

THE ORIGINS, CURRENT STATUS, AND FUTURE PROSPECTS OF BLOOD QUANTUM AS THE DEFINITION OF MEMBERSHIP IN THE NAVAJO NATION

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In the last few years, scholars, reporters, lawyers, and the general public have focused much attention on tribal membership requirements. Recent controversies over membership of “Freedmen,” or descendants of slaves, in the Cherokee Nation and other Oklahoma tribes have produced scholarly and popular discussions of what it means to be “Indian” and a member of a tribal nation.¹ Enrollment controversies among gaming tribes in California and recently recognized tribes in Rhode Island and Massachusetts, among others, have exposed acrimonious disagreements within tribal communities over how to define tribal membership.² Tribes have

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¹ See, e.g., Daniel E. Dawes, *Unveiling the Mask of Interracial Injustice: How the Seminole Nation Implicitly Endorses Dred Scott and Plessy*, 50 HOW. L.J. 319 (2007); Lydia Edwards, *Protecting Black Tribal Members: Is the Thirteenth Amendment the Linchpin to Securing Equal Rights within Indian Country?*, 8 BERKELEY J. AFR. AM. L. & POL’Y 122 (2006); Matthew Fletcher, *On Cherokee Black Freedmen*, MSU Legal Studies Research Paper No. 05-08, 2007, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015282; Carla Pratt, *Loving Indian Style: Maintaining Racial Caste and Tribal Sovereignty through Sexual Assimilation*, 2007 WIS. L. REV. 409 [hereinafter Pratt, *Loving Indian Style*]; Carla Pratt, *Tribal Kulturkampf: The Role of Racial Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241 (2005) [hereinafter Pratt, *Tribal Kulturkampf*]; S. Alan Ray, *A Race or a Nation?: Cherokee National Identity and the Status of Freedmen’s Descendants*, 12 MICH. J. RACE & L. 387 (2007); Terrion L. Williamson, *The Plight of “Nappy-Headed” Indians: The Role of Tribal Sovereignty on the Systematic Discrimination Against Black Freedmen by the Federal Government and Native American Tribes*, 10 MICH. J. RACE & L. 233 (2004); Evelyn Nieves, *Putting to a Vote the Question ‘Who is Cherokee?’*, NEW YORK TIMES, Mar. 3, 2007, <http://www.nytimes.com/2007/03/03/us/03cherokee.html?adxnml=1&adxnmlx=1199045180ItT6Bq6mo8LjZMMhpy pH7A> (concerning vote to define Cherokee membership by blood); Claudio Saunt, *Jim Crow and the Indians*, Feb. 21, 2006, <http://www.salon.com/news/feature/2006/02/21/cherokee> (article on Freedmen issue). Most of the scholarly discussions of the issue have been critical of the tribes and supportive of the Freedmen. See Dawes, *supra*; Edwards, *supra*; Pratt, *Loving Indian Style*, *supra*; Pratt, *Tribal Kulturkampf*, *supra*; Williamson, *supra*. But cf. Fletcher, *supra* (discussing Freedmen issue in context of conflict between tribal sovereignty and federal anti-discrimination laws).

² See, e.g., Stop Tribal Disenrollment, www.pechanga.info (last visited Dec. 30, 2007); Press Release, Pechanga Band of Luiseño Indians, A Message from the Pechanga Tribal Council, (Feb. 20, 2007), <http://www.pechanga-nsn.gov/page?pagelid=444> (statement of Pechanga Tribal Council on disenrollment controversy); Indianz.com, *Enrollment Dispute Hits Narragansett Tribe*, Mar. 9, 2006, <http://www.indianz.com/News/2006/012892.asp>, (discussing Narragansett Tribe of Rhode Island membership dispute); Indianz.com, *New Mexico Tribe Sued over Disenrollment*, Nov. 15, 2004, <http://www.indianz.com/News/2004/005353.asp>, (discussing suit by former members of Isleta Pueblo over disenrollment); Nick Rose, *Dividing Spoils, Dividing Tribes*, Utne Reader, Feb. 2, 2006, <http://www.utne.com/2006-02-01/DividingSpoilsDividingTribes.aspx> (discussing disenrollment of members by California tribes); Stephanie Vosk, *Mashpee Tribe Bars Many from Voting*, CAPE COD TIMES, Dec. 12, 2007,

disenrolled whole extended families and entire categories of members by reviewing prior enrollment records, or amending their laws to redefine membership eligibility.³ Popular press reports and scholarly articles on these controversies have introduced the concepts of “blood quantum” and “tribal membership” to a wider non-Indian audience.⁴ The resulting publicity has tested the power of tribal nations to define their membership independent of state and federal judicial and political control, as calls for outside intervention increase.⁵

In the midst of these controversies, a recent panel at a continuing legal education seminar held in Window Rock, the capital of the Navajo Nation, discussed whether the Nation would experience similar membership controversies in the future, and how such issues might be approached under Navajo law.⁶ This article arises out of a presentation the author gave at that seminar on the origins of the Navajo Nation’s current membership rule, which requires a person to have at least one-quarter Navajo “blood.” The presentation described the origins of this requirement in light of the origins of “blood quantum” in federal Indian law, which the author has described in two previous law review articles.⁷

Based on that presentation and the presentations of other panelists, as well as a lively

<http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20071212/NEWS/712120329/-1/SPECIAL05>

(discussing Mashpee Tribe of Massachusetts membership dispute).

³ See *Enrollment Dispute Hits Narragansett Tribe*, *supra* note 2 (stating that close to two hundred members of Narragansett Tribe were “suspended” as members); *New Mexico Tribe Sued over Disenrollment*, *supra* note 2 (stating that thirteen members of Isleta Pueblo were disenrolled); Rose, *supra* note 2 (citing claim that over one thousand members of California tribes were disenrolled).

⁴ See, e.g., Nieves, *supra* note 1; Pratt, *Tribal Kulturkampf*, *supra* note 1; Saunt, *supra* note 1; Pechanga Membership Battle, <http://video.knbc.com/player/?id=64156> (last visited Jan. 3, 2008) (video of Los Angeles NBC-affiliate television report on Pechanga Band disenrollment). The issue has received particular attention among African-American legal scholars due to the Freedmen issue. See, e.g., Dawes, *supra* note 1; Edwards, *supra* note 1; Pratt, *Loving Indian Style*, *supra* note 1; Pratt, *Tribal Kulturkampf*, *supra* note 1. The availability of web sites such as Indianz.com has made information on local disputes available to a global audience, and such disputes have been profiled in national newspapers such as the New York Times. See, e.g., Nieves, *supra* note 1. The on-line commentary on this issue is particularly interesting in gauging non-Indian reactions to membership disputes. See, e.g., Letters to the Editor, <http://letters.salon.com/news/feature/2006/02/21/chokeview/?show=all> (last visited Dec. 30, 2007) (letters to the editor concerning Saunt, *supra* note 1); Pechanga Membership Battle, *supra* (posted comments on video concerning Pechanga disenrollment).

⁵ See, e.g., Eric Reitman, *Note: An Argument for the Partial Abrogation of Federally Recognized Indian Tribes’ Sovereign Power over Membership*, 92 VA. L. REV. 793 (2006). In September, 2007, the House of Representatives voted to cut federal funding to the Cherokee Nation unless the Nation recognized the Freedmen, or descendants of its ex-slaves, as full members. See *House Votes to Cut Cherokee Funding*, Associated Press, Sept. 7, 2007, <http://www.msnbc.msn.com/id/20638110>. The Cherokee Nation also faced a lawsuit in the federal district court for the District of Columbia for failure to recognize the Freedmen. See *Vann v. Kempthorne*, 467 F. Supp. 2d 56 (D.D.C. 2006) (holding the Cherokee Nation’s sovereign immunity was abrogated by the Thirteenth Amendment because denial of vote based on race was a badge of slavery). California tribes have been sued several times unsuccessfully in state and federal courts over membership disputes. See *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008 (9th Cir. 2007) (holding no federal court jurisdiction over membership dispute); *Lamere v. Superior Ct.*, 131 Cal. App. 4th 1059 (Cal. Ct. App. 2005) (holding no state court jurisdiction under Public Law 280 to hear Pechanga enrollment dispute).

