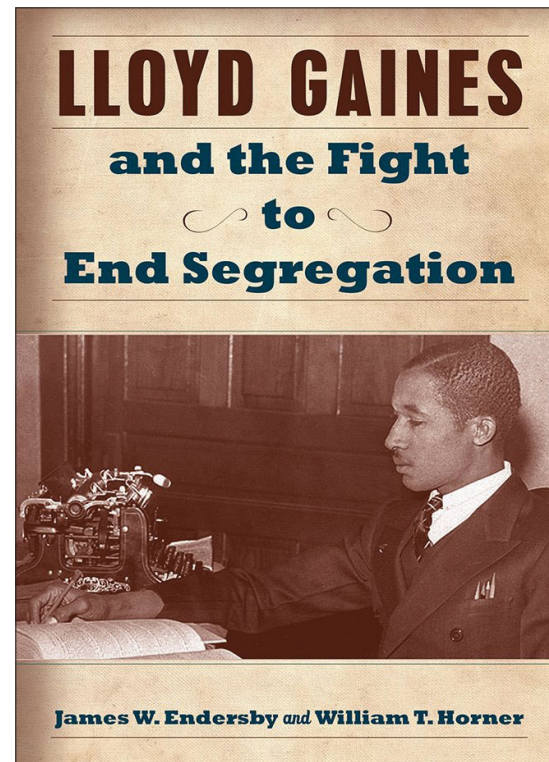


STUDIES IN CONSTITUTIONAL DEMOCRACY

New from the University of Missouri Press



LLOYD GAINES AND THE FIGHT TO END SEGREGATION

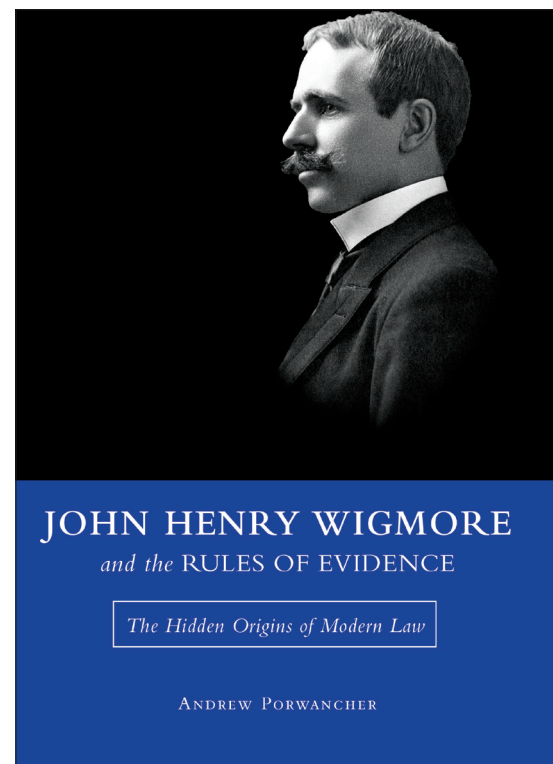
After being denied admittance to the University of Missouri Law School in 1936 solely on the grounds that the state constitution called for “separate education of the races,” Lloyd Gaines, along with the NAACP, successfully challenged the university’s admissions policies in the 1938 United States Supreme Court case *Missouri ex rel. Gaines v. Canada*.

As this book examines, the Gaines case, though often overlooked, marked a vital first step in the quest to end segregated public education in the United States, and it paved the way for a long series of Supreme Court rulings on race, education, and equal opportunity leading up to the landmark 1954 decision in *Brown v. Board of Education*.

In March 1939, just months after his Supreme Court victory, Lloyd Gaines disappeared at the age of 28, with his promise of attending law school in Missouri unfulfilled. Gaines, who the *New York Times* said, “might be in the pantheon of civil rights history with the Rev. Dr. Martin Luther King, Jr., Thurgood Marshall, and other giants,” was never seen or heard from again.

JOHN HENRY WIGMORE AND THE RULES OF EVIDENCE: THE HIDDEN ORIGINS OF MODERN LAW

At the dawn of the twentieth century, the United States was reeling from the effects of rapid urbanization and industrialization. Time-honored verities proved obsolete, and intellectuals in all fields sought ways to make sense of an increasingly unfamiliar reality. The legal system in particular began to buckle under the weight of its anachronism. In the midst of this crisis, John Henry Wigmore, dean of the Northwestern University School of Law, single-handedly modernized the jury trial with his 1904-1905 *Treatise* on evidence, an encyclopedic work that dominated the conduct of trials. In doing so, he inspired generations of progressive jurists—among them Oliver Wendell Holmes, Jr., Benjamin Cardozo, and Felix Frankfurter—to reshape American law to meet the demands of a new era. Yet Wigmore’s role as a prophet of modernity has slipped into obscurity. This book provides a radical reappraisal of his place in the birth of modern legal thought.



KINDER INSTITUTE
on CONSTITUTIONAL DEMOCRACY

NEWSLETTER | SPRING 2016

The COLUMNS



FACULTY SEARCHES

A key component of the October 2015 gift agreement was that it provided the resources necessary to open up Institute-specific faculty lines for four professors, two each in History and Political Science. These faculty lines will help the Institute take great strides toward achieving excellence by bringing in elite teachers and scholars of American political thought and history who will add new dimensions to the curriculum for our undergraduate minor; attract high-caliber graduate students in their respective fields; and introduce innovative new perspectives to the intellectual community that the Institute has already begun building. During March 2016, we hosted the following three scholars of American political thought and development on campus as part of our search for an Endowed Professor of Constitutional

Continued on page 3



CONSTRUCTING THE INSTITUTE

As is mirrored in the organization of this newsletter, activities at the Kinder Institute broke down along two lines during the first months of the Spring 2016 semester. On one hand, a number of our recruitment campaigns reached full speed, with candidates for our Endowed Professorship in Political Science and our Endowed Chair in History visiting campus during February and applications for our next class of graduate and postdoctoral fellows pouring in during March. On the other hand, we continued on as usual with a full schedule of events for our primary constituents, actively participating in Black History Month programming at the university, bringing scholars from around the region to campus to discuss their current research with faculty and graduate students, and engaging the community in discussion of key ideas, figures, and questions from the history of constitutional democracy in the United States. From the University of Missouri Black History Month Committee to the Reynolds Journalism Institute to Newsy, a multisource video news service based out of Columbia, we also spent time during the spring semester seeking out new partnerships on and around the MU campus, a trend that we fully expect to carry over into and continue to bear fruit during the coming months and years. What follows is a recap of activities during January, February, and March, which is accompanied by Volume 1 of our undergraduate-run *Journal on Constitutional Democracy* and a copy of the first title in our book series with University of Missouri press, *Lloyd Gaines and the Fight to End Segregation*, co-authored by MU Professors **Bill Horner** and **James Endersby**. For more information about recent happenings and upcoming events at the Institute, please visit our website, democracy.missouri.edu.

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FACULTY SEARCH *continued from page 1*

Democracy. Below are brief recaps of the job talks that each candidate delivered during his time in Columbia.

Lessons on Constitutional Imperfection



On February 8, 2016, University of Houston Associate Professor of Political Science **Jeremy Bailey** gave a talk focused on re-examining James Madison’s legacy within the context of what we traditionally think of as Madisonian constitutionalism. In the course of going through a number of Madison’s writings, this task of re-examination quickly took on a quality of liberation, as Prof. Bailey demonstrated how truly close readings of these writings raise important questions regarding whether certain qualities that we consider indivisible from Madisonian constitutionalism are, in fact, so. For example, in scrutinizing “Federalist 49” and Madison’s letters to Virginia judge and congressman John G. Jackson, Prof. Bailey showed how Madison was not bound by or to constitutional veneration but actually saw such reverence as an impediment to realizing the need to reform and weed imperfection from the nation’s founding document. Similarly, he argued that Madison’s commentaries on the writings of such figures as Burke and Hartley reveal his wavering faith in representatives’ faction-quelling ability to “refine and enlarge” the public view, as famously outlined in “Federalist 10.” He noted, moreover, how Madison often took a Jeffersonian middle path on the topic of deliberation by at least entertaining the notion that there was value in representatives looking to the people for guidance. Prof. Bailey concluded by surveying recent Madison scholarship to highlight the argument that he saw his written account of the Constitutional Convention not as a document that would definitively settle debates about the Founders’ intentions in 1787 but, instead, as one that might provide data on how principles and interests interacted during the drafting of the Constitution and, in this, that might expose the sometimes messy and imperfect compromises that emerged.

