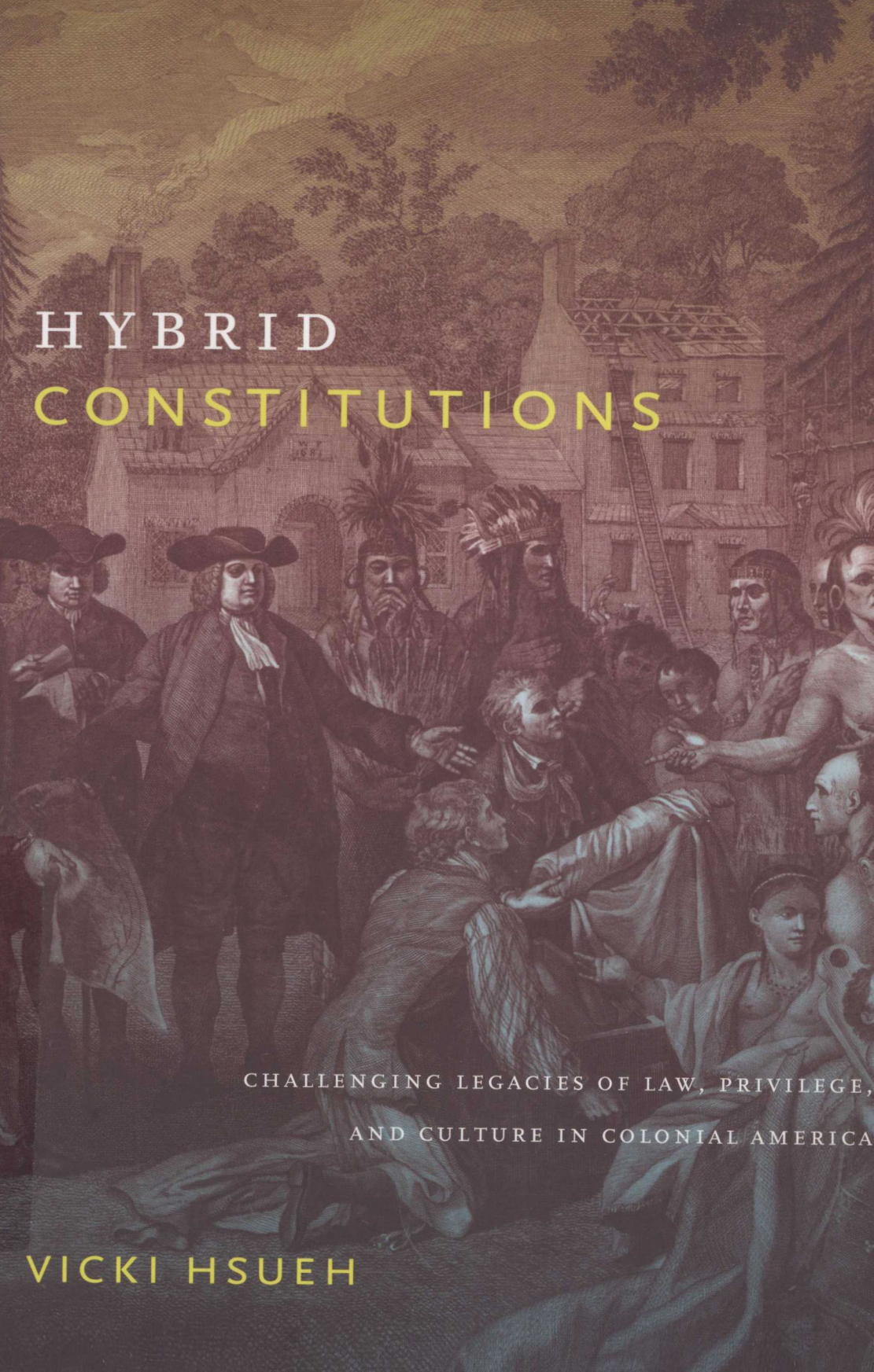

HYBRID CONSTITUTIONS

CHALLENGING LEGACIES OF LAW, PRIVILEGE, AND CULTURE IN COLONIAL AMERICA

VICKI HSUEH

Hybrid CONSTITUTIONS

Challenging Legacies of Law, Privilege, and Culture in Colonial America

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HYBRID CONSTITUTIONALISMS

Unsettling the Empire of Uniformity

1

The relationship[s] between desire, power, and interest are more complex than we ordinarily think, and it is not necessarily those who exercise power who have an interest in its execution; nor is it always possible for those with vested interests to exercise power.

