

American Indian Law Review

Volume 16 | Number 2

1-1-1991

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Recommended Citation

Renée Jacobs, *The Iroquois Great Law of Peace and the United States Constitution: How the Founding Fathers Ignored the Clan Mothers*, 16 AM. INDIAN L. REV. 497 (1991), <https://digitalcommons.law.ou.edu/air/vol16/iss2/5>

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NOTES

IROQUOIS GREAT LAW OF PEACE AND THE UNITED STATES CONSTITUTION: HOW THE FOUNDING FATHERS IGNORED THE CLAN MOTHERS

*Renée Jacobs**

Introduction

The Iroquois Confederacy gave rise to the first federal constitution on the American continent. That constitution, the Great Law of Peace (the Great Law), provided for federalism, separation of powers, equitable distribution of wealth, accountability of elected officials, freedom of assembly, speech, and religion, and a system of natural rights that influenced thinkers like Benjamin Franklin, Jean Jacques Rousseau, and Frederick Engels. Perhaps the most remarkable feature of the Great Law was its recognition of the status and suffrage accorded women by the Iroquois Confederacy. Approximately one-fourth of the Great Law's clauses recognize the power and influence of women in the Iroquois culture.¹

While Franklin and the Founding Fathers borrowed liberally and literally from the Great Law in theorizing about and framing the American model, no reference to universal suffrage or the rights of women appeared in the United States Constitution as originally written. It was not until the passage of the nineteenth amendment in 1920 that the United States Constitution recognized women as sentient citizens with an ability to exercise the vote. United States courts, taking their cue from the Constitution, had regarded women as merely the property of their husbands, fathers, and brothers.²

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First place award, 1989-90 *American Indian Law Review* Writing Competition. Third place award, 1990-91 Petra Shattuck Memorial Writing Competition sponsored by the Indian Law Resource Center.

1. A. PARKER, *THE CONSTITUTION OF THE FIVE NATIONS OR THE IROQUOIS BOOK OF THE GREAT LAW* (1916), reprinted in *NEW YORK STATE MUSEUM, SIXTY-NINTH REPORT OF THE NEW YORK STATE MUSEUM BULLETIN*. There are six versions of *The Great Law of Peace and the Founding of the Confederacy*. See G. SCHAAF, *THE GREAT LAW OF PEACE AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (spec. ed. 1987). For purposes of this paper, Parker's translation will be used.

2. U.S. CONST. amend. XIX; see *infra* notes 69-83 and accompanying text.

The influence the Great Law had on the United States Constitution has only recently been acknowledged. In October 1988, the United States Congress passed concurrent resolutions acknowledging the contribution of the Iroquois Confederacy and the Great Law to the development of the confederation of the original thirteen colonies and the United States Constitution.³

Previously, the connection had at best been ignored; at worst, it had been distorted and suppressed.⁴ Admitting that native cultures had participatory democracies that influenced the Founding Fathers is anathema to the supposedly unbroken line of political and intellectual influence generated by Anglo-European men. Therefore, it was not in the best interests of male American historians and politicians to admit the influence of an egalitarian, communal system where women controlled the economics, property, government, and structure of the society.⁵

This note will examine the matriarchal aspects of the Iroquois Confederacy that fostered equal rights (if not legal superiority) for women as well as ideas of natural law that profoundly influenced Enlightenment thinkers and the Founding Fathers. Colonial America and the sentiments of the Founding Fathers at the time of the Constitutional Convention serve to shed light on the prevailing social and political attitudes towards women. Finally, the contrasting positions of power for women in the Iroquois system as opposed to the scorn, subjection, and subjugation of women at the hands of the American legal system will be examined.

Women and Societal Structure of the Iroquois

The Founding of the Iroquois Confederacy

The Seneca, Onondaga, Oneida, Mohawk, and Cayuga tribes forged the League of the Hodenosaunee, or Iroquois, in the area that is now New York State, somewhere between A.D. 1000 and 1450. The Five Nations (later Six Nations when the Tuscarora joined in about 1722) are still governed by The Great Binding Law of Peace, or the Gayaneshagowa. Seth Newhouse, a Mohawk, transcribed the Great Law, which had been passed down orally from generation to generation, into English in about 1880.⁶

3. S. Con. Res. 76, 100th Cong., 2d Sess. (1988); H.R. Con. Res. 331, 100th Cong., 2d Sess. (1988).

4. See, e.g., G. SCHAAF, *supra* note 1. Schaaf has also posited that the colonists borrowed the symbology of the eagle and bundle of arrows from the Iroquois.

5. *Id.*

6. B. JOHANSEN, *FORGOTTEN FOUNDERS: BENJAMIN FRANKLIN, THE IROQUOIS, AND THE RATIONALE FOR THE AMERICAN REVOLUTION* 23 (1982).

Legend has it that Dekanawida, a messenger from the Creator, went among the Five Nations to bring an end to the continual warfare that had plagued the tribes. Dekanawida was conceived by a virgin who had been told by a messenger in a dream that she was to have a son who would become a great man and raise the Great Tree of Peace. Fearing catastrophe, the virgin's mother urged the woman to kill the child. The mother twice tried to drown the child, only to have it reappear the same evening.

According to legend,

the third time the grandmother herself took the child and drowned him, but in the morning the child nestled as before on its mother's own bosom. So the grandmother said to her daughter, "Mother, now nurse your child for he may become an important man. He cannot be drowned and you have borne him without having marriage with any man. Now I have never heard of such an occurrence nor has the world known of it before."⁷

Men of the Five Tribes, skeptical that the peace-seeking Dekanawida was a messenger of the Creator, asked for proof. Dekanawida responded that the Creator had endowed him with the choice of his own death. He agreed to climb to the top of a tree on the edge of a waterfall chasm and let the men chop the tree down, with all in agreement that he would most certainly drown. Many people witnessed Dekanawida's plunge and were convinced of his death. The next morning, the warriors saw strange smoke arising from the smoke hole of an empty cabin. Upon approaching, they found Dekanawida alive and cooking his morning meal. The people were convinced that Dekanawida had indeed been sent to establish the Great Peace.⁸

The legends of the founding of the Iroquois Confederacy parallel the Virgin Birth and Resurrection legends of the origins of Christianity, the religion that most directly molded the hierarchy of colonial society. However, the evolution of women in the two societies is radically dissimilar.

Societal and Governmental Structure of the Iroquois Confederacy

The societal structure of the Iroquois revolves around a system of clans, or gens, that are composed of the progeny of a woman

7. A. PARKER, *supra* note 1, at 14.

8. *Id.* at 16.

and her female descendants. Historically, the clans occupied a longhouse which was perhaps twenty to thirty feet wide and long enough to accommodate a grouping of people related to the matron of the household. Upon marriage, a young woman brought her husband into her mother's home; he was obliged to turn over either all or part of his hunt to his mother-in-law.⁹ The clans, with names like Great Bear, Turtle, Hawk, and Deer Pigeon, overlapped the different tribes in the league. Marriage within clans was prohibited, ostensibly to prevent factions within the League.¹⁰

Clan Mothers are the most respected members and hold the highest positions of authority, leading the matrilineal clan. They are chosen by other adult women in the clan.¹¹ The Clan Mothers select the Sachems, or Chiefs, to serve on the Council of Clans. While the Clan Mothers have the constitutional authority to depose Sachems, or literally, to "dehorn the Sachems," no constitutional provision exists for the removal of a Clan Mother.¹² Upon the death or removal of a Sachem, a new one is chosen by a Clan Mother who

walks around the Council House acting as if she were making a spontaneous choice from the spectators, although actually her decision was made some time before When the Clan Mother presents the man of her choice she does so through a chief who speaks for her; she does not speak to the people herself.¹³

The Clan Mother is then responsible for distributing the dead Sachem's property.¹⁴

Women not qualified to be Clan Mothers might be delegated as matrons or Faithkeepers. Matrons are responsible for raising children and are likely to be chosen as ceremonial leaders in the Longhouse.¹⁵ Faithkeepers, the majority of which are women, essentially run the Longhouse religious ceremonies.¹⁶

9. L. CARR, *THE SOCIAL AND POLITICAL POSITION OF WOMEN AMONG THE HURON-IROQUOIS TRIBES*, REPORT OF THE PEABODY MUSEUM OF AMERICAN ARCHAEOLOGY 215 (1884).

10. B. JOHANSEN, *supra* note 6, at 28-29.

11. C. Richards, *The Role of Iroquois Women: A Study of the Onondaga Reservation* 85 (1957) (unpublished Ph.D. dissertation, Cornell University). For an excellent description of modern-day Iroquois women, see *id.* at 86.

12. *Id.* at 82, 161.

