SPRING 2022

The COLUMNS

DISPATCHES FROM THE 4TH FLOOR

While much has been afoot at the Kinder Institute these past few months, there's no debating that the lead story of the winter/spring has been the colloquia, roundtables, lectures, and seminars that have been happening in and around the fourth floor of Jesse Hall. We took the first Friday of the semester off for an events committee meeting, as well as the first Friday in March for our typical True/False vacation, but we otherwise held fast to a one (at least)-talk-per-week schedule.

There was a snowed-in, triple-header on "Baseball, Law, and Society," which we're convinced ended the lockout. There was a launch party for University of Chicago Press' recently-published *African American Political Thought: A Collected History*, featuring the volume's co-editors, three of its contributors, and our own **Jennie Ikuta** as moderator. There was a John R. Kelso-fueled examination of biography vs. microhistory, our first ever grad student showcase at the MRSEAH, Distinguished Visiting Professor of Legal History **Anne Twitty** pulling the curtain back on the untold history of state constitutional ratification, and that's only the tip of the iceberg.

Continued on page 2

KINDER INSTITUTE *on* CONSTITUTIONAL DEMOCRACY

AS THIS NEWSLETTER GOES TO PRESS, ALL ASPECTS OF **UNDERGRADUATE PROGRAMMING AT THE KINDER INSTITUTE** ARE CONVERGING...

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CAMPUS & COMMUNITY

Friday Colloquium Series

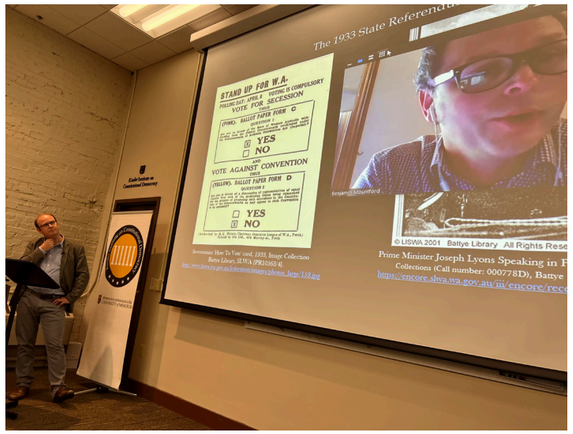
Lectures & Symposia

UNDERGRADUATE PROGRAMS

NEWS IN BRIEF

FRIDAY COLLOQUIUM SERIES

We're actually turning back the clock to November here, so we can pick up a couple late-fall events that didn't make the cut-off for the last issue of *The Columns*, and all post-Spring Break events, including the annual meeting of the Association of British American Nineteenth-Century Historians and our Distinguished Lecture with **Andrew Roberts**, will be covered in the summer edition. And before we get started, a special thanks to M.A. in Atlantic History & Politics candidate **Andrew Warbritton** for kicking this section of the newsletter off with his recap of our pre-Thanksgiving Break colloquium on the attempted secession of Western Australia, and to **Drew Hoffman** for wrapping it up with his notes on "The Crown and the English Constitution."



The Secession of Western Australia and the State of the British Empire, c. 1930-1935

Profs. Rob Fletcher and Benjamin Mountford

To finish off the fall semester's official Friday Colloquium Series programming, the "secession duo"—AKA Kinder Professor of British History **Rob Fletcher** and Dr. **Benjamin Mountford**, Senior Lecturer in History at Australian Catholic University in Melbourne—turned our attention to their ongoing research into the South Pacific of 1933, the setting of the unsuccessful (and rarely discussed) attempted secession of Western Australia from the Australian Commonwealth. The failed secession movement has fallen out of larger historical narratives, save for in Australia, with many claiming, as did scholar F.R. Beasley at the time, that its significance was "greatly exaggerated." Profs. Fletcher and Mountford, however, contested readings like Beasley's, arguing that any downplaying of the event's broader relevance was an intentional tactic of anti-secessionists who believed it beneficial to paint the movement as purely economic in its ambitions and contained within Australia's borders. As they explored in their talk, their counter-position is that the push for secession was, in fact, far more global in scope, and had more to do with larger issues in the British Empire, than the historical record has traditionally shown.

