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Ezra Rosser

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SPECIAL FEATURE

DISPLACING THE JUDICIARY: CUSTOMARY LAW AND THE THREAT OF A DEFENSIVE TRIBAL COUNCIL: A BOOK REVIEW OF RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE* (2009)

Ezra Rosser*

Introduction

Since it opened, the Smithsonian's National Museum of the American Indian has been criticized. The decision of the Museum *not* to tell the story of tribal life, particularly the history of contact with non-Indians, in a linear, scholarly fashion is faulted by many, critics and visitors alike. The primary permanent exhibits, "Our Peoples" and "Our Universes," give space to selected tribes to tell the stories of their lives and their beliefs.¹ According to a *New York Times* review of the Museum, the result is a "monotony" of similar stories; the review harshly explains that "[t]he notion that tribal voices should be heard becomes a problem when the selected voices have so little to say."² The main message of the tribal voices featured in the Museum's permanent exhibits is twofold: we (continue to) exist, and this is who we are as a people. Tellingly, Kevin Gover, Director of the Museum and former Arizona State University law professor, recently observed, "I'm stunned by the number of people who are angry when they come to the museum and see it is about Indians who are still here, rather than Indians who used to be."³

* Associate Professor, American University Washington College of Law; Research Affiliate, National Poverty Center, University of Michigan.

1. For more on the Museum, including a description of the exhibits, see National Museum of the American Indian, <http://www.americanindian.si.edu/index.cfm> (last visited Aug. 10, 2010).

2. Edward Rothstein, *Museum with an American Indian Voice*, N.Y. TIMES, Sept. 21, 2004, at E1.

3. Press Release, Sandra Day O'Connor Coll. of Law, Ariz. State Univ., Gover Addresses 'White Man's Indian' in Canby Lecture (Jan. 2010), <http://www.myazbar.org/AZBarInfo/NewsPDFs/Gover-Canby%20Lecture.pdf>.

Former Navajo Nation Supreme Court Justice Raymond Austin's impressive work, *Navajo Courts and Navajo Common Law*,⁴ embraces the same assertion of continued tribal existence and the importance of identity that inspires criticism of the Museum. Similarly, by exploring in detail the ideas and values underlying Navajo common law and showing their continued relevance today before Navajo courts, Austin highlights the importance of grounded understandings of tribal justice systems. The book unapologetically embraces a Navajo-centric perspective and resists generalizing to pan-Indian history, experience, and governance forms. *Navajo Courts and Navajo Common Law* can be appreciated on multiple levels. The message to the general reader is simple: Navajo courts and Navajo law are distinctly Navajo. Diné (the word Navajos use for themselves, which means "the People") beliefs, values, and customs play an important role in defining the content and practice of justice and law in the Navajo Nation. But beneath this simplicity lies a rich discussion of how three Diné values—*hózhó*, *k'é*, and *k'éi*—are used in practice by the Navajo Nation Supreme Court.

The study of tribal law has not kept up with the practice of tribal law; scholars and scholarship are falling behind tribal-court jurisprudence and the work of tribal judges. Considering the marginalized place of Indian nations, this is not surprising. Except for tribal members or those living near reservations, most people probably think the U.S. political system consists of two types of sovereigns: states and the federal government.⁵ Tribal sovereignty is not generally appreciated, and the possibility that tribes may call on their customs to resolve disputes arising on reservations is certainly not contemplated. Students can easily graduate from law school having encountered, at most, a passing mention of Indian tribes.⁶ Among Indian law scholars, tribal law—the law of particular tribes—takes a back seat to research on the (mis)treatment of Indian sovereignty by the U.S. Supreme Court.⁷ That

4. RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE* (2009).

5. See Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 262 (1994) (noting the persistence of tribes "as the third sovereign within the United States' borders").

6. First, the majority of law schools do not have tenured or tenure-track faculty who work on Indian law issues and may only offer an Indian law class on an ad hoc basis. Second, with a few possible exceptions such as *Williams v. Lee* in Civil Procedure and *Johnson v. M'Intosh* in Property, required classes often include no acknowledgment of this other form of sovereignty within the United States. Perhaps nowhere is the absence of coverage more striking than it is in most Constitutional law classes.

7. This is a descriptive claim, not a normative critique. The tortured jurisprudence of the

is not to say that scholars have not made valuable contributions to the study of tribal law,⁸ only that there is ample room for such scholarship. With the increased public availability of tribal-court decisions thanks to the internet and the high caseloads of tribal judiciaries,⁹ the timing of former Navajo Nation Supreme Court Justice Austin's coverage of Navajo common law is excellent and hopefully is on the leading edge of a wave of similar scholarship.¹⁰

Finally, *Navajo Courts and Navajo Common Law* is particularly timely in light of the Navajo Nation's ongoing struggle to define the powers of its President, Supreme Court, and Council. Austin, while referring obliquely to "the turmoil" of 1989 related to the power struggles and controversies between those who opposed and those who supported Navajo Tribal Chairman Peter MacDonald, Sr.,¹¹ primarily writes about tribal customs, not about politics. Nonetheless, by asserting the importance of Navajo customary or common law, Austin ends up taking a stand for the Navajo Nation Supreme Court and the rule of law.

These are exciting times for the Navajo Nation: the President has been pushing to reduce the size of the Council, tribal courts invalidated the

U.S. Supreme Court arguably justifies such a focus by the Indian law scholarly community. See also Robert B. Porter, *Cleaning Up the Colonizer's Mess: An Important Role for Legal Scholarship About the Indigenous Nations*, 50 U. KAN. L. REV. 431, 431-32 (2002), who makes the same descriptive claim in noting that few full-time professors write about tribal law because "the emphasis of 'Indian law' scholarship was, and continues to be, the area I refer to as 'federal Indian control law'").

8. See, e.g., Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998). The writings of a former clerk of the Navajo Nation Supreme Court, Paul Spruhan, are particularly good examples of how tribal law provides a lens onto federal Indian law. See, e.g., Paul Spruhan, *The Origins, Current Status, and Future Prospects of Blood Quantum as the Definition of Membership in the Navajo Nation*, 8 TRIBAL L.J. 1 (2007-2008); 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. 2 (2000-2001).

9. Tribal court decisions can be found on the commercial databases of Westlaw.com and Versuslaw.com, as well as on the website of the Tribal Court Clearinghouse, <http://www.tribal-institute.org/lists/decision.htm>. Some tribal courts have begun posting their opinions online as well. See, e.g., Navajo Nation Supreme Court Opinions, <http://www.navajocourts.org/suctopinions.htm> (last visited Aug. 10, 2010).

10. In as small a field as Indian law, the 2008 publication of Professor Justin Richland's examination of Hopi tribal courts and the 2009 publication of Justice Austin's book suggest at least a small wave has already begun. See JUSTIN B. RICHLAND, *ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT* (2008).