—MICHEL FOUCAULT, *LANGUAGE, COUNTER-MEMORY, PRACTICE*

There is scarce any form of government known, that does not prevail in some of our plantations.

—EDMUND BURKE AND WILSON BURKE, *AN ACCOUNT OF THE EUROPEAN SETTLEMENTS IN AMERICA*

Since the advent of English exploration in the Americas in the sixteenth century, the English tried in numerous ways to legitimize their ventures, drawing widely on the various period discourses of conquest, discovery, and improvement. But when English proprietors began to settle colonies in the Americas during the early seventeenth century, their constitutions represented a new and influential development in English colonization and constitutionalism. "From Canada to the Caribbean," as the legal historian Mary Sarah Bilder observes, "proprietors settled and governed a far larger area than the corporation colonies."[1] And in contrast to prior English settlements, proprietors were among the first to be granted charters that conveyed a quasi-sovereign status to their colonizing ventures. As the legal theorist Christopher Tomlins explains, the most influential form of English

colonization in the pre-Revolutionary period was proprietary, as "English colonizing became an exercise in the delegation of authority to landed proprietors."[2] Charters to proprietary settlement, in their most autonomous forms, included the feudal privileges given to the palatine counties of Chester and Durham after the Norman Conquest—the powers to establish self-rule, grant manors, build churches, tax, judge, punish, and wage war.[3] Other charters, more restricted in their privileges, conferred manorial rights to proprietors such as William Penn; he received the rights of manors of Windsor, political jurisdiction over free tenants, and the power to sell land.

Most distinctive of these many privileges, proprietors were able to draw on and transform the wide array of legal and political instruments in use in England. As Bilder explains, "What is striking about the early colonial period, however, is the centrality of the practice (and hence the problem) of the delegation of authority and the recurrence of developments that created dual authorities and then embraced their inherent tensions. To put it simply, for the first century and a half, English governance in America was *imperium in imperio*."[4] Yet for the proprietary colonies, as I will argue in this book, this was no simple appropriation. English constitutionalism in the early modern period, as Walter Bagehot famously observed, was "full of every species of incidental defect." Certainly Bagehot valued it as "a simple efficient part which, on occasion, and when wanted, *can* work more simply and easily, and better, than any instrument of government that has yet been tried," but he also noted its intricacy: "It contains likewise historical, complex, august, theatrical parts, which it has inherited from a long past—which *take* the multitude—which guide by an insensible but an omnipotent influence the associations of its subjects."[5] For English constitutionalism, as the historian David Konig further clarifies, was highly variegated, "a patchwork of regional and even subregional legal diversity. Laws of descent varied by and within region, for example, deriving from custom as well as from common law. Although feudal tenures were the norm for the gentry, many exceptions existed."[6] Also complicating the situation, English boroughs were differently shaped by charters obtained "at different times and under different circumstances from different monarchs, giving to each of them a different range of special privileges and varying degrees of autonomy that produced different local rules."[7] As a re-

sult, there were still many backwaters in England where mainstream legal developments had not made their imprint.

What did all this mean for English proprietary colonies in the seventeenth century? As I will argue in this book, proprietary constitutionalism developed out of a mixed condition of privilege and scarcity, freedom and dependence. The grant to proprietary settlement was not an unequivocal sign of the Crown's favor but, instead, a self-conscious recognition of both the ambitions and hesitations of colonial power. While charters were given typically to men who had served the Crown in the Privy Council or in foreign service, they could also function as an instrument of displacement, transferring potentially irritating or troublesome individuals or groups to territories overseas. In addition, although proprietors were in principle beholden to the Crown, they were often motivated by independent ambitions; indeed, these often diverged not only from the interests of other English colonies but also from those of settlers *within* the prospective colony. Last, proprietary settlements often received limited economic and political support from the Crown, which was wary of excess cost and responsibility; accordingly, proprietary interest in profit and expansion required careful evaluation of debt, risk, and defense.