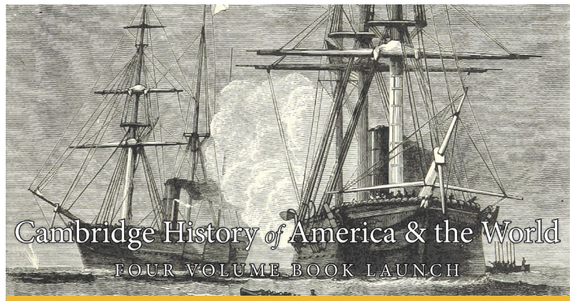
Prof. Mountford began unpacking their claim in the present day, outlining the current relations between Western Australia and the rest of the continent, as well as some of the other world events that drew their interest to the secession movement. He detailed, for example, how the Covid-19 pandemic has exacerbated some of the divisions between the Western Third and the East, as Western Australia had experienced very few cases and was then not in lockdown like the rest of the country. The focus on Brexit the last few years additionally allows us to look at the event through an international lens and to reconsider its implications for how we think about the connections between nations.

Looking backward beyond the movement itself, the pair described how the issue of secession wasn't at all confined to the 1930s but rather had roots in the Australian gold rush of the mid-to-late 19th century. The rush, they showed, saw a significant enough influx of Eastern settlers into the Western Third that when the question of joining the Australian Commonwealth was raised, the new residents were able to provide the 'yay' votes necessary to override the interests of many of the region's rural locals. Secession found its way back into the fray in the 1930s, after a speech by Secretary of Dominion Affairs J.H. Thomas that centered around the issue of self-government in the British Empire. Both the debate over secession and the successful referendum to pursue it that followed, the two went on to explain, can more or less be understood through four characters: the aforementioned Secretary Thomas and Australian Prime Minister Joseph Lyons, the loudest voices against secession; and Hal Colebatch, Agent-General for Western Australia, and H.K. Watson, co-founder of the Dominion League of Western Australia, who were the main drivers of the secession movement.

From here, the pair trained their argument on two questions: What were the imagined imperial connections that went into calls for secession? And what implications did leading figures perceive secession would have on the larger empire? Starting with the imagined connections, Prof. Fletcher described how secessionists promoted the idea that Western Australians had stronger imperial ties than their compatriots in the East. They played up, for example, how the tariffs being imposed by the national government were emblematic of the East's attempts to move away from trade with the empire. It was thus in their *and* Britain's best interest, Westerners argued, to support secession in order to maintain mutually beneficial commercial relations. Secessionists also focused on geographical divides in their political literature. At the most basic level, they pointed to the distance between East and West, noting that Perth was closer to Singapore than Sydney. More substantively, they highlighted how the vast stretch of deserts that separated Western Australia from the national government had led to the development of different cultural, political, and economic policies. These differing economic policies, in particular, were key to many of their claims, as they enabled secessionists to paint Eastern policies as similar to those of the Soviet Union.

As for the potential implications of the secession movement, Prof. Fletcher turned back to J.H. Thomas, who worried that the movement's success would inspire other provinces in Australia and Canada to follow Western Australians' lead. The empire, he explained, had primarily organized its dominions in federal systems, so the root of Thomas' concern was that if the Australian Federation were to fail, others might crumble around them. Imperial fears were compounded by the fact that the bid for secession in Western Australia wasn't the only major dominion sovereignty movement at the time. Part of a larger push to restructure British colonial power in the interwar period, it was, in fact, largely overshadowed by the Government of India Act, introduced just two days after Watson and the Dominion League of Western Australia met with Parliament in 1935. The India Act and the Australian secession movement would play off each other in the halls of Parliament, used by competing MPs to support their views on the proper organization of dominions. Proponents of the India Act argued against secession on the grounds that the legislation surrounding it was ultimately attempting to set up a federation as geographically spread out as the one Western Australia was trying to leave. On the flip side, opponents used the secession movement as a sign the India Act was doomed to fail.

In rounding out the talk, Prof. Mountford reasserted the central claim with which they began: that, even in its failure, the secession movement deserves greater recognition in the history of the British Empire, especially as a harbinger of things to come. "If the empire couldn't even keep the people of Western Australia happy," he noted in closing, "what hopes did they have of keeping the entire empire running?"



Cambridge History of America & the World Book Launch

Rich & Nancy Kinder Chair in Constitutional Democracy
Jay Sexton and Invited Guests

More collective, celebratory exhale than lecture proper, the December 3, semester-closing launch for Cambridge University Press' four-volume series, *Cambridge History of America & the World*, left anyone who attended with one primary takeaway: just go buy the books.