11. AUSTIN, *supra* note 4, at 95.

Council's suspension of the President, and the Council unsuccessfully tried to reduce the role of customary law in tribal courts. The Navajo Nation does not have a constitution, and the question remains open which branch of government should have final say on the powers of the executive, judicial, and legislative branches. The Navajo Nation Supreme Court responded to the recent political turmoil by issuing a series of opinions that amount to an updated Navajo version of *Marbury v. Madison*. The supreme court protected the idea of separate and coordinate branches of Navajo government by blocking a power grab by the Council and established the supremacy of Navajo Nation Supreme Court interpretations of customary law. The Navajo Nation Supreme Court's heavy reliance on customary law when resolving this and future moments of "turmoil" is strongly supported by Austin's *Navajo Courts and Navajo Common Law*.

I. Navajo Customary or Common Law

Former Justice Raymond Austin is ideally suited to write about customary law, but *Navajo Courts and Navajo Common Law*'s main contribution is to link customary practices and values to cases decided by the Navajo Nation Supreme Court. Austin wrote *Navajo Courts and Navajo Common Law* as a Ph.D dissertation with Professor Robert A. Williams, Jr. as his advisor. Professor Williams's foreword places Austin's focus on Navajo common law into the context of federal Indian law and the U.S. Supreme Court's ongoing efforts to diminish tribal jurisdiction. Austin, however, was not a typical Ph.D student; he started studying at the University of Arizona only after serving on the Navajo Nation Supreme Court from 1985 to 2001. On tribal law, and especially on Navajo tribal law, few people can match Austin's level of experience and mastery. The book reflects Austin's confidence in writing a career capstone project that showcases his depth of knowledge about Navajo law, moving fluidly between theory, oral history, and the decisions of the Navajo Nation Supreme Court.

The book's introductory chapter begins with the Navajo creation story and ends with Austin acknowledging that other Diné might view things differently than he does and differently from the traditional Diné education he received from his grandmother. The book's roadmap includes two chapters of background on the Navajo court system and the procedures for using and arguing the applicability of Navajo common law. Early on—a quarter of the way into the book—Austin turns to "three foundational doctrines that form the nucleus" of his book: "*hózhó* (glossed as harmony, balance, and peace); *k'é* (glossed as kinship unity through positive values); and *k'éi* (Navajo kinship or

clan system).”¹² Austin explains that the goal of the book is to “encourage” indigenous peoples to make use of “their own cultural norms, values, and traditional institutions” to solve the challenges they face.¹³

An introduction to the Navajo Nation and the history of the Navajo Nation court system provides the background for Austin’s discussion of the *hózhó*, *k’é*, and *k’éi* doctrines. The Navajo Nation is roughly the size of West Virginia and spans across Arizona, New Mexico, and Utah. Although “298,197 individuals identified themselves as Navajo” on the 2000 Census,¹⁴ the total Navajo population living on the reservation was 165,673, according to the same census.¹⁵ The Diné traditionally consider their homeland to be more expansive—defined by four sacred mountains—but their territory is now defined by the Treaty of 1868 and subsequent additions to the land described in the treaty. The Treaty of 1868 came only after Navajos had been subjected to a four-year imprisonment at Fort Sumner on the Bosque Redondo Reservation, following a harsh military campaign and the forced exile that began with “The Long Walk.”¹⁶ In the language of the U.S. Supreme Court, Indian tribes are “domestic dependent nations,” whose sovereignty has long been acknowledged by the United States.¹⁷ “The 1868 Navajo Treaty,” Austin explains, “reaffirms and guarantees to the Diné their socially distinct group character and political character as a sovereign nation”¹⁸

Like that of the United States, the Navajo Nation government is now divided into executive, legislative, and judicial branches. But it has not always been this way. The Tribal Council was originally established by the U.S. government in the 1920s to facilitate non-Indian access to Navajo resources.¹⁹ And though there is now an office of President, until “the turmoil” of 1989 the structure was more parliamentary, with the main leadership role held by the

12. *Id.* at xxi.

13. *Id.* at xxiii.

14. *Id.* at 2.

15. TRIBCHOUDHARY, DIV. OF ECON. DEV., NAVAJO NATION, NAVAJO NATION DATA FROM US CENSUS 2000, at 1 (2001), available at <http://navajobusiness.com/pdf/NNCensus2000.pdf> (additionally noting that the total reservation population, including non-Indians and Indians of other tribes, according to the 2000 Census was 180,462).

16. AUSTIN, *supra* note 4, at 3.

17. The term was introduced by Chief Justice John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). For an excellent article discussing what “domestic dependent nation” status means for the Navajo Nation, see Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004).

18. AUSTIN, *supra* note 4, at 6.

19. *Id.* at 13.

Chairman of the Council.²⁰ Abuses of power and corruption by Chairman MacDonald “spurred the 1989 government reforms that resulted in the present three-branch government with checks and balances.”²¹ Not surprisingly—this is a book written by a former Justice of the Navajo Nation Supreme Court—Austin goes into the most detail when it comes to the history of the Navajo Nation court system.

Professor David Wilkins writes of the Navajo court system: “The Navajo judiciary is the youngest of the three branches of government yet . . . it is unarguably the most respected institution in Navajo Nation government.”²² The precursor to today’s court system was the Navajo Court of Indian Offenses, established by the U.S. government in 1892 and charged with enforcing federal regulations on the reservation.²³ The judges of the Navajo Court of Indian Offenses “drew from Navajo customs and traditional dispute resolution methods to decide cases brought under the Bureau’s criminal code,” effectively manipulating an assimilative institution to reflect Diné values and meet Diné needs.²⁴ The Tribal Council created a separate and independent Judicial Branch of the Navajo Nation Government in 1958 that replaced the earlier Navajo Court of Indian Offenses.²⁵

A major challenge to the authority and separateness of the judiciary came in 1977–1978 when the Council, under the direction of Chairman Peter MacDonald, Sr., established the “Navajo Supreme Judicial Council.”²⁶ The entire purpose of this body was to reverse decisions striking down actions of the Council, and it was abolished after hearing three cases in 1985.²⁷ Since 1985, the Navajo Nation Supreme Court has been the highest judicial body of the tribe and reviews cases from the ten judicial districts of the Navajo Nation.²⁸ The caseload of the Navajo court system, according to the first-

20. *Id.* at 16.

21. *Id.* at 17. *But see* PETER MACDONALD WITH TED SCHWARZ, *THE LAST WARRIOR: PETER MACDONALD AND THE NAVAJO NATION* 278-341 (1993) (offering a defense to the bribery and corruption charges connected with the Big Boquillas Ranch purchase).

22. DAVID E. WILKINS, *THE NAVAJO POLITICAL EXPERIENCE* 137 (1999).

23. AUSTIN, *supra* note 4, at 21.

24. *Id.* at 24.

25. *Id.* at 29.

26. *Id.* at 30-31.

27. *Id.* at 31.