Jeremy D. Bailey received his Ph.D. in Political Science from Boston College and currently holds the Ross M. Lence Distinguished Teaching Chair at University of Houston, where he has dual appointments in the Department of Political Science and the Honors College. He is the author or co-author of Thomas Jefferson and Executive Power (Cambridge University Press, 2007) and The Contested Removal Power: 1789-2010 (University Press of Kansas, 2010), and his newest book, James Madison and Constitutional Imperfection, is forthcoming from Cambridge.

Rights Talk: Then & Now



For the second Spring 2016 job talk, Northern Illinois University Assistant Professor of Political Science **Adam Seagrave** addressed the history of dialogue about natural rights by tracing its evolution through three stages, beginning in 12th-century Europe and concluding in the modern day United States. After highlighting a critical innovation in discourse about rights that occurred in the 17th century—the rise of the belief that duties are derived from rights and, in turn, that rights are what we naturally possess and are universally entitled to simply by virtue of being human—Prof. Seagrave shifted his focus to examining the degree to which Nature was central to this second stage of rights talk. With regard to ideas concerning how actually to secure universal rights, he noted that the prevailing belief of the time was that human nature alone wasn’t enough to curb the impulse to expand individual rights beyond moral duties. Instead, reason would have to be cultivated and refined in order to prevent the indulgence of individual interest in a manner that would unjustly magnify one’s own rights at the expense of another’s. For many 17th-century thinkers, he argued, such a refinement of reason was dependent on individuals’ interaction with—and, moreover, on the respect and awe inspired by their interaction with—the intelligent design of the natural world. Prof. Seagrave then went on to explain how the fundamental shift in rights talk that has occurred in the 150 years following the Civil War thus to some degree can be attributed to the growing distance between the American people and the natural world. Citing the closing of the frontier and the rise of natural selection theory as drivers of this growing distance, he concluded by examining how rights are no longer treated as expressions of a common framework of and for humanity but, instead, as expressions of interests or preferences that policy is rationally designed to preserve.

S. Adam Seagrave received his Ph.D. in Political Science from University of Notre Dame and currently serves as Assistant Professor of Political Science at Northern Illinois University and managing editor of American Political Thought. His first book, The Foundations of Natural Morality: On the Compatibility of Natural Rights and the Natural Law, was published by University of Chicago Press in 2014, and his second book, Liberty and Equality: The American Conversation, was published in 2015 by University Press of Kansas. He currently is at work on two projects, a book on the history of rights in the United States and a modern re-phrasing of selected Federalist Papers, the latter of which is under contract with Hackett Publishing Co. At NIU, he teaches undergraduate and graduate courses on topics ranging from the political theory of capitalism to African American political thought.

Constitutive Stories About the Common Law in Modern American Conservatism



Drawing on research for his current book project, *Conservatives and the Constitution* (under contract with Cambridge University Press), Boston College Professor of Political Science **Ken Kersch** gave the final job talk for the Kinder Institute's Endowed Professorship search on February 15, 2016. Focusing specifically on the evolution of contemporary conservative ideology during its ascendant phase (from *Brown v. Board* through the Reagan presidency), Prof. Kersch examined the various constitutive stories about the importance of common law that both differentiate and bind modern American conservatives. In his first example, the constitutive story of subscribers to the public choice school of thought, the common law solves the problem of individuals being able to leverage their power over legislators to their own advantage, because it is derived from the work of a fundamentally “non-lobbyable institution” (the courts). Borne out of the writings of Friedrich Hayak, the second constitutive story frames legislators as inherently limited in their knowledge of social organization and thus given to hubristic action and, in turn, presents the common law as an organic solution to this problem of legislative ignorance on the grounds that its discovery and evolution were spontaneously driven by reason and concreteness. The final constitutive story, that of evangelical Christians, is one of knowing one's place in God's creation. If, as in this story, legislation is the byproduct of the idolatrous deification of the human—of humankind falsely believing that they can rule via their own will—the common law rolls back this problem, because it draws on scripture to determine what's best for society. And while each story represents a sometimes drastically different approach to establishing the importance of common law, Prof. Kersch concluded by noting how the overlapping consensus between them has proven strong enough to ally different conservative sub-groups into a stable political movement.

*Ken Kersch received his J.D. from Northwestern University and his Ph.D. in Government from Cornell University. He currently serves as Professor of Political Science at Boston College and Founding Director of the Clough Center for the Study of Constitutional Democracy, with additional appointments in BC's Department of History and Law School. He is the author or co-author of *Freedom of Speech: Rights and Liberties under the Law* (ABC-Cilo, 2003); *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge University Press, 2004); and *The Supreme Court and American Political Development* (University Press of Kansas, 2006). He is the recipient of the American Political Science Association's Edwin S. Corwin Award (2000) and J. David Greenstone Prize (2006) as well as the Supreme Court Historical Society's 2006 Hughes-Gossett Award. Prior to joining the faculty at Boston College, he was the inaugural Ann and Herbert W. Vaughan Fellow in the James Madison Program in American Ideals and Institutions, a faculty associate in the Madison Program, and an assistant professor of politics at Princeton University.*

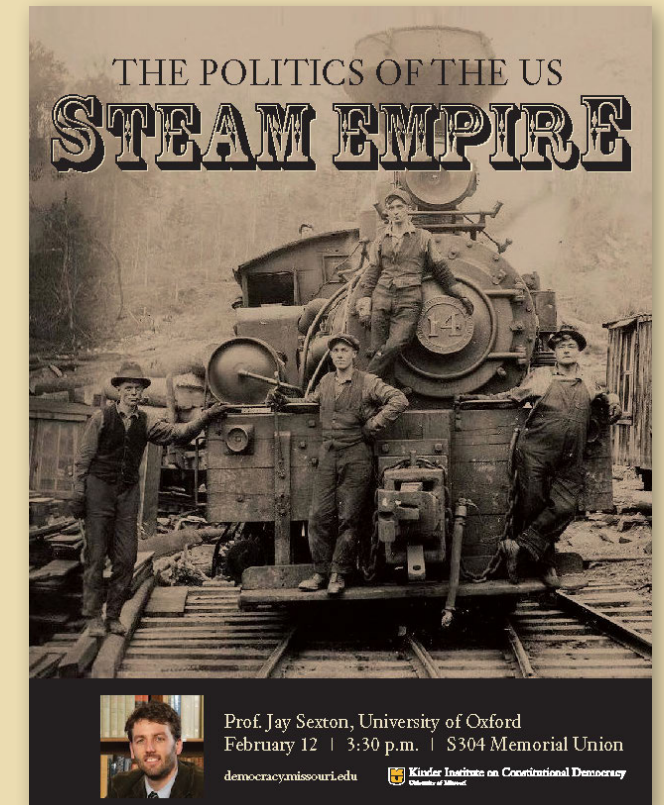
The Politics of the U.S. Steam Empire

Note: After a number of informal conversations, the Kinder Institute invited University of Oxford Professor of History Jay Sexton to Columbia during the week of February 8, 2016, to further explore the possibility of his serving as one of two Kinder Endowed Chairs of Constitutional Democracy. Below is a brief recap of the talk that he gave as part of his visit to campus.



Part history colloquium, part job talk, University of Oxford Professor of History **Jay Sexton** presented his current research on the international rise of steam transport systems on February 12, 2016, in the Alumni Lounge at MU's Memorial Union. Prof. Sexton began by framing his topic within the context of the growing, but still very nascent, field of 19th-century U.S. global history. Noting how valuable scholarly work certainly has been done on the economic and technological significance of advances in steam power and transit, he added that relatively little attention has been devoted to examining the rich history of how steam transformed the 19th-century political world by contributing to and, in many cases, accelerating nation building and imperial expansion both in the United States and abroad.