13. *Id.* at 83.

14. *Id.* at 161.

15. *Id.* at 158.

16. *Id.* at 161.

The governmental structure of the Confederacy is marked by a system of delegated authority that flows upward through the system to the League Council of Clans, rather than downward, and evinces shared liberty and responsibility for all members. As Lewis Henry Morgan, the father of American anthropology, observed in his 1851 study of the Iroquois, "With the departure of the individual, every vestige of Indian sovereignty vanishes."¹⁷

Fifty Sachems make up the League Council of Clans; each tribe casts a unit vote in the Council through its Sachem. The Mohawks and Senecas were designated the Elder Brothers; the Cayugas, Oneidas and Tuscaroras the Younger Brothers. The Onondagas became the Firekeepers of the Confederacy, completing the tripartite government with separation of powers and checks and balances.¹⁸

Cadwallader Colden, who published the first English-language account of the political system of the Iroquois in 1727, wrote:

Each of these Nations is an absolute Republick by itself, and every Castle in each Nation makes an independent Republick, and is govern'd in all publick Affairs by its own Sachems or old Men. The Authority of these Rulers is gain'd by, and consists wholly in the Opinion the rest of the Nation have of their Wisdom and Integrity. They never execute their Resolutions by Force upon any of their People. Honor and Esteem are their principal Rewards; as Shame, and being despised, their Punishments Their great Men, both Sachems and Captains, are generally poorer than the common People; for they affect to give away and distribute all the Presents of Plunder they get in their Treaties or in War, so as to leaving nothing to themselves. There is not a Man in the Ministry of the Five Nations, who has gained his Office, otherwise than by Merit; there is not the least Salary, or any Sort of Profit, annexed to any Office, to tempt the Covetous or Sordid.¹⁹

The Council bestows great rights, privileges and duties upon the Iroquois through enduring constitutional mechanisms such as equal representation of the tribes, a rule of unanimity in legis-

17. 1 L. MORGAN, *LEAGUE OF THE HODENOSAUNEE OR IROQUOIS* 55 (1901).

18. See G. SCHAAF, *supra* note 1.

19. 1 C. COLDEN, *HISTORY OF THE FIVE INDIAN NATIONS* xvi (1904 ed.).

lative discussions, male and female leadership, and political accountability.²⁰

The Social and Political Status of Women in the Confederacy

The powerful status of women pervaded Iroquois society. According to the Great Law, Clan Mothers selected and confirmed the Iroquois Sachems and war chiefs. Clan Mothers held the hereditary lines of title to the chieftainships.²¹

The Council itself selected some Pine Tree Chiefs on the basis of merit, in order that those "uterine families" not represented by hereditary chieftainships were not excluded. Some families joined with sister families in order to be represented.²²

Historically, upon the death of a Sachem:

he was succeeded not by his son, but by the son of a sister or of an aunt or niece on the maternal side; and his property, at least all of it that was not buried with him, was hereditary in his gens, it fell to the same parties and could not descend to his child for the reason that, by their peculiar laws of marriage, a child and its father must necessarily belong to different gentes. . . . This mode of reckoning descent was very general among our American Indians. . . . In fact there is no other way of accounting for many of their institutions, and notably to that singular phase of society in which woman, by virtue of her functions as wife and mother, exercised an influence but little short of despotic, not only in the wigwam but also around the council fire.²³

Not only were the Clan Mothers of each extended family responsible for holding title to a chieftainship, they monitored the Sachem's conduct closely and would warn a Sachem to abide by the Great Law if it appeared he was not proceeding with the welfare of the people in mind. After three warnings by the Clan Mothers who nominated him, a Sachem would be removed.²⁴ The white wampum belts that indicated the hereditary names of

20. J. COLLIER, *INDIANS OF THE AMERICAS* 120 (1947).

21. A. PARKER, *supra* note 1, at 29.

22. J. COLLIER, *supra* note 20, at 120.

23. L. CARR, *supra* note 9, at 210-11.

24. Johnston, *Self-Determination for the Six Nations Confederacy*, 44 U. TORONTO FAC. L. REV. 9 (1986). The Beloved Woman in the Cherokee tradition possesses similar capabilities, e.g., leading the Council, deciding the fate of captives, and the ability to wage war. See P. ALLEN, *THE SACRED HOOP* 32, 36-38 (1986).

the Sachems were kept by the women, and women were solely responsible for communicating the history of the nation to the children.²⁵

The Clan Mothers also had great influence with warriors. Women could support or disapprove the wisdom of a war party by providing or withholding moccasins and charred corn pounded into meal and sweetened with maple sugar for the warriors' journey.²⁶ If a Clan Mother forbade the departure of a war party, neither the Sachems nor the Council could object. The women had "entire control of affairs, even of those that are supposed to have been the peculiar province of the man."²⁷ Further, "apparently in pure mockery of the man's helplessness, [women also possessed the right] of sending him out on such an expedition whenever she pleased."²⁸ Mary Brant, the Mohawk widow of Sir William Johnson, is credited with convincing warriors to maintain loyalty to the British during the Revolution.

Women had their own separate council and would deliberate an issue first.²⁹ Upon determination of an issue, the Women's Council would notify the Sachems who would then convene the General Council.³⁰ The Women's Council sent a message to a General Schuyler in 1776, objecting to proposed movements of American troops. Schuyler responded to the women's concerns at a Council of the Sachems and implored the Sachems to ask the Clan Mothers not to unleash the warriors in a way that would disrupt the American-Iroquoian alliance.³¹ Clan Mothers settled General Council disputes and generally had far greater respect, status and control than did European or colonial women.

Clan Mothers decided whether captives would be adopted or killed. Adoptees were immediately accepted into the Confederacy as lost relatives. Many rose to prominence and few sought return. In 1689, the Wolf Clan of the Oneidas adopted the French Jesuit missionary Milet to replace a Sachem. The leading women of the Tribe helped him and, Milet wrote, "through the influence of the chief women, they showed me the friendship of giving me the place of a Sachem who had died long before of disease, rather than of one killed in the attack on the French."³²

25. B. GRAYMONT, *THE IROQUOIS IN THE AMERICAN REVOLUTION* 13 (1972).

26. *Id.* at 21.

27. L. CARR, *supra* note 9, at 223.

28. *Id.*

29. *Id.* at 230.

30. *Id.*

31. *Id.* at 230-31.

32. B. GRAYMONT, *supra* note 25, at 18.

Similarly, Mary Jemison, "the white woman of the Genessee," had been captured during the French and Indian War and later given to the Senecas. The Senecas adopted Jemison, who married twice, became quite content with Iroquois life, and most probably her elevated status as a woman, and chose to remain a Seneca rather than return to white society.³³

Non-adopted prisoners were treated with much cruelty, both by men and women. As Cadwallader Colden stated:

The Warriors think it is for their glory to lead them through all the Villages of the Nations subject to them . . . and . . . draw up two lines, through which the poor Prisoners, stark naked, must run the Gauntlet; and on this occasion, it is always observed that the Women are much more cruel than the Men.³⁴

With regard to women's status in Iroquoian society, Colden further observed that:

Polygamy is not usual among them; and indeed, in any Nation where all are on a Par, as to Riches and Power, Plurality of Wives cannot well be introduced. As all Kind of Slavery is banished from the Countries of the Five Nations, so they keep themselves free also from the Bondage of Wedlock; and when either of the Parties becomes disgusted, they separate without Formality or Ignominy to either, unless it be occasioned by some scandalous Offence in one of them. And in Case of Divorce, the Children, according to the natural Course of all Animals, follow the Mother. The women here bring forth their Children with so much Ease as other Animals, and without the Help of a Midwife, and, soon after their Delivery, return to their usual Employment. They alone also perform all the Drudgery about their Houses, they plant their Corn . . . they likewise cut all their firewood, and bring it home on their Backs; and in their Marches bear the Burdens. The Men disdain all kind of Labor, and employ themselves alone in Hunting, as the only proper Business for Soldiers.³⁵

33. *Id.* at 13. The great freedom and influence of women was extended to white women in Iroquois country. The Tory Sarah McGinnis prevented a wampum belt describing an American victory over the British from passing beyond her village. See also M. JEMISON, *LIFE OF MARY JEMISON: DEH-HE-WA-MIS* (1824).

34. C. COLDEN, *supra* note 19, at xxvii.

35. *Id.* at xxxii-xxxiii.

