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THE IMAGINARY CONNECTION BETWEEN THE GREAT LAW OF PEACE AND THE UNITED STATES CONSTITUTION: A REPLY TO PROFESSOR SCHAAF

*Erik M. Jensen**

I. Introduction

Professor Gregory Schaaf's recent essay in this *Review*¹ is a well-crafted presentation of what is becoming a common proposition: that a direct link can be shown between governmental attributes of seventeenth and eighteenth century American Indian tribes, particularly the Iroquois Confederacy (the Six Nations),² and the United States Constitution. The idea that American Indian concepts affected the thinking of the American founders is not new, but it is gaining currency. In recent years, it has been presented in monographs and articles,³ and it has begun to permeate the popular press as well.⁴

The Schaaf essay is one of the more extreme presentations of the idea. Following some other commentators, Schaaf goes so far as to say that large parts of the U.S. Constitution were

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1. Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 AM. INDIAN L. REV. 323 (1989).

2. The Six Nations were originally five: the Mohawks, Onondagas, Senecas, Oneidas, and Cayugas, which formed the League of the Iroquois sometime between 1000 and 1660. (Estimates of the date of formation vary so widely that no greater precision is possible.) The sixth tribe, the Tuscaroras, became part of the Confederacy in the early eighteenth century, after its displacement from North Carolina. See B. GRAYMONT, *THE IROQUOIS IN THE AMERICAN REVOLUTION* 5-6, 13-14 (1972).

3. See, e.g., B.E. JOHANSEN, *FORGOTTEN FOUNDERS: HOW THE AMERICAN INDIAN HELPED SHAPE DEMOCRACY* (1982); J. WEATHERFORD, *INDIAN GIVERS: HOW THE INDIANS OF THE AMERICAS TRANSFORMED THE WORLD 133-50* (1988) (chapter 8, titled "The Indian Founding Fathers").

4. See, e.g., Weatherford, *Get Your Act Together, the Indians Said*, Cleveland Plain Dealer, July 4, 1989, at 5-B, col. 5 (op-ed piece noting that, on American independence day, "few people will consider the role of American Indian men and women in creating our form of government"); see also Hendricks, *Constitutional Concepts Found in Iroquois Law*, Cleveland Plain Dealer, Aug. 18, 1990, at 3-C, col. 1 (Associated Press story describing dispute about influence of the Iroquois on American governmental principles).

modelled on the Iroquois arrangement and its founding document, the Great Law of Peace.⁵ To the extent that the two documents diverge, Schaaf suggests, it is because the American founders did not go far enough in following the Iroquois model.⁶

The idea certainly has romantic appeal, tinged with irony. Who cannot be struck by finding the origins of American constitutional government in a body of people so badly served by that government? Moreover, at a time when the educational establishment is reacting against curricula excessively based, many think, on the writings of dead, white, European males,⁷ the attraction of rejecting John Locke in favor of Deganwidah, the Peacemaker—the founder of the Haudenosaunee (“People of the Long House”)⁸—is too much to resist: “As the United States celebrates the Bicentennial of its Constitution, perhaps the time has come,” Schaaf maintains, “to give the [Iroquois Confederacy] credit for creating and sustaining a democratic form of government—the original source of our strength.”⁹

5. Schaaf set out parts of his argument at greater length in a privately printed pamphlet. G. SCHAAF, *THE GREAT LAW OF PEACE AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (special ed. 1987); see also R. UNDERHILL, *RED MAN'S AMERICA* 83 (1953) (“Some have even thought that [the Iroquois polity] gave suggestions to the American Constitution (Lee, Franklin, Jefferson, and Washington were quite familiar with the League.)”); C. WALDMAN, *ATLAS OF THE AMERICAN INDIAN* 93 (1985) (“this visionary Iroquois League would provide a model for America’s founding fathers in the framing of the Constitution”); P. WALLACE, *THE WHITE ROOTS OF PEACE* 3 (1946) (“the . . . confederacy provided a model for, and an incentive to, the transformation of the thirteen colonies into the United States of America”); Letter from Thomas J. Riley, *NAT’L REV.*, Nov. 19, 1990, at 4 (anthropologist criticizing those who “dismiss the League of the Iroquois as a model for the confederation that would make up the United States”). But see P. FARB, *MAN’S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE* 98 (1968) (noting and criticizing the argument: “The League did somewhat resemble the union of the Thirteen Colonies in organization, but it could more accurately be compared to the United Nations.”).