These myriad pressures, I argue, were reflected in the accretion of legal and political instruments—proclamations, orders, instructions, statutes, and frames, among others—that comprised proprietary constitutionalism. For while proprietors had access to the range of English political and legal instruments according to the terms of their charters, in practice the constitutions created often diverged greatly from the example in England because, to name only some of the difficulties, the settlements had too few settlers, insufficient courts and assemblies, and inadequate enforcement. What proprietors did was to variously cobble together constitutions out of the available resources listed by the charter to meet the needs of settlement. These constitutions were not single, inclusive documents struck off at one particular definitive moment—a form more commonly associated with the modern American constitution. Rather, they were what we might call *hybrid* assemblages of law that drew together governance from an already mixed source. Moreover, as we will see, 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.

Hybrid Constitutions traces the historical development and theoretical implications of proprietary constitutionalism by examining the colonial foundings of Maryland, Carolina, and Pennsylvania. In many ways, the aims of this study are quite formal. I am interested in the specific forms of law and political power developed by proprietors, governors, and settlers in the early modern period, and I am particularly drawn to the elements of hybridity that emerged in the colonies. How, for instance, were charter privileges employed in the task of constitution making? In what ways did proprietary colonies draw on and rearrange English constitutional forms? What roles did constitutions, treaties, executive instructions, proclamations, and other governmental instruments play? To what extent were these legal and political processes embraced, adapted, and challenged by colonists and other settlers in the territories?

To address these questions in detail, this book pays special attention not simply to constitutionalism as such, but also to the processes of *founding*—the generation and development of colony and constitution as an entwined process. With this focus, the book attends to the original mixed roots of proprietary constitutionalism in English law and then traces the displacement, recombination, and adaptation of the law as it was formulated in the colonies. Proprietary constitutionalism, as we will see, did not demonstrate the stable transfer of law and politics from a stable domestic center to unsettled colonial peripheries. Rather, what emerged were forms of governance assembled, often in hodgepodge fashion, out of an array of political and legal instruments. These constitutions were particular, regional, adaptive, and irregular. They were marked by pomposity and paternalism, and yet they were also characterized by apprehension and wariness of unknown conditions.

My interest also goes beyond merely describing the formal features of proprietary constitutionalism, for what was particularly distinctive about the period were the myriad *effects* of hybridity on colonial and political practice. In the proprietary colonies, complex mixtures of civic humanist, republican, and feudal forms were aimed at servicing a variety of colonial ambitions, such as crafting conceptions of colonial polity that were meant to attract settlers and support, and to develop independent communities that were distinct but nonetheless still nominally loyal to Crown

privileges. At the same time, these constitutions offered conceptions of colonial polity that developed and shifted over time because they were often modified by temporary laws, executive orders, and various revisions. They were also more contradictory in their various aspirations and effects. For example, in Maryland the confident claims of the charter were not realized immediately; instead, these chartered claims operated *rhetorically* in multiple ways. The Maryland charter promoted the prospects of settlement to investors and established nominal ideas of the colony as a polity to recruit prospective settlers. This performative quality recalled the conceptions of law and polis proffered in *The Human Condition*, where as Hannah Arendt notes: "The law of the city-state was neither the content of political action (the idea that political activity is primarily legislating, though Roman in origin, is essentially modern and found its greatest expression in Kant's political philosophy) nor was it a catalogue of prohibitions, resting, as all modern laws still do, upon the Thou Shalt Nots of the Decalogue. It was quite literally a wall, without which there might have been an agglomeration of houses, a town (*asty*), but not a city, a political community." The notion that "inclosure was political" reflected an elemental understanding of the law as an instrument of prudence.[8] Still, the charter's early portrayals of colonization were quickly adjusted and transformed by the proprietor's executive *Instructions* and the Maryland Assembly's numerous proclamations, acts, and orders. In a complication to Arendt's conception, in the proprietary settlements these constitutional "walls" were built over and over again with a variety of different texts—charters, instructions, proclamations, ordinances, constitutions, and treaties. What emerges not just in Maryland's constitution, but also in the other proprietary constitutions examined in this study, are forms of hybridity that include not merely formal mixtures of law, but also mixed qualities of temporality, rhetoric, and culture, and it is these qualities that help us in turn to conceptualize colonial power, polity, and identity in new and distinctive ways.