Some eighteenth-century European and American men were astounded at the liberty, political, social, and familial power held by Iroquois women. When Iroquois men returned from a hunt, they turned everything over to the women. An unsigned manuscript of the day stated that every possession of the man except his horse and rifle belonged to the women after marriage. Women controlled the household economy, giving money to their husbands as they deemed necessary. Further, “[t]he truth is that Women are treated in a much more respectful manner than in England and they possess a very superior power; this is to be attributed in a very great measure to their system of Education.”³⁶

As is repeated so often in women’s history, the status of Iroquois women has not been immune from revisionist historians trying to diminish or distort the importance of women in the society. In 1883 Lucien Carr, the assistant curator of the Peabody Museum of American Archaeology and Ethnology, wrote grudgingly of women’s status in the confederacy. Unable to reconcile women’s power without a corresponding diminishment of male stature, Carr relates that the male warriors Corn Planter and Red Jacket were obliged to follow the commands of the Clan Mothers, despite their protestations.

Chiefs, warriors and councils were obliged to yield to her demands when authoritatively expressed. This is perhaps a somewhat startling assertion. Bear in mind that among the gens or clan, with its privileges and obligations was, in reality, nothing but a brotherhood of individuals bound together by ties of blood, and it will at once be seen why women, through whom alone, this kind of union could be preserved and perpetuated, should have been accorded a prominence which can scarcely be paralleled outside the realms of fable.³⁷

Carr also seems appalled at the suggestion that polyandry, yet not polygyny, may have been practiced by the Senecas and was a result “of the gynocracy that existed among them. . . Th[e] moderation [of having only one spouse] speaks well for the Iroquois men. I am sorry, however, to say that the virtue was

36. B. JOHANSEN, *supra* note 6, at 40-41.

37. L. CARR, *supra* note 9, at 211-12. See also W. OSWALT, *THIS LAND WAS THEIRS* (1978); Richards, *Matriarchy or Mistake: The Role of Iroquois Women Through Time*, in *CULTURAL STABILITY AND CULTURAL CHANGE* 36 (ed. V.F. Ray 1957) (proceedings of the 1957 annual spring meeting of the American Ethnological Society).

not imitated by the women, as they allowed themselves a plurality of husbands."³⁸

However, Father Joseph Lafitau, who spent considerable time among the Iroquois, summarized the position of women with more clarity:

[The women] constitute the tribe, transmit the nobility of blood, keep up the genealogical tree and the order of inheritance, and perpetuate the family. They possess all actual authority; own the land, and the fields and their harvests; they are the soul of all councils, the arbiters of peace and war; they have the care of the public treasury; slaves are given to them; they arrange marriages; the children belong to them and to their blood is confined the line of descent and the order of inheritance. The men on the other hand are wholly isolated and restricted to their personal affairs; their children are strangers to them, and when they die, everything comes to an end, as it is only the women who can keep up and perpetuate the family. If there are only men in a household no matter in what numbers nor how many children they may have it is doomed; and although by courtesy they are made chiefs, and public business is transacted by a council of old men, yet they act merely as the representatives of the woman and to aid her in those affairs in which it would not be becoming for her to appear and act for herself.³⁹

There has been considerable debate as to whether Iroquois society constituted a true matriarchy, since Clan Mothers selected, but did not serve as, Sachems. Many historians claim that no true matriarchy has ever existed.⁴⁰ Some assert that Iroquois society is as close to a matriarchal model as the world has ever seen.⁴¹ Most agree that the authority exercised by the Clan Mothers over the economy, property, and government of

38. L. CARR, *supra* note 9, at 223.

39. *Id.*

40. See J. BROWN, IROQUOIS WOMEN: AN ETHNOHISTORIC NOTE 235-51; P. WEBSTER, *Matriarchy: A Vision of Power in TOWARD AN ANTHROPOLOGY OF WOMEN* 127-56 (R. Reiter ed. 1975); E. REED, WOMAN'S EVOLUTION 154-58 (1975); C. NIETHAMMER, DAUGHTERS OF THE EARTH: THE LIVES AND LEGENDS OF AMERICAN INDIAN WOMEN 139-40 (1977); G. LERNER, THE CREATION OF PATRIARCHY 30-31, 249 nn.42-43 (1986).

41. J. BROWN, *supra* note 40, at 243.

the society was unprecedented.⁴² Paula Gunn Allen writes convincingly of the Sachem's actions being mere proxies for Clan Mother sentiment, with all decision making solely reserved for the women.⁴³

Women in the Great Law

No amount of revisionist history, however, can derogate the actual codification of the Iroquois woman's status in the Great Law. J.N.B. Hewitt, a nineteenth-century ethnographer, has written that the original constitution of the League recognized federal women chiefs who had official standing equal to that of the Sachems, and had the same rights to attend the General Council sessions.⁴⁴ Hewitt's claim of women chiefs remains isolated; most historians generally agree that women were never chiefs in the Confederacy.

Nonetheless, it is true that of the 117 clauses in the Great Law, twenty-three deal with the rights and responsibilities of women. Of paramount importance, clause 44 of the Great Law states that "[t]he lineal descent of the people of the Five Nations shall run in the female line. Women shall be considered the progenitors of the Nation. They shall own the land and the soil. Men and women shall follow the status of the mother."⁴⁵ Clause 45 stipulates that "[t]he women heirs of the Confederate Lordship titles shall be called Royaneh (Noble) for all time to come."⁴⁶

According to the Great Law,

The women of every clan of the Five Nations shall have a Council Fire burning in readiness for a Council of the clan. When in their opinion it seems necessary for the interest of the people they shall hold a Council and their decision and recommendation shall be introduced before the Council of Lords by the War Chief for its consideration.⁴⁷

42. *Id.*

43. P. ALLEN, *supra* note 24, at 213. According to traditional Mohawk Brian Cole: "The men who go to a council fire, puff up their chests and push their weight around. But the women have the real power. The Clan Mothers are the power in the shadows of the Council fires." Interview with Brian Cole (Sept. 21, 1989). For descriptions of other historical matriarchies, see M. STONE, *WHEN GOD WAS A WOMAN* (1976).

44. J. HEWITT, *Iroquoian Cosmology* in FORTY-THIRD ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY 463 (1925).

45. A. PARKER, *supra* note 1, at 42.

46. *Id.*

47. *Id.* at 55.

Clan Mothers held the wampum belts of hereditary title,⁴⁸ could choose and depose chiefs (although no constitutional provision provided for their deposition),⁴⁹ or transfer chieftainships to sister families.⁵⁰ Women could punish those seeking to establish independent authority.⁵¹ "Women's Work," as it has come to be known, was optional and esteemed. "When a Lord holds a conference in his home, his wife, if she wishes, may prepare the food for the Union Lords who assemble with him. This is an honorable right which she may exercise and an expression of her esteem."⁵²

Women held the white wampum belts, the color white symbolizing "peace, love, charity and equity."⁵³ In contrast, men held the black wampum, entitling them to execute enemies of the League and take up the weapons of war.⁵⁴ The funeral recitation for Clans Mothers contained the acknowledgement that they "were one of the many joint heirs of the Lordship titles."⁵⁵ Both women of the people and Clan Mothers were laid to rest with chants of "You once held a sacred position as a mother of the Nation."⁵⁶

The Great Law not only elevated and embraced the status of women, but also secured the natural rights of the people as a whole. Among the admirable aspects of the Iroquois system was the Council's system of checks and balances, which resulted in unanimous decision making. Disputes were remanded for solutions. An issue would be debated by the Mohawks and Senecas, then referred to the Oneidas and Cayugas, establishing a process of checks, although the legislative council was unicameral.

The decision would then be passed onto the Onondagas, who were the Firekeepers, for their opinion. If affirmed by unanimity of the tribes, the motion would carry.⁵⁷ The Great Law had provisions for amendment,⁵⁸ punishment for murder,⁵⁹ embracing concepts of citizenship offered to conquered nations,⁶⁰ free-

48. *Id.* at 34.

49. *Id.*

50. *Id.* at 40.

51. *Id.* at 37.

52. *Id.* at 43.

53. *Id.* at 47-48.

54. *Id.* at 47, 54.

55. *Id.* at 59.