The task of unpacking the politics of the U.S. steam empire, he went on to explain, begins with understanding the degree to which the establishment of domestic steam transport systems—particularly oceanic transport systems—would have been impossible without state support. With regard to precedent, the British government set the bar for how states facilitated the rise of steam transport by offering subsidies in the form of mail contracts to private corporations for the purpose of offsetting massive overhead costs. While the U.S. Congress drew on this model in its dealings with companies such as Pacific Mail, the nation's leading oceanic steam transport corporation, the history of subsidizing steam in the United States is mired in controversy. Party conflict, Prof. Sexton noted, “left no victory safe,” and a boom/bust cycle ultimately emerged, with





overseas steam transport growing in the late-1840s and mid-1860s and fading in the late-1850s and mid-1870s. As for cause, he traced these boom periods to circumstances that neutralized opposition: Polk, an expected detractor, supported steamship subsidies as part of his larger westward expansion agenda in 1847; Southern Republicans, who almost certainly would have pushed back against subsidies, were not in Congress in 1865 to voice their discontent. With regard to decline, Prof. Sexton cited a number of factors that contributed to the erosion of overseas steam transport during the bust periods, including financial crisis, growing Sinophobia in the post-Civil War United States, and the relatively weak status of steamship lobbyists compared to their railway rivals.

In establishing the broader significance of this political contest over steam, Prof. Sexton mapped these periods of growth and decline onto an examination of the U.S.'s early forays into overseas expansion, looking at steam's role in increased American engagement and entanglement with Cuba, Japan, China, and, in his primary example, Panama. His study of U.S.-Panama relations focused on the gold rush years, when the preferred route from the East Coast to California was via Panama rather than over the American continent. Prof. Sexton observed how, during this period, the area surrounding Panama's transcontinental railroad—the construction of which was funded by Pacific Mail co-founder William Aspinwall—became a de facto U.S. territory, with private U.S. corporations exercising sovereign power in towns all along the rail line and the U.S. Military being called on to intervene when tensions inevitably flared between native Panamanians and gold-seeking American passengers who had taken up temporary residence on the isthmian route. Driven by a mutual incentive for profit, this arrangement proved quite beneficial to a number of parties—corporations like Pacific Mail, the Panamanian elite, the U.S. state, and the Panamanian government (then in Bogota)—and equally detrimental to the nation's labor force, leading to the rise of activist, liberal politics in Panama City. Returning once more to steam's boom/bust cycle, Prof. Sexton noted how the national instability that followed from the rise of resistance politics in Panama was un-coincidentally simultaneous with the U.S. government's de-funding of steamship transport in the late-1850s and, in turn, the receding political influence of companies like Pacific Mail on the transcontinental railroad route.

*Jay Sexton serves as a Field Fellow and Tutor in History at University of Oxford, Corpus Christi College, as well as Director of the Rothermere American Institute, the largest interdisciplinary center for the study of U.S. history, politics, and literature outside of North America. He received B.A. degrees in History and English from University of Kansas and his D.Phil from University of Oxford, Worcester College, where he was a Marshall Scholar. He is the author of *Debtor Diplomacy: Finance and American Foreign Relations in the Civil War Era, 1837-1873* (Oxford University Press, 2005, paperback ed. 2014) and *The Monroe Doctrine: Empire and Nation in Nineteenth-Century America* (Hill and Wang, 2011); and co-editor of *Empire's Twin: U.S. Anti-Imperialism from the Founding Era to the Age of Terrorism* (Cornell University Press, 2015), with Ian Tyrrell, and *The Global Lincoln* (Oxford University Press, 2011), with Richard Carwardine. He is currently at work on a book project entitled, *The Steam Empire: Transport and U.S. Expansion in the Nineteenth Century*. Prof. Sexton has articles and book chapters forthcoming in *The Journal of the Civil War Era*, *American Civil Wars* (University of North Carolina Press), and *The Transnational Significance of the American Civil War* (University of Georgia Press), and he is the past recipient of the University of Oxford Teaching Award, the Vice-Chancellor of Oxford University Research Prize, a John Fell Fund Research Award, and an Andrew W. Mellon Foundation Fellowship at the Huntington Library.*

POSTDOC SEARCHES

With the tenure of the Institute's first two postdoctoral fellows in history coming to an end in August, and with 2015-16 political science fellow **Kody Cooper** set to join the faculty at University of Tennessee-Chattanooga in the fall, we conducted searches for two new postdocs, one each in History and Political Science, during February and March. Review of applications began on March 1, and is still ongoing, but we are excited to announce that we have invited CUNY-Graduate Center Professor of History **Andrew Robertson** to fill one postdoctoral vacancy by joining the Institute's ranks as a Scholar-in-Residence for the 2016-2017 academic year.

While in Columbia, Prof. Robertson will continue work on his current book project, *Democracy in the Jeffersonian Republic: The Trajectory of America's Other Peculiar Institution, 1787-1828*. Drawing on materials from the Lampi Collection, a storehouse of election returns from the early Republic once thought to be lost from the nation's material history, Prof. Robertson's new manuscript examines how access to this election data has the capacity to "transform our understanding of the trajectory of American democracy" during the nation's first decades. For example, the book uses returns from the election of 1800 to challenge the argument that the "Era of the Common Man" began with the election of Andrew Jackson in 1828. With regard to the breadth and extent of American democracy, the data shows how political participation at the beginning of the 19th century was actually far higher and far more informed than previously thought. Not only was voter turnout among white males quite substantial, peaking at 80% in Vermont, Delaware, New Hampshire, and Tennessee; we also see unexpected levels of participation from a number of soon-to-be disenfranchised portions of the population: free men of color in Maryland and North Carolina, for example, and women head of households in New Jersey. This rate of participation, Prof. Robertson's book argues, likewise influenced the nature of political mobilization during the period in question, with party organizers and newspaper editors responding to high voter turnout by crafting discourse that encouraged mass deliberation about substantive political issues, such as the Alien & Sedition Acts, the 1799 Embargo, and, later, the War of 1812. At the same time, new debates about inclusion in political society emerged from the intense competition that came with expansive democratic participation, with the property requirements that radically extended the franchise to free men of color and women giving way to standards of national identity that would exclude these groups from the polls for decades to come.

*Andrew W. Robertson received his D.Phil in Modern History from Oxford University. He currently serves as Associate Professor of History at Lehman College at the City University of New York and as a faculty member at the CUNY-Graduate Center; where he is also the Spring 2016 Executive Officer. He is the author of *The Language of Democracy: Political Rhetoric in the United States and Britain, 1790-1900* (Cornell University Press, 1995); editor of *The Encyclopedia of American Political History, Volume 1: The Colonial Era, 1607-1775* (Congressional Quarterly Press, 2010); and co-editor, with CUNY-Graduate Center Prof. David Waldstreicher and Kinder Institute Associate Director Jeff Pasley, of *Beyond the Founders: New Approaches to the Political History of the Early American Republic* (University of North Carolina Press, 2005). Prof. Robertson has received numerous fellowships and honors, including an NEH Distinguished Visiting Professorship at Colgate University and a Gilder Lehrman Fellowship at the Pierpont Morgan Library, and he served as an Assistant Professor at Louisiana State University and a Visiting Assistant Professor at Cal Tech and UCLA before joining the faculty ranks at Lehman College.*



2016-17 KINDER GRADUATE FELLOWS

In March, committees made up of Justin Dyer and Cooper Drury (in Political Science) and Jeff Pasley and John Wigger (in History) chose the 2016-2017 class of Kinder Graduate Fellows. Designed to recognize graduate students whose work shows the potential to make significant contributions to scholarship on American political development, thought, and history, the fellowships provide recipients with work space in the Kinder Institute's new central offices in Jesse Hall as well as a stipend that relieves them of teaching duties, thus allowing them to devote the full weight of their attention to research and writing during the fellowship period. The following five Ph.D. candidates received 2016-2017 graduate fellowships.



Kenneth Bryant, Jr. completed his B.A. in Political Science and African-American Studies at Wright State University in Dayton, Ohio, and his M.A. in Political Science at the University of Missouri. His dissertation at the University of Missouri examines the history of policing in communities of color and assesses perceptions of police performance, with a particular focus on how police response to protests shapes public trust toward policing and public preferences for crime control policy. In addition to his research, Kenneth has served as president of the Graduate Student Association (GSA) and as an executive board member of the Association of Black Graduate and Professional Students (ABGPS). For his service as a graduate student leader, he was inducted into the Graduate Professional Council's Rollins Society in 2015. Kenneth also has been awarded the Dean L. Yearwood Scholarship for Excellence in American Policy Research and the Bryan L. Forbis Scholarship by the MU Department of Political Science.