Why? In framing the volume that she co-edited with our own **Jay Sexton** (Vol. 2, 1820-1900), University of Illinois Professor of History **Kristin Hoganson** highlighted how it spins histories—importantly plural—of the transnational turn in ways that

scholars of U.S. foreign relations in the 19th century hadn't yet imagined. The volume resists conventional pre/post-Civil War periodization, for example. It's less Eurocentric, thinking about U.S. relations with Africa and the Islamic World and featuring cutting edge work on Mexico and the Caribbean. And it pairs state and non-state actors in breaking the nation down into much smaller units of analysis, such as enslavement, ethnicity, race, class, and gender.

Following up on Prof. Hoganson's comments, Prof. Sexton added that the expanse of the volume he worked on speaks to something he initially resisted about the project but is now leaning into. If the book shows us anything, it's that, despite the insistence of past historiographies, we *don't* need a singular narrative in order to understand the relationship between the U.S. and the world in the 19th century. In fact, he continued, attempting to force a structural backbone on a project of this nature runs the risk of flattening the era into one in which the U.S. emerged as a world power and thus ignoring the host of political and imperial formulations that don't lead to the "American century" but instead tell us something new about how global developments shaped national histories.

And as series editor **Mark Bradley** noted, the innovations of the 19th-century volume spilled forward in time, so to speak. As Volumes 3 (1900-1945) and 4 (1945-present) were coming together, he described how certain questions and issues that were being tackled in Volume 2 caused him to re-think how the series was approaching the 20th century. He singled out both Indigenous and environmental histories as subjects that the 20th century volumes wouldn't otherwise have addressed—or, at the very least, would have pitched in a minor key—were it not for the work done in the 1820-1900 volume.

For contributors' remarks on the themes of religion, race, intellectual history, and intimacy that were addressed in their work, visit the Kinder Institute YouTube page for a recording of the event.

The Martyr and the Trickster: Ralph Ellison's Repertoire of Agency

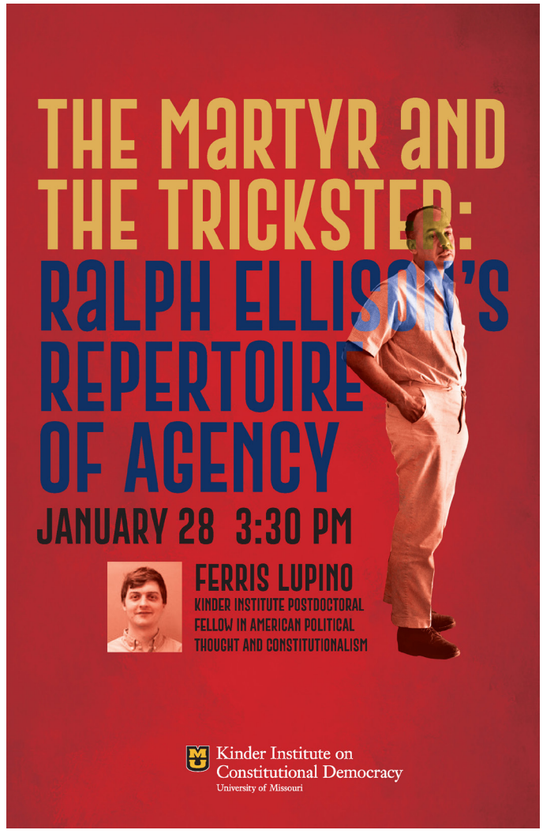
Kinder Institute Postdoctoral Fellow in American Politics & Constitutionalism Ferris Lupino

Since its publication in 1952, Ralph Ellison's *Invisible Man* has been a touchstone for political thinkers, who find in the novel a means—various means—of reckoning with racial impasse. This is as true now as ever, Kinder Institute Postdoctoral Fellow **Ferris Lupino** pointed out in setting up his January 28, semester-opening colloquium, with competing readings emerging among contemporary theorists of race and democracy when it comes to the novel's guiding metaphor of invisibility.

