency and stability on the law as a whole. Examples of such tools include the presumption against implied repeals,¹²⁹ the presumption of consistency with the common law,¹³⁰ and the "One Congress" canon¹³¹—all of which operate to avoid conflicts, instability, or unpredictability in the law. Deploying the absurdity doctrine as a result of the broader legal context also serves this purpose because it avoids interpreting or applying statutes in a manner that seems to contradict or undermine the rest of the statutory language or legal landscape.¹³²

In considering contextual absurdities, judges should be mindful that nullifying the plain language of a statutory provision on this ground is defensible only where the tension between that language and the broader

127. See SCALIA & GARNER, *supra* note 95, at 356 (distinguishing Textualism from "sterile literalism" or "hyperliteralism").

128. *Id.* at 234–39 (discussing and approving of a version of the absurdity doctrine).

129. See *id.* at 327–33 (discussing the presumption against implied repeal); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 937 n.77 (1992) (providing an example of the canon of the presumption against implied repeal).

130. See SCALIA & GARNER, *supra* note 95, at 318 (examining the presumption against change in common law); Shapiro, *supra* note 129, at 936–37 (discussing the interpretive tool where "statutes in derogation of the common law should be strictly construed").

131. See generally William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 173 (2000) (discussing the concept that it is a single Congress producing legislation); SCALIA & GARNER, *supra* note 95, at 322–26 (discussing what Scalia calls the "prior-construction canon," which is a version of the One-Congress fiction); see also Levin, *Contemporary Meaning and Expectations*, *supra* note 90, at 1126–27 (discussing the One-Congress fiction).

132. See generally Shapiro, *supra* note 129 (discussing the canons of statutory interpretation and how they foster continuity over change); Levin, *Contemporary Meaning and Expectations*, *supra* note 90 (arguing for a contemporary meaning and expectations approach towards statutory interpretation in order to promote consistency).

body of law is clear and not otherwise reconcilable. It is not necessarily obvious or beyond debate whether an apparent tension within the law is substantial enough to justify nullification of the text, and judges might overreach in some cases. Nevertheless, because this use of the absurdity doctrine relies heavily on textual interpretation and reflects broader judicial values, *in principle*, at least, it ought not to be especially controversial.

b. Constitutional Absurdities: Avoiding Constitutional Problems

A second category of cases in which judges have sometimes invoked the absurdity doctrine is that where applying the literal language of a statutory provision would raise constitutional questions.

Consider, for example, *Green v. Bock Laundry Machine Co.*¹³³ There, the Supreme Court confronted an evidentiary rule that, read literally, would require balancing the probative value of impeachment evidence against its tendency to prejudice in civil cases where the impeachment evidence is detrimental to the defendant, but would always allow impeachment evidence detrimental to a civil plaintiff, no matter how prejudicial or how little its probative value.¹³⁴ Although there was disagreement among the Justices as to how to construe the statute, all of them agreed that the language could not be applied as written.

In his concurring opinion, Justice Scalia invoked the absurdity doctrine, stating, “We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the word ‘defendant’ in [the statute] that avoids this consequence. . . .”¹³⁵ In other words, the manifest absurdity and potential unconstitutionality that would result from applying the plain language required judicial nullification and rewriting of that language.

In truth, this use of the canon could be framed as a specific example of the contextual absurdity category of cases. Indeed, in construing the statutory provision in *Bock Laundry*, the majority opinion, Justice Scalia’s concurring opinion, and the dissenting opinion all relied heavily on the broader structure of the evidentiary code.¹³⁶ Moreover, a statutory provision that is in tension with constitutional doctrine and values is inherently in conflict with the broader legal context because the Constitution is at the core of our legal structure. Alternatively, this category of cases might be better understood as a straightforward

133. 490 U.S. 504 (1989).

134. *Id.* at 509–10.

135. *Id.* at 527 (Scalia, J., concurring).

136. *Id.* at 508–09, 526, 530–31.

application of the constitutional avoidance canon of construction rather than an application of the absurdity doctrine at all.¹³⁷ This might explain why few cases invoke the absurdity doctrine in the face of constitutional problems; instead, they simply invoke the constitutional avoidance canon. Nevertheless, it happens often enough that it merits mention.