⁶ The seminar was entitled “Navajo Law Seminar: Reflections from Within and Without” and was sponsored by the Navajo Nation Department of Justice, the Sutin, Thayer law firm of Albuquerque, New Mexico, and the University of New Mexico and Arizona State University law schools. It was held on November 9, 2007 at the Navajo Nation Museum.

⁷ See Paul Spruhan, *Indian as Race/Indian as Political Status: Implementation of the Half-Blood Requirement under the Indian Reorganization Act, 1934-1945*, 8 RUTGERS RACE & L. REV. 27 (2006) [hereinafter Spruhan, *Indian as Race*; Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006) [hereinafter Spruhan, *A Legal History*].

discussion with members of the audience, this article aims to do several things. In Part I, the article describes the origins of the Navajo Nation's quarter-blood requirement in an attempt to answer the question: how and why did the Navajo Nation adopt blood quantum as the definition for membership? Part I describes how that requirement came about through the resolutions and minutes of meetings of the Navajo Nation Council,⁸ and examines what Council delegates thought they were accomplishing through the quarter-blood definition. Part I also discusses the role of the Bureau of Indian Affairs in the development of that membership definition. In Part II, the article discusses the current status of the quarter-blood requirement, how the Navajo Nation regulates it, and recent attempts to change the requirement. In Part III, the article analyzes the future prospects for the quarter-blood requirement, and blood quantum generally, in light of recent developments in Navajo Nation statutory law and the jurisprudence of the Navajo Nation Supreme Court concerning the "Fundamental Laws of the Diné."

I. ORIGINS

Interestingly, though the modern Navajo Nation government dates back to 1923, there was no definition of membership until 1953. The development of the concept of "membership" in the Navajo Nation is intertwined with two main themes in Navajo political and legal history: (1) the development of the Nation's natural resources, and (2) the attempts to adopt a constitution.

The development of the Nation's government has always been driven by natural resources. The modern Navajo Nation government originates from the Bureau of Indian Affairs' creation of a national council in 1923 to approve oil leases.⁹ Before then, there was no centralized power within the Nation, only local leaders who informally governed specific areas of the Reservation.¹⁰ Since the creation of the Council, a substantial amount of the Nation's non-federal funding comes from taxes and royalties on oil, gas, coal, timber, and other natural resources, and those revenues have fostered the expansion of the Navajo Nation government.¹¹ Such revenues have also driven the development of membership criteria.

The issue of membership came before the Council from time to time before 1953. Initially the Council appears to have heard membership applications directly, and voted to approve or reject applicants on a case-by-case basis.¹² In 1938 the Council referred applications to a five-member committee.¹³ The issue appeared again in 1951, as the Council again referred membership questions to a committee, and froze enrollment of persons over twenty-one years of age until procedures were adopted.¹⁴ The only general provision prior to 1953 barred adoption of anyone as a member of the Navajo Nation by stating that one could only be a Navajo by

⁸ Some minutes of the Council come from the Navajo Nation Records Office while others are located in a microfilm collection of tribal council meetings available at the Center of Southwest Studies at Fort Lewis College.

⁹ DAVID WILKINS, *THE NAVAJO POLITICAL EXPERIENCE* 82-84 (2003).

¹⁰ *Id.* at 79-80.

¹¹ See GARRICK BAILEY & ROBERTA GLENN BAILEY, *A HISTORY OF THE NAVAJOS: THE RESERVATION YEARS* (1986) (discussing revenues generated by mineral development); PETER IVERSON, *DINÉ: A HISTORY OF THE NAVAJOS* 242-44 (2002) (discussing coal and timber revenues).

¹² See *Minutes of the Navajo Nation Council*, 51-52 (Jan., 1938) (on file with author) [hereinafter *Minutes* (Jan., 1938)] (discussing application of a Mrs. Ashcroft, and referring all new applications to committee in lieu of consideration by the full Council).

¹³ See Navajo Nation Council Res. (Jan. 28, 1938).

¹⁴ See Navajo Nation Council Res. CM-12-51 (May 7, 1951).

birth.¹⁵ Curiously, according to the minutes of the Council meeting, delegates were not concerned with adoption generally, but with actors claiming to have been “adopted” by Navajos when filming movies on or near the Reservation.¹⁶ That resolution is now codified, and continues to bar adoption today.¹⁷

Several financial developments inspired the Navajo Nation Council finally to pass general membership requirements. First, the United States Congress passed the Navajo-Hopi Rehabilitation Act in 1950, authorizing the appropriation of eighty-eight million dollars for various projects and programs on the Navajo and Hopi Reservations.¹⁸ Second, uranium was discovered on the Nation,¹⁹ creating the belief that Navajos would receive financial benefits such as per capita payments from revenues generated from uranium mining.²⁰ Third and finally, the Nation filed claims against the United States before the Indian Claims Commission for damages arising out the Nation’s cession of land to the federal government.²¹ All of these developments caused the Council to believe that the Nation would be awash in claims for membership, though the uranium issue was the primary concern.²²

Importantly, the Navajo-Hopi Rehabilitation Act authorized a constitution for the Navajo Nation.²³ Unlike many other tribes, the Navajo Nation did not adopt a constitution under the Indian Reorganization Act of 1934. The IRA authorized tribes to adopt constitutions.²⁴ Though varying in the actual membership criteria, the IRA era constitutions all contain some definition of membership as part of their basic structure.²⁵ The Navajo Nation voted against adoption of the IRA, and consequently the Nation has no IRA constitution.²⁶ The Council attempted to adopt a constitution in 1937.²⁷ However, the Secretary of Interior rejected the proposed constitution, and the Navajo Nation Council continued (and continues) to be the governing body of the Nation

¹⁵ Navajo Nation Council Res. (Mar. 13, 1934).

¹⁶ *Minutes of the Navajo Nation Council*, 54-55 (Mar., 1934) (on file with author) [hereinafter *Minutes* (Mar., 1934)].

¹⁷ 1 N.N.C § 702 (2005).

¹⁸ Navajo-Hopi Rehabilitation Act of April 19, 1950, ch. 92, Pub. L. No. 474, 64 Stat. 44 (1950).

¹⁹ See BAILEY & BAILEY, *supra* note 11, at 236; PETER IVERSON, *supra* note 11, at 219. Bailey and Bailey state that uranium was discovered on Navajo lands in the late 1940s, *supra*, at 236, while Iverson states that uranium was discovered in 1951, *supra*, at 219.

²⁰ See *Minutes of the Navajo Nation Council*, 12 (July, 1953) (on file with author) [hereinafter *Minutes* (July, 1953)] (statement of BIA Area Director Allan Harper). The Nation never did issue per capita payments from uranium or any other natural resource revenues.

²¹ See IVERSON, *supra* note 11, at 207 (discussing suits).

²² See, e.g., Navajo Nation Council Res. CM-12-51 (May 7, 1951) (stating that “initiation of the Long-Range Rehabilitation Program and other developments have been accompanied by applications on the part of persons claiming Navajo blood, but whose names do not now appear on the Tribal rolls”); *Minutes of the Navajo Nation Council*, 131 (May, 1951) (on file with author) [hereinafter *Minutes* (May, 1951)] (statement of Bureau of Indian Affairs Area Director Allan Harper that claimants “have been reading about the claims suits”); *Minutes* (July, 1953), *supra* note 20 (statement of Chairman Sam Ahkeah that potential future distribution of tribal funds would cause claims to Navajo ancestry to collect funds).

²³ Navajo-Hopi Rehabilitation Act, § 6.

²⁴ Indian Reorganization Act of 1934, 25 U.S.C. § 476(a) (2000).

²⁵ IRA era tribal constitutions are available on-line through a database of the University of Oklahoma entitled “Indian Reorganization Act Era Constitutions and Charters,” <http://thorpe.ou.edu/IRA.html> (last visited Dec. 28, 2007).