Clint Swift earned his B.A. in Political Science from Whittier College and his M.A. in Government from California State University-Sacramento. His research interests include state legislative institutions and behavior and electoral accountability, and his dissertation at MU focuses on the determinants of state legislative committee system structure as well as its effects on legislative outcomes. Clint is the past recipient of a research grant from the Kinder Institute, the J.G. Heinberg Scholarship for comparative political research, and the Dean L. Yearwood and Bryan L. Forbis Awards for the study of American politics and public policy, and he has taught courses on American politics in the MU Department of Political Science.



Zachary Dowdle earned his B.A. and M.A. in History from Angelo State University in San Angelo, Texas. His dissertation at MU looks at shifting conceptions of race and gender in the political culture of nineteenth-century Missouri and the United States through an examination of the career of James Sidney Rollins, a slave owner who was a leading Whig politician and pro-Unionist. Rollins served as a representative at both the state and national levels, working to establish

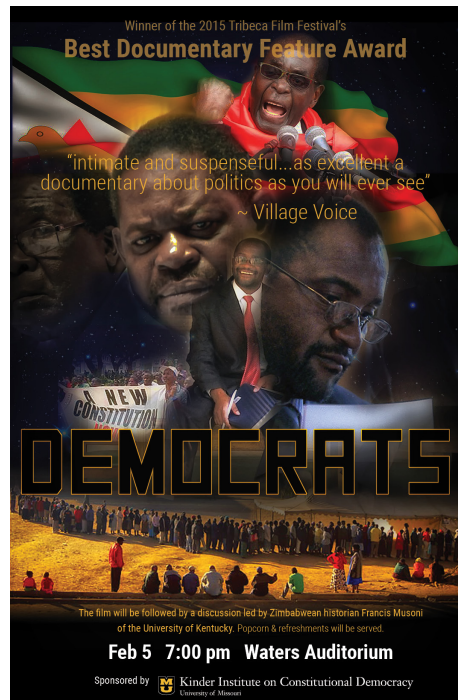
the University of Missouri in the 1830s and providing a crucial swing vote in Congress that led to the approval of the Thirteenth Amendment. Zachary has presented his work at conferences in Columbia, New Orleans, and San Diego, has received a travel grant from the Kinder Institute on Constitutional Democracy, and was a Fellow at the JMC Summer Institute in Philadelphia. In his free time, he enjoys spending time outdoors, either cycling on country roads or hiking along local trails. Zachary will join the Kinder Institute as the Spring 2017 Graduate Fellow in History.



Brandon Flint completed his B.A. in History at Patrick Henry College in Purcellville, VA, and his M.A. in History at the University of Louisiana at Lafayette. His dissertation at MU examines the early history and growth of Protestant short-term missions from the end of the Second World War through the 1970s, with close attention paid to the role of overseas missionaries as they negotiated between their identities as Christians and as Americans. More specifically, while missionaries have always been important in shaping the way in which America's democratic values are interpreted abroad, Brandon's dissertation focuses on how, under the long shadow of the Cold War, short-term missionaries in particular fought on the front lines to combat communism in the Soviet Union and to promote the image of the United States in the developing third world. Brandon will serve as a Kinder Graduate Fellow in History during the Fall 2016 semester.



Sean Rost completed his B.S. in History Education at William Woods University in Fulton, MO, and his M.A. in History at Lincoln University in Jefferson City. His dissertation at MU examines the revival of the Ku Klux Klan during the 1920s, with a particular focus on the efforts of anti-Klan activists to use their power at the polls, in the pulpit, and in the press to stymie the growth of the "Invisible Empire" in Missouri. Sean has received research grants from the James S. Rollins Slavery Atonement Endowment, the William A. Wilcher Endowment, and the Cushwa Center for the Study of American Catholicism at the University of Notre Dame. He has taught American History to 1865 at the University of Missouri, American History to 1877 and American History since 1877 at Columbia College-Jefferson City, and on-campus and online history courses at William Woods University.



UNDERGRADUATES

Society of Fellows February 5 Democrats Screening

For their first quarterly dinner meeting of the Spring 2016 semester, Society of Fellows members attended a screening of the 2014 documentary *Democrats*, which the Kinder Institute brought to campus as part of MU's Black History Month programming. Hailed by *Village Voice* critic Alan Scherstuhl as "intimate and suspenseful...as excellent a documentary about politics as you will ever see," *Democrats* chronicles the process of drafting Zimbabwe's first democratic constitution. Shot over a three-year period, following the 2008 election that ended with Robert Mugabe's ZANU-PF party theoretically forced to share power with the opposition Movement for Democratic Change, the film focuses primarily on the efforts of—and the often contentious, though at times inspiringly amicable and productive, relationship between—the two men tasked with chairing the nation's constitutional committee: Mugabe representative-slash-shill Paul Mangwana and MDC spokesperson Douglas Mwonozora. In a country where western media are rarely allowed to report, Danish Director Camilla Nielsson was given unprecedented access to the bipartisan committee's proceedings and negotiations, and the result was a film at once locally and universally incisive. On one hand, *Democrats* provides a rare, all-access glimpse into Zimbabwean politics, capturing private conversations between leaders, openly threatening speeches by Mugabe, and public consultations with ordinary citizens in which no one involved was sure if it were truly safe to speak. At the same time, the movie reveals not only the tense admixture of fear and hope that, throughout history and across the globe, has consumed populations poised uncertainly on the brink of large-scale political change, but also the oftentimes necessary, and oftentimes equally messy, compromises that go into transforming theoretical constitutional revision into concrete political reality. The screening was followed by a lively and enlightening Q&A led by University of Kentucky Professor of African History **Francis Musoni**, with whom Society of Fellows participants had dinner prior to the movie.



For the second Society of Fellows event of the semester, students attended a March 20 lecture delivered by **Bryan Stevenson**, author of the critically acclaimed *Just Mercy* and founder and executive director of the Equal Justice Initiative (a recap will follow in the June newsletter). The deadline for applying to the 2016-2017 Society of Fellows program was March 15, and while the committee was still in deliberation when this went to press, we look forward to introducing our next class of undergraduate fellows in the June newsletter.

Other Recent Undergraduate News

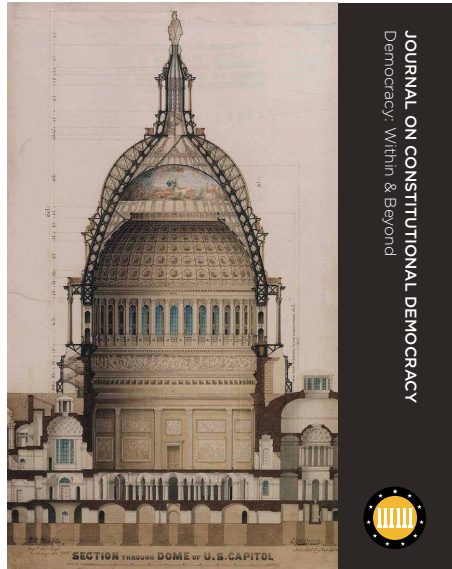
Looking forward to the summer (and beyond), we have other exciting news to share about current and former members of our undergraduate cohort.

In a sampling of a larger list to come in June, these 2016 Kinder Scholars participants will be interning at the following organizations in D.C. during their time in the capital this summer:

- **Nora Faris:** FLM+ Public Affairs, a hybrid marketing, strategic communication, and lobbying agency for agribusiness and commodity groups
- **Bishop Davidson:** The Heritage Foundation's Center for Principles and Politics
- **Leslie Parker:** The Office of Missouri 6th District Congressman Sam Graves

Joining former Society of Fellows member and Truman Scholar **Emily Waggoner** on the list of our undergraduate alumni who have recently been showered with accolades, we're thrilled to announce that **Anurag Chandran**, who took part in our 2014-15 Society of Fellows and 2015 Kinder Scholars programs, will be heading to Tsinghua University in Beijing in the fall of 2016 as part of the first class of Schwarzman Scholars. It's also with great pleasure that we get to share news that 2016 Kinder Scholars participant **Kate Hargis** was named a finalist for the Truman Scholarship this February.





Works Cited

¹“Thomas Jefferson First Inaugural Address,” accessed November 17, 2015, http://avalon.law.yale.edu/19th_century/jefinau1.asp.

From the 2016-17 Journal on Constitutional Democracy

Note: Below is an excerpt from MU Senior Political Science major Alex Hutton’s article “R/republican,” a study of typographical significance in Jefferson’s “First Inaugural Address.”