As with contextual absurdities, judges might overreach in invoking the absurdity doctrine in this manner. They might nullify a provision even where the purported constitutional problem with the plain statutory text is minimal or questionable. That is, like any interpretive move, it can be subject to abuse. But because the constitutional avoidance canon is itself so entrenched in legal doctrine and encodes such venerable rule-of-law principles, *in principle* this use of the absurdity doctrine should not be particularly controversial.

c. Intentionalist Absurdities: Avoiding Direct Conflict with Legislative History and Purpose

Next, the Court occasionally invokes the absurdity doctrine to nullify statutory text when the legislative history reveals that the statute's plain language clearly contradicts the clear legislative intent or purpose in enacting the statute.¹³⁸ As the Court has stated, "The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect."¹³⁹

Public Citizen v. U.S. Department of Justice offers an example of such intentionalist absurdities. There, the Court considered whether a committee of the American Bar Association (ABA) that rated potential judicial nominees constituted an "advisory committee" under a statute that subjects such committees to certain open records requirements.¹⁴⁰ The case

137. See *id.* at 527 (Scalia, J., concurring) (stating that the Court must construe the statute in a way that avoids producing an absurd and unconstitutional result); see also Note, *Should the Supreme Court Presume that Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 HARV. L. REV. 1798, 1799 (2003) ("The canon of constitutional avoidance . . . requires courts to construe statutes so as to avoid ruling on potential constitutional questions.").

138. See, e.g., *Pub. Citizen v. U.S. Dep't of Justice* (DOJ), 491 U.S. 440, 454–67 (1989) (applying the absurdity doctrine where an exhaustive review of legislative history demonstrated that the words chosen by Congress did not reflect legislative intent); *United States v. Ron Pair Enters.*, 489 U.S. 235, 242–43 (1989) (alteration in original) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (recognizing the legitimacy of applying the absurdity doctrine in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters," but declining to apply the principle to the statute at issue because strict application of the plain meaning would not truly "contravene the intent of the framers of the [statute]")

139. *Watt v. Alaska*, 451 U.S. 259, 266 (1981).

140. *Pub. Citizen*, 491 U.S. at 443–48.

turned on whether the President “utilized” the ABA committee under the meaning of the statute.¹⁴¹ The Court conceded that the plain meaning of the word “utilized” would lead to the conclusion that the ABA committee was indeed an advisory committee and consequently subject to the statute’s open records requirements.¹⁴² Nevertheless, it concluded, based in large part on a careful review of the legislative history, that Congress did not intend the statute to apply to the ABA committee.¹⁴³

One can correctly intuit that Textualists would typically reject this use of the absurdity doctrine. After all, Textualists usually object to the use of legislative history, as well as to the very concept of legislative intent.¹⁴⁴ But it is not only committed Textualists who have expressed discomfort with this application of the absurdity doctrine; courts in general have been reluctant to apply the doctrine in these circumstances. For instance, in *United States v. Ron Pair Enterprises, Inc.*,¹⁴⁵ the Supreme Court recognized the legitimacy of applying the absurdity doctrine in the “rare case [in which] the literal application of a statute [would] produce a result demonstrably at odds with the intentions of its draft[ing].”¹⁴⁶ But it declined to apply that principle in the case because it was not entirely certain that applying the plain meaning would truly “contravene the intent of the framers of the [Bankruptcy] Code.”¹⁴⁷

In another case, despite strong evidence in the legislative history that the legislature did not intend for the plain meaning of a statute to apply, the Ninth Circuit concluded that because the plain language was not altogether unjustifiable, the legislative history could not override it.¹⁴⁸ As the court stated, “If courts could ignore the plain meaning of statutory texts because their legislative histories showed that some (or even many) of those who

141. *Id.* at 451–52.

142. *Id.* at 463–65.

143. *Id.* at 455, 463–65.

144. See generally Hillel Y. Levin, *Intentionalism Justice Scalia Could Love*, 30 CONST. COMMENT. 89 (2015) (reviewing RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* (2012)) (explaining why Textualists oppose legislative history and the concept of legislative intent in general); see also SCALIA & GARNER, *supra* note 95, at 349, 369–98 (arguing against the concept of legislative intent and the use of legislative history); Alex Kozinski, *Should Reading Legislative History be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813–14 (1998) (summarizing why legislative history should not be used as an interpretive tool); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 441 (1990) (“It is misleading to speak of ‘the legislature’ as an entity with a mind or purpose or intent, and wrong to assume that the compromises necessary to enact laws are uniformly public-spirited.”).

145. 489 U.S. 235 (1989).