28. *Id.* at 32; *see also* Dale Beck Furnish, *Sorting Out Civil Jurisdiction in Indian Country After Plains Commerce Bank: State Courts and the Judicial Sovereignty of the Navajo Nation*, 33 AM. INDIAN L. REV. 385, 392 (2008-2009) (noting that the 1985 reforms “confirmed the Navajo court system in its current form and status, with a permanent Supreme Court and an increasingly active civil calendar”).

quarter report of 2010, was 29,656; the docket includes everything from civil matters to traffic violations to domestic-violence cases.²⁹

Customary law and practices play an important, arguably definitional, role in the Navajo court system. Austin's second chapter is dedicated to introducing the foundational Diné law principles and the role they play before the courts. The Navajo Nation offers some litigants the possibility of opting into a dispute-resolution system, *peacemaking*, created in 1982 and based on a traditional structure instead of an adversarial court system.³⁰ Even if litigants choose to stay before a "regular" court, customary law is an important source of law before all courts on the reservation. The central place of Navajo customary law can be seen in the preference of the Navajo Nation courts for "the term 'Navajo Common Law' rather than 'custom' for the reason that it is not widely understood that the customs and traditions of the Navajo People are law, and the English term is used because it more accurately reflects our customs as law."³¹

The major contribution of *Navajo Courts and Navajo Common Law* is the depth of Austin's explanation of Navajo common law (given the Navajo Nation judiciary's preference for the term "common law" over "customary law," it will be used from here on in this article). After a brief discussion on how common law is introduced and shown in court, Austin explains that "spirituality underlies Diné foundational laws" and that the *hózhó*, *k'é*, and *k'éi*

29. JUDICIAL BRANCH OF THE NAVAJO NATION, FISCAL YEAR 2010: FIRST QUARTER REPORT 45 (2010), available at <http://www.navajocourts.org/CalendarPSAs/JB%20FY2010%201st%20Qtr%20Rpt.pdf>.

30. For more on Navajo peacemaking, see Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297 (1999-2000); Robert Yazzie, "Life Comes from It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 186-87 (1994) (written by a Chief Justice of the Navajo Nation Supreme Court); James W. Zion, *The Dynamics of Navajo Peacemaking*, 14 J. CONTEMP. CRIM. JUST. 58 (1998) (written by the only non-Indian who has served as a judge/facilitator in the peacemaker courts).

31. *In re Estate of Apachee*, 4 Navajo Rptr. 178, 181 (Navajo D. Ct. 1983). Former Chief Justice of the Navajo Nation Supreme Court Tom Tso explains:

When we speak of Navajo *customary* law, however, many people become uneasy and think it must be something strange. Customary law will sound less strange if I tell you it is also called "common law." Our common law is comprised of customs and long-used ways of doing things. It also includes court decisions recognizing and enforcing the customs or filling in the gaps in the written law.

Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 230 (1989). For more on the Navajo Nation Supreme Court's preference for the term "common law" over "customary law," see Ezra Rosser, *Customary Law: The Way Things Were, Codified*, 8 TRIBAL L.J. 18, 20 (2007-2008).

doctrines or values are among the most important general principles of Navajo life that make up Navajo common law.³² For each of these three key doctrines, Austin starts by introducing their traditional origins and significance and then shows how they have been used by the Navajo Nation Supreme Court. It is worth noting at this point that I am *not* Diné, or even Indian, so there is a limit to my understanding of these doctrines and Navajo common law even after having read Austin's account of them.

English translations of words like *hózhó*, *k'é*, and *k'éí* capture only part of the meaning of such terms. Austin's extended effort to define *hózhó* reflects the problems of translation—in language and in culture—required for non-Indians to understand traditional Diné values. Austin first introduces the glossed definitions of *hózhó* that anthropologists have used: “harmony, balance, beauty, goodness, blessed, pleasant, perfection, ideal, and other attributes considered positive.”³³ Austin also considers a definition of *hózhó* equating it to perfection before settling on “that state of affairs where everything is in its proper place and functioning in harmonious relationship to everything else.”³⁴ Still later, Austin uses “good” for *hózhó*.³⁵ The translation challenges of *hózhó* are also true for *k'é*, *k'éí*, and many other Diné traditional values, from *nályééh* (restitution) to *nabik'íyátí* (talk things out). Austin deals with this by writing the Diné words and then summarizing the significance of particular terms, but the sense remains that the true meanings of these traditional values are lost in translation.

A central goal of the Navajo courts is the restoration of *hózhó* (harmony). Traditional ceremonies seek to eliminate or neutralize bad forces or monsters, *naayéé'*, that cause disharmony in the community or in one's life.³⁶ After *naayéé'* create disharmony, these forces “are identified/isolated and then matched to a specific ceremony,” which then “returns things or beings (humans included) to *hózhó*.”³⁷ Peacemaking processes that existed prior to the current Navajo court system made use of *hózhó* dispute-resolution procedures, and these values have now been brought into the current adversarial system by Navajo judges.³⁸ Austin explains that the Navajo common-law doctrine of *hózhó* guided the Navajo Nation Supreme Court on

32. AUSTIN, *supra* note 4, at 44.

33. *Id.* at 53.

34. *Id.* at 54 (quoting GARY WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE 8 (1975)).

35. *Id.* at 59.

36. *Id.* at 60-61.

37. *Id.* at 61.

38. *Id.* at 62.

everything from citizen-standing requirements to the requirement of a case or controversy.³⁹ The Navajo Nation Supreme Court in *Halona v. MacDonald*, a case arising out of corruption during Chairman MacDonald's term in office, used the "traditional and abiding respect for the impartial adjudicatory process" of Diné people to uphold the right of the court to review Tribal Council legislation.⁴⁰ Because *Halona v. MacDonald* helped establish the authority of the judiciary, it has been analogized to *Marbury v. Madison*.⁴¹ Similarly, in a more recent case, the supreme court used Navajo common-law values of participatory democracy to strike down a ten-thousand-dollar pay raise the Council gave itself.⁴²

But *hózhó* is not limited to balance-of-power matters: it is "all-encompassing" and "pervades everything in the traditional and contemporary Navajo universe."⁴³ The Navajo Nation Supreme Court's role in restoring harmony in domestic-relations cases, for example, led it to highlight the importance of finality when there is a divorce and the way that traditional rules regarding property division promote *hózhó*.⁴⁴ Austin writes that the *hózhó* concept "is the foundational backbone of Navajo philosophy" and, as such, is important in every category of dispute heard by Navajo courts.⁴⁵

The second traditional Navajo common-law doctrine that Austin presents is *k'é*, which guides Diné relationships with everything around them: people, animals, holy beings, and the earth.⁴⁶ *K'é* recognizes the "universal kinship" that all beings, human and non-human, share and corresponds with norms reflective of the relationships Diné have with the world and with others.⁴⁷ Austin explains that "the *k'é* doctrine describes the ideal relationship among everyone in the Navajo world where values maintain relationships that produce concord."⁴⁸ Children are taught how to behave and relate to other Navajos and

39. *Id.* at 65-66.

40. 1 Navajo Rptr. 189, 205 (Navajo 1978) (per curiam), *quoted in* AUSTIN, *supra* note 4, at 70.