...Acutely aware that he was coming to power in a nation that had already become sharply divided over political parties as well as over an electoral system that had already proven to be less than perfect, Jefferson structured his inaugural address in a way that attempted to reestablish the public’s trust in democratic institutions. Specifically, he pointed towards the Constitution as the device which would not only bind the country under common political principles but would also allow for difference of political opinions within the population, all the while working to reunite the country through this complex, and at times seemingly contradictory, set of appeals.

...

Even though Jefferson is quick to uphold the Constitution as providing the common ground necessary to safeguard against tyranny in the United States, he also takes great care to point out that an adherence to the Constitution does not preclude a difference of political opinion. This is most clearly seen when, in the second paragraph of his speech, Jefferson claims, “But every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all Republicans, we are all Federalists.” On the surface, the use of capital F-Federalist and capital R-Republican would seem to undermine Jefferson’s argument by inherently playing up the divisive and hostile partisan climate of the era. However, upon closer examination, and especially when read within the context of the modifying language of “we are all,” it becomes apparent that these terms actually strengthen his claims regarding how imperative political unity was to the survival of the nation in two ways: by rhetorically negating the distinction between parties and, in doing so, invoking the abstract meaning of the terms federalist and republican in a manner that would have forced people to acknowledge them as articulating the common underlying principles upon which these parties were founded. These terms’ double reference thus serves a specific purpose for Jefferson. While he uses the terms to clearly note that party affiliations and the differences of opinion that come with them are inevitable and even welcome within a democracy, his summoning of their abstract meaning simultaneously demands a recognition of how even the most contentious disagreement still reflects the ideals of and is governed by the common principles contained in the Constitution.

It stands to reason that citizens’ understanding of Jefferson’s address, particularly when it comes to details like the capitalization of Republicans and Federalists, would have been dictated by how the speech appeared in the only media source then available: newspapers. The newspapers would seem to have been “at liberty,” so to speak, to reprint the message in whatever way they saw fit, allowing them to alter details as a way of reflecting their support or condemnation of Jefferson and his message. Based on my argument above, papers that supported Jefferson may not have capitalized Republican and Federalist to enhance his argument about the importance of unity by stressing the terms’ abstract connotations. Conversely, papers that did not support Jefferson may have used any typographical and editorial means at their disposal to edit the message in a way that would have highlighted these terms’ partisan meanings and suggested that Jefferson was invoking them in an attempt to more deeply drive a wedge into an already divided public.

FACULTY & GRADUATE STUDENTS

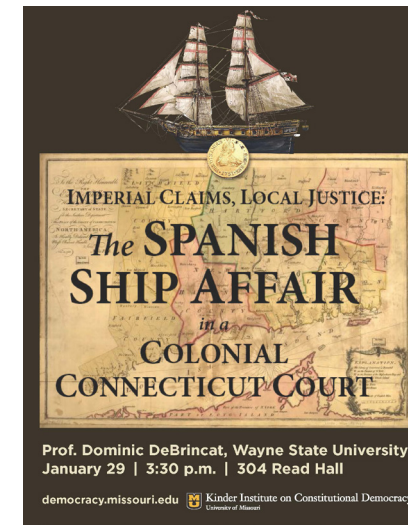


Imperial Claims, Local Justice

In November 1752, the Spanish cargo ship *St. Joseph and St. Helena* was towed into New London, Connecticut, after being rendered unseaworthy by a reef near the entrance to the city’s harbor. As Missouri Western Assistant Professor of History **Dominic DeBrincat** outlined in his January 29, 2016, presentation at the Kinder Institute’s Friday History Colloquium Series, the events that followed the arrival of the *St. Joseph and St. Helena* in New London make up one of the more fascinating and understudied episodes

in early American legal history. After anchoring, the contents of the ship—which included stores of indigo, gold, and silver—were divided between various “secure” locations around the city, where they were to stay until provisions were made for the cargo to be returned to Spain. Within weeks, however, New Londoners and Spanish crewmembers alike had taken to looting the warehouses and honorable homes where the ship’s inventory was stashed, setting the stage for a protracted battle that would reveal much about the legal infrastructure in colonial Connecticut, including the too often overlooked importance of local courts in pre-Revolution America.

Intent on retrieving—or at the very least being compensated for—the lost goods, the ship’s supercargo, Don Joseph Miguel de St. Juan, first petitioned the admiralty court in New York for restitution and, after failing to secure compensatory justice there, turned to the Connecticut General Assembly. There, too, he found little in the way of assistance, with the Assembly determining that no Connecticut officials were blameworthy for the looting and recommending only that then-Governor Roger Wolcott be granted license to investigate the incident—a concession which Prof. DeBrincat described as “a limp offer of justice” at best. It was only after pursuing the matter in the New London County Courts that Don Miguel’s efforts to collect on his losses began to bear some fruit. In many respects, the justice he received from the New London County Courts was symbolic, as actual restitution was made impossible by the fact that a majority of defendants had escaped incarceration and fled the county with their portions of the cargo. Still, the County Courts were persistent in the assistance they offered: repeatedly awarding Don Miguel with “treble damages” in cases pertaining to the lost cargo, aiding in the recovery of stolen property when possible, and all the while prosecuting notorious New London ne’er-do-wells and members of prominent local families with equal severity. As Prof. DeBrincat pointed out, this willingness to come to Don Miguel’s defense speaks to a larger trend in Colonial America: not only during the Spanish Ship Affair, but also in many legal disputes throughout the era, the local courts often proved themselves the best, and sometimes the only, venues for securing justice.

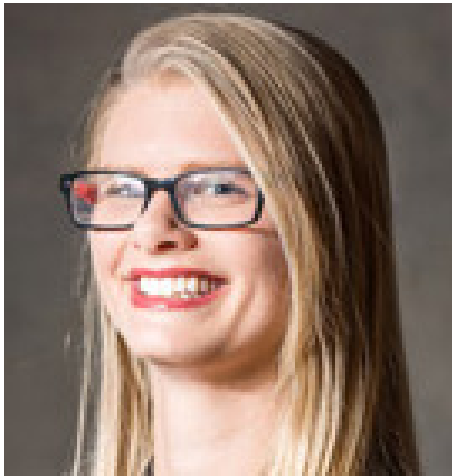


State and Landscape

The first Spring 2016 meeting of the Missouri Regional Seminar on Early American History was held on February 19, 2016, at Cardwell’s in Clayton, MO. The presenter for the February MRSEAH was University of Missouri-St. Louis Curators’ Teaching Professor and Political Science Department Chair **David Robertson**, who gave an overview of his current research into the evolution of land governance in America from the founding of the colonies through the adoption of the U.S. Constitution. MU Professor of History **Jerry Frank** served as interlocutor for the event, which was attended by graduate students and faculty members from University of Missouri, Washington University, Southern Illinois University-Edwardsville, Southeast Missouri State University, University of Illinois-Springfield, and St. Louis University.

The final 2015-2016 meeting of the MRSEAH, our yearly “double-header,” will be held on April 8 at the Broadway Hotel in downtown Columbia. Following a discussion of “Science and Devotion: The Book of Nature Among the Laity,” a chapter from Southeast Missouri State Prof. **Lily Santoro**’s current book project, Washington University Professor of English **Abram Van Engen** will give a dinner lecture entitled, “Missionary Impulses and Historical Societies: The Political Theology of American History in the Early Republic.”

Each year, per the terms of their fellowship agreement, the Kinder Graduate Fellows in Political Science and History give public presentations on the research they engaged in during their time with the Institute. On the Political Science side, Rebecca Miller and Kathryn VanderMolen gave overviews of and fielded questions about their dissertation projects during a February 5 panel discussion with faculty members and graduate student colleagues.



Political Science Dissertation Fellows Panel Discussion

Subnational Consequences of Natural Resource Extraction on Political Participation

Drawing largely on data compiled while overseas on a research and travel grant provided by the Kinder Institute, **Rebecca Miller** opened her talk on the implications of the mining industry on democratic participation in South Africa with an observation that, at least on its surface, would seem like something of a contradiction: that protest activity increases, but conventional political participation declines, in areas of consolidated natural resource wealth. Resolving this contradiction, Miller noted, requires understanding the relationship between mining communities and companies within the larger context of the degree to which the latter function as state-like entities. In many South African municipalities where the economy is driven by natural resource extraction, the state often retreats, shifting governing responsibility—namely service provision—to the mining companies themselves. It was in these communities where mines became the primary (and often sub-standard) provider of services such as hospitals, roads, schools, and lights that Miller saw a marked increase in confrontational political participation, characterized by low voter turnout, preference for extreme political parties and actors, and high rates of protest. She went on to explain this exchange of participation for protest in terms of how, in instances of institutional failure, members of these communities still targeted their grievances against the government rather than the mines. Ultimately, she concluded, the increased disengagement from conventional or assimilative political participation can thus be traced back in large part to a lack of clarity regarding whom the responsibility for service provision falls on as well as to significant variation in the ways in which the mines consult with members of the many communities of which they are a significant part, both as an employer and a de facto governing body.