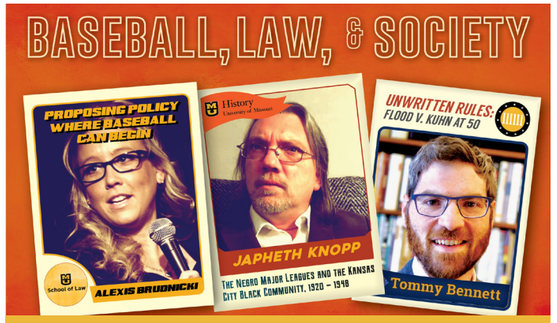
On one hand, Afropessimists such as Frank B. Wilderson III and Jared Sexton read invisibility as a totally debilitating condition that militates against any action opposed to it. The novel confirms, in this, their interpretation of Blackness as a structural position that gives coherence to the non-Black world by occupying a space—of social death, of non-being, of slavery—outside it: or, in the case of *Invisible Man*, a space below it, as the novel ends with the narrator driven underground, without any capacity to redress the displacement imposed on him by the violent, white supremacist institutions of Jim Crow. Any response to the absence of rights—whether deviation or acquiescence—leads, Wilderson and Sexton argue, to victimage of one form or another. Ellison, Prof. Lupino noted, anticipated and in some respects gave strength to this pessimistic reading. His depiction of power as taking precedence over democratic principles, for example, renders the narrator not only outside of politics but also vulnerable to violence without any semblance of recourse to legal protection. Similarly, Ellison's later essay, "An Extravagance of Laughter," dovetails with Afropessimism in presenting stereotyping, romanticizing the past, and lynching as operating according to a sacrificial logic that gives unity and order to white communities at the expense of Black victims.

Running counter, at least in part, to the Afropessimists is the work of scholars like Danielle Allen, who see in the novel the faint outline of what Prof. Lupino described as a rule of law approach to racial injustice that condemns racial inequality—and its analog, invisibility—as evidence of an institutional failure to live up to the laws that were promised but that still holds out hope for consensus, unity, and the emancipatory potential of the state. The grandfather's riddle in *Invisible Man*—in which the narrator is told to "live with your head in the lion's mouth" and to "overcome 'em with yeses…agree 'em to death and destruction, let 'em swoller you till they vomit or bust wide open"—factors interestingly into such readings. Approached from one direction, it seems to prefigure the nonviolence of the Civil Rights movement and, in this, put forth a martyr strategy for combating racial injustice. Suffering invisibility, in this context, heightens the contradiction between principle or law and practice, thus modeling a way to bear loss that might ultimately force a moral awakening among white onlookers through emphasis on a healthy, heroic—because subordinate—form of citizenship. Allen would acknowledge, though, that this raises as many questions as it answers. Does invisibility, within this framework, threaten the intelligibility of actions in such a way that capitulates to the state of affairs without inducing notions of a shared citizenship? Can we actually assume that martyrdom will find a healthy audience, that suffering *won't* be needless?

But what if another strategy or model of protest were in play for *Invisible Man's* narrator? One that, even in occupying a position in the lion's mouth—even in conceding to the fact of being structurally conscripted into such a position—gave in neither to the hopelessness of Afropessimism nor the mandated suffering of rule of law theorists? As Prof. Lupino explained in outlining part of his current book project, he finds such a model in the figure of the trickster, who appears most prominently in the novel via Ellison's allusions to Homer's Odysseus. Ellison, in fact, outlines the function of the trickster—if not naming him as such—in his essay "Change the Joke and Slip the Yoke," where he proposes that adding disorder to order can re-render what is possible for Black actors. Specifically, the experience of what is not permitted within the context of what is, Ellison argues, allows one to make exploitative use of oppressors' weaknesses and thus offers a means not only of escaping violence but also, at best, a means of pressing the law to confront its own unjust application. For example, in his provocation with the (now-blinded) Brother Jack, a very clear calling back to Odysseus' deception of the Cyclops, the narrator's invisibility becomes part of the trickster's arsenal that meets the pessimist's structural position but then darts away from it by utilizing an evasive capacity for action and choice that likewise dismisses the alternative of martyrdom as being as unpalatable as it is unnecessary. And in the novel's eviction scene, a very clear summoning of the practices of thwarting



evictions common at the time in New York and Chicago, the deliberate unruliness of the crowd occupies a middle ground that is set apart both from fruitlessly appealing to the law for a justness that won't come and from self-annihilative violence. In drawing on disorder or unruliness to disrupt the habits of injustice—and in refusing, in this, to sacrifice the body to these habits—tricksterism, Prof. Lupino concluded, illuminates a new path toward reciprocity and good will by re-framing democracy as a system of antagonistic cooperation.