41. Valencia-Weber, *supra* note 5, at 238 n.40.

42. AUSTIN, *supra* note 4, at 64-66 (discussing *Judy v. White*, 8 Navajo Rptr. 510 (Navajo 2004)).

43. *Id.* at 53.

44. *Id.* at 77-78.

45. *Id.* at 53.

46. *Id.* at 83-84.

47. *Id.* at 83.

48. *Id.* at 84.

relatives in accordance with *k'é*, which includes how elders should be addressed and the obligations owed to relatives.⁴⁹

Austin ends the book with *k'éí*, the doctrine governing family and clan relations, arguably a subset of *k'é* but important enough itself to Navajo culture to merit separate treatment. The overlap means, however, that Austin introduces the clanship system in the *k'é* section. Diné society is matrilineal, which means that children take the clan of their mothers and that women traditionally controlled most property. Every full-blooded Navajo, however, has four basic clans, and the norm when meeting people is to give an introduction that traces clan connections back to the grandparent generation. Such an introduction helps establish the relationships between people and their clanship obligations, which can range from providing shelter to giving financial support for major ceremonies.

Politics traditionally has been guided by *k'é*-based principles that inform expectations of governance processes and forms of Navajo leadership. Traditionally, leaders were chosen for their persuasive abilities; those "adept at 'talking things out' became successful leaders and enjoyed long service."⁵⁰ Such skills were important because Navajo society valued egalitarianism and a non-hierarchical, horizontal relationship between leaders and the people.⁵¹

The Navajo Nation Supreme Court's notice of Navajo common law regarding governance has led it to rule against legislation that in one way or another stands in the way of the vibrant form of participatory democracy that traditionally has been the norm in Navajo governance.⁵² Austin explains: "The values that create an environment of *k'é* are, of course, respect, kindness, friendliness, cooperation, use of kinship terms, and other positive values that promote free-flowing discussion and consensual decision making."⁵³ *K'é* also reflects the high value of community in Diné society. "The maxim, 'it's up to him,'" captures Diné respect for individual freedom⁵⁴ and is balanced by the admonishment "He (or she) acts as if he (or she) has no relatives," used when someone violates *k'é* rules.⁵⁵ Finally, Navajo Nation Supreme Court precedent regarding the *k'é* doctrine includes recognition of substantive rights in areas such as due process, speech, and equity.

49. *Id.* at 85-89.

50. *Id.* at 90.

51. *Id.* at 91-93.

52. *See id.* at 101-05 (discussing three cases in which the Navajo Nation Supreme Court struck down laws and practices that limited public participation).

53. *Id.* at 103.

54. *Id.* at 109.

55. *Id.* at 87.

Given the importance of family and clan for Navajos, it is not surprising that Austin ends *Navajo Courts and Navajo Common Law* with *k'éi* and that it is the largest chapter in the book. Austin primarily explains *k'éi* in relation to the clan system and the regulation of domestic matters, though he also discusses the relationship of *k'éi* to land and grazing rights. An extended-family structure is far more prevalent among Diné than is the norm among non-Indians.⁵⁶ Multiple generations and families often live together in extended-family housing compounds.⁵⁷ The clan system and an elaborate system of kinship terms reflect the expansiveness of the relations acknowledged by Navajos. The clan system means that a Navajo will have “thousands of relatives, many of whom he or she will never meet during his or her lifetime.”⁵⁸ The relationship that one has with another Navajo helps determine expectations and the roles played; for example, maternal grandparents are responsible for passing along Diné culture to grandchildren, and relatives on the paternal side may contribute to the costs of major ceremonies.⁵⁹ For non-Indians accustomed to a smaller zone of concern, often coterminous with the nuclear family, the Navajo system is both complex and extensive by comparison.

Judicial recognition of the importance of clanship and extended family in Diné society—in short, of *k'éi*—impacts all of family law, including marriage, divorce, alimony, child support, and inheritance. In this area of law, one of the primary functions of the Navajo Nation Supreme Court is to sort out the legal effect of traditional practices or ceremonies. For example, if customarily a woman could divorce a man by putting his saddle outside their hooghan, the traditional eight-sided wood-and-earth home of Diné, should courts recognize this as a valid divorce today?⁶⁰ Although a book giving an overview of U.S. law might relegate family law to a few pages, Austin’s lengthy discussion of domestic matters and *k'éi* reflects the centrality Diné place on family and clan relationships.

Reservation land is held in trust by the tribe and the U.S. government, so land control is mediated by grazing and land-use permits that are controlled

56. See *In re A.M.K.*, No. SC-CV-38-10, at *10-11 (Navajo Oct. 8, 2010) (Navajocourts.org) (contrasting Navajo and Anglo-American conceptions of the family); see also Austin, *supra* note 4, at 184-85 (discussing the Navajo extended family concept).

57. Ezra Rosser, *This Land Is My Land, This Land Is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. REV. 245, 257 (2005).

58. AUSTIN, *supra* note 4, at 139.

59. *Id.* at 141.

60. See *id.* at 168-71 (discussing the effect of contrary common law and Tribal Council actions on this method of divorce).

according to matrilineal descent rules.⁶¹ The role of *k'éí* values regarding domestic-relations cases is especially significant in light of Navajo conceptions of sovereignty. According to Austin, Navajo “sovereignty, including nation building, emanates from inside the *hooghan* (hogan) outwards to the Four Sacred Mountains and beyond.”⁶² While non-Indians may prioritize the state or the state’s monopoly on the use of force when thinking about sovereignty, for Diné the home is “the source of Navajo Nation sovereignty and Navajo nation building, because Navajo culture, knowledge, language, spirituality, identity, and all things that compose the Navajo Nation flow outwards from inside the hogan.”⁶³

Austin concludes with an eloquent and strongly stated summary of the importance of Navajo courts and Navajo common law that is worth quoting at length:

Navajo judges have proven that Navajo customs and traditions work well at resolving legal disputes brought by Navajos and non-Navajos alike. This book, it is hoped, will educate non-Indian state and federal judges, including those on the U.S. Supreme Court, who harbor or express antagonistic views of American Indian customs and traditions and American Indian tribal courts in general. Navajo common law and American Indian common law are products of human experience, just as Euro-American common law is the product of human experience. Thus, any suggestion that Indian common law is so divergent that it should be confined to matters involving only Indians on their reservations is unwarranted, unsupportable, and smacks of extreme Euro-American ethnocentrism, probably to the point of racial bias.⁶⁴

Austin’s conclusion may strike some readers as overly strong; after all, the book’s focus is Navajo courts and Navajo common law, not the antagonistic views that non-Indian judges have about tribal law. But having shown the origins, depth, and contemporary role of Navajo common law, Austin is describing what is at stake for Indian communities *and* for non-Indian society if judges, and non-Indians generally, fail to respect the significance of tribal law.

61. *Id.* at 189-98.

62. *Id.* at 76.

63. *Id.* at 159.

64. *Id.* at 202.