Severing the Electoral Connection: Public Preference for Governing through Experts over Politicians

In beginning her presentation, **Kathryn VanderMolen** noted that, while some literature on public preference for the nation’s “fourth branch of government” exists, much of it is relatively and problematically uncritical when it comes to addressing the reasons behind the public’s affinity for bureaucrats over elected officials. In contextualizing this discrepancy, she pointed out how, for example, the factors that are often credited as being at the root of the public’s support of non-elected officials—namely, the perceived objectivity and expertise of bureaucratic actors—rarely are situated, let alone carefully studied, in relation to the public’s enduring trust in democratic institutions. VanderMolen then outlined how the surveys she created for her dissertation were thus focused in large part on soliciting data that might refine our understanding of the basis for public support for non-elected officials and, in the process, might help us address discrepancies like the one noted above. In citing some examples of the conclusions that she has drawn based on the survey data she has collected, VanderMolen noted how support for bureaucratic actors is often tied to variations in the language used and the type of trust cued in questions about the administrative state posed to the public. For instance, while describing non-elected officials’ qualifications as “merit-based” often generates a positive response, describing these officials as “political appointments” yields the opposite. Similarly, whereas support for non-elected officials often comes when questions cue specific trust, questions that cue diffuse trust tend to reinforce broad support for democratic institutions over bureaucratic processes.

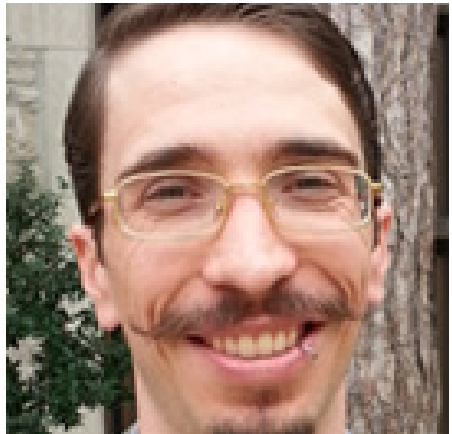
Research & Travel Grant Update

In many cases, the research and travel grants awarded by the Kinder Institute to faculty and graduate students in October won’t bear fruit until later in the spring, when conference travel peaks, or during the summer, when teaching responsibilities ease up and recipients can devote their full attention to ongoing scholarly projects. That said, we are pleased to be able to report back on work that was recently completed for two awards that were given out during the Fall 2015 grant cycle.

Through a \$460 grant from the Kinder Institute, Political Science Ph.D. candidate **T. Murat Yildirim** was able to travel to a conference at Texas A&M University that was designed to provide attendees with an opportunity to share and discuss invited papers for a special edition of the *Journal on European Public Policy* (JEPP). While in College Station, Yildirim presented “Budgeting in Authoritarian and Democratic Regimes,” an article co-authored with a number of scholars, including UNC-Chapel Hill Distinguished Professor Frank R. Baumgartner, and which was previously delivered at the June 2015 Comparative Agendas Project Conference in Lisbon. Based on the overwhelmingly positive feedback he received at the December 2015 conference in Texas, Yildirim expects that the paper will be published in late-November 2016 in the JEPP.

A \$2,500 grant from the Kinder Institute allowed Political Science Assistant Professor **Michael Wahman** to travel to Malawi in February 2016 to speak at the launch of *Democracy Maturing? The 2014 Malawi Tripartite Elections*, a collection of essays recently published by the National Initiative for Civic Education in Malawi that he contributed to and co-edited with Nandini Patel. Prof. Wahman’s presence at the event, which was widely covered by national media houses and attended by dignitaries including EU Ambassador Michael Germann, provided the Kinder Institute and the university key exposure in the international donor community and helped increase interest in the collection.

Looking forward to the coming months, History Ph.D. candidate and current Kinder Dissertation Fellow **Chris Deutsch** will deliver a paper at the April 2016 American Society of Environmental Historians conference in Seattle as a result of an award he received from the Kinder Institute, while Political Science Professor and Institute core faculty member **Jay Dow** will travel to the American Antiquarian Society and the Massachusetts Historical Society over spring break to conduct preliminary research for his current book project, which traces Federalist and Democratic-Republican strength from 1792 through 1824.



Prof. Justin Dyer’s “Crisis and Constitutionalism” community seminar continued during the Spring 2016 semester, with participants addressing topics ranging from FDR’s executive initiatives during the Great Depression and WW II to emergency power during the War on Terror. The seminar concluded on March 16, 2016, with a dinner reception with Professors John Yoo and Alberto Coll, who were in Columbia for a public debate on whether the U.S. President needs congressional authorization to involve the United States in foreign wars.

Community Seminar Series

The International Church: Conversion and Culture



19th-century origins in America. The result, she noted, is that the Church in a sense is becoming international without fully becoming global in scope. With this distinction in mind, much of the discussion that followed focused on the difficulty that the Mormon Church has faced in melding native culture and Church traditions or, more generally, in striking a balance between diversity and unity. As Dr. Park noted, in Africa, for example, the stalled growth of Mormonism in some ways can be attributed to how the Church’s “unilateral view of what worship looks like” has prevented certain local customs from being retained in and integrated into religious practice. Prof. Maffly-Kipp added that this observation reflects the broader trend of the Church excelling at celebrating cultural diversity while simultaneously containing culture in safe ways. Thinking in terms of the future of globalization, participants in the seminar keyed in on how success in this endeavor would thus be measured by the degree to which the Church finds a way to be multi-directional and reciprocal in its approach by allowing for greater local creativity within the context of the existing bureaucratic structure and without sacrificing the pillars of a unified Mormon community.

As part of Kinder Postdoctoral Fellow **Ben Park’s** yearlong “Mormonism and American Politics” community seminar, Washington University’s Archer Alexander Distinguished Professor of Religious History **Laurie Maffly-Kipp** came to Columbia to deliver opening remarks for and lead a group discussion on the Mormon Church in global context. Prof. Maffly-Kipp, who is at work on a book that focuses on the LDS church abroad, began with the observation that, while Mormonism is growing on an international scale, with the membership base beginning to tilt away from the United States, the story, and to some degree the culture, of the Church remains very centered on its

Black History Month Programming

Racism, Reparation, & Reconciliation



In partnership with the MU Department of Black Studies, the Chancellor’s Distinguished Visitors Program, and the MU Black History Month Committee, the Kinder Institute co-sponsored a February 25, 2016, lecture with **Verene Shepherd**, University of the West Indies Professor of Social History and acting member on the United Nations Committee on the Elimination of Racial Discrimination. Ranging from mass incarceration rates to mock slave auctions at Sweden’s Lund University to the post-traumatic effects of colonialism, Prof. Shepherd began by detailing examples that underscore the degree to which racially motivated forms of discrimination still very much impede the realization of fundamental freedoms and the enjoyment of public life among people of African descent. While organizations such as the global Black Lives Matter movement and the UN Committee on which she serves have taken a lead role in working to eliminate ideologies and policies that ensure the continued dominance of one group over another, Prof. Shepherd stressed how more work must be done to create institutional frameworks for promoting and protecting the human rights of those who were subject to grave violations at the hands of colonizers and enslavers and who continue to suffer from the influence of this history of violation on the present.

Prof. Shepherd then focused on how an essential component of this work involves advancing the cause of global reparations. Achieving reconciliation via reparatory justice, she noted, has been an integral component of European jurisprudence for centuries, and, in the case of formerly enslaved peoples, reparations are necessary both for psychological rehabilitation and for the establishment of social, political, and economic equality. Looking at the plan crafted by the CRC (Caricom Reparations Commission), Prof. Shepherd discussed how its action points—which include a full formal apology from all generations enriched by slave labor, public health reform, technological transfer, and debt cancellation— are designed to right a broad spectrum of historical wrongs. If, on the one hand, the CRC’s plan aims to restore to victims of enslavement the dignity that was compromised by this injustice, it also seeks to establish resources, from financial stability to literacy, that address the problem of how colonization economically stunted now independent nations, leaving them without the infrastructure to carry the burden of development. Prof. Shepherd closed by noting how, as ahistorical as it may seem, leaders in the reparations movement will persist not only in their demand that states be held accountable for and own up to the tragedies they inflicted in the past, but also in their conviction that this form of reparatory justice is itself a human right.