²⁶ WILKINS, *supra* note 9, at 86.

²⁷ *Id.* at 86-87. For the provisions of the 1937 constitution, see Proposed Constitution, October 25, 1937, reprinted in *Charters, Constitutions and By-laws of the Indian Tribes of North America, Part IV: The Southwest (Zuni-Navajo)* (George Fay, ed. 1967).

through recognition by the BIA.²⁸

The Navajo Nation Council adopted the quarter-blood definition as part of another proposed constitution in 1953. The constitution included the quarter-blood requirement as Article III:

The membership of the Navajo Nation shall consist of the following persons:

- (a) All persons of Navajo blood whose names appear on the official roll of the Navajo Tribe maintained by the Bureau of Indian Affairs, as of the date of adoption of this constitution, provided, however, that corrections may be made in said roll for a period of ten years hereafter.
- (b) Any person who is at least of one-fourth (1/4) degree Navajo blood, but who has not been previously been enrolled as a member of the Tribe, is eligible for membership and enrollment.
- (c) Children born to any enrolled member of the Navajo Tribe subsequent to the adoption of this constitution shall automatically become members of the Navajo Tribe, provided they are at least of one-fourth degree Navajo blood.²⁹

The requirement itself actually became law through a separate resolution.³⁰ The Council passed the resolution as a stop-gap measure while the constitution was pending approval.³¹ The constitution never came to be, however, as the Council withdrew it from consideration by the Secretary of Interior because the Council believed it would grant the Secretary more power over the Nation's government.³² Though originally intended to be temporary, the resolution became permanent, and is now codified as Navajo Nation law without amendment to this day.³³ Several questions arise out of this action by the Council: (1) Who suggested the quarter-blood requirement? (2) Whom did the Council want to prevent from claiming membership? (3) Why did the Council use blood quantum, instead of other criteria, such as residence or lineal descent?

It appears that the quarter-blood requirement was drafted by local Bureau of Indian Affairs officials, including Robert Young,³⁴ and Norman Littell, the Nation's attorney. At the time, Young or BIA Area Director Allan Harper introduced resolutions at Council meetings, and

²⁸ WILKINS, *supra* note 9, at 87.

²⁹ Proposed Constitution, art. III, Navajo Nation Council Res. CO-72-53 (Oct. 8, 1953).

³⁰ Navajo Nation Council Res. CJ-50-53 (July 20, 1953). The language is identical to the constitutional provision, except that the references to the constitution itself are omitted. *See* Navajo Nation Council Res. CO-72-53, art. III. The resolution was originally presented to the Council in May, 1953, but the Council tabled it pending further discussion. *See Minutes of the Navajo Nation Council*, 329 (May, 1953) (on file with author) [hereinafter *Minutes* (May, 1953)]. At the May meeting, the Council did lift a freeze on new adult enrollments put into place in 1951. *See* Navajo Nation Council Res. CM-36-53 (May 21, 1953). After further discussion, the Council approved the quarter-blood requirement in July, 1953. *See* Navajo Nation Council Res. CJ-50-53. This article uses discussions in both May and July, 1953 as recorded in the minutes of the Council.

³¹ *See* Navajo Nation Council Res. CJ-50-53, Resolved Clause 2; *Minutes* (May, 1953), *supra* note 30, at 326.

³² WILKINS, *supra* note 9, at 89.

³³ 1 N.N.C. § 701 (2005).

³⁴ Robert Young was a long-time BIA employee who worked closely with the Navajo Nation Council. *See* Biography/History in Inventory of the Robert W. Young Papers, 1860-1992 (bulk 1823-1980), <http://rmoa.unm.edu/docviewer.php?docId=nmu1mss672bc.xml> (last visited Dec. 28, 2007). *See also* Robert W. Young Papers, Center for Southwest Research, University Libraries, University of New Mexico. After leaving the BIA, Young was a professor of linguistics at the University of New Mexico and a well-known expert on the Navajo language. *Id.* His papers contain a wealth of information on Navajo government, culture, and language.

Littell and other tribal attorneys discussed and recommended action to the Council.³⁵ Young and Littell, among others, drafted the constitution,³⁶ and Young presented the resolution approving the quarter-blood requirement to the Council and advocated for its passage.³⁷ Young and Harper told the Council that claimants were descending on the Nation seeking their share of uranium revenues based on their alleged Navajo ancestry.³⁸ They further told them that some bona fide Navajos had trouble collecting social security and other benefits due to the lack of clear membership criteria.³⁹

Why one-quarter Navajo blood became the cut-off is unclear from the available records. The proposed constitution of 1937 defined membership as one-quarter of more Navajo blood, and it might be that they simply copied that provision.⁴⁰ It might be that other BIA officials recommended the provision. BIA officials in Window Rock had received correspondence from the BIA's central office on the issue in 1952, in which the Commissioner of Indian Affairs discussed the Bureau's approach to membership requirements.⁴¹ The Commissioner did not suggest blood quantum or the quarter-blood definition specifically, but suggested that the Navajo Council should not require residence on the Reservation.⁴² The Commissioner contended that the lack of resources for Reservation residents meant that Navajos had to leave the Reservation for jobs, and that it therefore would be unfair to cut off non-residents.⁴³ Consistent with this advice, the proposed requirement did not define membership by residency.

When Young introduced the resolution, Council delegates clearly were confused over how membership worked, believing several different definitions already existed. Though a tribal

³⁵ See *Minutes* (May, 1951), *supra* note 22, at 130-31 (introduction of membership resolution by Allan Harper); *id.* at 132 (statement of Norman Littell supporting membership resolution introduced by Harper); see *Minutes* (May, 1953), *supra* note 30, at 326 (May, 1953) (presentation of membership resolution by Young); see also *Minutes* (July, 1953), *supra* note 20, at 9-10, 14-15 (discussion of resolution by tribal attorney Charles Tansey).

³⁶ See *Minutes* (May, 1953), *supra* note 30, at 328 (statement of Robert Young); WILKINS, *supra* note 9, at 88 (discussing draft by Norman Littell); Selected Materials Relating to the Development of a Navajo Tribal Const. 11 (n.d.) (on file with author) (document in papers of Robert Young, see *supra* note 34, indicating that Window Rock BIA staff and the tribal attorney developed draft constitution). Interestingly, Littell had drafted a proposed constitution in 1948 even before the passage of the Rehabilitation Act. See Draft of Constitution for Consideration of the Navajo Tribe, Dec. 6, 1948 (on file with author). That proposed constitution had a membership provision, but defined membership by lineal descent, and not by blood quantum. *Id.*, art. II. Why the definition changed between that draft and the 1953 draft is unclear from the available records. It might be that the discovery of uranium altered Young and Littell's thoughts on membership, as they might have believed a threshold blood quantum was necessary to cap the number of members in the Nation seeking a share of the alleged riches that would arise from uranium mining.

³⁷ See *Minutes* (May, 1953), *supra* note 30, at 325-26.

³⁸ *Id.* at 325 (statement of Robert Young); see *Minutes* (July, 1953), *supra* note 20, at 12 (statement of Allan Harper).

³⁹ See *Minutes* (July, 1953), *supra* note 20, at 17-18 (statements of Robert Young and Allan Harper). Interestingly, at some point prior to 1953, the Navajo census office issued metal discs as proof of Navajo identity. See *id.* at 11 (statement of Council Delegate Sevier Vaughn).

⁴⁰ See Proposed Constitution, *supra* note 27, art. III, § 1.

⁴¹ Letter from Commissioner of Indian Affairs to Area Director Allan Harper (n.d., but file stamped as received by Window Rock BIA office in Apr. 1952) (on file with author). This letter was included in the records of the Navajo Nation Council concerning Council Res. CM-12-51, which empowered the Advisory Committee of the Navajo Nation Council, see *infra* text accompanying note 60, to establish enrollment procedures. A handwritten notation on the letter indicates BIA officials were instructed to discuss the letter with the Advisory Committee.