6. See Schaaf, *supra* note 1, at 330 (“Featuring high qualifications for leadership, political rights for women, and a remarkable system of justice, the Great Law of Peace may inspire people to reconsider the founding principles of America’s origins.”).

7. Cf. A. BLOOM, *GIANTS AND DWARFS: ESSAYS 1960-1990* at 29 (1990) (defending dead, white, European males: “The last thing we need is a sort of philosophic U.N. run by bureaucrats for the sake of representation by all peoples.”).

8. Aided by an Onondaga orator, Hiawatha, the Mohawk Deganwidah proposed that the original Five Nations, which had been regularly torn by war, lay down their arms and form a confederacy. The Great Peace was “founded on the principles Deganwidah and his kinspeople cherished and nurtured: freedom, respect, tolerance, consensus, and brotherhood.” S. O’BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 17-18 (1989).

9. Schaaf, *supra* note 1, at 331.

The United States Congress has determined that that time has indeed come and, in 1988, it gave the Iroquois Confederacy much of the credit Schaaf asked for. Relying on his and others' testimony¹⁰—and apparently paying little attention to what was going on¹¹—the two Houses overwhelmingly passed a concurrent resolution “acknowledg[ing] the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution.”¹² The resolution also postulated that “the confederation of the original Thirteen Colonies into one republic was influenced by the political system developed by the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself.”¹³

Notwithstanding the congressional validation, the time for Professor Schaaf's theory has not come and should not come—if we care about historical truth. The proposition is nonsense—it is an act of faith, not a matter of historical analysis—and it is recognized as such by nearly all serious historians.¹⁴ It relies

10. Schaaf was identified at the time as “Ethnohistorian for the Oneida Nation.” See *Iroquois Confederacy of Nations: Hearing on S. Con. Res. 76 Before the Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. 7, 53 (1987) [hereinafter *Hearing*]. Others testifying included Onondaga Indian Chief Oren Lyons and academic historian Donald Grinde. See *id.* at 7, 12. Because the resolution at issue also “reaffirm[ed] the continuing government-to-government relationship between Indian tribes and the United States established in the Constitution,” much of the testimony and the prepared statements included in the published transcript of the hearing are not directly relevant to the Schaaf theory.

11. See Farrell, *Indians* (Sept. 30, 1988) (State News Service article, datelined Washington) (available on NEXIS) (“I’ll be honest with you, a commemorative resolution is not one of the highest priorities of the 100th Congress,” said one aide”).

12. See H.R. Con. Res. 331, 100th Cong., 2d Sess. (1988). The resolution passed the House of Representatives with 408 yea votes and only 8 nays. See 134 CONG. REC. H9,474-75 (daily ed. Oct. 4, 1988). It was passed by unanimous consent in the Senate. See 134 CONG. REC. S17,139 (daily ed. Oct. 21, 1988).

13. The latter clause was modified in the course of the legislative process. In its originally introduced form, the resolution had stated that the confederation of the Thirteen Colonies “was explicitly modeled upon the Iroquois Confederacy.” The change was made because it was thought the original language “was not completely accurate.” See Farrell, *supra* note 11 (quoting deputy counsel for Indian Affairs for House Interior and Insular Affairs Committee).

14. See, e.g., *id.* (“‘I don’t know how they [Senate and House committees] let it get through,’ said Francis Jennings, director emeritus of the D’Arcy McNickle Center for the History of the American Indian [at] the Newberry Library . . . ‘It destroys my faith in the historical literacy of the Senate.’”).

Schaaf's position is not entirely new. See *supra* notes 3-5 and accompanying text. However, it is peculiar enough to help establish an academic reputation. Reward structures in academia now give greater weight to publications that take outrageous positions than to traditional scholarly pieces—where truth and understanding are the

on what might be called the Asch theory of history: if enough people say the same thing enough times, people will start to accept the proposition, no matter how unbelievable it might be.¹⁵ Repetition and emotion substitute for evidence.¹⁶

Most of those pressing the Schaaf theory, including the Congressmen who bought into it, have the best of intentions, I am sure; an overwhelming number of wrongs done to American Indians need to be redressed.¹⁷ "It is easy to ignore the Indians," Edmund Wilson wrote in 1959,¹⁸ and we should do so no more. But the issue here is not one of Indian rights, and it would be a mistake for friends of the American Indians to link their cause to such a misguided historical view. If the case for fair treatment depended on fabricated history, the prospects for improvement would be bleak—perhaps hopelessly so. Fortunately, that is not the case. It is the truth, not the status of American Indians, that is at issue in Schaaf's article.¹⁹

goals. Cf. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 917 (1986) ("The . . . traits of novelty, surprise, and unconventionality that are considered marks of distinction in other fields should be considered suspect in economics and law, in which thoughtfulness may be a more important virtue.").