146. *Id.* at 242.

147. *Id.* at 242–43.

148. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 939–40 (9th Cir. 2001).

drafted and voted for the texts did not understand what they were doing, the plain meaning of many statutes . . . would be in jeopardy.”¹⁴⁹

Consequently, this application of the absurdity doctrine is best seen as a narrow one that applies, if at all, only where the contradiction between the plain language and the legislative history is clear *and* there are other problems with applying the text’s plain language.

d. Policy-Based Absurdities: Avoiding Irrational Results

The final category of cases in which the Court has applied the absurdity doctrine are those in which applying the language as written would lead to a manifestly irrational result that would be “so monstrous, that all mankind would, without hesitation,” reject it.¹⁵⁰ This is the most controversial use of the absurdity doctrine, for the separation-of-powers concerns are most acute. It is here that courts must be most cautious. Consequently, the Court has set the bar high for meeting this standard of absurdity, and cases in which it is successfully invoked to overcome the plain language of a statute are few and far between.

In describing this category of cases, courts sometimes use the language of legislative intent. For example, the Court has justified applying the absurdity doctrine to nullify the plain language where there is “no plausible reason why Congress would have intended” the absurdity that would result from applying the plain language¹⁵¹ and where Congress could not have “intended [an] incongruous, absurd, and unjust result.”¹⁵² This rhetorical appeal to legislative intent could lead one to conflate this category of cases with the previous category—what we have called “intentionalist absurdities.” But despite the use of such rhetoric, the two categories are quite different. Here, what the Court means by referencing legislative intent is that the legislature logically *could not* have intended the statute to have such an outlandish result. As the Court once put it, it can use the doctrine “to avoid an absurdity, which the legislature ought not to be presumed to have intended.”¹⁵³ In contrast, intentionalist absurdities are

149. *Id.* at 940; *see* *United States v. Locke*, 471 U.S. 84, 95 (1985) (“The fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do.”).

150. *Sturges v. Crowninshield*, 17 U.S. 122, 202–03 (1819).

151. *Clinton v. City of New York*, 524 U.S. 417, 429 (1998).

152. *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731, 735 (1967).

153. *Calderon v. Atlas S.S. Co.*, 170 U.S. 272, 281 (1898); *see* *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 172 (1896) (“Such an absurdity cannot be imputed to the legislature.”); *see also* Manning, *supra* note 83, at 2406 n.70 (discussing cases involving absurd results).

those where the legislative history indicates that Congress *actually did not* intend the plain meaning.¹⁵⁴

The most defensible kinds of cases that fit in this category are those in which the absurdity in the plain language of the statute is so self-evident that it can be explained only as the product of a scrivener's or drafter's error. For example, in *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Service*,¹⁵⁵ the Ninth Circuit confronted a statute that required an appeal to be filed "not less than 7 days" after the entry of a court's order.¹⁵⁶ Read literally, this would mean that a litigant would have to wait seven days to file an appeal of the order, and that after seven days, the time period for filing would then be infinite, a result that would be inconceivable.¹⁵⁷ Consequently, in this decision, of which Justice Scalia has signaled his approval,¹⁵⁸ the court concluded that the statute included a drafting error and that it should instead read "not *more* than 7 days."¹⁵⁹ Indeed, this case seems to meet Justice Scalia's two-part criteria for applying the absurdity doctrine.¹⁶⁰

Beyond the narrow set of cases that could qualify as scrivener's or drafter's errors, however, the Supreme Court has rarely agreed with litigants who advocate the nullification a statute's plain language based on apparently outlandish results. For example, in *Griffin v. Oceanic Contractors, Inc.*,¹⁶¹ the Supreme Court rejected an absurdity argument in favor of applying a statute's plain language—even though the plain language resulted in a windfall award of more than \$300,000 due to lost wages of only \$412.50.¹⁶² As the Court explained, "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts."¹⁶³

Indeed, the Court has repeatedly warned against the danger of judges

154. See, e.g., *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*, 435 F.3d 1140, 1146 (9th Cir. 2006) ("Even where the plain language appears to settle the question, we may nonetheless look to the legislative history to determine whether there is clearly expressed legislative intention contrary to that language that overcomes the strong presumption that Congress has expressed its intent in the language it chose.").

155. *Id.*

156. *Id.* at 1142.

157. *Id.* at 1145.