⁴² *Id.*

⁴³ *Id.*

census office operated prior to 1953, and received applications for membership,⁴⁴ it was unclear to the delegates how the office determined eligibility. Some delegates thought all Navajos who lived off the Reservation for three years automatically were cut off from membership.⁴⁵ This belief apparently came from a provision in the Navajo Treaty of 1868, which states that any Navajo who leaves the Reservation forfeits his or her rights under the Treaty.⁴⁶ At least one delegate thought that the BIA applied a patrilineal descent rule, requiring that a child's father be Navajo for a child to be a member.⁴⁷ Another alleged rule was that a Navajo had to be born on the Reservation.⁴⁸ Young, tribal attorney Charles Tansey, and Harper emphasized that none of these criteria were actual membership definitions, and that the time had come for the Council to clearly define who would be Navajo.⁴⁹

Several delegates were concerned with the issue of intermarriage.⁵⁰ Importantly, they were not concerned merely with white-Navajo intermarriage, but also with intermarriages between Navajos and members of other tribes.⁵¹ Some of the delegates' own families faced the issue, as family members had married whites or other Indians.⁵² Delegate Hoskie Cronemeyer asked whether intermarriage meant their relatives were not Navajo.⁵³ Interestingly, as noted by Delegate Eugene Gordy, some of the Council delegates themselves had non-Navajo ancestry.⁵⁴

The Council minutes show that delegates were concerned about restricting membership to prevent false claims to tribal property by those with Navajo ancestry, but no legitimate claim to Navajo membership. But why blood quantum? And why one-quarter as the threshold? Though originating from non-Indian advisors, the detailed discussions show that the Council did not adopt the definition blindly. Indeed, there was some disagreement over the validity of using blood quantum to define membership. Delegate Manuelito Begay expressed concern over cutting off his relatives merely based on ancestry, contending that as long as his relatives were connected to his family, they should remain Navajo.⁵⁵ However, Delegates Howard and Samuel Gorman advocated strongly for the quarter-blood definition, arguing that the lowering of blood

⁴⁴ See *Minutes* (July, 1953), *supra* note 20, at 11-12 (discussing census office).

⁴⁵ See *Minutes* (May, 1953), *supra* note 30, at 327 (statement of Council Delegate George Hubbard).

⁴⁶ Treaty with the Navajo Tribe of Indians art. 13, Jun. 1, 1868, 16 Stat. 667; *Minutes* (July, 1953), *supra* note 20, at 9-10. (statement of Tribal Attorney Charles Tansey).

⁴⁷ See *Minutes* (July, 1953), *supra* note 20, at 11 (statement of Council Delegate Frank Bradley).

⁴⁸ *Id.* at 9. (statement of Council Delegate Frank Bradley).

⁴⁹ *Minutes* (May, 1953), *supra* note 30, at 328 (statement of Robert Young); *Minutes* (July, 1953), *supra* note 20, at 9-10 (statement of Charles Tansey); *id.* at 12-13 (statement of Area Director Allan Harper).

⁵⁰ See *Minutes* (May, 1953), *supra* note 30, at 328; *Minutes* (July, 1953), *supra* note 20, at 9-10, 15-16, 18.

⁵¹ See *Minutes* (July, 1953), *supra* note 20, at 9-10 (statement of Chairman Sam Ahkeah); *id.* at 15 (statement of Tribal Attorney Charles Tansey).

⁵² See *Minutes* (May, 1953), *supra* note 30, at 328 (statement of Council Delegate Hoskie Cronemeyer) (discussing marriage of nephew to white woman); *Minutes* (July, 1953), *supra* note 20, at 9-10 (statement of Chairman Sam Ahkeah) (discussing marriage of nephew to Yakima Indian); *id.* at 17 (statement of Council Delegate Roger Davis) (discussing marriage of daughter to white man).

⁵³ *Minutes* (May, 1953), *supra* note 30, at 328 (statement of Council Delegate Hoskie Cronemeyer).

⁵⁴ *Minutes* (July, 1953), *supra* note 20, at 18 (statement of Council Delegate Eugene Gordy) ("I do not have any objection to mixed marriages that we have gone through in which we have mixed blood represented on the Council here, since they maintained their identity as Navajos.").

⁵⁵ *Id.* at 16 (statement of Council Delegate Manuelito Begay). Delegate Begay invoked the Navajo traditional concept of clanship, see *infra* text accompanying notes 115-20, and stated that "if a non-Indian married into my family, the offspring is considered a relative to the third generation, to the point where it gets too small- maybe we can say to where there is very little blood in the third or fourth generation and only if they do not want us as their relatives" *Id.*

through intermarriage meant that those less than one-quarter blood ceased to be Navajo.⁵⁶ Delegate Eugene Gordy did not object to intermarriage or the lowering of Navajo blood generally, but did believe that the quarter-blood definition was necessary to protect the tribe's resources:

As far as intermarriage of offspring is concerned, if there is nothing else involved, it is not of great concern to us but [sic], on the other hand, when it involves something the Navajo has, like the Chairman mentioned, the Tribal money, it comes to be a question of great importance . . . I think a little understanding should be given to the mixed marriage problem in regard to money and land; that they will in the future, because of mixed marriages, have to say who is eligible to part of that money and part of that land.⁵⁷

In the end, the Council voted to adopt the quarter-blood requirement 68 to 1, apparently to protect the Nation's limited resources from people the delegates believed merely sought enrollment for financial benefit.⁵⁸

Subsequent Council action implemented the membership definition. In 1954 the Council instructed the Advisory Committee of the Council to draft regulations to process membership applications.⁵⁹ The Advisory Committee was a smaller group made up of Council delegates that met between Council sessions and took action when instructed by the larger Council.⁶⁰ The Advisory Committee issued membership regulations in 1955.⁶¹ The Committee created an "Enrollment Screening Committee," whose job was to consider membership applications.⁶² The Advisory Committee instructed the Screening Committee to reject any applicant who could not show one-quarter or more Navajo blood, and, on all other applications, make recommendations for or against enrollment to the Advisory Committee.⁶³ An applicant rejected by the Screening Committee for lack of one-quarter blood could appeal to the Advisory Committee, which could rule on the appeal with or without a hearing.⁶⁴ Interestingly, full-blood applications were to be automatically approved, but the Screening Committee was to make recommendations on mixed-blood applications based on blood quantum and several non-biological criteria:

If the applicant appears to have Navajo blood of $\frac{1}{4}$ degree or higher, but not full blood, [the Screening Committee] shall base its recommendations on his degree of Navajo blood, how long he has lived among the Navajo people, whether he is

⁵⁶ See *id.* at 15 (statement of Council Delegate Howard Gorman) ("What the blood might be will depend upon the amount of blood of the parents, and in time, by intermarrying, it gets too small. There is no end to that at all."); *id.* at 16 (statement of Council Delegate Samuel Gorman).

⁵⁷ *Id.* at 18 (statement of Council Delegate Eugene Gordy).

⁵⁸ *Id.* Interestingly, the Council delegates stood up to indicate their vote. *Id.* One wonders how the lone holdout, who is not named in the minutes, felt standing alone against the resolution.

⁵⁹ Navajo Nation Council Res. CM-12-54 (Feb. 26, 1954).

⁶⁰ MARY SHEPARDSON, *NAVAJO WAYS IN GOVERNMENT* 64 (1963).

⁶¹ Navajo Nation Council Advisory Comm. Res. ACS-39-55 (Sept. 7, 1955).

⁶² *Id.* § 2.