Debate on Presidential War Powers with Alberto Coll and John Yoo

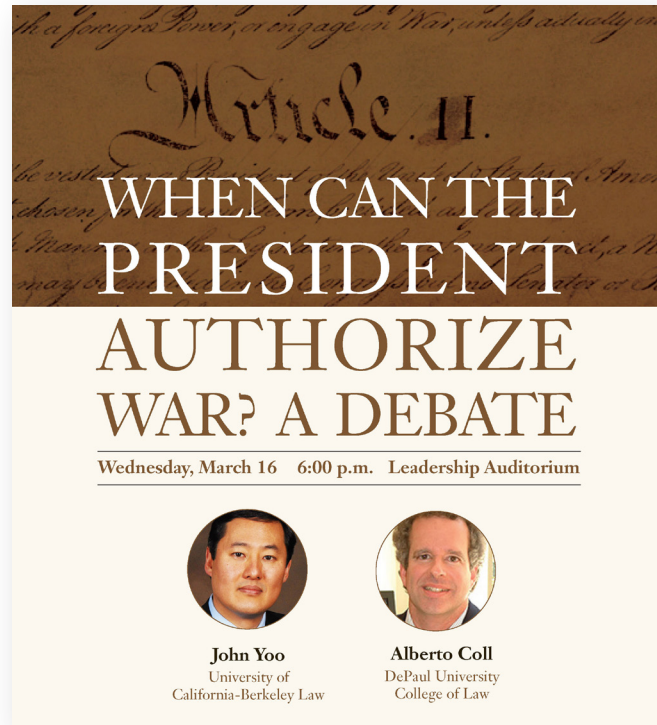
In the opening remarks for his March 16 debate with Professor **John Yoo**, DePaul College of Law Professor **Alberto Coll** first established the common ground the two scholars hold on certain components of the question of whether or not the U.S. President needs congressional authorization to involve the United States in major wars. Both he and Prof. Yoo, he noted, not only believe in a strong executive but, more importantly to the matter at hand, believe that the Framers' intention was

for the Constitution to invest the office with significant power. He then went on to describe how he likewise agrees with Prof. Yoo that there are certainly instances, most notably times of crisis, when the president can constitutionally initiate the use of military force without congressional authorization. Finally, he pointed out how, while they both seek out the answer to the question being debated in the original language of the nation's founding document and subsequent interpretations thereof, the conclusions they draw in going back to the text of the Constitution differ drastically.

In providing an overview of his argument for why the president does, in fact, need congressional authorization to involve the nation in major wars, Prof. Coll began by noting how his position is consistent with a form of democratic accountability that is central to both the spirit and structure of the U.S. government as outlined in the Constitution. More specifically, in a society of free men and women, it is imperative, he argued, that momentous decisions like whether or not to enter war not be made by a single person but instead be deliberated over by the representatives of the people. As he then explained, the writings of the architects of the nation's government and the early interpreters of the Constitution—including Washington, Madison, Hamilton, and many others—very much support this argument. Most outspoken about this issue, Prof. Coll noted, was Jefferson, who wrote in a September 1789 letter to

Madison that “we have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.” Prof. Coll then outlined how this conviction that the Constitution confines the power to authorize war to the legislature—the conviction that changing the condition of the country from war to peace should require deliberation—has held over time. For example, in deeming a declaration of war “the highest act of legislation,” Joseph Story argued in his 1833 *Commentaries on the Constitution* that since “the representatives of the people are to lay the taxes to support a war, [they] therefore have a right to be consulted, as to its propriety and necessity.” Lincoln, Prof. Coll added, pointed to a long and oppressive history of monarchs pretending war was for the good of the people to underscore the danger of consolidating the power to declare war in the hands of a single person.

In providing his counter-argument, Yoo, a Professor at University of California-Berkeley Law, likewise stressed how the true answer to the question of whether or not major wars require congressional authorization lies in the text, structure, and history of the U.S. Constitution. With regard to the text, he argued that it's telling that the



instance in which the Constitution is clearest on this issue comes in Article 1, Section 10, Clause 3, when it is declared that, unless invaded, no individual state shall enter into war without the consent of Congress. The Framers, he explained, could have used language this exact and this forceful elsewhere in the Constitution to address this issue, but they didn't; in a document so precise in its word choice, they could have used “authorize,” but instead choose the far vaguer verb “declare,” to articulate Congress' role with regard to involving the nation in major wars. Examining the question in terms of constitutional structure, he argued that the Framers clearly anticipated moments in which immediate action or reaction was necessary and thus very practically invested responsibility for engaging in and/or responding to hostility in a single person. While the power to fund these actions is certainly held by the legislative branch, the power to initiate them, he noted, is not. Deviating somewhat from his otherwise originalist line of inquiry, Prof. Yoo then argued that history requires us to be adaptable in how we read the Constitution on this matter. While, in purely financial and pragmatic terms, an act of Congress once was necessary for raising the military, the presence of a standing army renders this necessity moot, a historical transformation, he added, that we must take into account when interpreting the Constitution with regards to the imperative that Congress declare war. This is especially true, he concluded, in the contemporary moment. Given the capacity for immediate, catastrophic violence that individual actors possess today, error may come in not acting, an outcome that a mandate of congressional deliberation could potentially facilitate.



Alberto R. Coll is a Professor of Law in the DePaul University College of Law. He has served as Principal Deputy Assistant Secretary of Defense and Dean at the U.S. Naval War College.

This commentary was prepared for a debate on the president's war powers that was held by the Kinder Institute on Constitutional Democracy at the University of Missouri on March 16, 2016. It will be published in Goverance: An International Journal of Policy, Administration, and Institutions, a peer-reviewed academic journal edited by Kinder Institute affiliated professor Alasdair S. Roberts.

The U.S. Congress Must Authorize Major Wars

by Alberto Coll

Professor John Yoo is a distinguished and formidable scholar who has written numerous articles and books on the U.S. Constitution and the powers of the president. Although he and I agree on a number of important issues, we also disagree profoundly on some vital ones, such as the question of who has the power to authorize major wars. The historical record is clear: Only the U.S. Congress has the right to initiate major conflicts.

The Constitution's Article I clause gives Congress the "power... to declare war." Professor Yoo says that this does not mean that only Congress can provide the legal authorization for the United States to enter a major military conflict. But he reads that clause differently than it has been read traditionally. His argument is that a "war declaration" is simply and solely an announcement by Congress to the world that a particular legal status exists between the United States and the foreign state against which Congress has declared war. It is not an "authorization" to the president, without which the president would be unable to place the United States in a major conflict. In theory, the president has no limits on the amount of military force he or she can use on the basis of their powers under Article II and their oath to defend the Constitution against all enemies, foreign and domestic. Congress, of course, has an important lever over presidential decision making, in the form of its undisputed power to appropriate money. If the Congress wants to stop a particular war, it always can do so by denying funding for it.

Reasonable as Professor Yoo's argument may sound, there is one large flaw with it: The people who drafted the Constitution and operated the federal government during the generations immediately after its adoption saw things rather differently. They read the "power ... to declare war" as the means by which Congress authorized the president to start major military hostilities. Certainly, a war declaration might serve as an announcement to the world and to a hostile power that a particular legal status is now operative, but it was also intended to provide an authorization to the executive, without which the executive lacked the legal basis for placing the country in a major military conflict.

Professor Yoo describes himself as an "originalist." Yet, without a single exception, all of the Constitution's drafters and expositors—James Madison, Alexander Hamilton, James Wilson, Chief Justice John Marshall—as well as presidents in the immediate generations following the Constitution's adoption from Washington and Jefferson through Lincoln followed this second, traditional understanding of the "authorization clause," rather than Professor Yoo's novel interpretation. Hamilton's inclusion on this list is particularly relevant. Like Professor Yoo, Hamilton was an unabashed champion of executive power. But in the Federalist Papers, as well as in his "Pacifcus-Helvedius" debate with Madison, he made it quite clear that while the president was commander in chief of the armed forces, only Congress had the power to decide whether the United States was to enter into a war.