15. I have adopted the name from the famous experiments investigating "the effects upon individuals of majority opinions when the latter were seen to be in a direction contrary to fact." See Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments* (1952), reprinted in H. PROSHANSKY & B. SEIDENBERG, *BASIC STUDIES IN SOCIAL PSYCHOLOGY* 393, 401 (1965).

16. See, e.g., *Hearing*, *supra* note 10, at 12 (testimony of Gregory Schaaf) ("The evidence is overwhelming. I swear to you, my leader, I swear to the American people, I swear to the people from all around the world that the evidence to support [the concurrent resolution] is overwhelming.").

17. Nevertheless, the issue is being used for blatant political purposes: the New York Department of Education is facing pressure to modify textbooks to emphasize this new theory of constitutional evolution. See Farrell, *supra* note 11; see also NEW YORK DEP'T OF EDUC., *A CURRICULUM OF INCLUSION: REPORT OF THE COMMISSIONER'S TASK FORCE ON MINORITIES* ("curricular materials must be developed so there is equity in the coverage of . . . Mohawks, Oneidas, Cayugas, Senecas, and Tuscaroras"), quoted in Hacker, *Trans-National America*, N.Y. REV. BOOKS, Nov. 22, 1990, at 19.

18. E. WILSON, *APOLOGIES FOR THE IROQUOIS* 274 (1959).

19. By stressing the search for truth, I do not mean to endorse a simple-minded, objectivist view of history—i.e., with the ideal a collection of facts, facts, and more facts. See P. NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* (1988) (discussing the profession's adoption and later discarding of "objectivity" as an attainable goal). I recognize that, no matter how hard we try, none of us is able to view the world unaffected by ideological blinders. Moreover, I know that historians disagree on almost every issue of importance; that disagreement reflects no moral failing in the historical profession.

Nevertheless, good history is in some sense constrained by the natural world. We

II. *Schaaf's Lack of Primary Authority*

To have a plausible theory connecting Iroquois ideas to the United States Constitution, a historian—one might expect—would cite discussions of the Iroquois Confederacy at the Constitutional Convention. Schaaf and others cannot do that for one simple reason: there were no such discussions.

To be sure, American Indians were considered at the Convention. For one thing, security at the frontier was an obvious concern for the founders, but Schaaf can derive no comfort from that fact. Militarily, the Indian tribes—including the Iroquois—were viewed as threats, not as models.²⁰ And the other subjects of discussion at the Convention were, at best, irrelevant to the Schaaf hypothesis. The founders made specific provision for regulating commerce with the tribes,²¹ and “Indians not taxed” were not to be included in a state’s population for

value originality and imagination, but we would deplore (and ultimately ignore) a “historian” who insisted that the Goldwater presidency was a high-water mark of twentieth century American history. Whether or not there is a single immutable truth, there are *untruths*, and, as Shelby Foote has stated, “All historians know that any untruth stains everything around it.” *Quoted in Waters, Prime Time's New Star*, NEWSWEEK, Oct. 8, 1990, at 60.

20. *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 316 (M. Farrand rev. ed. 1937) [hereinafter FARRAND] (Madison’s noting with disapproval that individual states have entered into “treaties & wars” with Indian tribes); *see also* THE FEDERALIST No. 4, at 44 (J. Jay) (C. Rossiter ed. 1961) (“Not a single Indian war has yet been produced by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States”); *id.*, No. 24, at 161 (A. Hamilton) (“The savage tribes on our Western frontier ought to be regarded as our natural enemies . . .”).

In our search for understanding, we should avoid romanticizing the “peace-loving” Iroquois, who were in fact ferocious in war. *See* B. GRAYMONT, *supra* note 2, at 17-22. The colonists had every reason to fear the Iroquois military power:

The Iroquois . . . were recognized and respected as [a potent military power] by the Europeans, who could not afford, during much of [the first half of the eighteenth century], to confront them directly.

....

The Revolutionary War brought a respite of sorts. . . . [T]he Iroquois were able to play one party off against the other, although ultimately the pressures of the diplomatic game, combined with other developments, undid the League, some nations siding with England, others with the colonies.

S. CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 27 (1988); *see also* L. DINNERSTEIN, R.L. NICHOLS & D.M. REIMERS, NATIVES AND STRANGERS: BLACKS, INDIANS, AND IMMIGRANTS IN AMERICA 30-32 (2d ed. 1990) (to same effect). Does that sound like a likely model for the founders?

21. U.S. CONST. art. I, § 8, cl. 3 (giving Congress power to “regulate Commerce . . . with the Indian Tribes”); *see* THE FEDERALIST No. 42, *supra* note 20, at 268-69.

purposes of calculating representation in the House of Representatives and apportioning direct taxes.²²

Not once, however, in Madison's—or anyone else's—notes of the Convention is mention made of the Iroquois Confederacy as a model for the American Constitution. In his article, Schaaf makes no serious effort to deal with this fundamental flaw in his counterintuitive argument. Lacking direct evidence, he instead follows a distressing practice in academic law reviews: he cites somebody else. Historian A's imagination becomes the authority for historian B's treatise.²³

Cross-citation is not a satisfactory substitute for evidence, of course. Ever undaunted, Schaaf has sought to make a virtue of his lack of primary authority. In an earlier pamphlet, upon which his *American Indian Law Review* article is based, he suggested that the founders purposely kept their reliance on Iroquois precedent secret. The Iroquois were more progressive in their treatment of women than the American founders, and the founders did not want others to go overboard in borrowing concepts from the Great Law of Peace.²⁴

If the burden of proof were on me, I would concede defeat at this point: I cannot pretend to disprove a theory so amorphous that no-evidence constitutes evidence. How does one do battle with a miasma? But of course the burden is on Schaaf, not on those skeptical of his theory, and we should all demand more from him.

The idea that the extraordinary group of men at the Constitutional Convention spent the summer months sweltering in Philadelphia²⁵ purposely not talking about what they intended is incredible, to say the least. It is an idea so incredible that it does not surface in Schaaf's essay in this *Review*; perhaps he has wisely discarded it.²⁶ In any event, in the rest of this article

22. See U.S. CONST. art. I, § 2, cl. 3; see also 1 FARRAND, *supra* note 20, at 201 (noting motion by James Wilson to, among other things, exclude "Indians not paying taxes" from apportionment base).

23. See, e.g., Schaaf, *supra* note 1, at 327 & nn.14-16 (citing P. WALLACE, *supra* note 5, which itself cited no authority, for the proposition that the Iroquois Confederacy was a model for the U.S. Constitution).

24. See G. SCHAAF, *supra* note 5, at 2 ("Why did the Founding Fathers choose to keep secret the original design of the United States government? . . . White women could have argued they deserved, at least, equal rights with American Indian women.").

25. Cf. Gruson, *About Philadelphia; Jokes Still Go for the City's Jugular*, N.Y. Times, Dec. 22, 1986, at A-21, col. 5 (noting W.C. Fields's apocryphal suggestion that his gravestone bear the words, "On the whole, I would rather be in Philadelphia.").

26. Schaaf does discuss the Iroquois' enlightened view of women's rights. See Schaaf, *supra* note 1, at 330-31. However, he now mentions no conspiracy of silence.

I will deal with what I understand to be Schaaf's more serious attempts to leap the evidentiary and logical chasms in his position.

III. Constitution-Writing Through Osmosis

The argument of those who have hypothesized relationships between the Great Law of Peace and the U.S. Constitution relies not on direct connections, for which there is no evidence, but on osmosis. As phrased by Onondaga Nation Chief Oren Lyons, the transference of democratic ideals to the white man "was a process of association, of years of meetings, discussions, wars, and peace."²⁷ In effect, the founders were gradually imbued with the learning of the Iroquois, and we can see evidence of that, Schaaf suggests, in (1) the founders' general interest in Indian societies; (2) Benjamin Franklin's sponsorship of the Albany Plan of Union; and (3) textual similarities between the Constitution and the Great Law.