⁶³ *Id.* The Screening Committee was also to reject any applicant who was already enrolled in another tribe. *Id.*

⁶⁴ *Id.* § 4. The Navajo Nation Council eliminated the role of the Advisory Committee in 1969. See Navajo Nation Council Res. CJY-70-69 (July 24, 1969). After 1969, the Screening Committee makes the decision for or against enrollment, and an applicant can appeal to the Navajo district courts, and, if rejected again, to the Navajo Nation Supreme Court. See *id.* (codified at 1 N.N.C §§ 752(B), 753-754 (2005)).

presently living among them, whether he can be identified as a member of a Navajo clan, whether he can speak the Navajo language, and whether he is married to an enrolled Navajo. . . .⁶⁵

Why did the Advisory Committee require mixed-blood applicants to show cultural connections to the Nation when the 1953 Council resolution required only one-quarter blood? It appears the Committee and the full Council were concerned about a specific group of people: descendants of Navajos who were “Mexican slaves.”⁶⁶ Throughout the history of relations between Navajos, Pueblos, other tribes, and Spanish settlers in New Mexico, individuals were captured, traded, or resettled among the different tribal and non-tribal populations, fostering intermixture among the various groups.⁶⁷ As part of this process, Navajos became slaves in Mexican and Anglo households in New Mexico.⁶⁸ There were attempts by Navajos to return such slaves and their descendants to the Navajo Nation.⁶⁹ Indeed, in 1868 Navajo leaders questioned federal officials during treaty negotiations at Bosque Redondo⁷⁰ about the return of slaves, but were told that they would have to go through the New Mexico territorial legal system to retrieve them.⁷¹

In the discussion of the 1954 resolution instructing the Advisory Committee to adopt guidelines,⁷² Council delegates were concerned about these slave descendants. Robert Young again presented the resolution, and specifically identified claimants from southern New Mexico and the area around Cuba, New Mexico that allegedly were seeking membership under the quarter-blood definition.⁷³ According to Young, these people claimed their grandfathers were former Mexican slaves, and that they met the one-quarter blood requirement.⁷⁴ Young also told the Council that they sought enrollment so that “they may share in Navajo resources and benefits

⁶⁵ Advisory Comm. Res. ACS-39-55 § 3(b).

⁶⁶ The term “Mexican” refers to the Spanish/Mestizo population of New Mexico. Different terms such as “Spanish,” “Hispanic,” or “Mexican” have been used through time to describe this group of people. See LAURA GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 12 (2007) for a discussion of the author’s choice to use “Mexican American” instead of “Spanish” or “Hispanic” to describe people of New Mexico. The author here uses the term “Mexican” because that is the term used by Young when presenting the slave issue to the Council. See *infra* text accompanying notes 73-75.

⁶⁷ See generally JAMES BROOKS, *CAPTIVES AND COUSINS: SLAVERY, KINSHIP, AND COMMUNITY IN THE SOUTHWEST BORDERLANDS* (2002); JENNIFER NEZ DENETDALE, *RECLAIMING NAVAJO HISTORY* 140-142 (2007); GÓMEZ, *supra*, note 66, at 105-112.

⁶⁸ BROOKS, *supra* note 67, at 234-50; GÓMEZ, *supra* note 66, at 108-09. Navajos also held slaves captured or traded from other populations in the region. See DENETDALE, *supra* note 67, at 141-42 (discussing belief of non-Navajos and some Navajos that Juanita, wife of Navajo Chief Manuelito, was a Navajo slave of Mexican origin).

⁶⁹ See DENETDALE, *supra* note 67, at 141, 147; *Minutes of the Navajo Nation Council*, 125 (Feb., 1954) (on file with author) [hereinafter *Minutes* (Feb., 1954)] (statement of Chairman Sam Ahkeah); see *infra* text accompanying note 77.

⁷⁰ The United States government forced Navajos on the “Long Walk” to the Bosque Redondo Reservation in Southeastern New Mexico. See IVERSON, *supra* note 11, at 51-57; DENETDALE, *supra* note 67, at 70-78. The Treaty of 1868 ended Navajo captivity at Bosque Redondo, and Navajos returned to the newly-created Navajo Reservation. *Id.* at 75-76; IVERSON, *supra* note 11 at 63-65.

⁷¹ See Navajo: A Century of Progress 1868-1968 9 (Martin Link ed., 1968) (transcript of treaty negotiations). After the treaty, Navajos continued to seek the return of slaves by requesting assistance from agents of the Bureau of Indian Affairs and, on a visit to Washington, D.C., directly from President Ulysses S. Grant. See DENETDALE, *supra* note 67, at 141, 147.

⁷² See Navajo Nation Council Res. CF-12-54 (Feb. 26 1954).

⁷³ See *Minutes* (Feb., 1954), *supra* note 69, at 154.

⁷⁴ *Id.*

. . . free hospital care and . . . free educational benefits, or something of that nature.”⁷⁵ However, according to the Chairman of the Council Sam Ahkeah, individual Navajos previously had gone in search of their relatives among non-Navajos communities, only to be rebuffed:

My grandmother went to Fort Sumner,⁷⁶ while her sister, she was captured and taken to Taos, New Mexico. She was there eight years while and, after [the Navajos] returned [from Fort Sumner], there was a party of Navajo people gotten up and they went East through New Mexico, hunting up these young men and women who had been captured, to try to get them back into the Tribal fold. This sister to my grandmother was in Taos and the party came around and asked her if she would be willing to come back home and she consented and came back with a party of fifty or more young men and women but there was a great number of them who would rather not come back because they were married and thought they were happy over there, so they did not come back. Now my question is what to do in case some of these people whose grandmothers refused to come back and stayed over there[?]⁷⁷

According to some delegates, these “lost” Navajos should remain lost, as they allegedly chose to stay away from the Reservation and their Navajo relatives.⁷⁸

The adoption of the Committee guidelines appears to respond to the Mexican slave issue by creating additional non-biological requirements for mixed-bloods seeking enrollment. As the slave descendants appeared to meet the bare blood quantum requirement, the Committee appears to have added the additional cultural requirements to keep them out. Regardless of the specific motivation, the two-tiered system in the Committee guidelines shows a tension in Navajo legal thought between a pure biological definition of Navajo identity and one based on cultural or other non-biological criteria. The definition the Council passed only required one-quarter Navajo blood, and allowed automatic enrollment of children of enrolled members, as long as the children had one-quarter or more Navajo blood.⁷⁹ However, from a bare reading of the guidelines, persons of one-quarter or more Navajo blood are not automatically enrolled, even if children of enrolled members, but must prove cultural and physical connections to the Navajo Nation to be worthy of membership. This tension exists in other situations in Indian legal history, as the federal government has also struggled with defining “Indian” solely by blood, without blood, or through a combination of blood and cultural characteristics subjectively considered “Indian.”⁸⁰

⁷⁵ *Id.* at 125.

⁷⁶ Fort Sumner is the location of the Bosque Redondo Reservation where Navajos were sent by the United States government after the “Long Walk.” See *supra* note 70. The site of Bosque Redondo is outside the modern town of Fort Sumner, New Mexico.

⁷⁷ *Minutes* (Feb., 1954), *supra* note 69, at 125.

⁷⁸ *Id.* at 126 (statement of Council Delegate Hoskie Cronemeyer); *id.* at 126-27 (statement of Sam Gorman) (“I want to state here that these people who claim to be Navajos and want to be enrolled . . . whose forefathers refused to return to the Navajo reservation, have now completely lost their identification as Navajos.”).

⁷⁹ Navajo Nation Council Res. CJ-50-53 (July 20, 1953).

⁸⁰ See Spruhan, *Indian as Race*, *supra* note 7, at 44-45.

II. CURRENT STATUS

The Navajo Nation continues to define its membership based on the original Council and Advisory Committee resolutions. The census office, officially called the Navajo Office of Vital Records, accepts membership applications based on the quarter-blood definition.⁸¹ It is federally funded through a “638” contract,⁸² and the office issues a “certificate of degree of Navajo blood” as proof of enrollment.⁸³ The Enrollment Screening Committee also continues to operate.⁸⁴ The two offices work together to review applications. All applications showing lineal descent from a currently enrolled member are approved by the Office of Vital Records if the applicant has one-quarter or more Navajo blood.⁸⁵ The office uses a 1940 “base roll” created by the Bureau of Indian Affairs to confirm enrollment of an applicant’s ancestors, and adds any approved applicants to that roll.⁸⁶ An applicant who cannot show lineal descent from a currently enrolled member is sent to the Enrollment Screening Committee, which holds an adjudicatory hearing on his or her application.⁸⁷ As this system currently operates, anyone whose lineal ancestor is enrolled does not need to show any cultural ties to the Nation; simply being one-quarter or more Navajo blood is sufficient. Therefore, despite the Advisory Committee guidelines, there currently is no universal cultural requirement for mixed-bloods. However, if an ancestor is not enrolled, the applicant who is not a “full blood” must show those cultural ties set out in the guidelines to the Nation to be accepted as a member.

