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## Review

### **Constituent Moments: Enacting the People in Postrevolutionary America**

Jason Frank

Duke University Press, Durham, NC and London, 2010, 346pp.,

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### **Hybrid Constitutions: Challenging Legacies of Law, Privilege and Culture in Colonial America**

Vicki Hsueh

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Jason Frank's *Constituent Moments* and Vicki Hsueh's *Hybrid Constitutions* are dynamic, thoughtful works of democratic theory, as well as remarkably timely. When the projects that became these texts were first proposed, 'Arab spring' was an aspirational phrase in op-eds, but in the last year, the question of how democratic unrest becomes the creation of a new order has become a topic of great importance. What is happening? Revolution? In Hannah Arendt's formulation, 'revolution' requires not just transformative violence but the creation of something new, the founding of a space for freedom to be exercised. How does this happen? Via a fluid project of becoming, and Frank and Hsueh, in two very different sorts of projects, help us explore how contingent, rich and unstable the idea of 'founding' truly is.

The zone of the Arab spring is not the only area showing a renewed fascination with foundings. From Tea Party activists to Supreme Court justices, Americans are invoking 'their'; revolutionaries incessantly (although their intent seems far from revolutionary). Samuel Adams, Patrick Henry, Thomas Jefferson all have particular modern constituencies; even Puritans and pilgrims are invoked to authorize electoral reform, or condemn particular narratives of 'radical' change. Jason Frank, too, endorses an active turn toward an American founding tradition – but in a fashion that operates against the logic of this popular form of exhortation. 'The preoccupation with "founding" should perhaps be supplemented by the ongoing and enacted pursuit of a "finding", a search after our answerability to the claims made by others upon us and by us upon them', he argues, and offers as an example the immigration reform marches of 2006, in which 'many of the

participants ... were formally non-citizens who nonetheless enacted a claim to speak on behalf of the (authorized and enfranchised) people; they, 'the undocumented' and their supporters enacted a political power that they did not yet officially have ...' (Frank, 2010, p. 254). It is the history of this method of 'finding', as well as its potential as an exemplar for the future, that form the heart of Frank's book.

How do we arrive at the 'undocumented' finding of 2006? As Arendt has done, Frank begins with a central riddle of democratic authorization: 'the potency of *vox populi* in American history derives in part from its persistent latency or virtuality, from the paradoxical political reality that the people are forever a people that is not ... yet' (Frank, 2010, p. 5). But, while Arendt (like many in the tradition of American political thought) focuses on the original founding self-authorization of the American republic, Frank looks at a series of such revolutionary foundings among the excluded, 'the unauthorized – imposters, radicals, self-created entities' (Frank, 2010, p. 8), who seek to transform themselves into the empowered American 'we' of revolutionary action.

Representation is at the heart of this process of American self-creation. This situation proved 'politically productive in the sense that it elicited transformative forms of political contention over who is authorized to speak on the people's behalf' and indeed, over how to define that people in the first place (Frank, 2010, p. 44). The colonial era had a number of ways in which people could claim to incarnate the *vox populi*, including parades, public spectacles, riots and the larger phenomenon known as 'the people out of doors'. Instead of one founding moment, we see a struggle over 'the right to have rights', what Frank refers to as 'the right to be a political being, to make claims not through appeal to an existing juridical authority but through the popular enactment and protection of rights themselves' (Frank, 2010, p. 147).

Representation has something of a magic trick to it under any circumstances; the political representative somehow makes manifest larger populations via actions taken within official institutions, as authors of law, or within bureaucratic regulation or debate. The issue in the revolutionary era with which Frank begins his story is doubly magical. Not only must the larger people be made manifest through the intervention of specific individuals, it must first be conjured into existence, sketched and defined over huge expanses of territory. In some cases, this was done via violence and exclusion: race, region, religion and politics all provided ways to delimit the American body politic via its defining others. Traditional founding characters are present in this account as anxious figures, trying to understand and control the popular powers they have helped to unleash. Frank finds his founding authorities instead within the tradition of democratic 'taking', a practice of findings that he traces to our own radical moment(s).