What this book explores, in consequence, are constitutions spurred by colonial ambitions that develop in the midst of rapid change, limited resources, and contrary and inconsistent circumstances. In this way, these proprietary constitutions represent the ("on the ground") working out of political theory in response to the ambitions and contingencies of colonization. Such work is certainly relevant for understanding the attributes of English colonial power in the early modern period. But cast more broadly,

such work also helps us to reconsider colonialism and constitutionalism as *grounded practices* that rely as much on legal and political precedent as on more tacit and circumspect tactics of discretion, adaptation, and negotiation.

These constitutions, with their dual sovereignties, mixed array of political and legal instruments, and unruly populations, demonstrate less a purposeful march to modernity and uniformity than something much more ambiguous and unwieldy. In particular, the example of the proprietary colonies offers a way to respond critically to some of the most compelling recent works in political theory, where English colonial expansion in the Americas during the seventeenth century has become a weighty issue.[9] Most notably, critics such as Bhikhu Parekh, Iris Marion Young, and James Tully link the elements of homogeneity, exclusion, and coercion in modern constitutional forms to the entangled development of English colonialism and constitutionalism in the early modern period. Parekh, for example, looks to the colonial record to argue the imperialist aspects of a host of canonical texts, such as John Locke's *Two Treatises of Government*.[10] Through a different approach, Young focuses on the treaties between colonists and indigenes in the colonial and Revolutionary periods and connects the restrictive elements of liberalism to the long history of "conflict between Indians and colonists."[11]

Among the most comprehensive and widely cited of recent criticism is Tully's *Strange Multiplicity: Constitutionalism in an Age of Diversity*, based on his Seeley lectures delivered at Cambridge in 1994.[12] In a historical and critical survey of four hundred years of European and non-European constitutionalism, Tully discusses the current prevailing language of "modern constitutionalism."[13] This discourse, he contends, developed many of its most assimilative and exclusionary features toward cultural diversity through its designs to justify English settlement of the Americas in the seventeenth century. More specifically, *Strange Multiplicity* depicts the colonial emergence of modern constitutionalism in terms of an "empire of uniformity," stressing its imperial features and its tendencies toward cultural homogeneity.[14] "Modern constitutionalism," in Tully's survey, encompasses seven features. Most notable among them, it holds "concepts of popular sovereignty which eliminate cultural diversity as a constitutive aspect of politics"; characterizes itself in terms of "a society of equal individuals who exist at a 'modern' level of historical development"; is "defined

in contrast to an ancient or historically earlier constitution"; and "rests on the 'stages' or 'progressive' view of human history, which the classic theorists produced in order to map, rank and thereby comprehend the great cultural diversity encountered by Europeans in the imperial age."[15] This "competing tradition of rights, virtues and manners," Tully argues, was initially established in contrast to the "customs of non-European societies at 'earlier' and 'lower' stages of historical development" and in dispossession of the territory and sovereignty of "Aboriginal nations."[16] In its emergence, according to Tully, modern constitutionalism did not simply reject indigenous and non-European culture outright. More subtly, it viewed culture as either bounded or able to be transcended. European institutions, manners, and traditions are upheld as superior forms of rationality and advancement, and peoples of traditional or non-European societies are cast as underdeveloped, primitive, and pre-modern.[17]

For Tully and others, the language of modern constitutionalism—despite its vexed colonial emergence—has come to be not simply familiar and conventional but, indeed, the standard of impartial treatment for cultural diversity. "The invasion of America, usurpation of Aboriginal nations, theft of the continent, imposition of European economic and political systems, and the steadfast resistance of the Aboriginal peoples," Tully laments, have become "replaced with the captivating picture of the inevitable and benign progress of modern constitutionalism."[18] Especially in the face of ongoing dilemmas centered on cultural identity and recognition, we need, in Tully and others' estimation, to reevaluate the triumphal sentiments that cast constitutionalist development as a march of progress.