The logic behind the founders' choice is quite clear, and was laid out by Madison, Jefferson, and Lincoln among others. In a republican form of government, the awesome decision to enter a major conflict in which many American lives and much

treasure might be lost should not be made by a single person. It should be made instead by the people's representatives through deliberation and open discussion. Throughout American history, Congress has inserted itself into the process of making this decision, at least with regard to major conflicts involving either great risks to the United States or the prospective expenditure of large numbers of lives and significant sums of money. Even though it has not always used a "war declaration," Congress has carried out its functional equivalent by passing some form of "authorization" for the president to use force. This was the case most recently in both Iraq wars, and in Vietnam, though not in Korea.

Professor Yoo and I agree that the president has wide latitude to use force under their Article II executive powers with respect to smaller uses of force. One notable principle, articulated by the U.S. Supreme Court in a series of decisions during the mid to late nineteenth century, is that the president can respond to attacks on American citizens and property, or on the United States itself, without congressional authorization. As part of their Article II powers over the conduct of foreign policy, the president also can use force in support of foreign policy objectives and national security, so long as the use of force in question involves only limited risks, and the expected expenditures in American lives and resources are also limited.

Current military operations against ISIS are an example of a borderline case. On the one hand, President Obama has restricted the number and scope of missions of American forces involved in the ISIS campaign. There are only a few thousand American troops involved in advisory and logistical, as opposed to direct combat, roles. The operation's overall risk and financial costs are also limited. On the other hand, there is a possibility of escalation and the operation turning into a larger war, though President Obama has made it abundantly clear he does not intend to allow that to happen under his watch. Under current conditions and constraints, the president can conduct this mission without congressional authorization. Even so, Congress should live up to its constitutional responsibilities and pass some kind of authorization measure that will provide an adequate legal foundation for the mission.

Although the Obama administration has asked Congress for an authorization measure, so far the Congress has failed to pass one. The Republican majority seems to be divided on the issue. Many despise the president and want to foster the narrative that he is a weak and indecisive leader. They do not want to appear, in the eyes of their constituents or potential primary opponents, to be bestowing any kind of perceived legitimacy on the president's policies. In addition, the current Congress may be no different than others before it in seeking to avoid blame or take credit. If the ISIS mission fails, Congress can claim to have had "clean hands," and if it succeeds, they will ascribe that success to the undoubted valor and skill of our troops and their own wisdom in approving the weapons programs and other appropriations undergirding the military campaign.

It is proper to bemoan Congress's lack of courage and its engagement in political games. And we should also worry that Congress's irresponsibility may allow future presidents to involve the country in large and risky military ventures that have not been properly deliberated upon by the peoples' elected representatives. The text of the Constitution, and the way it was read by those who drafted it, makes it quite clear that Congress was given the role of authorizing any uses of force large enough to qualify as a major war.



John Yoo is the Heller Professor of Law at the University of California at Berkeley and a visiting scholar at the American Enterprise Institute, and was a Justice Department official from 2001 to 2003. His most recent book is Point of Attack: Preventive War, International Law, and Global Welfare (Oxford University Press, 2014).

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U.S. Presidents Don't Need Congress's Approval to Go to War

by John Yoo

When does the president of the United States need Congress's approval to engage in foreign conflicts? As a matter of law, never. Presidents need no formal permission from Congress to wage war other than funding support. Over the last two centuries, neither presidents nor Congress have ever acted under the belief that the Constitution requires a declaration of war before the United States can engage in military hostilities abroad. Although this nation has used force abroad more than 100 times, it has declared war only 5 times: the War of 1812, the Mexican-American and Spanish-American Wars, and World Wars I and II.

Without declarations of war or any other congressional authorization, presidents have sent troops to oppose the Russian Revolution, intervene in Mexico, fight North Korean and later Chinese Communists in Korea, remove Manuel Noriega from power in Panama, and prevent human rights disasters in the Balkans. Other conflicts, such as both Persian Gulf Wars, received "authorization" from Congress but not declarations of war. Even now, U.S. forces are conducting air strikes against ISIL, despite a lack of specific congressional approval. President Obama in his 2016 State of the Union urged Congress to authorize the ongoing strikes against ISIL, though he claims the strikes are legally justified under both his constitutional authority as commander in chief and under the 2001 authorization to fight Al Qaeda and the 2002 authorization of the Iraq war.

The Constitution gives the president the leading role in war, not Congress. When the framers wrote the Constitution they created an independent, unified chief executive with its own powers. The most important of these powers is to wage war as commander in chief and chief executive. "The direction of war implies the direction of the common strength," Alexander Hamilton wrote in Federalist 74, "and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority."

Hamilton wasn't only a framer, but a man of uncommonly good sense as well. Hamilton argued that the president should manage war because he could act with "decision, activity, secrecy, and dispatch." "Energy in the executive is a leading character in the definition of good government," he observed. "It is essential to the protection of the community against foreign attacks."

While Congress does have the power to declare war and to pass laws to govern and regulate the armed forces, presidents and congresses have never believed the laws allow for congressional control of tactics and strategy. While many today believe that Congress's power to declare war gives the legislature the sole authority to start wars, in doing so they give the eighteenth-century constitutional language a contemporary meaning. In the eighteenth century, declaring war did not mean initiating military hostilities. Instead, a declaration of war gave a formal legal status to a state of existing affairs: stating the grievances against another nation, describing the changed legal status between their citizens, and describing the remedies that would end hostilities. Congress's real power is its power of the purse, not any right to dictate which units should fight where, or what ISIL stronghold to bomb first. Congress is too fractured, slow, and inflexible to micromanage military decisions that depend on speed, secrecy, and force.

Indeed, when Obama sought congressional approval for strikes in Syria in retaliation for Bashar al-Assad's use of chemical weapons, he found himself facing criticism from all sides, including members of his own party. Realizing he likely wouldn't gain congressional approval and stymied by Congress's indecision, Obama was forced to rely on Vladimir Putin to save him from his own threat to use force against Damascus. The effort to obtain congressional approval only served to restrict the president's military options, tying his hands politically and undermining our national security.

If Congress thinks it has been misled in authorizing war, or if it disagrees with the president's decisions, all it need do is cut off funds, either all at once or gradually. It can reduce the size of the military, shrink or eliminate units, or freeze its supplies. Congress could end American involvement in a war simply by doing nothing. No risk of presidential veto is necessary; it could simply decline to enact the funds needed to keep the war going.

Congress has no political incentive to mount and execute its own wartime policy. Congressmen interested in keeping their seats at the next election do not want to take stands on controversial issues where the future is uncertain. They will avoid like the plague any vote that will anger large segments of the electorate no matter what they do. Members of Congress want the president to take the political risks and to be held accountable if failure results.

Many worry about a president's foreign adventurism, and point to the Vietnam War as an example of the faults of the "imperial presidency." But Vietnam also ushered in a period of congressional dominance that witnessed American setbacks in the Cold War, and the passage of the ineffectual War Powers Resolution. Congress passed it over President Nixon's veto, and no president, Republican or Democrat, has ever accepted the constitutionality of its 60-day limit on the use of troops abroad. Congress has never even tried to enforce it.

Our Constitution usually makes clear when it requires a specific process before the government can act, especially when the executive and legislative branches share a power. It sets out detailed procedures for the passage of laws, the appointment of Supreme Court justices, and the making of treaties. There are none for war. Our Constitution even declares that states shall not "engage" in war "without the consent of Congress." Why didn't the framers use this same language for the president if they wanted the same result?

The many conflicts that the United States has engaged in without a declaration of war show that we have a durable system that gives presidents the initiative and allows Congress to control war through funding and shaping the size and composition of the military.

A radical change in the system for making war might appease critics of presidential power. But it could also seriously threaten American national security. In order to forestall another 9/11-style attack, or to take advantage of a window of opportunity to strike terrorists or rogue nations, the executive branch needs flexibility. Time for congressional deliberation, which may result in mediocre, watered-down options, will come at the price of speed and secrecy. Wars aren't won by committee.

The Constitution creates a presidency that can respond forcefully to prevent serious threats to our national security without waiting for congressional approval. As we confront the evolving challenges of worldwide terrorism, this distribution of power has only become more important, and the wisdom of the framers' design more apparent.