56. *Id.*

57. B. JOHANSEN, *supra* note 6, at 24.

58. A. PARKER, *supra* note 1, at 34.

59. *Id.*

60. *Id.* at 53.

dom of religion,⁶¹ confirmation of the rights of the people to approach the council for redress of problems,⁶² federalism,⁶³ prohibition against unauthorized entries of homes,⁶⁴ and communal possession of the land.⁶⁵

The Lords of the Confederacy were constitutionally required to serve at the behest of the people while showing endless patience. "Their hearts shall be full of peace and good will and their minds filled with a yearning for the welfare of the people of the Confederacy Neither anger nor fury shall find lodgement in their minds and all their words and actions shall be marked by calm deliberation."⁶⁶

The Great Law also provided that "the men of every clan of the Five Nations shall have a Council Fire ever burning in readiness for a council to be held to discuss the welfare of the clans. This council shall have the same rights as the council of the women."⁶⁷

The Iroquois, according to former U.S. Commissioner of Indian Affairs' John Collier,

wrought out a social institution, a system of greatness of human relationships, a system for evoking maximum genius and for socializing it, and a role of women in society which well may stand today as the most brilliant creation in the record of man. Then from a world unknown, a ravenous race swept in a dark age for the native life which was hurled into the pit by cannon, by rum, by money, by unconscionable intrigue."⁶⁸

Colonial America

Women's Status

If the tenets of equality that so pervaded the Iroquois Great Law had been adopted by the American legal system or overlaid onto the existing common law framework, the status of women in colonial America would have been radically altered. Under

61. *Id.* at 56.

62. *Id.*

63. *Id.* at 55.

64. *Id.* at 57.

65. *Id.* at 50.

66. *Id.* at 37.

67. *Id.* at 55.

68. J. COLLIER, *supra* note 20.

the English common law system embraced by the colonies, women were not considered "persons" or "citizens."⁶⁹ Correspondingly, women were disenfranchised and thereby precluded from directly changing their conditions.

It has been noted that the subjugation of women at early common law was not entirely dissimilar from the way slaves were treated.⁷⁰ Unlike the co-equal status of women in the Iroquois society, women under Anglo-American common law were, as noted by feminist legal authority Sylvia Law, relegated merely to roles of

production, reproduction, maintenance, consumption, and acculturation in the home. Home and family — the core social unit upon which [Anglo-American] constitutional, political, economic [and common law] arrangements are built — are constructed on the premise that women are not active citizens or people free to pursue the full range of common occupations and callings.⁷¹

At common law, as developed from Blackstone's Commentaries, a woman merged her legal identity into that of her husband when she married. She could not sue, be sued, enter into contracts, make wills, keep her own earnings, or control her own property. Married women were civilly dead.⁷² This concept of coverture, or *femme covert*, meant that upon marriage, a woman became quite literally "veiled"; clouded, covered by her husband.⁷³

Correspondingly, at common law, a man could chastise his wife, restrain her freedom, beat, and rape her.⁷⁴ The husband gained control and management of his wife's real property and complete ownership of her personal property, including a wom-

69. In 1765, Blackstone wrote: "By marriage, the husband and wife are one person in law, that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated into that of her husband under whose wing, protection and cover she performs everything." Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 957 (1984) [hereinafter Law, *Rethinking Sex*] (quoting 1 W. BLACKSTONE, COMMENTARIES 430 (Oxford 1765)); see also *In re Lockwood*, 154 U.S. 116 (1894) (denying writ of mandamus by woman seeking admission to Virginia bar; for purposes of the statute, "person" meant "male").

70. C. HYMOWITZ & M. WEISSMAN, A HISTORY OF WOMEN IN AMERICA 21 (1980).

71. Law, *Family, Gender and Sexuality: What Our Founding Fathers Had to Say*, 26 JUDGE'S J. 22, 24 (1987) [hereinafter Law, *Founding Fathers*].

72. *Id.*

73. E. FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 8 (1959).

74. Law, *Founding Fathers*, *supra* note 71, at 25.

an's clothes and household goods.⁷⁵ New England colonies had prohibitions against "solitary living" to assure that women would be subject to the governance of family life.⁷⁶

At common law, divorce was prohibited; divorce became more commonly available to men at the time of the Revolution.⁷⁷ Women were not entitled to keep their children following divorce; divorce was granted at a woman's behest only for flagrant abuses such as adultery, desertion, non-support, and extreme physical cruelty.⁷⁸

Women were denied identity — since they were required to assume the husband's name — and power. One of the most significant common law tenets resulting in male dominance was the concept of illegitimacy. The legal doctrine permitting condemnation of a child as a bastard and the resulting legal disabilities were alien to the Iroquois system.⁷⁹ Common law concepts of illegitimacy fostered sexual purity of women and the social and economic dependence of both the child and mother upon the male.⁸⁰

Married women had the same rights as children or idiots — virtually none. Single women fared only slightly better. Since they had no man to protect them, they retained some legal rights, such as the ability to own property and keep their wages. A single woman could amass a fortune, but was excluded from voting or sitting on a jury.⁸¹

Even if a woman outlived her husband, common law still discriminated against her. Property passed from the husband to the eldest son or closest male blood relation. If a man died without a will, a wife would inherit one-third of his estate. On her death, however, the inheritance reverted to a male heir. A widow could not alienate any of the estate's property.⁸²

It is not surprising that Thomas Paine, who had spent considerable time with the Iroquois, condemned the position of women in colonial America. Paine wrote that

even in countries where they may be esteemed the most happy, constrained in their desires in the disposal

75. Law, *Rethinking Sex*, *supra* note 69, at 957.

76. Law, *Founding Fathers*, *supra* note 71, at 25.

77. *Id.* at 27.

78. E. FLEXNER, *supra* note 73, at 8.

79. Law, *Rethinking Sex*, *supra* note 69, at 957.

80. *Id.* at 962.

81. *Id.*

82. C. HYMOWITZ & M. WEISSMAN, *supra* note 70, at 23. After the Revolution, courts of equity improved some of the rights of married women.

of their goods, robbed of freedom and will by the laws, the slaves of opinion, which rules them with absolute sway and construes the slightest appearances into guilt; surrounded on all sides by judges, who are at once tyrants and their seducers Who does not feel for the tender sex?⁸³

The common law structure thus supported the subservience of women in ways that were fundamentally inconsistent with the natural rights and concepts of equality that were blended in the Iroquois Great Law. At common law, women had many duties, but no rights apart from the protection their husbands or fathers might deem fit. In contrast, Iroquois women had many rights, duties, and received great respect. Had American common law adapted to Iroquoian concepts, legal equality would have been normative.

Attitudes of the Founding Fathers

Although the Great Law's ethical and governmental structure influenced the Founding Fathers and a number of American men, the status of women in Iroquois society left no indelible imprint on their own domestic relations or the documents that would shape the American government. Perhaps the exposure to the status of Iroquois women acted to reinforce the desire to isolate women from political participation. Of the Founding Fathers, Franklin and Jefferson had the most contact with the matriarchal Iroquois society and were greatly influenced by the ethical edicts and complex government of the League.⁸⁴

Although American feminism is presumed to have originated in the 1830s with the activism of Elizabeth Cady Stanton and Susan B. Anthony, feminism was not unknown in the Revolutionary Era.⁸⁵ The white privileged males that forged the Constitution did not do so in a vacuum, isolated from the political dreams and aspirations of the politically disenfranchised. The sentiment of the Founding Fathers is perhaps most accurately

83. *Id.* American changes to the English common law included recognition of a wife's right to share her husband's home and bed, a right to be supported by her husband even if he abandoned her, and a right to be protected from a husband's violence. But women were denied the right to sue in court.

84. See B. JOHANSEN, *supra* note 6; B. GRAYMONT, *supra* note 25.

85. Sally Roesch Wagner has posited that the feminist movement of the 1820s did not accidentally form in the area of Seneca Falls. Rather, the status of Iroquois women in what is now New York greatly influenced early feminists. Interview with Sally Roesch Wagner (Nov. 15, 1989). See Wagner, *Introduction*, in M. GAGE, *WOMAN, CHURCH AND STATE* (1980).

revealed in exchanges between Abigail Adams and her husband, John Adams, who later became the second President.

Abigail Adams, uneducated herself, ardently supported the rights and education of women. On the eve of the adoption of the Declaration of Independence in 1776, while John Adams was at the Continental Congress in New York and she was managing their farm in Massachusetts amidst insecurity, war, and epidemic,⁸⁶ Abigail implored her husband to "Remember the Ladies":

In the new code of laws which I suppose it will be necessary for you to make, I desire you would remember the ladies and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the husbands. Remember, all men would be tyrants if they could. If particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation.

That your sex are naturally tyrannical is a truth so thoroughly established as to admit of no dispute; but such of you as wish to be happy willingly give up the harsh title of master for the more tender and endearing one of friend. Why, then, not put it out of the power of the vicious and the lawless to use us with cruelty and indignity with impunity. Men of sense in all ages abhor those customs which treat us only as the vassals of your sex. Regard us as Beings placed by providence under your protection and in imitation of the Supreme Being make use of that power only for our happiness.⁸⁷

John Adams replied on April 14, 1776:

As to your extraordinary code of laws, I cannot but laugh. We have been told that our struggle has loosened the bonds of government everywhere; that children and apprentices were disobedient; that schools and colleges were grown turbulent; that Indians slighted their guardians and Negroes grew insolent to their

86. Law, *Founding Fathers*, *supra* note 71, at 22, 24.

87. Letter from Abigail Adams to John Adams (Mar. 31, 1776), *reprinted in THE BOOK OF ABIGAIL AND JOHN: SELECTED LETTERS OF THE ADAMS FAMILY, 1762-1784*, at 121 (L. Butterfield, M. Friedlaender & M. Kline eds. 1975).

masters. But your letter was the first intimation that another tribe, more numerous and powerful than all the rest, were grown discontented. This is rather too course a Compliment but you are so saucy, I wont blot it out.