A. Studying the Ways of the American Indians

Schaaf writes, "Benjamin Franklin, Thomas Jefferson, and other Founding Fathers were impressed by the Iroquoian political structure, which featured three branches of government and a system of checks and balances, as well as many of the freedoms now protected by the Bill of Rights."²⁸

Well, yes and no. The reference to those unidentified "other Founding Fathers" should be a clue to the extent to which this proposition is grounded in quicksand. Thomas Jefferson was an important founding father, but he was not a delegate to the Constitutional Convention. Benjamin Franklin was a delegate, but at that stage of his career he was more a venerated symbol than a major participant in the deliberations. Maybe we could throw in George Washington as a seminal figure, too, as the draftsmen of the congressional resolution did,²⁹ but he was a

27. *Hearing, supra* note 10, at 10; see also B.E. JOHANSEN, *supra* note 3, at xvi ("Franklin and his fellow founders . . . learned from American Indians, by assimilating into their vision of the future, aspects of American Indian wisdom and beauty.").

28. Schaaf, *supra* note 1, at 324-25 (footnote omitted).

29. See H.R. Con. Res. 331, *supra* note 12 ("the original framers of the Constitution, including, most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts of the Six Nations of the Iroquois Confederacy"). At the hearing on the resolution, historian Donald Grinde presented materials that quoted Washington's letter to James Duane on Sept. 7, 1783: "I have been more in the way of learning the sentiments of the Six Nations than of any other tribes of

brooding omnipresence, not a significant participant in the debates, at the Convention.

Schaaf is quite right that the founders were interested in Indian societies, and, in one respect, I am delighted by his suggestion. It implicitly concedes that the founders viewed the Indians as having the rights of men, a proposition that has been under some challenge recently.³⁰ In fact, the founders (with some exceptions, to be sure) thought that no difference whatsoever existed among whites, Indians, and blacks in one critical respect: all were "endowed by their Creator with certain inalienable rights."³¹

The founders were interested in matters of governance, and good governance requires an understanding of human nature. The more different societies that the founders could study, the greater the possibility of distinguishing the attributes peculiar to one culture from those common to all. The founders therefore did study, to the extent they could, the cultures of the American Indians as well as those of antiquity and those of contemporary western Europe.

The American Indians had come to occupy a special place in seventeenth and eighteenth century political philosophy. "In the beginning," wrote John Locke, "all the World was America."³² The Indian as he was imagined to be—Margaret Mead had not yet been born, and anthropological information was skimpy—

Indians." THE WASHINGTON PAPERS 352 (S. Padover ed. 1955), quoted in *Hearing*, supra note 10, at 137. However, the quotation is taken out of context. In this letter, Washington was not demonstrating intellectual (or benevolent) interest in the Iroquois; he was writing about the likelihood of war if attempts were made to displace the Six Nations.

30. I have elsewhere defended the founders against claims that they viewed Indians (and enslaved blacks) as lacking political rights. See Jensen, *Monroe G. McKay and American Indian Law: In Honor of Judge McKay's Tenth Anniversary on the Federal Bench*, 1987 B.Y.U. L. REV. 1103, 1113-22; see also Jensen, *Commentary: The Extraordinary Revival of Dred Scott*, 66 WASH. U.L.Q. 1 (1988) (challenging Justice Thurgood Marshall's use of the Taney opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), as a description of the founders' views on racial matters).

31. Jefferson meant precisely that when he penned those words in 1776, and his views on rights did not change. In his second inaugural address, for example, he stated that the "aboriginal inhabitants" of the North American continent were "[e]ndowed with the faculties and rights of men." Jefferson, *Second Inaugural Address* (Mar. 4, 1805), reprinted in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 341 (A. Koch & W. Peden eds. 1944) [hereinafter JEFFERSON'S SELECTED WRITINGS].

32. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT § 49, reprinted in J. LOCKE, TWO TREATISES OF GOVERNMENT 343 (P. Laslett ed. 1960).

became the model for man in the state of nature.³³ Whatever rights were attributable to nature thus clearly attached to the Indians.

Writings of the founders are replete with discussions of Indian tribes as subjects for study to discern the nature of man. For example, Thomas Jefferson wrote at length about Indians in his *Notes on Virginia*. The passages are unfortunately reminiscent of a natural history text, but they nevertheless demonstrate that, for the author of the Declaration of Independence, the Indians were human and were thus endowed with natural rights. Indians “will crayon out an animal, a plant, or a country, so as to prove the existence of a germ in their minds that only wants cultivation. They astonish you with strokes of the most sublime oratory; such as prove their reason and sentiment strong, their imagination glowing and elevated.”³⁴