II. Navajo Common Law and the Tribal Council

Austin could not have foreseen that today the biggest threat to Navajo common law would come not from non-Indian judges but from the Navajo Nation Council. The Council voted in January 2010 to impose severe restrictions on the use of Navajo common law by the judiciary.⁶⁵ Navajo Nation President Joe Shirley, Jr. vetoed the legislation, but sixty-seven of eighty-eight Council delegates voted to override the veto.⁶⁶ The passage of the legislation⁶⁷ was an angry reaction by the Council to the role the judiciary played, or threatened to play, in a proposal to reduce the size of the Council. Although Navajo common law is codified as Diné Fundamental Law or Diné Foundational Law, the actions of the Council beg two related questions: just how fundamental is Navajo common law to the law of the Navajo Nation and, provocatively, can the Council can declare itself above the law and the will of the people?

First, the back story on why the Council wants to limit how Navajo courts can use Navajo common law arguably explains the Council's anger and fear. A proposal to reduce the size of the Navajo Nation Council has dominated Navajo politics since 2008; 18,000 people signed President Shirley's petition to "reduce the Council from 88 to 24 members."⁶⁸ Such support reflected widespread dissatisfaction with the Council, but, perhaps fearing for their jobs, the Council attempted to block a voter initiative on the issue.⁶⁹ The Navajo Nation Supreme Court had to step in three times to ensure that the initiative, and another initiative that would give the Navajo Nation President line-item-

65. See Jason Begay, *Council Reinstates Limits on Diné Law, Expanded Legal Power*, NAVAJO TIMES (Window Rock, Ariz.), Feb. 25, 2010, at A1.

66. *Id.* (listing how every delegate voted).

67. Navajo Nation Tribal Council, *An Act Relating to Government Services, Judiciary and Intergovernmental Relations; Enacting the Foundation of the Diné, Diné Law and Diné Government Act of 2009; Amending 1 N.N.C. §§200-207, Resolution No. CJA-08-10 (2010)*, *invalidated by Office of the Navajo Nation President v. Navajo Nation Council*, No. SC-CV-02-10, at *47 (Navajo Aug. 2, 2010) (Navajocourts.org) [hereinafter Shirley v. Morgan] (connecting the enactment of the Resolution with the Council's "dissatisfaction with a number of recent decisions by the courts that have gone against the Council's partisan interests, in which the courts have used Fundamental Law").

68. Jason Begay, *Voters: 'Yes!': Majority of Diné Vote for 24-Member Council, Line-Item Veto for President*, NAVAJO TIMES (Window Rock, Ariz.), Dec. 17, 2009, at A1 [hereinafter Begay, *Voters: 'Yes!'*].

69. Jason Begay, *A Long, Twisting Road: People's Vote in Special Election Took a Year of Legal Wrangling*, NAVAJO TIMES (Window Rock, Ariz.), Dec. 30, 2009, at A3 [hereinafter Begay, *A Long, Twisting Road*].

veto authority, would be put before the Navajo people.⁷⁰ Tensions reached a high point in October 2009, when the Council passed legislation putting President Shirley on forced leave, suspending his presidency by a majority vote.⁷¹ The drama surrounding the suspension was captured by a photo, which appeared on the front page of the next edition of the *Navajo Times*, of a sharpshooter looking down on the tribal offices in Window Rock.⁷²

Although Shirley was allegedly suspended for involvement in two deals where the Navajo Nation overpaid for telecommunications services, the timing was suspicious.⁷³ The suspension followed weeks of bad press about the Council using discretionary funds to channel money to relatives of members of the Council or others connected to the Council,⁷⁴ and it came as a deadline for the initiative approached.⁷⁵ Responding to yet another story about misuse of discretionary funds, this one about a \$9,999 check from the Council for which records cannot be found, a frustrated Navajo wrote in a letter to the editor of the *Navajo Times*: "Some of us still live in one-room homes without

70. See *In re Navajo Nation Election Admin.'s Determination of Insufficiency Regarding Two Initiative Petitions*, No. SC-CV-28-09 (Navajo July 30, 2009) (Navajocourts.org); *In re Navajo Nation Election Admin.'s Determination of Insufficiency Regarding Two Initiative Petitions*, No. SC-CV-24-09 (Navajo June 22, 2009) (Navajocourts.org); *In re Two Initiative Petitions*, No. SC-CV-41-08 (Navajo July 22, 2008) (Navajocourts.org).

71. Jason Begay, *Turmoil, but No Riot: President's Leave Cloaked in Secrecy, but Court Reinstates Shirley*, NAVAJO TIMES (Window Rock, Ariz.), Dec. 30, 2009, at A3 [hereinafter Begay, *Turmoil*].

72. See Bill Donovan, *Life Goes On, Despite Suspension*, NAVAJO TIMES (Window Rock, Ariz.), Oct. 29, 2009, at A3 (explaining that the sharpshooter was used because of concerns regarding the reaction of Shirley supporters).

73. For the limited information released on the Navajo Nation's OnSat contract and Shirley's involvement, see Begay, *Turmoil*, *supra* note 71. As the supreme court would later highlight, because the "report was not shown to the President and never became public[,] . . . the contents of the report, including the basis for any of its findings, remain unknown to the public to the present day." Shirley v. Morgan, No. SC-CV-02-10, at *42 (Navajo May 28, 2010) (Navajocourts.org). Note: having already been disappointed by the actions of a Navajo leader, Chester Carl, whom I had looked up to, I am not passing judgment one way or another on the OnSat allegations. See Ezra Rosser, *Suspension of Indian Housing Leader Impacts All Tribes*, INDIAN COUNTRY TODAY (Oneida, N.Y.), Nov. 29, 2006, at A3.

74. See, e.g., Marley Shebala, *Legislative Relatives Received \$100,000: Total Given to Six Family Members Since 2003 Breaks Century Mark*, NAVAJO TIMES (Window Rock, Ariz.), Oct. 8, 2009, at A1. The *Navajo Times* should be commended for bringing to light the Council's use of discretionary funds. The Council and the Office of the President both refuse to release records of how they spend discretionary funds, despite their choice to allocate ten percent of the budget to such funds. *Id.*

75. The Navajo Election Administration had six months from June 25, 2009 to hold the special election per judicial order. Begay, *A Long, Twisting Road*, *supra* note 69.

electricity and indoor plumbing while people that we trust are helping themselves. We are forgotten.”⁷⁶ Despite the efforts of the Council to derail the proposed reduction of its size, over two days in mid-December the Council was twice rebuked. First, on December 14, 2009, a Window Rock District Court judge ruled that the Council’s legislation suspending President Shirley was “null and void”;⁷⁷ the next day the initiative on reduction of the Council to twenty-four members was “overwhelmingly approved.”⁷⁸

It is against this backdrop, particularly the very real possibility that most delegates stand to lose their jobs, that the Council fired its most damaging salvo at the Navajo court system. The actions of the Council with regard to Navajo common law make it challenging to situate Navajo common law in Navajo law generally. The Council in 1959 passed a choice-of-law statute authorizing use of Navajo common law.⁷⁹ In 2002, the Council amended the Navajo Nation Code to “[r]ecognize the Fundamental Laws of the Diné.”⁸⁰ One way to look at the actions of the Council is contained in the title of the Act, “[r]ecognize,” suggesting that with regard to the judiciary the Council was merely affirming what Navajo courts were already doing. The preamble to the 2002 Act seems to state as much: “[T]he Navajo Nation Council has not acknowledged and recognized such fundamental laws in the Navajo Nation Code; instead the declaration and practice of these fundamental laws have, up to this point in time, been left to those leaders in the Judicial Branch.”⁸¹ Arguably, the Council was just playing catch-up with judicial development of Navajo common law. But by asserting that Navajo common law is the highest law, the Council perhaps was changing the law, requiring more of courts with regard to Navajo common law.