Depend upon it, we know better than to repeal our Masculine system. We dare not exert our Power in its full Latitude. We are obliged to go fair and softly, and in Practice you know We are the subjects. We have only the Name of Masters, and rather than give up this, which would completely subject Us to the Despotism of the Petticoat, I hope General Washington and all our brave Heroes would fight. I am sure every good politician would plot against Despotism, Empire, Monarchy, Aristocracy, Oligarchy, or Ochlocracy.⁸⁸

Abigail answered on May 7, 1776:

I cannot say that I think you are very generous to the ladies; for, whilst you are proclaiming peace and goodwill to men, emancipating all nations, you insist upon retaining an absolute power over wives. But you must remember that arbitrary power is like most other things which are very hard, very liable to be broken; and, notwithstanding all your wise laws and maxims, we have it in our power, not only to free ourselves, but to subdue our masters, and without violence, throw both your natural and legal authority at our feet.⁸⁹

Adams, who believed that "power always follows property," was by no means alone.⁹⁰ Thomas Jefferson, responding to a French woman who had queried him on the United States Constitution, wrote that it "need not agitate you. The tender breasts of ladies were not formed for political convulsion; and the French ladies miscalculate much their own happiness when they wander from the true field of their influences into that of politicks."⁹¹ In a letter to Washington, Jefferson expressed fur-

38. Letter from John Adams to Abigail Adams (April 14, 1776), *reprinted in THE BOOK OF ABIGAIL AND JOHN: SELECTED LETTERS OF THE ADAMS FAMILY, 1762-1784*, at 123 (L. Butterfield, M. Friedlander & M. Kline eds. 1975).

39. Letter from Abigail Adams to John Adams (May 7, 1776), *reprinted in FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS 3-4* (M. Schneir ed. 1972).

90. 4 PAPERS OF JOHN ADAMS 108-211 (R. Taylor ed. 1979).

91. Letter from Thomas Jefferson to Angelica Schuyler Church (Sept. 21, 1788), *reprinted in 13 THE PAPERS OF THOMAS JEFFERSON 623* (J. Boyd ed. 1956).

ther vexation regarding French women, their influence in the French Revolution and gratitude that American women were not similarly inclined.⁹² And this notation from a visit Jefferson made to Holland:

While one considers [women] as useful and rational companions, one cannot forget that they are also objects of our pleasures. While employed in dirt and drudgery some tag of a ribbon, some ring or bit of bracelet, earbob or necklace . . . will shew that the desire of pleasing is never suspended in them.⁹³

Jefferson had dealings with the Iroquois and corresponded with Handsome Lake, a Seneca Chief.⁹⁴ While Jefferson expressed admiration for many of the accomplishments of the Iroquois,⁹⁵ he was inexplicably unaffected by the status of women in the society. Undoubtedly, if he considered the matriarchal aspects of the League at all, it was with the same scorn with which he viewed French women. Jefferson and Adams' emphases on property-based suffrage and the subjugation of women clearly stand in stark contrast to the embracing paradigm of Iroquois society.

In the late 1700s and early 1800s, other voices were calling for universal suffrage, proposing systems of natural law and embracing the ethics and equality of the Iroquois. In England Mary Wollstonecraft wrote *A Vindication of the Rights of*

92. Letter from Thomas Jefferson to George Washington (Dec. 4, 1788), *reprinted in* 14 *THE PAPERS OF THOMAS JEFFERSON* 330 (J. Boyd ed. 1956). Jefferson wrote:

The manners of the nation allow [women] to visit, alone, all persons in office, to solicit the affairs of the husband, family or friends and their solicitations bid defiance to laws and regulations. Nor can one, without evidence of his own eyes, believe in the desperate state of which things are reduced in this country from the omnipotence of an influence, which, fortunately for the happiness of the sex itself, does not endeavor to extend itself in our country beyond the domestic line.

Id.

93. T. Jefferson, Notes of a Tour Through Holland and the Rhine Valley (Apr. 19, 1788), *reprinted in* 13 *THE PAPERS OF THOMAS JEFFERSON* 27-28 (J. Boyd ed. 1956). Jefferson further wrote:

How valuable is that state of society which allots [women] internal employments only, and external to the men. [Women] are formed by nature for attentions and not for hard labor. A woman never forgets one of the numerous train of little offices which belong to her; a man forgets often.

Id.

94. *THE PORTABLE THOMAS JEFFERSON* 305 (M. Peterson ed. 1975). Paula Gunn Allen has commented that the Code of Handsome Lake ("the tribal version of the white man's way") which advocated adoption of nuclear family arrangements where women cleaved to their husbands, helped to patriarchize the Iroquois in the early 1800s. P. ALLEN, *supra* note 24, at 33.

95. See B. JOHANSEN, *supra* note 6; B. GRAYMONT, *supra* note 25.

Woman, and critics labeled her a “hyena in petticoats.”⁹⁶ John Stuart Mill fought for women’s equality; as we have seen, Thomas Paine did also. However, while the Iroquois influenced Enlightenment thinkers on a panoply of ideas, its philosophical proponents ignored the status of women in Iroquois society.

The Founding Fathers and the Iroquois

Although numerous colonial statesmen had contact with the Iroquois and witnessed the status of women in that society, Benjamin Franklin probably had the most far-reaching interaction with the League. Franklin started his political career as a provincial governor of Pennsylvania. Among his tasks was assisting colonial envoys assigned by the British to form an alliance with the Iroquois against the French.⁹⁷

As a Philadelphia printer, Franklin had begun printing treaty accounts and news of the Iroquois in 1736. At a treaty conference between the British and Iroquois in 1744, Franklin, his son William, and Cadwallader Colden, sat around the Iroquois Council Fire with the Iroquois Sachems.⁹⁸ In 1753, he received his first diplomatic assignment, as an Indian commissioner representing Pennsylvania.⁹⁹

Franklin’s early writings and publications indicate that his interactions with the Iroquois influenced his concepts of federalism, natural rights, and the role of man and property in society.¹⁰⁰ At the same time, Franklin was shaping his thoughts about an American federal union of the colonies in which each state would govern its own internal affairs, and a confederated government, much like the League, would oversee common, external matters.¹⁰¹ In one account of the 1744 treaty council printed by Franklin, an Iroquois Sachem named Canassatego urged the colonists to unite by saying, “Our wise forefathers established union and amity between the Five Nations. This has made us formidable . . . We are a powerful Confederacy and by your observing the same methods . . . you will acquire much strength and power; therefore, whatever befalls you, do not fall out with one another.”¹⁰²

96. Kramnick, *Introduction*, in M. WOLLSTONECRAFT, *VINDICATION OF THE RIGHTS OF WOMAN* 7 (1983 ed.).

97. B. JOHANSEN, *supra* note 6, at 31, 69.

98. *Id.* at 46-47.

99. *Id.* at 54-56.

100. *Id.* at 54.

101. *Id.* at 64.

102. *Id.* at 61-62.

Using the parlance of the day, Franklin wrote the following in a letter in 1751:

It would be a very strange thing if Six Nations of Ignorant Savages should be capable of forming a Scheme for such a Union and be able to execute it in such a manner, as that it has subsisted Ages, and appears indissoluble and yet a like Union should be impracticable for ten or a dozen English colonies, to whom it is more necessary, and must be more advantageous.¹⁰³

Franklin also suggested that the thirteen colonies form a movable council to meet successively at the different colonies, much like the Council of the League.¹⁰⁴

In 1754, the colonists met with the Iroquois at Albany, New York. The purpose of this Albany Conference was twofold: to cement a British/Iroquois alliance against the French; and to formulate a plan of union for the colonies.¹⁰⁵ Franklin solicited commentary on his "Short Hints Toward a Scheme for Uniting the Northern Colonies."¹⁰⁶

Tiyanuga, an Iroquois Sachem who had been specifically invited by the Governor of New York to instruct the colonial delegates on the structure of the Iroquois Confederacy, urged the colonists to unite.¹⁰⁷ After two weeks of debate, the colonists voted unanimously to support a colonial union based on Franklin's principles.¹⁰⁸ Several weeks after the Albany Conference, Franklin published his famous "Join or Die" severed snake cartoon in his *Pennsylvania Gazette*.¹⁰⁹

The ratified plan for unification bore numerous similarities to the Iroquois structure. In each system, one "state" could veto the action of the entire body; unanimity was required. The colonies were to have a "Grand Council" capable of choosing its own speaker. Like the Iroquois system, the plan endorsed a unicameral legislature, unlike the bicameral British system that was eventually adopted. Both governments had varying numbers of representatives from the states with the colonists' systems based roughly on population. Iroquois representation sprang

103. 3 THE WRITINGS OF BENJAMIN FRANKLIN, 1750-1759, at 42 (A. Smyth ed. 1907).