Modern critics have given much needed attention to colonialism's ambitions and coercions. The normative thrust of their critiques enables more global considerations of the dilemmas of conquest, especially as they pertain to broader conceptualizations of legitimacy, rights, and justice. So, too, have they been valuable in focusing on the numerous ways in which indigenous rights and cultures have been excluded and delegitimized in the historical development of constitutionalism. Ironically, though, while much contemporary theory seeks to unearth the instrumental and coercive forces helping to form modern constitutionalism, its reliance on macro-historical narratives of colonialism and more formal accounts of constitutionalism often thwarts this ambition. First, contemporary theory's emphasis on describing long-term effects often encourages interpretations

that emphasize the stadial, hierarchical features of Enlightenment imperialism. Second, the more formal treatment of constitutionalism tends to deemphasize the multiple, particular ways in which early modern constitutionalism was not only conceptualized but *practiced*. These accounts thus at times seem to solidify and lengthen the conceptual and historical power of modern constitutionalism, making it difficult to apprehend the vicissitudes of English colonial power.

To be sure, Tully and others tackle an extremely wide purview—one that ranges from the sixteenth century to the twenty-first century—and with such ambitious accounts it is neither unreasonable nor unsurprising that more minor details drop from view. At the same time, when the field of examination is cast so broadly, modern criticism may be unable to attend to the details and nuances regarding the creation and implementation of colonial constitutional forms. Perhaps most consequential in this regard, contemporary theory, in its strong focus on tracking the rise of modern constitutionalism, often skirts discussion of the many contingencies, contestations, and failures of colonialism. As I suggest in this book, the prevailing approach, while productive in a number of ways, runs the risk of reinscribing, even if negatively and inadvertently, the triumphalist narrative of the modern constitutional form.

This study adopts an approach different from much of contemporary political thought—an examination that is both smaller in scale and more explicitly contextual in approach. Instead of tackling a wide swath of constitutional development over the centuries, *Hybrid Constitutions* focuses on a specific, highly relevant period of colonial and constitutional development: the founding of the seventeenth-century English proprietary colonies. Yet while *Hybrid Constitutions* seeks to actively engage contemporary theory concerned with the legacy of colonialism, this book is deliberately not a response in kind. The bulk of my analysis is local rather than global, and it is limited in its historical scope. It examines the founding periods of three Anglo-American proprietary colonies in the seventeenth century and emphasizes practice (on the ground) rather than the long-term effects of colonial interactions from the early modern period to the present. With its focus on proprietary founding, it seeks in part to address an element of English colonialism largely unaddressed by political theory and one that was a formative element of English colonialism and constitutionalism. In that way, the book's more local and genealogical focus seeks to

extend, supplement, and at times amend contemporary assessments. Distinctively, selfish ambition and grandiose ideals were deeply co-mingled in the proprietary colonies, and the process of creating polity involved the constant remaking of a tradition that was itself irregular and patchwork at its origins. Equally, in these examples of founding, we can see an aspect of appropriation that can too easily drop from view—namely, the persistent mixture of cruelty and accommodation that help to forward colonial ambitions.

The Terms of Hybridity

Three different, at times overlapping, forms of hybridity take center stage in this study. The first form of hybridity is *political/legal* in nature. Central to this hybridity was the proprietary charter; although strongly shaped by the feudal imaginary of the palatinate of Durham, it was also intrinsically open-ended with respect to the specific forms of law employed in the colony. The Crown granted proprietors an express power to make and publish the laws with the "assent advice and approbation of the freemen," but "provided nevertheless, that the same laws be consonant to reason, and be not repugnant or contrary, but (as near as conveniently may be) agreeable to the laws, customes, statutes, and rights of this our kingdom of England."[19] Indeed, while the proprietor's license to create such laws was a unique privilege, it did not entail or require the production of a systematic internal consistency. Even within its own terms, the category of "laws, customes, statutes, and rights" would have been a mixed, irregular assemblage in England. Customary law recalled decisions made by judges in local jurisdictions, while statute laws were written code designated in contradistinction to the unwritten common law. Rights, in addition, could reference a host of protections, not all of which were commensurate with each other. Especially pertinent here, as J. G. A. Pocock and others illustrate, is the fact that the revivals of both the ancient constitutionalist forms of the common law and republicanism in England were themselves creations of the seventeenth century.[20] Compounding the ambiguity, the charters made no specific provision for which form of law should take precedence.[21] The primary restriction was of a negative tone—namely, that the law must not be "repugnant."[22]

This assemblage reflected the various traditions of law and politics in England. It also reflected, as Daniel Hulsebosch argues, the ways in which