Some founders, Benjamin Franklin in particular, had substantial dealings with the Indians. From his experience as a publisher of Indian treaty accounts, an Indian Commissioner in Pennsylvania, and a student of mankind, Franklin derived ideas about the proper role and structure of government.³⁵ John Adams also discussed Indian societies to illustrate points about human nature.³⁶ James Wilson, a primary architect of the Constitution, studied Indians for the same purpose.³⁷

I am a strong defender of the founders’ relatively enlightened views on cultural and racial differences, but let’s not overdo it. Indians were understood to have the rights of men, but at the

33. See A. NORTON, *REFLECTIONS ON POLITICAL IDENTITY* 81 (1988). Of course, to some the state of nature meant not only “the noble savage (pride, independence, natural aristocracy, magnanimity, indifference to wealth) [but also] qualities proper to the inhabitants of Hobbes’s state of nature (ferocity, cruelty, cannibalism, paganism, lawlessness).” *Id.*

34. T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, query xiv (1784), reprinted in *JEFFERSON’S SELECTED WRITINGS*, *supra* note 31, at 258.

35. See B.E. JOHANSEN, *supra* note 3, at 77-97. Franklin, like Washington, had interest in the Indians for selfish reasons. See J. WEATHERFORD, *supra* note 3, at 142 (“Washington showed a greater interest in land speculation and making money than in observing the political life of the Indians.”); Farrell, *supra* note 11 (quoting historian Laurence Hauptmann: “[A]lthough individuals like Benjamin Franklin were interested in some things about Indian life, they were land speculators . . .”).

36. See, e.g., J. ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* xv, 118 (1787; DaCapo reprint 1971) (references to the “rudest tribes of savages in North America” and “the savages of North or South America”).

37. See J. WILSON, *On the History of Property*, in 2 *THE WORKS OF JAMES WILSON* 711, 715 (R. McCloskey ed. 1967) (discussing Peruvian Indians in describing different societies’ views of property).

time of the founding they were also thought to be unfit to be citizens of the United States. The Indians were "savages" to the founders, barbarous persons having no experience with law (as distinguished from force) and government.³⁸ Franklin, probably the Indians' strongest supporter among the delegates at the Constitutional Convention, used the term,³⁹ as did Adams,⁴⁰ Washington,⁴¹ and others. The word "savages" did not carry the opprobrium that it does now, but neither was it a term of unqualified praise. Consider, for example, Jefferson's condemnation in the Declaration of Independence of King George's incitement of the "merciless savages."⁴²

A people considered to be without law and government, as the founders saw the Indians, can hardly be considered a model for the U.S. Constitution. A Jefferson might look with envy on societies in which government, as he understood it, did not exist: "I am convinced that those societies (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."⁴³ But that knowledge of an apparently constitution-less society did not—indeed, it could not—translate into a

38. See W. BERNIS, *TAKING THE CONSTITUTION SERIOUSLY* 38 (1987).

39. See *infra* text accompanying note 47. To be fair to Franklin, I should note that he sometimes used the term "savages" ironically. In his essay, "Remarks Concerning the Savages of North America," published in 1784, Franklin wrote,

Savages we call them, because their manners differ from ours, which we think the Perfection of Civility; they think the same of theirs. . . . Perhaps, if we could examine the Manners of different Nations with Impartiality, we should find no People so rude, as to be without any Rules of Politeness; nor any so polite, as not to have some Remains of Rudeness.

Quoted in B.E. JOHANSEN, *supra* note 3, at 85.

40. See *supra* note 36.

41. See, e.g., Letter from George Washington to Richard Henderson, June 19, 1788, reprinted in *THE WASHINGTON PAPERS*, *supra* note 29, at 356, 357.

42. The full passage reads as follows: "[George III] has EXCITED DOMESTIC INSURRECTION AMONG US, AND HAS endeavored to bring on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions." See T. JEFFERSON, *THE AUTOBIOGRAPHY OF THOMAS JEFFERSON* (1821), reprinted in *JEFFERSON'S SELECTED WRITINGS*, *supra* note 31, at 3, 25.