104. *Id.*

105. B. JOHANSEN, *supra* note 6, at 69.

106. *Id.* at 70.

107. *Id.*

108. *Id.*

109. *Id.* at 71.

more from tradition. Both systems embraced the concept for a common, voluntary militia. The proposed colonial Grand Council was to have forty-eight delegates; the Iroquois Council had fifty.¹¹⁰

Franklin's plan, prescient though it was, died in the colonial legislatures because states feared losing autonomy. The Crown vetoed the plan, believing that it gave the colonies too much freedom. The failure led Franklin to remark that "the councils of the savages proceeded with better order than the British Parliament."¹¹¹ Franklin also feared that the failure would lead the Iroquois to dissolve their alliance with the British since "no assistance from [the Six Nations] is to be expected in any dispute with the French 'till by a Compleat Union among our selves we are able to support them in case they should be attacked."¹¹²

Franklin's comments indicate that his belief in an Iroquois-style union stemmed not just from grand principles of Enlightenment thinking, but also from very practical military considerations. Franklin and Jefferson, however, did see in the Iroquois a "happy mediocrity" that embodied the visions to which Enlightenment thinkers aspired. Ideally, Franklin saw a "Virtuous Order" that would combine the best of European art and literature and the natural rights inherent in the Iroquois system, yet would remain unburdened by overcivilization.¹¹³

Both men believed that an Iroquoian-style culture provided more opportunity for happiness than a European model.¹¹⁴ Both men admired the fact that leaders of the Iroquois held their positions to serve the people and were readily retractable for failing to do so. Both preferred the Indian attitude towards the possession of private property.¹¹⁵

110. *Id.* at 74.

111. *Id.*

112. *Id.*

113. *Id.* at 83.

114. *Id.* at 91.

115. Franklin wrote of the Iroquois:

All property, indeed except the savage's temporary cabin, his bow, his matchcoat and other little Acquisitions absolutely necessary for his Subsistence, seems to me to be the creature of public Convention. Hence, the public has the rights of regulating Descents, and all other conveyances of Property, and even of limiting the quality and uses of it. All the property that is necessary to a man is his natural Right, which none may justly deprive him of, but all Property superfluous to such Purposes is the property of the Public who, by their Laws, have created it and who may, by other Laws dispose of it.

B. JOHANSEN, *supra* note 6, at 104-05.

Indeed, for Jefferson, the natural, inalienable rights of "life, liberty and the pursuit of happiness" expounded in the Declaration of Independence were paramount, as contrasted to the philosophy of John Locke, who advocated "life, liberty and property."¹¹⁶ As Jefferson wrote, "I am convinced that those societies [such as the Indians] which live without government enjoy in their general mass an infinitely greater degree of happiness than those who live under European governments."¹¹⁷

Jefferson myopically overlooked how pervasive that happiness was, never mentioning the ramifications of sexual equality when discussing the ethical, natural state that bound and harmonized the Iroquois. Franklin, however, was at least cognizant of the role of women in the Iroquois society, acknowledging that "women are the Records of the Council . . . who take exact notice of what passes and imprint it to their Memories, to communicate it to their children."¹¹⁸

Thomas Paine, who travelled to America at Franklin's invitation, sat around Iroquois Council Fires, learned the language, and tried to negotiate an alliance with the Iroquois during the Revolution. He wrote that Iroquois society lacked "any of those spectacles of human misery which poverty and want present to our eyes in all the towns and streets of Europe."¹¹⁹ Paine, unlike Jefferson or Franklin, may have been influenced by the role of Iroquois women, for he was an advocate of women's rights.

Two decades after the Albany Conference, Franklin's modified plan turned into the Articles of Confederation.¹²⁰ In 1775 the colonists sent word that they were finally heeding Canassatego's advice from thirty years earlier.

The colonists wrote:

Our old men have . . . frequently taken a single arrow and said, Children, see how easily it is broken. Then they have taken and tied twelve arrows together with a strong string or cord and our strongest men could not break them This is what the Six Nations mean. Divided, a single man may destroy you; united you are a match for the whole world. We thank the great God that we are all united; that we have a strong confederacy, composed of twelve provinces These

116. *Id.* at 103.

117. *Id.* at 98.

118. *Id.* at 86.

119. *Id.* at 116.

120. *Id.* at 75.

provinces have lighted a great council fire at Philadelphia and sent sixty-five counsellors to speak and act in the name of the whole, and to consult for the common good of the people.¹²¹

It was in this environment that the great (male) thinkers of the day convened in Philadelphia in 1787 to hammer out the Great Compromise. We now know that women were among the most compromised.

The Formation of the United States Constitution

The Constitutional Convention commenced in Philadelphia on May 29, 1787, with ten states represented by forty delegates.¹²² At different points of the convention, fifty-five men actually attended.¹²³ The average participant was a wealthy, white male, about forty-two or forty-three years of age.¹²⁴ All were landed, but a self-made man was regarded as at a "social disadvantage."¹²⁵

Three-quarters served in Congress; many were Revolutionary War heroes. There were gentlemen, doctors, lawyers, politicians, teachers, and "respectable Characters."¹²⁶ Franklin, though in attendance, was in frail health. Jefferson, who was in Paris at the time, referred to them as a "collection of demi-Gods."¹²⁷

Others were not so impressed. One contemporary writer, considering that some appointments were randomly made to round out state delegations, opined that "Some of the characters which compose it, I revere; others I consider as of small consequence, and a number are suspected of being great public defaulters and to have been guilty of notorious speculation and fraud, with regard to our public property in the hour of our distress."¹²⁸

The gathering seemed acutely aware of the historical magnitude of the Convention. Pennsylvania's Governor Morris remarked that "the whole human race will be affected by the proceedings of this Convention."¹²⁹ In opposing slavery and the counting of slaves in determining congressional representation,

121. *Id.* at 76.

122. M. FARRAND, *FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 58 (1913).

123. *Id.* at 39.

124. *Id.*

125. *Id.* at 26.

126. *Id.* at 23.

127. *Id.* at 39.

128. *Id.* at 40.

129. *Id.*

Morris remarked that citizens of southern states who might go to Africa, and “in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages” would have more votes in a “Government instituted for protection of the rights of mankind” than would Northern Citizens who loathed “with a laudable horror, so nefarious a practice.”¹³⁰ Yet, remarkably, Morris eventually wrote the final draft of the Constitution¹³¹ that embraced political representation in the House of Representatives based on the population of “free Persons” in each state, plus three-fifths of all “other Persons.”¹³²

Two hundred years later, Supreme Court Justice Thurgood Marshall, commenting on the Constitution’s flaws and explaining why his enthusiasm for celebrating the document’s bicentennial anniversary lacked the same patriotic fervor evinced by many, remarked that the Framers “possessed . . . [an] ability to trade moral principles for self-interest.”¹³³ Marshall further noted that the slave trade commercially benefitted the North, since customs duties of up to ten dollars a slave helped raise public revenue.¹³⁴

Although some delegates objected to the recognition of slavery in the Constitution on moral grounds, the majority “regarded slavery as an accepted institution, as a part of the established order, and public sentiment on the slave trade was not much more emphatic and positive than it is now on cruelty to animals.”¹³⁵

It is surely an extension of this acceptance of the patriarchal structure of society that accounts for the complete absence of discussion by the Framers regarding the rights of women. Sylvia Law has remarked, “Silence — absolute and deafening — is the central theme of the original Founders’ discussions of women and families.”¹³⁶ Law has found virtually nothing in the constitutional text, the Federalist Papers, the constitutional debates, or the ratification discussions in the colonies directly addressing the situations of women and families.¹³⁷ The only reference to

130. Marshall, *Those the Constitution Left Out*, 26 JUDGE’S J. 18, 20 (1987).

131. *Id.*

132. U.S. CONST. art. 1, § 2.

133. Marshall, *supra* note 130, at 20.

134. *Id.* at 21.