158. See SCALIA & GARNER, *supra* note 95, at 235 n.5 (citing the Ninth Circuit's decision approvingly).

159. *Amalgamated Transit Union*, 435 F.3d at 1146.

160. See SCALIA & GARNER, *supra* note 95, at 237–38.

161. 458 U.S. 564, 574–77 (1982).

162. *Id.* at 574–77.

163. *Id.* at 575.

deeming statutory schemes “irrational” simply because the policies seem misconceived.¹⁶⁴ For the absurdity doctrine to remain “a legitimate tool of the Judiciary,” the Court has warned, courts must “act[] with self-discipline” in deploying it.¹⁶⁵ Otherwise, the doctrine threatens to undermine the legislature and become a tool for judicial policymaking. In order to limit the potential for this sort of abuse, the Court has tightly circumscribed the circumstances in which the plain meaning of a statute may be nullified absurd on the ground of irrationality: it must be “so bizarre that Congress could not have intended it”¹⁶⁶ or “so gross as to shock the general moral or common sense.”¹⁶⁷ Thus, in most cases, even strange or troubling results will not meet this standard. For example, in *Barnhart v. Sigmon Coal Co.*,¹⁶⁸ the Court refused to apply the absurdity doctrine even where the plain meaning led to manifestly counterintuitive and anomalous results.¹⁶⁹

In general, lower courts have heeded the Court’s warnings about the doctrine.¹⁷⁰ Occasionally, though, because the Court has been less than

164. See, e.g., *United States v. Gonzales*, 520 U.S. 1, 10 (1997) (“Given [a] clear legislative directive, it is not for the courts to carve out statutory exceptions based on judicial perceptions of good . . . policy.”).

165. *Pub. Citizen v. DOJ*, 491 U.S. 440, 470–71 (1989).

166. *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991).

167. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930); see also *Small v. United States*, 544 U.S. 385, 404 (2005) (Thomas, J., dissenting) (“We should employ [the absurdity doctrine] only where the result of applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone.”) (quoting *Pub. Citizen*, 491 U.S. at 470–71).

168. 534 U.S. 438, 459 (2002).

169. *Id.* at 459; see also *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 30, 32 (1989) (refusing to use the absurdity doctrine even though petitioner’s argued that strict construction of the notice provision would result in procedural anomalies); *United States v. Locke*, 471 U.S. 84, 93–96 (1985) (explaining why the Court should not decide a filing date other than the one in the statute).

170. For example, the Eleventh Circuit cautioned as follows:

Though venerable, the [absurdity doctrine] is rarely applied, because the result produced by the plain meaning canon must be truly absurd before the principle trumps it. Otherwise, clearly expressed legislative decisions would be subject to the policy predilections of judges. In other words, it is irrelevant that we may not have made the same policy decision had the matter been ours to decide [if] we cannot say that it is absurd, ridiculous, or ludicrous for Congress to have decided the matter in the way the plain meaning of the statutory language indicates it did.

CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1228 (11th Cir. 2001) (alteration in original) (citations omitted); see also *McGhee v. Helsel*, 686 N.W.2d 6, 8 (Mich. Ct. App. 2004) (declining to nullify the plain language of a statute and declaring, “A result is not absurd merely because reasonable people viewing a statute with the benefit of hindsight would conclude that the Legislature acted improvidently. Courts may not rewrite the plain language of the statute and substitute their own policy

clear in defining the absurdity doctrine, lower courts have pushed the doctrine well beyond any defensible bounds.

IV. BEYOND ABSURD: THE THIRD CIRCUIT'S MISUSE OF THE ABSURDITY DOCTRINE

Now that we have identified the different kinds of absurdity arguments, we can better evaluate whether a particular invocation of the absurdity doctrine is justified. The Third Circuit's decision in the *Thorpe* case is an example of the most controversial use of the absurdity doctrine, and it illustrates why it is necessary for the Supreme Court to clarify the doctrine's proper application.

Although the court did not say so explicitly in its opinion, its invocation of the absurdity doctrine in the *Thorpe* case resonates, at best, with the fourth—and most controversial and limited—circumstance in which the doctrine might apply to nullify plain statutory text. That is, the court evidently concluded that applying the plain meaning of “museum” to the Borough would be irrational. As noted above, the court identified two supposed absurdities: first, the plain language would require repatriation even where the original burial was “in accordance with the wishes of the decedent’s next-of-kin;”¹⁷¹ and second, that the statute would be used “to settle familial disputes within Native American families.”¹⁷²

In nullifying the plain language on these grounds, the Third Circuit ignored the Supreme Court’s admonitions about the danger of the absurdity doctrine and the need to avoid judicial policymaking. Indeed, the plain language interpretation is entirely rational, harmonious with the statute’s structure, and consistent with Congress’s purposes for enacting it. Even if the court considered Congress’s policy choices—reflected in the statute’s plain language—to be distasteful, overbroad, or ill-conceived, none of these characteristics rises to the level of irrationality necessary to justify nullifying NAGPRA’s plain language.