43. Letter from Thomas Jefferson to Edward Carrington, Jan. 16, 1787, reprinted in 11 *THE PAPERS OF THOMAS JEFFERSON* 48, 49 (J.P. Boyd ed. 1955) [hereinafter *JEFFERSON PAPERS*], and quoted in B.E. JOHANSEN, *supra* note 3, at 98; see also Letter from Thomas Jefferson to James Madison, Jan. 30, 1787 (describing advantages of "no government, as among our Indians"), reprinted in *JEFFERSON PAPERS*, *supra*, at 92, 92, and quoted in A. NORTON, *supra* note 33, at 81.

particular constitutional structure,⁴⁴ and it provided no guidance for the future relationship between the dominant white society and the Indian tribes.⁴⁵

B. Benjamin Franklin and the Albany Plan

Benjamin Franklin necessarily occupies a central role in the Schaaf theory because no other founder had such a long-term relationship with Indian tribes.⁴⁶ No event in Franklin's life is accorded greater significance on this point than his proposal, made prior to the French and Indian War, for the Albany Plan of Union, a unified governmental body for the colonies. And he did use the Six Nations as a point of comparison:

It would be a very strange Thing if six Nations of ignorant Savages [the Iroquois League] should be capable of forming a Scheme for such an Union, and be able to execute it in such a Manner, as that it has subsisted Ages, and appears indissoluble; and yet that a like Union should be impracticable for ten or a Dozen English colonies.⁴⁷

44. If anything, the Iroquois played a greater role in Marxist theory than in American constitutional thinking. Friedrich Engels learned of the Confederacy (or so he thought) from a 1851 work, *League of the Ho-De-No-Sau-Nee or Iroquois*, by Lewis Henry Morgan. Morgan, an amateur anthropologist, had substantial contact with the Iroquois, and he saw his purpose in writing the work "[t]o encourage a kinder feeling towards the Indian, founded upon a truer knowledge of his civil and domestic institutions, and of his capabilities for future elevation." 1 L.H. MORGAN, *LEAGUE OF THE HO-DE-NO-SAU-NEE* at ix (H.M. Lloyd ed. 1901). Engels incorporated some of Morgan's learning into his own work: "And a wonderful constitution it is . . . in all its childlike simplicity! No soldiers, no gendarmes or police, no nobles, kings, regents, prefects, or judges, no prisons, no lawsuits." F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (1884), quoted in P. FARB, *supra* note 3, at 100.

45. Jefferson came to be disappointed in the Indian societies. The intellectual potential was there—Jefferson left no doubt on that point—but it was largely unfulfilled, he thought. By the time of his second inaugural address in 1805, the Indians continued to adhere excessively to tradition, custom, and habit, which is to say that they continued to be different—and savage. Jefferson had hoped that the Indians could join the ranks of yeoman farmers, the foundation of the ideal Jeffersonian society, but instead they were resisting the adaptation necessary to assimilate into a predominantly white society. Jefferson, *Second Inaugural Address* (Mar. 4, 1805), reprinted in *JEFFERSON'S SELECTED WRITINGS*, *supra* note 31, at 341-42. They were, in Tocqueville's words, "fulfill[ing their] destiny apart," 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 332 (P. Bradley ed. 1945), to the dismay of the survivors of the founding generation. See also E. WILSON, *supra* note 18, at 275 (discussing, among other things, the lack of a westernized version of property law: "[T]he Indians do not fit into, and for the most part do not want to fit into, the alien life we have brought here.').

46. See *supra* note 35 and accompanying text.

47. Letter from Benjamin Franklin to James Parker, Mar. 20, 1750/51, reprinted in 4 *THE PAPERS OF BENJAMIN FRANKLIN* 117, 118-19 (L.W. Larrabee ed. 1961), and quoted in B.E. JOHANSEN, *supra* note 3, at 66.

But what inferences should we draw from that premise? Schaaf concludes, "The result of Franklin's challenge was the creation of the United States of America with a Bill of Rights and the Constitution based on the Great Law as symbolized by the Tree of Peace."⁴⁸ In Schaaf's view, more than thirty years of history—including the Declaration of Independence, the Revolutionary War, and the Constitutional Convention—apparently flowed inexorably, as natural extensions of a perceived need for union.

Positing inevitability and proving it are two different things. Of course, Schaaf can throw in a few connecting facts. For example, he can show some connection between Franklin and George Morgan, the first Indian agent appointed in 1776 by the Continental Congress.⁴⁹ The newly united colonies viewed the Indian tribes as nations, and Morgan was heavily involved in treaty negotiations with the tribes.⁵⁰ But connections between Morgan's negotiations with the Indian tribes and the U.S. Constitution? Schaaf shows none.