Baseball, Law, & Society

With baseball locked out, and with Columbians locked in at home due to snow, a trio of presenters took to Zoom for the Friday, February 4 installment of the Colloquium Series to speak on the nation's pastime, from its early days to its present state.

"*Unwritten Rules:* Flood v. Kuhn at 50"

"It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

—Oliver Wendell Holmes, *The Path of Law* (1897)

And yet, as Kinder Institute Associate Professor and MU Law Wall Family Fellow **Tommy Bennett** made clear throughout his portion of the talk, it is in this blindly imitative state that baseball finds itself today, at the golden anniversary of the landmark *Flood v. Kuhn* Supreme Court case. To get to *Flood* requires first going through *Federal Baseball Club v. National League* (1922), where the high court, drawing on a consistent-with-its-time interpretation of the Constitution's Commerce Clause, unanimously decided in favor of the league, reversing an initial ruling that found Major League Baseball (MLB) guilty of conspiring to monopolize the sport and, in doing so, deeming MLB exempt from antitrust regulation under the Sherman or Clayton Acts. The grounds? In spite of players crossing state lines to compete, the actual games, Holmes argued in his majority opinion, were purely local affairs and thus outside of Congress' purview when it came to regulating interstate commerce.

Fast-forward to *Flood*, where what was being challenged was Paragraph 10a of MLB's Uniform Player Contract, better known as the Reserve Clause, which held that if a team and player don't agree on terms of a new contract, the club has a right to renew the player's deal for a period of one year on the same terms as the prior season. The prevailing view (though certainly not the only one) was that this functionally gave teams a perpetual option on players' services, so when Curt Flood, a defensive revelation in center and a fixture in the St. Louis community, approached the Cardinals after the 1969 season looking for a $100,000 contract, the front office traded him to the Phillies rather than concede to his demands. Flood refused the trade and filed suit against the league, its then Commissioner Bowie Kuhn, and all 24 teams, on the grounds that his inability to negotiate with other teams until his one-year team option expired (also per the Reserve Clause) violated the Sherman Act's protection against restraint of trade.

Flood lost, and as Prof. Bennett pointed out, the terms of the loss are somewhat indefensible and confounding: one might even say revolting. For one, during the New Deal, the Court's interpretation of the Commerce Clause shifted dramatically, un-narrowing itself to include pre-commercial activities and indirect economic impact as subsumable under interstate commerce and thereby squarely within Congress' regulatory jurisdiction. With this, *Federal Baseball Club* found itself disconnected from its times, and as Flood's case wound its way through the court system, jurists had no option but to acknowledge this. As Justice Jerome Frank of the 2nd Circuit Court of Appeals noted, given recent Supreme Court decisions, *Federal Baseball Club* was an "impotent zombi[e]." Precedent, however, nonetheless prevailed, both at the 2nd Circuit and the Supreme Court, where Justice Harry Blackmun, one of a new wave of justices appointed by Nixon, relied almost entirely on the common law doctrine of *stare decisis* in his majority opinion, surrendering curiously and unnecessarily to the idea that questions decided by previous courts should be decided similarly in the future, regardless of how inconsistent those decisions might be with evolving interpretations of the law. Amazingly, Prof. Bennett added, Blackmun somehow managed to contradict *Federal Baseball Club* even as he was upholding it.

Months before the ruling in *Flood*, the Major League Baseball Players Association went on strike for the first time in league history, emerging from the labor strife victorious in so far as the Reserve Clause was replaced by an independent process of arbitration that paved the way for modern free agency. This change alone would lead one to believe that *Flood* is due to be revisited, and MLB's antitrust exemption is due to be overturned, a conclusion further supported by the fact that the Roberts Court has become increasingly interested in hearing cases that ask it to overrule precedent, including the one established in *Roe v. Wade*, a year prior to *Flood v. Kuhn*. Baseball, though, remains mired under the heavy sceptre of Henry IV.

"*Proposing Policy: Where Baseball Can Begin*"

In September 2021, first-year MU Law Student **Alexis Brudnicki** went to MLB headquarters in New York to present her proposal for how the league could—and how and why it must—improve its procedures for reporting, investigating, and ruling in cases of sexual harassment and violence in the workplace. The proposal, which lays out research on reforms in other industries that MLB could utilize to unwind its own inefficiencies, consists of four key components that all combat the power imbalance that currently exists for women in baseball.