This democratic practice of findings is not limited to any particular era or trajectory, and so Frank explores it from a variety of different moments and figures: the people-out-of-doors and Pope's Day rioters of postrevolutionary America; the anxious medical metaphors of Benjamin Rush; the Democratic-Republican Societies of the postrevolutionary and Federalist eras; the literary romances of Charles Brockdon Brown; the poetry of Walt Whitman. The argument achieves its climax in perhaps the most surprising act of antebellum democratic takings: Frederick Douglass' Fourth of July oration.

In the Fourth of July address, and in many of Douglass's other speeches and texts from this volatile period leading up to the Civil War, the centrally reiterated, radical and unavoidable claim is that Douglass better represents the destiny of the people he at once addresses and is excluded from than do their official representatives in Congress, their spokesmen in political parties or the constitutional authority of the Supreme Court. It is in this sense that Douglass's address exemplifies a constituent moment (Frank, 2010, p. 220). And it is precisely these 'constituent moments' – the democratic findings, these self-authorizing and self-identifying acts of political creation – that Frank hopes to find and emphasize at our own historical moment.

America's fetishized founding, the Revolution, Frank notes, 'is the animating center' of the American constituting process, 'but by its very nature this point of historical origin can neither anchor nor contain the constituent people, nor can the laws or procedures of democratic decision making that they establish' (Frank, 2010, p. 238). In his conclusion, Frank provides us with two contemporary exemplary constituent moments. The first, in 1989, took place at the Fifth International AIDS Conference in Montreal, where 'members of ACT UP, AIDS Action Now, and Reaction SIDA invaded the Palais de Congres, seized the podium', and, claiming the inaugurating office of the 'authorized' representatives of those struggling with HIV/AIDS, "officially" opened the conference "on behalf of persons living with AIDS in Canada and around the world" (Frank, 2010, p. 252). Frank's second example is from March and April 2006, when millions of protestors took to the streets of American cities to protest a wave of xenophobic legislation that targeted undocumented immigrants. Following in the footsteps of Douglass's example, protestors lay claim to representative status: "'We Are America'", some of the signs provocatively read'. In the spirit of a democratic 'finding', of, as Frank often frames it, 'a people that is not ... yet', 'the undocumented and their supporters enacted a political power that they did not yet officially have' (Frank, 2010, pp. 252–253). Frank, in other words, finds political power and hope in one of the surprising discoveries of the Democratic-Republican societies: that the 'ultimate ambiguity of the people, often noted in the debates around the societies, [is] an engine of democratic contestability; competing claims over the determination of that subject generate an oppositional

democratic practice', and can and should continue to do so now (Frank, 2010, pp. 141–142).

Vicki Hseuh's *Hybrid Constitutions* has a more historical focus, but she shows how contingent and rife with difference and potential the act of founding has been in North America since the seventeenth century. American beginnings, in Hseuh's account, combine race, political orders and even temporalities, in ways that can be violent and hierarchical, but are far more complex than we generally assume. 'What might it mean', she asks, 'to reconceptualize the colonial and pre-Revolutionary period as an era marked less by a triumphal march to modernity than by a persistent hybridity that emphasized regional particularity and variously mixed the ancient and modern?' (Hseuh, 2010, p. 123). Her answers suggest that this complexity presents radical opportunities for new orders of authorization and potential for democratic action.

Turning to the crafting of constitutions in Maryland, Pennsylvania and the Carolinas, Hseuh finds a pattern of multiple, overlaying difference that grows out of rich English and Native American traditions and that provides for an ongoing pattern of what Frank might refer to as democratic takings. Hseuh refers to this pattern as hybridity, and she finds several forms of it in play. 'The first form of hybridity is *political/legal* in nature'. The colonies were frequently formed as private enterprises, intended to enrich owners and the Empire via the exploitation of indigenous populations and settlers. Despite the institutional hierarchies involved, however, 'these constitutions were not stable; they were frequently adapted and altered, based on responses from a variety of actors on the ground, who included not just proprietors, administrators and governors, but also farmers, traders, indigenes and other European settlers' (Hseuh, 2010, pp. 3–4, 9).