135. M. FARRAND, *THE FATHERS OF THE CONSTITUTION* 120 (1921).

136. Law, *Founding Fathers*, *supra* note 71, at 23.

137. *Id.* at 24.

women in the Federalist Papers is “a brief allegorical discussion of the dangers that courtesans and mistresses pose to the safety of the state.”¹³⁸

When the Constitution and subsequent Bill of Rights were completed, the influence of the Great Law was unmistakable. Elements of first amendment free speech, religion, and assembly doctrines, provisions for amendment, fourth amendment search and seizure protections, federalism, checks and balances, and separation of powers were all firmly rooted in the Great Law.¹³⁹ Unlike the Great Law, however, the Founding Fathers summarily rejected equality by embracing slavery and denying suffrage for women, blacks, and non-propertied men.¹⁴⁰

The Transition from Iroquois Matriarchy to Colonial Patriarchy

Anglo-American male society embraced and codified the subjugation and enforced dependence of women, in contradistinction to the co-equal status of women and men in the Iroquois Great Law and society. How could the Founding Fathers generate a Constitution so revered for its eloquence and, in part, modeled after the Iroquois Great Law, that lacked recognition of the rights of citizens below the narrowest strata of society at the top of the social ladder? Why did the oft-venerated opening language of the Constitution — “We the People” — ring hollow for so many for so long?

Overwhelmingly, the recognized intellectual and philosophical underpinnings of American political thought reinforced patriarchal systems. Of the early Western philosophers who influenced the Founders, perhaps Plato stands alone as a proponent of women’s rights. Plato’s Republic espoused that confining women to domesticity was a waste and that “the innate qualities of women could not be known, so long as the socialization and education of the sexes were so different.”¹⁴¹ However, the Enlightenment political theory, which Jefferson and Franklin expounded, emphasized male dominance.¹⁴²

John Locke, who challenged patriarchal styles of government, still believed in the natural dominance of a husband over a wife in areas of domestic disagreement. Locke wrote that where

138. *Id.*

139. See G. SCHAFF, *supra* note 1; see also *supra* notes 57-65 and accompanying text.

140. U.S. CONST. art. 1, § 2.

141. Law, *Founding Fathers*, *supra* note 71, at 57 n.8.

142. *Id.* at 24-25.

matters of common interest and property are concerned, “the Rule . . . naturally falls to the Man’s share as the abler and stronger.”¹⁴³ Early American courts took their views on women’s rights from Blackstone’s Commentaries.¹⁴⁴ The man, by law and custom, was the titular head of the household.

A wife was no better than a child, a helpless creature, a supportive assistant (at best) but viewed legally as a nullity — perhaps a piece of property. Under Blackstone’s legal analysis, a married woman could not sue or be sued, create contracts, wills, or exercise any legal control over her property. Since possession of property, according to Blackstone and Locke, was the linchpin for participation in the political process, the fact that a woman and her property dissolved into her husband logically should not have foreclosed the right of an unmarried woman in possession of property to exercise the vote. However American legal thinkers did not make this logical leap.¹⁴⁵ The property rights of women in Revolutionary America, according to Sylvia Law, “reveal above all else a picture of enforced dependence.”¹⁴⁶

In contrast, the Iroquois paradigm rested on egalitarian principles. Engels, building on Morgan’s work with the Iroquois, used the possession of property as the starting point in his analysis of the subjugation of women in “civilized” society.

Engels continued:

The substitution of the female line for the male, effecting thereby the disinheritance of the son, the partially elective character of the Sachemships, the absence of all landed estates, and the power of deposing lodged with the tribes, are reasons conclusive for regarding the government of the Iroquois as an oligarchy rather than an aristocracy.

The spirit which prevailed in the nations and in the Confederacy was that of freedom. The people appear to have secured to themselves all the liberty which the hunter state rendered desirable. They fully appreciated its value, as is evinced by the liberality of their institutions. The red man was always free from political bondage, and, more worthy still of remembrance, his free limbs never wore a shackle. His spirit could never

143. *Id.* at 25.

144. See *supra* notes 72-82 and accompanying text.

145. Law, *Rethinking Sex*, *supra* note 69, at 955, 957.

146. Law, *Founding Fathers*, *supra* note 71, at 25.

be bowed in servitude. In the language of Charlevoix, the Iroquois were "entirely convinced that man was born free, that no power on earth had any right to make any attempts against his liberty and that nothing could make him amends for its loss." It would be difficult to describe any political society, in which there was less of oppression and discontent, more of individual independence and boundless freedom The absence of family distinctions, and of all property, together with the irresistible inclination for the chase, rendered the social condition of the people peculiar to itself. It secured to them an exemption from the evils, as well as denied to them the refinements, which flow from the possession of wealth, and the indulgence of the social relations . . . [The Iroquois] never felt the "power of gain" It was doubtless the great reason of his continuance in the hunter state; for the desire of gain is one of the earliest manifestations of progressive mind, and one of the most powerful passions of which the mind is susceptible. It clears the forest, rears the city, builds the merchantman — in a word, it has civilized our race.¹⁴⁷

Another byproduct of the "uncivilized" matriarchical Iroquois society was that theft, hunger, and destitution were unknown among the Iroquois.¹⁴⁸ Morgan, however, believed that the matriarchy was mostly ceremonial and that true sexual equality did not exist. In Morgan's view, "[t]he Indian regarded woman as the inferior, the dependent, and the servant of man, and from nurture and habit she actually considered herself to be so."¹⁴⁹

Morgan quoted Montesquieu for an explanation of why the Iroquois system is preferable and paradigmatically superior to the American system: "In aristocratical governments, there are two principal sources of disorder: excessive inequality between the governors and the governed, and the same inequality between the different members of the body that governs."¹⁵⁰ The Iroquois had neither (integrity was a publicly accountable common denominator and Sachems wielded equivalent amounts of power); the American model has elements of both.

147. F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 75 (1942).

148. L. MORGAN, *supra* note 17, at 319, 324.

149. *Id.* at 315.

150. *Id.* at 97.

Engels built on Morgan's findings about the difference in communal societies and civilized societies in which an insular "us-versus-them" mentality predominates. Engels, however, named this schism as the most important factor in defining and perpetuating the subjugation of women. Engels adopted a theory advanced by Bachofen in the 1861 publication, *Mutterrecht* (Mother Right), to explain matrilineal society.¹⁵¹

According to Bachofen, man (presumably the generic use of the word) originally lived in a state of sexual promiscuity and as such, any certainty of paternity was excluded. By extension, descent could only be in the female line; therefore, women were held in high esteem and rule by women (gyneocracy, as termed by Bachofen) naturally resulted.¹⁵² Monogamy, "a violation of a primitive religious law," thus led to Father Rights.

Bachofen pointed out that "it is not the development of man's actual conditions of life, but the religious reflections of these conditions inside their head, which has brought about the historical changes in the social position of the sexes."¹⁵³ Thus, Bachofen's basic premise is that women originally held an elevated status in society simply because mothers were the only certainly ascertainable parent of a child. This view, however, may be criticized because of its simplistic, unwaveringly hegemonic biological and anti-intellectual approach. It is entirely possible that in the Iroquois society (and other primitive matriarchies) women held positions of power because of a superior ability to effectuate harmony, structure, and cohesiveness.

Engels faulted Enlightenment theory for its view that in the beginning of society, women were the slaves of men, a notion that had even entered Morgan's analysis. Rather, the communistic households evidenced in Iroquois society resulted in the supremacy of women, since most women in the household were members of the same gens, as opposed to the men who would come to the arrangement from different gens.¹⁵⁴ Engels quoted Ashur Wright, a long-time missionary among the Iroquois:

The female [gens] ruled the house . . . The stores were in common; but woe to the luckless husband or lover who was too shiftless to do his share of the providing. No matter how many children, or whatever goods he

151. F. ENGELS, *supra* note 147, at 75.

152. *Id.*

153. *Id.* at 76.