76. Lisa Kennedy, Letter to the Editor, *Must Be Nice to Write a Check to Yourself*, NAVAJO TIMES (Window Rock, Ariz.), Dec. 17, 2009, at A6.

77. Jason Begay, *Judge Voids Shirley Ouster*, NAVAJO TIMES (Window Rock, Ariz.), Dec. 17, 2009, at A1.

78. Begay, *Voters: ‘Yes!’*, *supra* note 68 (stating that the vote was 25,206 in support, 16,166 opposed).

79. AUSTIN, *supra* note 4, at 45.

80. Navajo Nation Tribal Council, Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the *Diné*, Resolution No. CN-69-02 (2002), *available at* <http://www.navajocourts.org/Resolutions/CN-69-02Dine.pdf>. The resolution is now codified at NAVAJO NATION CODE tit. 1, §§ 201-206 (2008). For more on the passage of the Fundamental Laws of the Diné, see Kenneth Bobroff, *Diné Bi Beenahaz’áanii: Codifying Indigenous Consuetudinary Law in the 21st Century*, 5 TRIBAL L.J. 4 (2004-2005).

81. Navajo Nation Tribal Council, Res. No. CN-69-02, at pmbl. ¶ 3.

The 2002 Act refers to Diné Fundamental Law as “immutable laws” and explains that these laws are the foundation of Diné sovereignty, government, and the rights of Diné as individuals.⁸² The Navajo Nation Supreme Court had previously made similar statements, writing of Navajo common law as “something written in stone . . . which is absolutely there; and, something like the Anglo concept of natural law.”⁸³ The court went on to describe this “higher law” as akin to “unwritten constitutional law.”⁸⁴ Though these are similar statements, with the 2002 Act the Council’s statutory requirement that fundamental law be given primacy arguably increased the authority of the judiciary when it interprets Navajo common law.⁸⁵ Although probably unintentional, because tribal customs are not fully codified, tasking Navajo courts to follow Diné Fundamental Law involves accepting judicial notice and use of custom when resolving disputes.⁸⁶

The question of whether the Council merely affirmed the Navajo Nation Supreme Court’s treatment of Navajo common law or changed the law with passage of the Diné Fundamental Law Act of 2002 and has the power to go back and reverse itself remained open until the Navajo Nation Supreme Court’s simultaneous release of two linked decisions on May 28, 2010. The *Navajo Times* called *Shirley v. Morgan*⁸⁷ and *Nelson v. Initiative Committee to Reduce Navajo Nation Council*⁸⁸ the Navajo Nation Supreme Court’s “most wide-ranging decisions in its history.”⁸⁹ The Council’s 2010 amendments attempted to strip authority from Navajo courts and (non-cooperative) Navajo judges. Based in part on the “non-traditional, non-consensual and adversarial” nature of Navajo courts, the Council declared: “The courts of the Navajo Nation shall not hear any disputes nor render any decisions on the

82. *Id.* at pmbl. ¶ 2 and tit. 1, § 2.

83. *Bennett v. Navajo Bd. of Election Supervisors*, 6 Navajo Rptr. 319, 324 (Navajo 1990).

84. *Id.* The Navajo Nation voted against an Indian Reorganization Act constitution in the 1930s by a vote of 8197 to 7679. MARSHA WEISIGER, *DREAMING OF SHEEP IN NAVAJO COUNTRY* 179 (2009). For more on constitutional-reform efforts of Indian tribes, see *AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS* (Eric D. Lemont ed., 2006).

85. For more on the effect of the 2002 Act on the Navajo Nation Supreme Court’s use of Navajo common law, see Rosser, *supra* note 31, at 21-22.

86. See AUSTIN, *supra* note 4, at 50 (“[M]ost of the traditional normative precepts that make up the modern body of Navajo common law have been identified and developed through the legal doctrine of judicial notice.”).

87. No. SC-CV-02-10 (Navajo May 28, 2010) (Navajocourts.org).

88. No. SC-CV-03-10 (Navajo May 28, 2010) (Navajocourts.org).

89. Bill Donovan, *High Court Upholds Vote to Reduce Council to 24*, NAVAJO TIMES (Window Rock, Ariz.), June 3, 2010, at A1 [hereinafter Donovan, *High Court*].

interpretation, application or validity of the Diné, Diné Law and Diné Government statute or its underlying core principles.”⁹⁰

The 2010 Act’s findings explain that the Council’s 2002 statute was neither meant to “supersede duly-adopted” law nor to “delegate authority” regarding the content of Diné Fundamental Law.⁹¹ There is some irony to be found in the 2010 action of the Council. The 2010 Act’s findings acknowledge that the judiciary’s role is to interpret Navajo law, and the opening paragraph of the amended Foundation of the Diné, Diné Law and Diné Government section seems to recognize the importance of “maintaining respect for the specific roles, responsibilities and authorities of the three branches of contemporary Navajo Nation government.”⁹² The very same legislation, however, guts the significance of Diné Fundamental Law by making it little more than “a general statement of guiding principles . . . [that] shall not be construed to create any legally enforceable rights, entitlements or causes of action.”⁹³ And it is hard to see how the Council is maintaining respect for the judiciary when it asserts that Diné Fundamental Law should not be “heard or resolved in the courts of the Navajo Nation.”⁹⁴

Having lost the battle over whether there should be a voter initiative on the size of the Tribal Council and not having had success with the Navajo Nation President’s suspension, the Council took aim at the third branch of government, the judiciary. In *Navajo Courts and Navajo Common Law*, Austin notes, “Of the three branches (executive, legislative, and judicial), the Navajo Nation Council (legislative branch) wields the most power.”⁹⁵ Austin goes on to accuse the Council of refusing “to share power with the other two branches.”⁹⁶ Although issues of power-sharing between branches are muted in most disputes heard by Navajo courts, the threat of a reduction in the size of the Council put the Council on the defensive, and it lashed out with its 2010 amendments. The statement President Shirley issued when he vetoed the initial legislation highlights the stakes:

90. Navajo Nation Tribal Council, Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Diné, Resolution No. CN-69-02, at § 5 (A)-(B) (2002), available at <http://www.navajocourts.org/Resolutions/CN-69-02Dine.pdf>.