1. **Addressing Policy Gaps:** Freelancers—journalists, statisticians, and many more—make up a sizable portion of the workforce that orbits and sustains professional baseball, but their lack of official affiliation with the league leaves them largely unprotected when instances of sexual misconduct arise. They have no HR department; they have no bosses who are attached to the entities where the problems they encounter are coming from. New policies must be drawn up, then, to ensure that women beat writers for *The Athletic*, for example, have a place to go when they are harassed on the job. Brudnicki added that, while the question of "where to go" is clearer for league employees, women in MLB who experience sexual misconduct still face the problem of being in an environment where they are a significant minority and where everyone is constantly scared for their jobs.

2. **Pathways to Victim Assistance:** As part of the process of addressing policy gaps, Brudnicki proposed to the league the creation of an ombuds program, which, whether embedded in or independent from MLB, would let people coming forward with reports of sexual harassment and violence know that there was an office devoted to defending their interests.

3. **Education:** At all levels—from scouts, to staffers, to players, to members of the front office—the league would benefit mightily from robust training in, for example, bystander intervention. Climate surveys could determine exactly where and what forms of training are most needed, and league officials committed to such surveys when Brudnicki met with them, though it warrants mention that these surveys have yet to be implemented.

4. **Advocacy for All Reporters:** Reporters of sexual harassment and violence might be confident they understand how the process works. They might know people involved and know the facts are on their side. They might anticipate—and receive—a favorable outcome, and yet the entire experience is still stressful and demeaning. In a 100-day trial, a reporter might not get a lawyer until day 90. The fear that comes with occurrences like this—the fear that what is promised might vanish according to the whims of a disinterested bureaucrat—would at least be mitigated by a clear chain of advocates who work with reporters at every step in the process.

"*The Negro Major Leagues and the Kansas City Black Community, 1920-1948*"

Over 10,000 people—Boy Scouts troops, Elks Lodge members, to say nothing of droves of regular fans—turned out for opening day of the Kansas City Monarchs' 1923 season. The city's mayor, Frank Cromwell, threw out the first pitch ("somewhere near the plate") to the mayor of Kansas City, Kansas. On some level, this might keep perfectly with our Rockwell-ian vision of baseball. But as MU History Ph.D. Candidate **Japheth Knopp** noted in painting this scene, it should be treated as anything but familiar. Here were two white mayors ceremonially kicking off the start of the Negro League season at least a decade prior to when traditional historical narratives tell us that Democratic politicians started coming into, and appealing to, African American communities. Why Kansas City?

As Knopp explained, there are a number of factors behind K.C. being uniquely ahead of this traditional timeline. Many late-1870s Exodusters stopped in Kansas City instead of heading further west into the Plains, finding employment in major industries—railroads, meatpacking, smelting—that were open to hiring Black men. This meant, on one hand, that the city had a substantial African American population before The Great Migration. It likewise meant that economic vitalization had already begun in Kanas City's African American communities by World War I and, in turn, that K.C. didn't experience the racialized labor strife of the 1920s to anywhere near the extent that other urban centers did.

When talks to start the Negro National League were being planned, Kansas City, with its flourishing Black business district at 18th and Vine, was a natural host site. Kansas City, too, was a natural home for a team, and the Monarchs, founded in 1920, became a centerpiece, culturally and economically, of the African American community in the city. It was also at this time that the *Kansas City Call* first went to print, rapidly establishing itself as one the largest, most successful Black-owned newspapers in the nation (and the largest Black-run business in the Midwest). The *Call* celebrated commerce, education, and desegregation, and denounced crime in the community, but as Knopp noted, its sports section played a particularly fascinating part in the paper's politics. Because of the Monarchs' popularity, reporters followed players to the spots around the Western Hemisphere where they moonlit

during the off-season, sending stories home from Mexico or the Dominican Republic about life in already desegregated societies. Of course, these reporters also were there for Spring Training in Georgia, where Klansmen showed up at the ballpark gates…

For more on baseball and Kansas City during the reign of the Pendergast Machine and in the wake of Jackie Robinson breaking the color barrier, visit the Kinder Institute YouTube page, where a recording of the talk can be found.