The Screening Committee acts as a quasi-judicial body, and its decision can be appealed to the Nation’s courts. The Committee is currently made up of several Navajo officials: the President, the Vice-President, the Executive Director of the Division of Natural Resources, the Agency Census Clerk (presumably the head of the Office of Vital Records), and the Attorney General.⁸⁸ It operates under rules mostly deriving from the Advisory Committee’s guidelines.⁸⁹ An applicant can appeal any denial by the Screening Committee to a Navajo district court, and, if denied again, ultimately to the Navajo Nation Supreme Court.⁹⁰

There is only one published opinion on an appeal from the Screening Committee. The Navajo Court of Appeals (the precursor to the Navajo Supreme Court) issued its opinion in *Trujillo v. Morgan* in 1970.⁹¹ In that case, the Court held a de novo trial,⁹² and concluded that the applicant Jose Pablo Trujillo had not shown that he was of one-quarter or more Navajo

⁸¹ Telephone Interview with Marge Natanobah, Navajo Office of Vital Records (n.d.) (on file with author).

⁸² The Indian Self-Determination and Education Assistance Act of 1975 authorizes the federal government to enter into “self-determination” contracts with tribes for tribal governments to receive federal funding and provide services agencies such as the Bureau of Indian Affairs previously provided on reservations. See 25 U.S.C. § 450f(a) (2000). Such contracts are called “638” contracts based on the public law number of the act. As the BIA previously issued certificates of Indian blood, the Navajo Office of Vital Records now provides them pursuant to its 638 contract.

⁸³ Telephone Interview with Marge Natanobah, *supra* note 81.

⁸⁴ Interview with Donovan Brown, Assistant Attorney General, Navajo Nation Dept. of Justice (n.d.).

⁸⁵ Telephone Interview with Marge Natanobah, *supra* note 81.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 1 N.N.C. § 752(A) (2005). In practice, representatives of these individuals sit on the Committee. Interview with Donovan Brown.

⁸⁹ See ENROLLMENT SCREENING COMM., PROCEDURAL GUIDELINES FOR CONDUCTING HEARINGS (n.d.) (on file with author).

⁹⁰ §§ 754-55.

⁹¹ *Trujillo v. Morgan*, 1 Nav. R. 59 (Nav. Ct. App. 1970), available at 1970.NANN.0000002 (VersusLaw).

⁹² See *Allen v. Fort Defiance Housing Corp.*, No. SC-CV-05-05, slip op. at 3 (Nav. Sup. Ct. Dec. 14, 2005), available at 2005.NANN.0000019, ¶ 17 (VersusLaw) (discussing history of appellate jurisdiction).

blood.⁹³ The Court has not applied the quarter-blood requirement in the thirty-eight years since *Trujillo*.

There was one recent attempt by Council delegates to amend the quarter-blood definition. Council Delegate Ervin Keeswood introduced legislation in 2004 to lower the blood quantum requirement to one-eighth Navajo blood.⁹⁴ Even before the resolution was put up for vote before the Council, Navajo Nation President Joe Shirley, Jr. issued a public statement objecting to the lowering of the required quantum.⁹⁵ The public discussion of the amendment focused again on resources, specifically the effect of increasing the population of enrolled Navajos on the tribe's budget and ability to provide services.⁹⁶ Interestingly, Delegate Keeswood advocated for the lowering of the blood requirement by suggesting that the increase in enrollment might actually result in increased federal funding where such funding is based on the number of tribal members.⁹⁷ However, according to President Shirley, such a significant change to Navajo Nation membership should be approved by the Navajo people through a referendum, and not by Council resolution.⁹⁸ The Council voted down the resolution 44 to 18.⁹⁹ Though President Shirley suggested a referendum, no such referendum has been put before the Navajo people.¹⁰⁰ As of early 2008, the original 1953 Council resolution and 1955 Advisory Council regulations continue to define Navajo membership, fifty years after their initial approval.¹⁰¹

III. FUTURE PROSPECTS

What are the future prospects of the quarter-blood requirement, and blood quantum in general on the Navajo Nation? As of early 2008, there has been no new attempt to amend the requirement in the Council. No referendum on the issue has been forthcoming. There is a continued movement to adopt a Navajo constitution,¹⁰² which presumably would include a definition of membership, but no sign the Council intends to develop one.

In the absence of revisions by the Council or the Navajo people, the Navajo Nation Supreme Court may be the institution that amends the requirement. As discussed in previous articles in the *Tribal Law Journal*, the Navajo Nation Council passed a resolution in 2002 known as the "Fundamental Laws of the Diné."¹⁰³ In that resolution, the Council identifies four types of

⁹³ *Trujillo*, 1 Nav. R. at 62, 1970.NANN.0000002, ¶ 20.

⁹⁴ See Jim Maniaci, *Navajo Prez: Don't Drop Blood Requirement until People Vote on It*, GALLUP INDEPENDENT, April 22, 2004, available at <http://www.gallupindependent.com/2004/04apr04/042204navajoprez.html> (last visited Dec. 28, 2007) (discussing Bill No. 0032-04).

⁹⁵ See *id.*

⁹⁶ *Id.*; see also Marley Shebala, *Nation Could Not Afford 1/8 Blood Quantum, Delegates Say*, NAVAJO TIMES, April 22, 2004, available at <http://archiver.rootsweb.com/th/read/MIXED-BLOODS/2004-04/1082749089> (last visited Jan. 2, 2008). One Delegate, Duane Tsinigine, suggested that the Council consider eliminating blood requirements completely for "humanitarian reasons." *Id.*

⁹⁷ *Id.*

⁹⁸ Maniaci, *supra* note 94.

⁹⁹ See Indianz.com, *Bid to Lower Navajo Blood Quantum Rejected*, Apr. 23, 2004, <http://www.indianz.com/News/archive/001892.asp> (last visited Dec. 28, 2007).

¹⁰⁰ See 11 N.N.C. §§ 401-40. (2005). The Navajo Nation Council may refer an issue to the Navajo people to vote on by referendum, or registered voters may put an issue on the ballot at a special or general election. § 402(A), (C).

¹⁰¹ See 1 N.N.C. §§ 701, 751-54 (2005).

¹⁰² A group of Navajos recently circulated an on-line petition. See <http://www.navajoconstitution.com> (last visited Dec. 28, 2007).

¹⁰³ Navajo Nation Council Res. CN-69-02 (Nov. 1, 2002) (codified at 1 N.N.C. § 201 (2005)) (amending Title 1 of the Navajo Nation Code to recognize the Fundamental Laws of the Diné). See Kip Bobroff, *Diné Bi*

“Fundamental Law” or, in the Navajo language, “Diné bi beenahaz’áanii”: Traditional Law, Customary Law, Natural Law, and Common Law.¹⁰⁴ Within these categories, the resolution describes certain laws that are “fundamental,” including under “traditional law” that Navajo voters have the right to choose leaders of their choice, and under “natural law” Navajos have the duty and responsibility to “protect and preserve the beauty of the natural world for future generations.”¹⁰⁵ However, the resolution does not comprehensively describe all such “fundamental laws” as the Council believed that such a description “should not be attempted” because “more work is required to elucidate the appropriate fundamental principles and values which are to be used to educate and interpret the statutory laws already in place and those that may be enacted.”¹⁰⁶ Nonetheless, the resolution mandates that the Navajo Nation government, including the Judicial Branch, apply those laws to its operations.¹⁰⁷ The Judicial Branch is specifically instructed to “uphold the values and principles of Diné bi beenahaz’áanii in the practice of peace making, obedience, discipline, punishment, interpreting laws and rendering decisions and judgments.”¹⁰⁸

The Navajo Nation Supreme Court currently interprets the resolution to mean that statutes must be harmonized with Diné bi beenahaz’áanii. Though the Court had already applied “Navajo Common Law” in its decisions, and had stricken statutes as invalid under the Navajo Bill of Rights,¹⁰⁹ after the passage of the Fundamental Law resolution, the Court now applies Fundamental Law directly to statutes. The Court has applied Fundamental Law principles to give meaning to ambiguous language in the Navajo Bill of Rights, the Navajo Preference in Employment Act, and the Forcible Entry and Detainer Act.¹¹⁰ Significantly, the Court also has

Beenahaz’áanii: Codifying Indigenous Consuetudinary Law in the 21st Century,
5 TRIBAL L. J. (2004/2005), http://tlj.unm.edu/tribal-law-journal/articles/volume_5/dine_bi_beenahazaanii_codifying_indigenous_consuetudinary_law_in_the_21st_century/index.php; Philip Morin, *Case Note: Navajo Nation v. Rodriguez and the Traditional Principle of Hazhó’gó*,
7 TRIBAL L. J. (2006/2007), http://tlj.unm.edu/tribal-law-journal/articles/volume_7/case_note_navajo_nation_v_rodriguez_and_the_traditional_navajo_principle_of_hazhoog/index.php.