91. *Id.* § 1(F); see also *id.* §§ 2, 200(B) (noting the same in the amended text for NAVAJO NATION CODE tit. 1, § 200(B) (2008)).

92. *Id.* §§ 2, 200(A).

93. *Id.* §§ 2, 207(A)-(B).

94. *Id.* §§ 2, 207(D).

95. AUSTIN, *supra* note 4, at 90.

96. *Id.*

Diné Fundamental Law is the bedrock upon which Navajo society and our Navajo government is built. By attempting to amend, and, in essence repeal, its applicability, the Council is undermining all we hold dear and that which identifies us specifically as Navajo, distinct from other tribes or other governmental entities.⁹⁷

The Council's political tinkering with the place of Navajo common law was a transparent effort to protect itself and to prevent reduction in the size of the Council from occurring. The Council, for good reason it turns out, was no doubt particularly concerned about two cases on the docket of the Navajo Nation Supreme Court: *Shirley v. Morgan*,⁹⁸ appealing a lower court's ruling that the Council's suspension of Shirley was null and void, and *Nelson v. Initiative Committee to Reduce Navajo Nation Council*,⁹⁹ reviewing an Office of Hearings and Appeals dismissal of a challenge to the plan to reduce the Council.

The Navajo Nation Supreme Court's *Shirley* and *Nelson* opinions are remarkable in many regards, from the manner of their delivery and the court's related awareness of their importance to the strength and tone of their arguments. The manner of the court's delivery of the two decisions telegraphed the importance of the rulings: for the first time the court both gave the decisions outdoors and broadcast them over a local radio station serving the reservation.¹⁰⁰ This public pronouncement and oral delivery by the court highlights the cases' importance for the Navajo Nation *and* the Navajo Nation Supreme Court.¹⁰¹ The significance of the (re)assertion, found throughout the cases, of the Navajo Nation Supreme Court's authority to exercise judicial review of Council-enacted legislation is even suggested by the court's twice citing *Marbury v. Madison* in the *Shirley* opinion.¹⁰² Finally, *Shirley* and *Nelson* are notable for the legal lengths to which the court went to reach its holdings and the strong language—both in criticizing the Council and in insisting on judicial review—found throughout the opinions.

97. Memorandum from Dr. Joe Shirley, Jr., President of the Navajo Nation, to Lawrence T. Morgan, Speaker, Navajo Nation Council 1 (Feb. 12, 2010) (vetoing Resolution No. CJA-08-10).

98. No. SC-CV-02-10 (Navajo May 28, 2010) (Navajocourts.org).

99. No. SC-CV-03-10 (Navajo May 28, 2010) (Navajocourts.org).

100. Donovan, *High Court*, *supra* note 89.

101. See, e.g., Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008) (discussing the significance of oral dissents).

102. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803), is cited in *Shirley* at *7 n.2, *20 n.8 (Navajocourts.org).

In *Shirley*, the Navajo Nation Supreme Court affirmed that the suspension of President Shirley was improper and, in doing so, also struck down the Council's amendments that purported to strip the judiciary of its ability to interpret Fundamental Law. The court blamed the Council for having "become so intransigent in its position" in the ongoing dispute between the legislative and executive branches that it "purports to have authority to enact a new statute that would reduce the discretion of our courts to question the sources and complexion of our laws and governmental authority."¹⁰³ Starting with a discussion of responsibilities of government leaders according to *k'é*, the court quickly addressed procedural issues¹⁰⁴ before holding that the Council cannot declare legislation to be outside the purview of judicial review.¹⁰⁵ Recognizing that the Council was attempting to "encroach upon the independence of the Judicial Branch," the court declared Resolution CJA-08-10 invalid.¹⁰⁶

The Navajo Nation Supreme Court used *Shirley* to connect the Navajo Nation's current division of governance into three branches with Fundamental Law. Arguing that separation of powers was based on a "borrowed" structure, the Council claimed that there was no place for Fundamental Law in adjudicating a dispute between branches.¹⁰⁷ By so claiming, the Council was asserting itself as "the absolute source of governance for the Navajo People."¹⁰⁸ The court responded by expressing its surprise and sadness that elected leaders "believe that the government that they have been entrusted with really is not a Diné government, and that Diné values, principles, laws, tradition and culture have nothing to do with our government structure."¹⁰⁹ Connecting the position of the Council to the colonialism experienced by the Diné, the court emphasized the continuing indigenous aspects of the Navajo Nation government and unapologetically stated that it was "obligated to respond in blunt manner" to the assertions of the Council.¹¹⁰

The three-branch government was formally created in 1989 as a reaction to the "turmoil" of the MacDonald period.¹¹¹ But according to the court, the

103. *Shirley*, at *3 (Navajocourts.org).

104. *Id.* at *4-10.

105. *Id.* at *12.

106. *Id.* at *15.

107. *Id.* at *17 (quoting from Appellants' Response to Appellees' Supplemental Brief at 18-19).

108. *Id.*

109. *Id.*

110. *Id.* at *18.

111. *Id.* at *19.

formal structure reflects the lesson that power should not be concentrated,¹¹² which can be seen in an emergence story recounted by the court. In the story, a question about who should be made leader of the People was ultimately resolved by the decision that power should be shared among four leaders—a wolf, a bluebird, a mountain lion, and a hummingbird—each with its own unique contributions to the People.¹¹³ Finally, the court contrasted the decisions of the Council immediately following the 1989 turmoil that recognized that the People, not the Council, are the source of governance, with the more recent decisions of the Council that “strayed from the course.”¹¹⁴ In affirming a trial court’s holding that President Shirley had been wrongly suspended, the court continued to call the Council to account. Discussing the suspension resolution, the court admonished the Council: “The process of its enactment is notable for secrecy, haste, disregard for persuasive Navajo Nation legal authority, and the shabbiest of shabby treatments of the President, both individually and in his Office, in violation of the fundamental principle of *k’é*.”¹¹⁵

The Council suffered a second blow on the same day when the Navajo Nation Supreme Court announced in *Nelson* that the overwhelming results of the voter initiative to reduce the size of the Council would stand.¹¹⁶ If *Shirley*’s significance can be found in the direct manner which the court reaffirmed its power of judicial review, the legal maneuvering found in the *Nelson* opinion is similarly remarkable. The Council’s best argument against the initiative was a strong one: by statute, changes to the “fundamental character of the Navajo government, like the size of the Council,” seemingly could not be approved by a simple majority vote.¹¹⁷ The terms of the statute provide that such changes must be “**approved by majority vote of all registered voters in all precincts.**”¹¹⁸ For those in favor of the reduction of the Council, the vote seemed to stumble in two respects. First, though approved by an overwhelming majority, because only “44% of registered voters cast ballots,”¹¹⁹ the initiative was not approved by a majority of *registered* voters. Second, in a few chapters or precincts, the initiative was not

112. *Id.* at *23.

113. *Id.* at *21-23.