African American Political Thought Roundtable

Kinder Institute Assistant Professor of Constitutional Democracy Jennie Ikuta (Moderator)

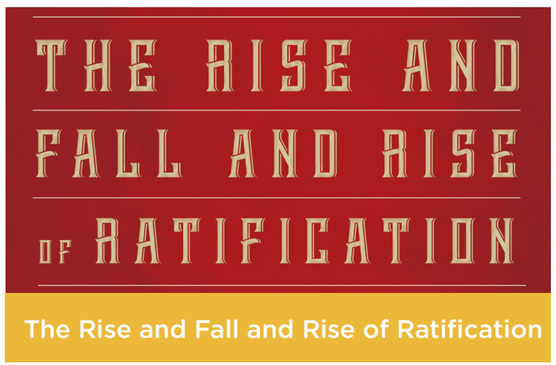
In discussing the overarching goal for the recently-published *African American Political Thought: A Collected History* (University of Chicago Press, 2021), co-editor and University of Washington Associate Professor of Political Science **Jack Turner III** pointed to how the tradition in the field has long been to divide Black thinkers into taxonomies of ideology: feminism, Marxism, nationalism, to name a few. Without at all intending to displace this approach, the new collection, Prof. Turner continued, was designed to provide a thinker-centered, multidisciplinary counterbalance to it that illuminated, rather than obscured, the singularity and granularity of particular minds from the African American community and African diaspora, both in terms of their ideas and their distinct interpretive methodologies. Doing so required a second intervention: a reconstitution of American intellectual history writ large in order to reflect how "African American political thought and American political thought are essential to one another and share a common historical fate."

Elaborating on the project's thematic binding, Brown University Associate Professor of Political Science **Melvin L. Rogers**, the collection's other co-editor, noted how, in the act of encountering the persistence of racial inequality, the growth of economic inequality, and the overall pall of political decay, readers are asked to take stock of the health of democracy both as an ideal and as a practice, particularly in the U.S. Specifically, by framing our understanding of democracy within the context of the terror, harm, disappointment, and vulnerability that Black people have experienced over time and continue to experience in the present, the collection demands that we take very seriously the question of whether or not democracy is up to the task of making good on its promises. And this imperative, Prof. Rogers added, should not in any way be construed to suggest that the figures examined collectively stand or stood in a positive, affirmative relationship with democracy. Democracy's critics—Wells, Du Bois, Delany, and more—were vital to the task at hand.

Following the co-editors' comments on what the collection as a whole aspired to and how it took shape, a trio of contributing authors shared brief remarks on the thinkers they spent time with. **Carol Wayne White**, Presidential Professor of Philosophy of Religion at Bucknell University, spoke on Anna Julia Cooper's construction of a new model of relational humanity that promoted democratic values which were not as visible in the work of leading white intellectuals (and white leaders) of the time, nor in the work of Cooper's African American male peers. In her writing, activism, community work, and educational efforts, Cooper revealed an unrelenting love for an idealized and intersectional—if, of course, also unconsummated—vision of an America transformed into what it could be. Hers was a vision quite out of fashion in academia today, though Prof. White noted in closing that we would do well to channel Cooper's faith in humanism. If not a transformed U.S., she asked, what are we fighting for?

University of Illinois-Chicago Associate Professor of Political Science and African American Studies **Cedric Johnson** then looked at Huey Newton, whose life, from beginning to end, he argued, reflected turns in the Black experience in the second half of the 20th century. Newton was, for example, one of the first to lay bare the kind of role that prisons and police were playing in Black communities, long before mass incarceration was common coin. Along with Bobby Seale and other fellow Black Panther Party members, he helped popularize the idea that Black people constituted an internal colony within the U.S., a conceptualization that powerfully oriented Black political life away from American democratic politics and toward international events. And when they later de-committed from this colonial understanding and instead embraced a politics of inter-communalism, Newton and the Panthers brought up issues that continue to speak to a major conundrum in American life: How do you lead a socialist revolution on U.S. soil at a time when the majority of people veer toward liberal democratic capitalism? Is it possible, that is, for Black activists to serve as a vanguard when the rest of the country is not prepared to move in the same direction?