The second form of hybridity Hseuh studies is *temporal*, a result of the patchwork of legal forms that composed English constitutional law. 'Composed of a variety of written and unwritten instruments, these proprietary constitutions were quite unlike our more modern conceptions of constitutions, in which founding orders were enshrined in a single document and inaugurated at a single moment'. Lastly, she turns to *cultural* hybridity: American 'foundings called for the mediation of differences in power and influence within local indigenous American tribes and among English colonists of Quaker, Catholic and Protestant backgrounds', and in which the colonial proprietors were actively encouraged to integrate as many political and cultural practices as would increase their chances of success. In short, instead of finding a single moment, which constituted all that came after, Hseuh finds a process of virtuous political action and adaptability, 'a call for a form of agonism in which struggle is persistent, and energy and attentiveness are needed to remain responsive' (Hseuh, 2010, p. 4).

Hseuh's close, exciting historical and textual analysis illuminates the basic circumstances and assumptions of the British colonial enterprise in North America, depicting an Empire that is violent and exploitative but also surprisingly flexible. Her primary characters study and make common cause with populations they will eventually battle and/or destroy, and the sixteenth century exhibits, not a transplanted Leviathan, but an almost Foucauldian web of power relationships. Interestingly, she locates this development in British tradition: as English law, and English concepts of rights, formed a patchwork of agreements with different sovereigns at different times and the populations of different areas in the British Isles, British actors in the 'New World' found it easy to create hybrid assemblages of overlapping politics and membership. As Hseuh puts it, this 'assemblage of law represented not the superiority of colonial power, but rather its uneven and contested terms' (pp. 52–53). The examinations of Maryland and Pennsylvania are both fascinating, but her discussion of the Carolinas also leads to an excellent reading of Locke's *Fundamental Constitutions*, and I will focus primarily on that chapter.

Scholars have long noted the coexistence in the *Fundamental Constitutions for the Carolinas* of an almost feudal order of submission to distant English lords proprietor and more modern concepts of representation. Nonetheless, it is often read within the context of the liberal tradition. After all, the *Constitutions* endorsed religious toleration, a secret ballot and a relatively low property qualification for political membership. Hseuh is careful, however, not to impose intellectual history on the circumstances of this particular founding. In Locke, Hseuh finds

a ripe example for reconsidering the fluidity and fecundity of political languages and forms in circulation in the period, where English colonialism and constitutionalism were not only polyvocal but also highly unsettled – and even contradictory – in their mix of feudal, humanist, republican, and authoritarian elements. Likewise, Locke's role as scribe helps to illustrate the tensions between *claims* of colonial authority and territorial possession and *practices* of founding that were more tentative, adaptive, and negotiated on the ground. (Hseuh, 2010, pp. 81–82)

In other words, Hseuh argues – very persuasively – for a complex, hybrid Locke in order to show us a complex, hybrid American constitutionalism. The result is an alternate exemplar for thinking *and enacting* democratic power in the Americas.

All this talk of political potential and democratic takings should not suggest an open-ended world of popular power. Colonial governors, lords proprietor

and imperial bureaucrats found an openness to dealing with indigenous elites potentially fruitful, but they were also laying the foundations for what would become a genocidal enterprise; and slavery had already developed the racialized form that would carry it past the Emancipation Proclamation. African slaves were not ‘tolerated’ by the polity as religious dissenters or Native Americans were, and there are foundations of *Dred Scott* in the *Constitutions’* Article 101: ‘Every freeman of Carolina shall have absolute power and authority over his negro slaves, of what opinion of religion soever’. Hseuh’s goal is not to strip away liberal hegemony to uncover a forgotten pluralist golden age, but rather to demonstrate the powerful political cross-currents, the presence of an *agon* in the ruins of American pre-history. Her careful historical analysis, rather than binding us to an ancient *fait accompli*, is a dynamic appeal to action and rethinking.

Appeals to the American founding have been ubiquitous (even obnoxiously so) in recent months. American politicians, left and right, sound at times like Biblical literalists, at others like Plutarch, pointing to an official story of representation’s heroic founding. Neither Frank nor Hseuh have come here merely to praise American foundings, but they have also not come to engage in what Nietzsche called ‘critical history’. They are helping us to see a different history, one that is complex, difficult but rich with potential, and their arguments are not nostalgic. Rather, and even at their most historically scrupulous, they are exhortations to rethink the context for our own actions, and the power of the narratives we inherit and create.

Ronald J. Schmidt  
University of Southern Maine, Portland, USA