¹⁰⁴ Navajo Nation Council Res. CN-69-02, § 2 (codified at 1 N.N.C. § 202 (2005)).

¹⁰⁵ *Id.* § 3(A) (codified at 1 N.N.C. § 203(A) (2005)); *id.* § 5(G) (codified at 1 N.N.C. § 205(G) (2005)).

¹⁰⁶ *Id.* at cl. 9.

¹⁰⁷ *Id.* § 3(C)-(E) (codified at 1 N.N.C. § 203(C)-(E) (2005)).

¹⁰⁸ *Id.* § 3(E) (codified at 1 N.N.C. § 203(E) (2005)).

¹⁰⁹ *See, e.g., Means v. Dist. Ct. of Chinle Judicial Dist.*, 7 Nav. R. 382, 392-93 (Nav. Sup. Ct. 1999), *available at* 1999.NANN.0000013, ¶ 73 (VersusLaw) (applying Common Law concept of *hadane* to criminal jurisdiction); *Navajo Townsite Develop. Corp. v. Sorrell*, No. SC-CV-19-00, slip op. at 5-7 (Nav. Sup. Ct. Jan. 28, 2002), *available at* 2002.NANN.0000001, ¶¶ 22-25 (VersusLaw) (striking down portion of Forcible Entry and Detainer statute as violating due process and equal protection clauses of Navajo Bill of Rights); *see also* Daniel Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. INDIAN L. REV. 379 (1993) (survey of cases applying Navajo Common Law up to 1992); J.R. Mueller, *Restoring Harmony through Nalyeeh: Can the Navajo Common Law of Torts be Applied in State and Federal Forums*, 2 TRIBAL L. J. (2001/2002), http://tlj.unm.edu/tribal-law-journal/articles/volume_2/mueller/index.php.

¹¹⁰ *See, e.g., Navajo Nation v. Kelly*, No. SC-CR-04-05, slip op. at 6-8 (Nav. Sup. Ct. July 24, 2006), *available at* 2006.NANN.0000012, ¶¶ 27-28 (VersusLaw) (interpreting double jeopardy clause of Navajo Nation Bill of Rights in light of Fundamental Law principles of comprehensive dispute resolution); *Navajo Nation v. Rodriguez*, No. SC-CR-03-04, slip op. at 10-11 (Nav. Sup. Ct. Dec. 16, 2004), *available at* 2004.NANN.0000014, ¶ 38 (VersusLaw) (interpreting Navajo Bill of Rights in light of Fundamental Law principle of *hazhó’ógo*); *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 9 (Nav. Sup. Ct. Aug. 26, 2004), *available at* 2004.NANN.0000013, ¶ 41 (VersusLaw) (interpreting Navajo Preference in Employment Act in light of principle of *nalyeeh*); *Fort Defiance Housing Corp. v. Lowe*, No. SC-CV-32-03, slip op. at 3-5 (Nav. Sup. Ct. Apr. 12, 2004), *available at*

struck down statutes that the Court found to be in irreconcilable conflict with Fundamental Law.¹¹¹ In the last several years, the Court has struck provisions of the Navajo Nation Election Code and the Probate Code, while upholding another provision of the Election Code as consistent with Fundamental Law.¹¹² This new approach changes the playing field for litigants who challenge the validity of the Council's enactments.

How might the quarter-blood requirement fare under a Fundamental Law analysis? Would the fact that blood quantum is not a traditional Navajo concept affect its enforceability? The concept of "blood quantum" originated in Anglo-American colonial law to define the status of mixed-race people and bar them from rights afforded whites.¹¹³ The federal government adopted this pre-existing concept to define "Indian" and "tribal member" for various purposes long before the Navajo Nation Council adopted blood quantum in 1953.¹¹⁴ Traditionally, Navajos use clanship to define identity.¹¹⁵ Each Navajo has four clans he or she identifies himself or herself by: the mother's clan, the father's clan, the maternal grandfather's clan, and the paternal grandfather's clan.¹¹⁶ A Navajo is a member of his or her mother's clan and is "born for" his or her father's clan.¹¹⁷ According to Navajo history, there were four original clans, and many clans that were subsequently adopted.¹¹⁸ Some of the adopted clans originate from Pueblo or other tribal peoples, as well as Mexicans, who were adopted into Navajo society.¹¹⁹ Various "non-Navajos" were absorbed into the Navajo people, and clans were created to conform them to the existing system of identity.¹²⁰ Navajos also define themselves by "cultural identity markers" derived from origin stories, identified by one Navajo scholar, Lloyd Lee, as "worldview, land,

2004.NANN.0000005, ¶¶ 20-30 (VersusLaw) (interpreting Forcible Entry and Detainer Act in light of importance of home under Fundamental Law).

¹¹¹ See *In re Appeal of Lee*, No. SC-CV-32-06, slip op. at 7-8 (Nav. Sup. Ct. Aug. 11, 2006), available at 2006.NANN.0000016, ¶ 24 (VersusLaw) (striking down residency requirement for candidates for Navajo Nation President as violative of Fundamental Law right of Navajo voters to choose leaders of their choice); *In re Estate of Kindle*, No. SC-CV-40-05, slip op. at 7 (Nav. Sup. Ct. May 18, 2006), available at 2006.NANN.0000017, ¶ 28 (VersusLaw) (striking down Probate Code provision mandating use of state law in intestate inheritance situations as inconsistent with mandate to apply Fundamental Law).

¹¹² See *In re Appeal of Lee*, slip op. at 7-8, 2006.NANN.0000016, ¶ 24; *In re Estate of Kindle*, slip op. at 7, 2006.NANN.0000017, ¶ 28; *In re Grievance of Wagner*, No. SC-CV-01-07, slip op. at 7-8 (Nav. Sup. Ct. May 14, 2007), available at 2007.NANN.0000001, ¶¶ 27-30 (VersusLaw) (upholding bar on Council delegates simultaneously serving as state legislators as consistent with Fundamental Law).

¹¹³ See Spruhan, *A Legal History*, *supra* note 7, at 4-9.

¹¹⁴ See *id.* at 9-47.

¹¹⁵ See WILSON ARONILTH, JR. FOUNDATION OF NAVAJO CULTURE 77-80, 116-118 (Nancy Cottrell Maryboy ed., 1992) (1991); Robert Yazzie, "Life Comes from It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 182-83 (1994) (discussing clanship in Navajo law and society).

¹¹⁶ Navajos will introduce themselves to other Navajos and at public events by identifying these four clans. See Yazzie, *supra* note 115, at 182.

¹¹⁷ *Id.* at 182 n. 41.

¹¹⁸ ARONILTH, *supra* note 115, at 104-08 (discussing origin of four original clans), 135-38 (listing clans, including adopted clans); Yazzie, *supra* note 115, at 182 n.39.