A. NAGPRA’s Plain Language Applies Even Where the Original Burial was in Accordance with the Wishes of the Decedent’s Next-of-Kin

The Third Circuit made much of the fact that Thorpe’s burial in the Borough was in accordance with the wishes of his next-of-kin, and thus presumably lawful at the time.¹⁷³ In light of this, the court concluded that

decisions for those already made by the Legislature”).

171. *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255, 264 (3d Cir. 2014), *cert. denied sub nom.*, *Sac & Fox Nation of Oklahoma v. Borough of Jim Thorpe*, 136 S. Ct. 84 (2015).

172. *Id.* at 265.

173. *Id.* at 257–58 (highlighting the District Court’s opinion).

applying NAGPRA in such cases would be absurd. The court cited no language in the legislative history to support this assertion affirmatively. Instead, it relied on its own apparent discomfort with the repatriation requirement where the initial interment was lawful.¹⁷⁴ But NAGPRA's text and structure make clear that human remains must be repatriated even where, as here, the agency or museum lawfully obtained them.¹⁷⁵

Two categories of objects are subject to NAGPRA: (1) human remains and associated funerary objects; and (2) unassociated funerary objects, sacred objects, and objects of cultural patrimony.¹⁷⁶ NAGPRA recognizes that an agency or museum may have a right of possession to either type of item. It defines a "right of possession" as "possession obtained with the voluntary consent of an individual or group that had authority of alienation."¹⁷⁷ For human remains and associated funerary objects, a right of possession exists where the object was "obtained with full knowledge and consent of the next-of-kin."¹⁷⁸ With respect to an unassociated funerary object, sacred object, or object of cultural patrimony, a right of possession exists where the object was obtained "from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or

174. *See id.* at 264–66.

175. The fact that Jim Thorpe's remains were buried rather than publicly displayed is irrelevant. Whether the remains were actually displayed in a glass case or, as here, interred underground as part of a shrine does not determine an entity's status as a museum. First, the statute defines what it means to be a "museum," and that definition is paramount. *See Burgess v. United States*, 553 U.S. 124, 130 (2008) ("When a statute includes an explicit definition, we must follow that definition . . .") (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)). Nothing in the statutory definition of "museum" suggests that a distinction between interment and display of human remains is relevant. Second, even the plain or dictionary meaning of the word "museum" easily encompasses Jim Thorpe's mausoleum:

2.a. A building or portion of a building used as a repository for the preservation and exhibition of objects illustrative of antiques, natural history, fine and industrial art, or some particular branch of any of these subjects, either generally or with reference to a definite region or period. Also applied to the collection of objects itself.

THE OXFORD ENGLISH DICTIONARY 123 (2d ed. 1991). Jim Thorpe's gravesite was designed to bring in curious tourists and provide them with information and entertainment. In fact, the towns of Mauch Chunk and East Mauch Chunk believed that Thorpe's body could be used to generate revenue, and, once the towns combined, the Borough built an above-ground mausoleum to attract visitors. *See Petition for Writ of Certiorari at 10, Sac & Fox Nation of Oklahoma v. Borough of Jim Thorpe*, 136 S. Ct. 84 (2015) (No. 14–1419), 2015 WL 3486600, at *10. The gravesite therefore easily falls within the dictionary meaning of "museum," even though Jim Thorpe's remains are interred rather than displayed there.

176. *See* 25 U.S.C. § 3001(3) (2012) (defining "cultural items").

177. *Id.* § 3001(13).