The idea that greater union meant greater strength was hardly a new idea with the Iroquois. Much of the colonists' resistance to union was based not on disputes about whether the colonies' collective strength would be greater, but whether it *should* be. Greater strength was not seen as an unalloyed good. The concern throughout the founding period—a concern left unresolved until the Civil War—was the extent to which power should be lodged in a central government. Greater power could damage individual rights as well as facilitate resistance to France or Great Britain. The Albany Plan may have been a beginning in some sense, but in no sense did it lead inevitably to the U.S. Constitution.

C. *Comparative Textual Analysis of the Great Law of Peace and the Constitution*

One of Professor Schaaf's most imaginative propositions, expounded at greater length in a separate pamphlet, is that a comparison of "appropriate passages" from the Great Law of Peace with the United States Constitution gives "striking" results: "The parallels are unmistakable."⁵¹

In his *American Indian Law Review* article, Schaaf gives only a taste of his analysis by juxtaposing the preambles to the two

48. Schaaf, *supra* note 1, at 327.

49. *Id.* at 325-26.

50. As discoverer of the Morgan papers, Schaaf has some special interest in promoting Morgan's importance.

51. Schaaf, *supra* note 1, at 330.

documents.⁵² The reader is obviously expected to exclaim at their similarity. Perhaps I am more obtuse than most, but I see almost no similarities, except at the highest level of generality: both are obviously preambles. Schaaf sees carrots as cantaloupes and vice versa; there is a relationship, I admit, but for most purposes the differences outweigh the factors in common. To this reader, the rest of the claimed similarities collected in Schaaf's pamphlet are no more convincing.⁵³

Nonetheless, for the sake of argument, I am willing to concede that Schaaf has found some similarities—albeit less than striking—in the two documents. If so, has he proven his case? In its most robust form, his argument takes the following form: If a governmental attribute exists in jurisdiction X and also in jurisdiction Y, then one of the jurisdictions copied the attribute from the other.⁵⁴ If jurisdiction X predated jurisdiction Y, then Y must have copied X.

Whatever its precise date of origin, the Iroquois League unquestionably antedated the American founding.⁵⁵ But the Great Law of Peace, in the form analyzed by Professor Schaaf, has existed as a written document since only the late nineteenth century.⁵⁶ In earlier periods, the Great Peace was transmitted orally, with its principles preserved by wampum belts and strings, many of which were lost or destroyed.⁵⁷

If a causal relationship in fact exists between the written Great Law of Peace and the United States Constitution, is it so clear which served as the model for which?⁵⁸ Professor Schaaf's

52. I shall not reproduce those texts here. *See id.* at 324.

53. *See* G. SCHAAF, *supra* note 5, at 9-14.

54. I will also concede this point *arguendo*, although I do not accept it. It is quite possible that those deliberating about matters of governance can come to similar conclusions independently.

55. *See supra* note 2.

56. *See* B.E. JOHANSEN, *supra* note 3, at 23 ("The Great Law of Peace was not written in English until about 1880 when Seth Newhouse, a Mohawk, transcribed it.").

57. A.C. PARKER, *THE CONSTITUTION OF THE FIVE NATIONS OR THE IROQUOIS BOOK OF THE GREAT LAW* 7 (1916) ("fearing a total destruction of their ancient archives, the Six Nations of New York Indians in 1898 elected the University of the State of New York the official custodian of their wampums"), *reprinted in* PARKER *ON THE IROQUOIS* (W.N. Fenton ed. 1968) (footnote omitted); *see also* P. WALLACE, *supra* note 5, at vii ("The legend of Deganawidah and the founding of the Iroquois Confederacy has for many generations been handed down among the Indians by word of mouth. Only in this generation [1946] has the full narrative of this remarkable man and his league for peace, which has endured for five hundred years, been set down in letters.").

58. *See* Farrell, *supra* note 11 (quoting Ives Goddard, curator of anthropology at the Smithsonian Institution: "[T]he Great Law documents . . . don't date to nearly a hundred years after the Constitution. The possibility has to be considered that the influence went the other way.").

position not only is counterintuitive; it also fails to account for the historical record.

IV. Conclusion

For those of us who think that the founding era of this nation was a special time—a time dominated by statesmen of the sort that this country has seen far too few of recently—there should be some solace, I suppose, in having a theory advanced that suggests that the Constitution, as formulated, really meant something worthwhile. If Schaaf's work were to lead to renewed study of the origins of the Constitution, his position, however deficient, would have some value.

But the Schaaf theory does not lead to renewed study. Instead, it rejects solid research in favor of fevered imagination. No one benefits from such make-believe, and the scholarly enterprise in American Indian legal history may be irreparably damaged by it.