114. *Id.* at *28.

115. *Id.* at *42-43.

116. *Nelson v. Initiative Comm. to Reduce Navajo Nation Council*, No. SC-CV-03-10, at *18 (Navajo May 28, 2010) (Navajocourts.org).

117. *Id.* at *13.

118. NAVAJO NATION CODE tit. 2, § 102(A) (2008).

119. *Nelson*, at *4 (Navajocourts.org).

approved by a majority even though nationwide it was. The initiative cleared these hurdles when the court, looking to the importance of participatory democracy contained both in Fundamental Law and the post-1989 restructuring of the Navajo government, held that a simple majority was sufficient for an initiative to pass.¹²⁰ Characterizing the statute as requiring “an extraordinary majority impossible to be attained” based on past-election voter turnout and different precinct results,¹²¹ the court reduced the statutory requirement to only a simple majority of those voting.

Together, the *Shirley* and *Nelson* opinions reflect the best of the Navajo Nation Supreme Court. Read out of context, the *Nelson* opinion by itself seems of lesser importance, but the statutory interpretation in which the court engaged to ensure that the People’s voice would be heard in *Nelson* reflects the affirmation both of judicial review and Fundamental Law found in *Shirley*. And although the court in both cases was critical of the Council, it subsequently showed its impartiality in the ongoing dispute between the legislative and executive branches by upholding a statutory prohibition on the Navajo Nation President running for a third consecutive term. The court did not agree with President Shirley that the statutory prohibition violated the Diné concept that the People should be able to choose their leaders.¹²² Following the publication of *Navajo Courts and Navajo Common Law*, the Navajo Nation Supreme Court found itself in the position of having to (re)assert its *Marbury*-esque power of judicial review and authority to rely on Navajo common law. The matters being adjudicated—the suspension of the Navajo President and an effort to change the nature of the Council—were important in their own right, but equally significant is the court’s demonstrated willingness and ability to draw on all forms of legal authority, including Navajo common law.

Debate about the use and role of Navajo common law is good. In a letter to the editor of the *Navajo Times* motivated by the Council’s 2010 Act, Austin,

120. *Id.* at *14-18. In a case of dueling memos, the Navajo Nation Attorney General came to the same conclusion in an April 2008 memorandum on the issue, but a memorandum by the Chief Legislative Council reached the opposite conclusion. See Louis Denetsoisie, Opinion of the Attorney General of the Navajo Nation: Vote Requirements of the Diné to Enact Legislation by Means of the Initiative Process (Apr. 29, 2008) (on file with author); Memorandum from Frank M. Seanez, Acting Chief Legislative Counsel, Office of Legislative Council to Lawrence T. Morgan, Speaker, Navajo Nation Council (May 12, 2008) (discussing the vote requirements to pass an initiative) (on file with author).

121. *Nelson*, at *17 (Navajocourts.org).

122. *Todacheene v. Shirley*, No. SC-CV-37-10, at *11-12 (Navajo Aug. 2, 2010) (Navajocourts.org).

together with former Navajo President Peterson Zah, former Chief Justice Robert Yazzie, and Manley Begay, Jr., of the Native Nations Institute, cautioned against “weaken[ing] Diné Foundational Laws in any manner for political expediency.”¹²³ Given that *Navajo Courts and Navajo Common Law* can be read as a celebration both of Navajo common law and how the Navajo Nation Supreme Court has incorporated the doctrines of *hózhó*, *k’é*, and *k’éi* that make up the common law, Austin’s position in such a debate is well established. In the same letter to the editor, Austin calls Navajo common law “a shining example of Diné cultural strength and political sovereignty at work.”¹²⁴ Others may feel differently, however, and the Navajo Nation government would likely be improved by a lengthy public debate on the use and role of Navajo common law before the courts. But instead, because the Council arguably acted to determine the outcome of cases involving the Council that were already on appeal, the Navajo Nation had to pass through something like a constitutional, or in this case an unwritten constitutional, crisis.

Conclusion

Even after reading Austin’s work, the extent to which non-Indians, or non-Diné for that matter, can fully understand or internalize the role the Navajo creation story or the clan system plays in Navajo common law is limited. Implicit in this recognition is the importance of maintaining and supporting a separate and independent Navajo judicial system with jurisdiction over the reservation. Awareness that Navajo beliefs and customs can be only partly translated out of the Navajo language and cultural experience is a necessary component of affirming the role tribal courts play in protecting tribal lifeways. As the Navajo Nation Supreme Court noted at the end of its decision in *Shirley*: “Our culture is best known through interactions and experience, not through interpretations and secondary sources. We exhort those advising our government and those practicing in our courts to seek out knowledge by going

123. Raymond D. Austin et al., Letter to the Editor, *Lessening Diné Law Would Return Us to the Dark Ages*, NAVAJO TIMES (Window Rock, Ariz.), Feb. 11, 2010, at A7 (signed by Raymond Austin, Manley Begay, Jr., Robert Yazzie, and Peterson Zah). Zah is a former President of the Navajo Nation; Yazzie is a former Chief Justice of the Navajo Nation Supreme Court; Begay is the Director of the Native Nations Institute at the Udall Center for Studies in Public Policy and Codirector of the Harvard Project on American Indian Economic Development at the John F. Kennedy School of Government, Harvard University.

124. *Id.*

among our Diné people and experiencing the Diné way of life first-hand.”¹²⁵ The issues raised by the Navajo Nation Council’s attack on a strong and binding role for Navajo common law is being, and should be, resolved by the Navajo Nation and not by non-Indians, especially non-Indian academics.¹²⁶ That being said, my hope is that Diné voters will hold their elected officials accountable for trying to make the Council the sole arbiter of law in the Navajo Nation and failing to live up to their obligations as tribal leaders.¹²⁷ “In the Navajo world, privileges, rights, duties, and mutual obligations must be identified,” Austin explains, “relationships and kinship unity must be maintained, and the universe’s multifarious elements must remain in harmony.”¹²⁸ It remains to be seen whether the current power struggles occurring within the Navajo Nation will be resolved in a way that accords with Diné values of *hózhó*, *k’é*, and *k’éí*.

125. Shirley v. Morgan, No. SC-CV-02-10, at *47 (Navajo May 28, 2010) (Navajocourts.org).

126. The latest move of the Council to strike a blow against the independence of the judiciary involves putting before the voters a referendum on replacing the current judicial-nomination system with a system of elected judges, including electing the members of the Navajo Nation Supreme Court. See Noel Lyn Smith, *Move to Elect Judges a Step Closer to Vote*, NAVAJO TIMES (Window Rock, Ariz.), June 24, 2010, at A1. Ironically, the Council’s implicit reliance on *Nelson* in using this process will present a novel challenge to the court if such a referendum is approved by a majority of voters.

127. For more on the challenges of identifying and labeling tribal leadership and actions of tribal governments as good or bad and the need to avoid imposing non-Indian norms, see Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007).

128. AUSTIN, *supra* note 4, at 135.