178. *Id.*

group with authority to alienate such object.”¹⁷⁹

It was uncontested that the Borough had a right of possession to Jim Thorpe’s remains, as they were given to the Borough by Thorpe’s lawful next-of-kin.¹⁸⁰ Such a right of possession, however, does not free the Borough from its obligations under NAGPRA. The statute explicitly provides that a right of possession in Native American cultural items confers benefits that differ depending on the object’s category.¹⁸¹ Under § 7, if the agency or museum can “prove that it has a right of possession” to “unassociated funerary objects, sacred objects [or] objects of cultural patrimony,” then it may retain them and need not return them to the claimant—in other words, they are exempt from the repatriation requirement.¹⁸²

But NAGPRA does not extend this exemption to human remains or associated funerary objects.¹⁸³ Instead, it provides that an agency or museum holding a right of possession to such objects merely escapes criminal prosecution for illegal trafficking.¹⁸⁴ That is, unlike in cases where the museum had no right of possession to the human remains, it will not be subject to criminal penalties. Yet the repatriation requirement still obligates the museum to return this category of objects to lawful claimants.

Thus, Congress recognized that an agency or museum might have initially obtained human remains through lawful means, and it provided certain benefits to possessors in those circumstances. But, as the plain language of NAGPRA makes clear, Congress decided to treat human remains and associated funerary objects differently from other kinds of objects, requiring that they be returned to heirs or other enumerated claimants.¹⁸⁵ Thus, how an entity initially obtained human remains has no

179. *Id.*

180. *Id.*

181. The Third Circuit appears to have overlooked or ignored the different treatment of the two categories of objects. *See* Petition for Writ of Certiorari at 22a, *Sac & Fox Nation of Oklahoma v. Borough of Jim Thorpe*, 136 S. Ct. 84 (2015) (No. 14–1419), 2015 WL 3486600 (discussing 25 U.S.C. § 3001(13), which defines “right of possession” to include human remains, but failing to mention 18 U.S.C. § 1170 (2012), which provides that a museum with a “right of possession” to human remains merely is immune from criminal liability); *see also supra* notes 63–74 and accompanying text.

182. 25 U.S.C. § 3005(c) (2012).

183. *See* NAGPRA Regulations, 60 Fed. Reg. 62,134, 62,153 (Dec. 4, 1995) (to be codified at 43 C.F.R. pt. 10) (“The right of possession basis for retaining cultural items in an existing collection does not apply to human remains or associated funerary objects, only to unassociated funerary objects, sacred objects, and objects of cultural patrimony.”).

184. 18 U.S.C. § 1170.

185. *Compare* 25 U.S.C. § 3005(c) (providing that “unassociated funerary objects, sacred objects or objects of cultural patrimony” should be returned to a lineal descendant or tribe), *with* 18 U.S.C. § 1170 (governing the punishment for trafficking human remains of Native Americans).

bearing on its obligation to return them.

It is easy to imagine rational reasons why Congress may have chosen to draw this distinction. First, it could have concluded that human remains and associated funerary objects are qualitatively different from other kinds of cultural items and bear more importance to tribes. This would justify NAGPRA's different treatment of the two categories of objects.

Second, Congress could have drawn this distinction because of differences in the property status of the two categories of objects. With respect to repatriation, Congress initially made no distinction between human remains and associated funerary objects, on the one hand, and other cultural objects, on the other.¹⁸⁶ By the time the statute was enacted, however, it provided for the two categories of objects to be treated differently when the museum or agency had a right of possession.¹⁸⁷ Congress may have made this distinction due to a concern that, where a right of possession to non-human remains existed, the repatriation requirement could implicate the Takings Clause. But that concern did not apply in the case of human remains.¹⁸⁸

Thus, not only is there nothing "irrational" in NAGPRA's plain language, it is entirely consistent with the statute's internal structure and logic and apparently the result of legislative policy choices.

B. NAGPRA Explicitly Anticipates and Provides Guidance for Resolving Familial Disputes

The Third Circuit also identified a second purportedly absurd result of applying the plain language: NAGPRA would be used to resolve disputes within Native American families as to the proper treatment of ancestral remains. As the court put it, NAGPRA was not intended "to settle [such] familial disputes within Native American families."¹⁸⁹

This, too, misuses and unduly expands the absurdity doctrine. Congress well understood that NAGPRA could give rise to family disputes. First, simply as a matter of logic, *any* scheme that—like NAGPRA—gives remote

186. As introduced on July 10, 1990, NAGPRA's repatriation requirement made no distinction between the two categories of objects. *See* H.R. 5237, 101st Cong. § 6(a) (1990).

187. 25 U.S.C. § 3005(c).