¹¹⁹ See ARONILTH, *supra* note 115, at 112-15 (discussing origins of certain clans and relation to Pueblo people), 135-38 (listing clans, including "Zuni clan," "Tewa clan," "Ute People," and "Mexican clan"); Philmer Bluehouse, *My Dineh Clans, A Simple Summary* (in materials for "Reflections from Within and Without" Seminar, Nov. 9, 2007) (discussing origins of Mr. Bluehouse's clans, including clan originating from adoption of Hopi child); DENETDALE, *supra* note 70, at 28, 142; Yazzie, *supra* note 115, at 182 n.139; Means v. Dist. Ct. of Chinle Judicial Dist., 7 Nav. R. 382, 392 (Nav. Sup. Ct. May 11, 1999), available at 1999.NANN.0000013, ¶ 73 (VersusLaw) (discussing adopted clans arising out of intermarriage with "people of other nations").

¹²⁰ See *id.*

language, and kinship.”¹²¹ Practicing the principles of hozho and sa’ah naaghai bik’eh hozhoon,¹²² speaking the Navajo language, and recognizing Navajo kinship, Lee argues, are the true definition of Navajo identity.¹²³ Blood quantum plays no part in these conceptions of Navajo identity.¹²⁴ Significantly, these concepts were essentially absent from the discussions of the prior Council in adopting the quarter-blood requirement.¹²⁵

Even before the passage of the Fundamental Law statute, the Navajo Nation Supreme Court applied traditional legal principles to define certain types of membership. The high-profile case of Russell Means introduced the concept of hadane or “in-law” to modern Navajo law.¹²⁶ The Court ruled that Means was a “member” of the Nation for purposes of criminal jurisdiction because he was married to a Navajo and therefore had obligations to her clan, justifying criminal jurisdiction over him.¹²⁷ Interestingly, the Court discussed the 1934 bar on adoption of non-Navajos,¹²⁸ stating that Means had not been “adopted” in a formal sense, but had responsibilities under Navajo traditional law nonetheless.¹²⁹ The Court did not strike down the adoption bar, but invoked the concept of hadane as an alternative means of “membership.”¹³⁰

Based on the Court’s new approach, is the quarter-blood requirement in irreconcilable conflict with Fundamental Law? One commenter at the recent Navajo law seminar suggested it was, and also suggested she would challenge the quarter-blood requirement under that theory. Time will tell whether that challenge occurs, and how the Navajo Nation Supreme Court will deal with the issue. As current law clerk to the Court, the author cannot comment on the potential outcome of such a challenge. The important point for purposes of this article is that the issue is out there and may yet bring the blood quantum issue to the forefront of the ongoing evolution of Navajo law.

¹²¹ See Lloyd Lee, *Navajo Cultural Identity: What Can the Navajo Nation Bring to the American Indian Identity Discussion Table?*, 21 WICAZO SA REV. 79, 92 (2006).

¹²² Lee describes these principles as meaning that Navajos “must always try to achieve balance and harmony in their lives.” *Id.* at 81. Another Navajo, Council Delegate Rex Lee Jim, describes Sa’ah Naaghai Bik’eh Hozhoon as meaning “May I be everlasting and beautiful living.” DENETDALE, *supra* note 70, at 10. He explains the phrase as “encapsulat[ing] a declaration to live a healthy and wealthy lifestyle and the practice of applying its teachings to life.” *Id.*

¹²³ Lee, *supra* note 121, at 92.

¹²⁴ *Id.* at 92-97; DENETDALE, *supra* note 70, at 28, 142. Denetdale notes that Navajos of mixed ancestry now “often state their blood quantum.” *Id.* Lee advocates the abandonment of blood quantum, and return to a definition of Navajo identity consistent with the Navajo “cultural identity markers” he identifies in his article. Lee, *supra* note 121, at 100.

¹²⁵ As noted above, one delegate did briefly discuss clanship in questioning denial of relatives simply due to blood quantum. See *supra* note 55.

¹²⁶ See *Means v. Dist. Ct. of Chinle Judicial Dist.*, 7 Nav. R. 382, 392-93 (Nav. Sup. Ct. May 11, 1999), available at 1999.NANN.0000013, ¶ 73 (VersusLaw). For a detailed discussion of the *Means* case, see Paul Spruhan, *Case Note: Means v. District Court of the Chinle Judicial District and the Hadane Doctrine in Navajo Criminal Law*, 1 TRIBAL L. J. (2000/2001), http://tlj.unm.edu/tribal-law-journal/articles/volume_1/spruhan/index.php.

¹²⁷ *Means*, 7 Nav. R. at 392-93, 1999.NANN.0000013, ¶ 78.

¹²⁸ See text accompanying *supra* notes 15-17.

¹²⁹ *Means*, 7 Nav. R. at 392, 1999.NANN.0000013, ¶¶ 72-74.

¹³⁰ *Id.*

IV. CONCLUSION

The legal history of membership on the Navajo Nation tracks the development of Navajo law itself. Since its creation to serve the needs of the Bureau of Indian Affairs, the modern Navajo Nation government has gone through several evolutionary stages towards independence. The current Navajo Nation Code,¹³¹ a collection of the various resolutions of the Council, reflects these various developmental stages. If the Code is separated out into the various resolutions and arranged chronologically, these stages become clear. As observed through its resolutions, the Council has changed from an institution created and controlled by the BIA, to one advised by the BIA to adopt certain laws Bureau officials drafted or at least recommended, to one reinvigorating its laws to reflect fundamental Navajo principles independent of BIA influence.

However, the laws created in these various stages have never been reconciled through comprehensive review and amendment of the Code by the Council. The Fundamental Law resolution exists alongside older statutes from previous eras. Layer upon layer of laws exist one on top of the other, with no clear guidance by the Council as to how to reconcile them. The courts are left to sort out these various provisions on a case-by-case basis, and make them consistent with the contemporary needs of a regulatory state and the mandate to maintain and apply the unique, fundamental legal principles of unwritten Navajo tradition.

Some laws, like the quarter-blood requirement, have not been changed at all since the passage of the original resolutions. The membership requirement remains as it was fifty years ago, despite developments since then, including, most significantly, the increase in intermarriages both with Indians of other tribes and non-Indians.¹³² Such intermixture creates the potential for children of enrolled Navajos to be ineligible for enrollment because they lack the required amount of Navajo blood, regardless of their residence on the Navajo Reservation or knowledge of Navajo language and culture. What was originally designed to keep out claimants allegedly disconnected from Navajo society now threatens some within Navajo society itself.

The current issue is how the Navajo government and its people will deal with the question of membership in light of these changes in Navajo law and society. There are no answers, just several serious questions. What is the purpose of having a membership requirement? Is defining who is "Navajo" simply to allocate resources, as it appears the Council believed in 1953 and 2004, or are there other cultural, political, or legal reasons to do so? With the shift in approach to Navajo law, particularly the rise of Fundamental Law as a recognized source of authority, can prior adopted concepts like blood quantum be successfully integrated into the new legal order regardless of why the Council previously thought it was necessary? Will blood quantum be abandoned by the Council or struck down by the courts? And what of the Navajo people themselves? Will they utilize the referendum process or lobby their leaders to lower the blood quantum requirement, raise the requirement, or abandon blood quantum altogether? Has blood quantum become so engrained in the language and perceptions of the Navajo people that it is considered appropriate and useful today, regardless of its origins or Navajo Fundamental Law? With the imminent arrival of casino gambling on the Navajo Nation, will there be new calls for revising the membership requirement in ways similar to other tribes

¹³¹ The Office of Legislative Counsel recently issued a revised Code in 2005.

¹³² The author is not aware of a published study of intermarriage rates across the Navajo Nation. An unpublished study by Yolynda Begay presented by Professor Kip Bobroff at the Navajo law seminar, *see supra* note 6, suggested a rising rate of mixed children born to Navajo mothers in New Mexico.

that have seen financial benefits from gaming?

The Navajo Nation is at an important crossroads in its law and society, and by confronting the membership issue, Navajos have the opportunity to define themselves independent of prior pressures or influences. Whether and how the Navajo people and their government choose to confront the identity issue remains to be seen.