154. *Id.* at 113.

might have in the house, he might at any time be ordered to pick up his blanket and budge; and after such orders it would not be healthful for him to attempt to disobey. The house would be too hot for him and he must retreat to his own clan; or as was often done, go and start a new matrimonial alliance in some other. The women were the great power among the clans. They did not hesitate, when occasion required, "to knock off the horns," as it was technically called, from the head of a chief, and send him back to the ranks of the warrior.¹⁵⁵

Engels argued that the introduction of monogamous pairing and wealth into society fostered the rise of Father Right and the corresponding decline of Mother Right. When inheritance took on the importance of wealth, men tried to strengthen their position in favor of their children. Therefore, men had to overthrow Mother Right, the traditional order of inheritance. Engels wrote that this revolution — one of the most decisive ever experienced by humanity — was deceptively simple and could occur by simple decree that, in the future, the offspring of the men would remain within the gens, but that those of the female should be transferred to the gens of the father.¹⁵⁶ Engels wrote that the ease of the revolution can be seen "in a whole series of American Indian tribes where it has only recently taken place and is still taking place under the influence, partly of increasing wealth and a changed mode of life (transference from forest to prairies), and partly of the moral pressure or civilization and missionaries."¹⁵⁷

According to Engels, the overthrow of Mother Right then resulted in the "world historical defeat of the female sex."¹⁵⁸ Women became degraded and relegated to mere involuntary incubators.¹⁵⁹ Male supremacy is then effectuated through the

155. *Id.*

156. *Id.*

157. *Id.* at 119. Catherine MacKinnon challenges Engels' assumptions for being "rigidly causal, unidirectional, and one-sided. Material conditions alone create social relations; consciousness and materiality do not interact And he takes history as a fixed object within a teleology in which what came before necessarily led to what came after One must understand that society could be other than it is in order to explain it, far less to change it Engels' empiricism can imagine only the reality he finds, and therefore he can find only the reality he imagines." C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 36 (1989).

158. F. ENGELS, *supra* note 147, at 120.

159. *Id.*

patriarchal family.¹⁶⁰ Engels pointed out that the ancient Roman word for family, *famulus*, means “domestic slave”; and *familia*, the “total number of slaves belonging to one man.”¹⁶¹

Engels further argued that the monogamous patriarchal family

was the first form of the family to be based not on natural but on economic conditions — on the victory of private property over primitive, natural communal property The first class opposition that appears in history coincides with the development of the antagonism between man and woman in monogamous marriage, and the first class oppression coincides with that of the female sex by the male. Monogamous marriage was a great historical step forward; nevertheless, together with slavery and private wealth, it opens the period that has lasted until today in which every step forward is also relatively a step backward, in which prosperity and development for some is won through the misery and frustration of others.¹⁶²

It is most probably the combination of factors — movement away from the communal gens to the monogamous pair, desire for gain and private property, coupled with the effects of Judeo-Christianity — that accounts for the differences between the female-driven interconnectedness in both the Iroquois legal and social system and the male-driven disconnectedness of the patriarchal American system.

In her 1982 book *In A Different Voice*, Carol Gilligan describes what she sees as the differences between socialization of men and women:

The images of hierarchy and web, drawn from the texts of men’s and women’s fantasies and thoughts, convey different ways of structuring relationships and are associated with different views of morality and self As the top of the hierarchy becomes the edge of the web and as the center of a network of connection becomes the middle of a hierarchical progression, each image marks as dangerous the place which the other defines as safe. Thus the images of

160. *Id.* at 121.

161. *Id.*

162. *Id.* at 128-29.

hierarchy and web inform different modes of assertion and response: the wish to be alone at the top and the consequent fear that others will get too close; the wish to be at the center of connection, and the consequent fear of being too far out on the edge. These disparate fears of being stranded and being caught give rise to different portrayals of achievement and affiliation, leading to different modes of action and different ways of assessing the consequences of choice.¹⁶³

According to Gilligan, the differences originate in self-definition. Men see their interactions on contractual terms, and perceive themselves as lonely contenders in a competitive battle for a spot at the top of the hierarchical ladder.¹⁶⁴ Morality and justice are thus defined by rights to be free from the interference of others.¹⁶⁵

Women tend to distrust a morality based on rights and non-interference, because of its potential for justification of indifference and unconcern. Further, women define morality and justice in the language of responsibility, seeking solutions for moral problems not in impersonal abstract rules, but in the capacity to understand what someone else is experiencing; women react from a desire to preserve human interrelationships.¹⁶⁶ In the male ladder of hierarchy, competition and isolation predominate. In the female web of connection, an understanding and contextual morality emerges; the self is more in connection with a continuous human environment of networked social relations.¹⁶⁷

If Gilligan's premise is adopted, American constitutional jurisprudence undoubtedly resembles the ladder. The Iroquois social and legal system, with its desire to embrace and expand,

163. C. GILLIGAN, IN *A DIFFERENT VOICE* 62 (1982). MacKinnon has criticized Gilligan for describing women's voice as the gender-constructed "feminine" — a voice that is incorrect "because his foot is on her throat." Conversation between Carol Gilligan and Catharine MacKinnon, Mitchell Lecture Series, State University of New York at Buffalo Law School (Nov. 20, 1984), reprinted in *Feminist Discourse, Moral Values and the Law — A Conversation*, 34 *BUFFALO L. REV.* 11 (1985). See also Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797 (1989) (arguing that Gilligan's description of "women's voice" is less a description of women's psychology than an attempt to attribute to women a critique of traditional Western epistemology and possessive individualism).

164. C. GILLIGAN, *supra* note 163, at 100.

165. *Id.* at 24-63.

166. *Id.* at 66.

167. *Id.* at 27.

seems much closer to the web of connection. The varying descriptions of the systems parallel which sex held access to decision making power in the respective communities.¹⁶⁸ The Iroquois held property communally and offered citizenship freely with the belief that the inherent superiority of the system would reign.

Morgan wrote that the Iroquois were a “progressive confederacy” founded by the assimilation of five warring tribes, with sufficient accumulated “power to absorb adjacent nations, molding them, successively by affiliation, into one common family.”¹⁶⁹ It is this aspect of outreach and continual embrace that marks Gilligan’s female-oriented web paradigm in contradistinction to the male ladder model of hierarchy marking most Anglo-European systems. Morgan added, “Unlimited in their capacity for extension . . . the tribes thus interleagued would have suffered no loss of unity by their enlargement, no loss of strength by the increasing distance between their council-fires. The destiny of this League, if it had been left to work out its own results among the red races exclusively, it is impossible to conjecture. With vast capacities for enlargements, and remarkable durability of structure, it must have attained a great elevation, and a general supremacy.”¹⁷⁰ The dominant vision of Iroquois society is of an ever-expanding interdependent web of egalitarian relationships in which natural rights, notably “life, liberty and the pursuit of happiness” could flourish. The gaps between the rungs of the Anglo hierarchical ladder are antithetical to establishing a system based on egalitarian principles.

Conclusion

The Iroquois might be unlike any other civilization with regard to the extremely elevated and institutionalized status of women. The significant differences between the legal and social systems of the League and those of Anglo culture can be explained by a combination of factors. The most significant difference is the Anglo emphasis on private property and economical hierarchies.

The male dominance perpetuated in the American system has been continued by rigid, stratified definitions of citizenship. In Anglo culture, men established for themselves positions of power

168. See *supra* notes 21-56, 69-83 and accompanying text.

169. L. MORGAN, *supra* note 17, at 88.

170. *Id.*

— through means of religious, mental, physical, emotional, legal and economic force — that allowed them to control access to political participation and finite resources. The Founding Fathers then codified that stratification in a constitutional code of law that attempted to annihilate any outside threats to that dominance.

Initially, this was achieved by restricting the citizenship and suffrage of blacks and women. As the barriers to black men, first, and to women, later, began to break down, the circle of protection changed from societal power to societal resources and familial structure.

If participation in the political process is restricted, those who form the bottom rungs of the hierarchical ladder remain non-threatening. A relatively small number of people retain the greatest amount of control through arbitrary and self-serving patterns of legal and social control. In the United States, this was historically, and is continually, played out at the national political level (witness the failure of the equal rights amendment and the current attempts to restrict abortion) as well as in every home where violence and enforced subjugation keep women either in, or on the edges of, circles of abuse and poverty.¹⁷¹ The Iroquois system lacks this hierarchical structure.

The influence of, and the distinctions between, the embracing Iroquoian principles and the “arms-length” patriarchal American model are nowhere shown more clearly than in the preambles to the respective constitutions:

I am Dekanawida, and with the Five Nations Confederate Lords, I plant the Tree of the Great Peace . . . Roots have spread out from the Tree and the name of these Roots is The Great White Roots and their nature is Peace and Strength. If any man or nation outside the Five Nations shall obey the laws of the Great Peace . . . they may trace the Roots to the Tree if their minds are clean and they shall be welcomed to take shelter beneath the Tree of the Long Leaves.¹⁷²

* * *

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings

171. R. SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* (1986); *Female and Poor: If These Are the Best of Times . . . They Are Also the Worst*, L.A. Daily J., Apr. 26, 1984, at 4, col. 1.

172. A. PARKER, *supra* note 1, at 30.

of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United states of America.¹⁷³

The Great Law reflects the Iroquois philosophy of inclusion. The United States Constitution evinces the male Anglo desire to secure privileges for themselves and their posterity, and to exclude the rest of humanity.

173. U.S. CONST. preamble.