188. *See* NAGPRA Regulations, 60 Fed. Reg. at 62,153 ("American law generally recognizes that human remains cannot be 'owned.'"); *cf.* H.R. REP. NO. 101-877, at 14-15, 24-27 (1990) (noting that definition of "right of possession . . . was amended. . . . The language was adopted to meet the concerns of the Justice Department about the possibility of a 5th amendment taking of the private property of museums through the application of the terms of the Act.").

189. Petition for Writ of Certiorari at 19a, *Sac & Fox Nation of Oklahoma v. Borough of Jim Thorpe*, 136 S. Ct. 84 (2015) (No. 14-1419), 2015 WL 3486600.

descendants the opportunity to make claims on ancestral remains and other objects invariably invites competing claims. After all, different descendants might have different views on the matter.

Second, even a cursory review of NAGPRA's language reveals that Congress explicitly anticipated family disputes and created an administrative process for resolving them. Section 7 provides that if there are "competing claims" concerning an object, then "the agency or museum may retain [the] item" until the dispute is resolved.¹⁹⁰ Moreover, the statute provides a mechanism for resolving familial disputes over an item's disposition. Section 8 directs the Secretary of the Interior to establish a review committee tasked with "monitor[ing] and review[ing] the implementation of the . . . repatriation activities required [by NAGPRA]."¹⁹¹ Most notably, section 8(c)(4) charges the review committee with "facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or *lineal descendants* and Federal agencies or museums relating to the return of such items. . . ."¹⁹² To resolve disputes, the review committee is directed to compile a report and recommendations for proper handling of such disputed items.¹⁹³ If resolution cannot be achieved through this administrative process, NAGPRA grants federal district courts ultimate enforcement authority.¹⁹⁴ In a district court proceeding under this section, the review committee's report and recommendation are admissible evidence.¹⁹⁵

Although NAGPRA does not mandate exhaustion of this administrative process prior to initiating suit in a district court, the fact that Congress created this detailed process demonstrates that it fully expected that there could be competing claimants. That manifest expectation defeats the notion that the possibility of intra-familial disputes justifies application of the absurdity doctrine. Of course, a disinterested observer might question the wisdom of the mechanism Congress devised for resolving such disputes. But given that Congress explicitly incorporated that mechanism into the statutory scheme, there is no legitimate basis for applying the absurdity doctrine on the ground that the statute's plain meaning would implicate intra-familial disputes.

190. 25 U.S.C. § 3005(e) (2012).

191. *Id.* § 3006(a).

192. *Id.* § 3006(c)(4) (emphasis added).

193. *Id.* §§ 3006(c)(9), (e).

194. *Id.* § 3013.

195. *Id.* § 3006(d).

C. The Third Circuit's Opinion Would Not Eliminate the Supposed Absurdities

Even assuming that the result of applying the plain language might be irrational for the reasons given by the Third Circuit, the court's decision would not have eliminated these absurdities—a fact that further underscores the extent to which the court's decision untethers the absurdity doctrine from its proper moorings.

Suppose that the next of kin of a Native American had given that person's remains to an entity that is a “real” museum in the eyes of the Third Circuit, and that certain lineal heirs then made a claim for repatriation. Just as in the *Thorpe* case, the museum would hold a right of possession, and a dispute could arise among the family members. That is, these supposed absurdities could occur in even the most run-of-the-mill cases that come within NAGPRA's scope. Nullifying NAGPRA's plain language to negate the Borough's status as a museum therefore does nothing at all to address the Third Circuit's concerns, as there is no connection between its reasoning (that the statute may give rise to absurd results) and its ultimate holding (that the Borough is not a “museum” as defined in § 2 of NAGPRA).

In sum, applying the plain language in the *Thorpe* case leads to no absurdities at all, but only to results that are fully anticipated by, consistent with, and provided for in the statutory scheme.

CONCLUSION

For committed Textualists, the Third Circuit's opinion in *Thorpe* is low-hanging fruit because the absurdity doctrine should almost never be applied in the absence of statutory ambiguity. But the opinion should equally trouble non-Textualists, for it strengthens Textualists' rule-of-law critique of non-Textualist methodologies and reinforces the image of non-Textualist judges as legislators in robes. But more than anything, this case illustrates that the absurdity doctrine is an interpretive weapon that must be wielded cautiously and brandished rarely. Unfortunately, the Supreme Court has provided precious little guidance to prevent lower courts from misusing it. Our proposed taxonomy of absurdities offers a useful way of systematizing and appropriately cabining the use of the absurdity doctrine.

* * *