Wrapping up the roundtable, University of Virginia James Hart Professor of Politics **Lawrie Balfour** described how her chapter for the collection not only allowed her to re-engage with a figure, in Toni Morrison, who "taught me how to read [and] how to think about the American literary canon"; re-visiting Morrison, Prof. Balfour continued, also opened up a new pathway for thinking about her as a literary theorist and author, particularly in terms of how her work provides a map for exploring the lived meaning of freedom from the vantage point of "the unchosen." For one, Morrison's fictional worlds create pictures of alternative, non-status quo ways to imagine and organize power and define community. Additionally, in turning to *Beloved*, Prof. Balfour drew out how the language of hunting and prey, so formative to Morrison's fiction and non-fiction work alike, serves as a means of constructing metaphors for a modern world built from the Atlantic slave trade, chattel slavery, and colonialism of many forms. In centering this history, Morrison helps us define freedom by way of an understanding of what it means to be on the move, to be hunted; she helps us think about what it means to occupy a democratic society whose constitution has a fugitive slave clause etched into its original structure, a fact that, to this day, brings to the fore questions about political belonging and issues related to how coerced movement—forced migration, mass eviction, the violent policing of borders—remains a core problem in political life. Who, Morrison asks, is the foreigner, and where is the foreigner's home?



The Rise and Fall and Rise of Ratification

Kinder Institute Distinguished Visiting Professor of Legal History Anne Twitty

For at least a decade, her lecture to undergraduates has gone like this: In an age of constitutional innovation, Massachusetts provided the spark with the ratification of its 1780 state constitution; the delegates at the Constitutional Convention in Philadelphia happily appropriated this practice post-drafting; and from then on out, ratification was the American way. However, as Distinguished Visiting Professor of Legal History **Anne Twitty** discovered in researching her chapter for Volume 1 of the Institute's scholarly re-appraisal of the Missouri Crisis, and as she laid out in her February 25 colloquium, the one small problem with this lecture is, well, that it's wrong. Of the 48 new or revised state constitutions adopted between 1780 (Massachusetts) and 1860 (Kansas), not a single one was ratified by a vote of the people between 1785 and 1818, and it wasn't until the mid-1830s that ratification became the rule, rather than the exception.

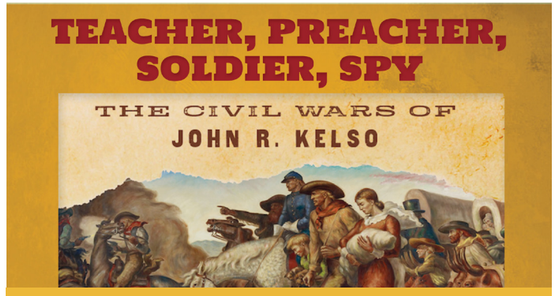
At least we're not alone in this popular misconception. Gordon Wood described the Massachusetts experience as setting the proper pattern of constitution making and constitution altering going forward. James Willard Hurst, in *The Growth of American Law*, emphasized how the overwhelming weight of the work of constitutional conventions involved the submission of their product to the voters. And the textbook *Liberty, Equality, and Power* reads: "Starting with New Hampshire in 1784, other states adopted the Massachusetts model." The potential reasons we've mangled this story, Prof. Twitty explained, are many. Especially among historians, there's a pronounced scholarly disinterest in state constitutions of the early national and antebellum eras, and the histories that are out there, she added, are often siloed and narrate constitutional change through persistent passive constructions. Moreover, the constitutions themselves are on-balance silent when it comes to articulating the appropriate mechanism for adoption.

Perhaps more than anything, though, we might be guilty of consistently misreading what one might call the touchstone moments of our "Intro U.S. History" lectures. In the case of Massachusetts in 1780, we may have glossed over two things: that the process there was different from what we commonly associate with ratification, running through towns instead of individuals; and that, by virtue of this, ratification should be understood less as an innovation and more as an extension of a long history of town governance. As for New Hampshire ratifying the "mandate" of ratification four year later, it might just be a red herring in the mystery, given the degree to which its constitution copied Massachusetts'. And in the case of the U.S. Constitution, we might not have paid quite enough mind to Federalists' puppeteering. Because there were already concerns about the legitimacy of the Convention—and because the Articles of Confederation proved that some kind of ratification would likely be inevitable—they turned to the people to establish the document's legal legitimacy out of practicality, rather than out of some lofty idealization of

the public will. There is no reason, then, to assume that the need to ratify the federal constitution was a referendum on the need for ratification, writ large.

What literature exists on ratification, particularly in the immediate wake of the U.S. Constitution, supports the implication that ratification was one option among many for determining the legality of state charters. John Adams makes this broadly clear in his *Autobiography* when he declares that the existence of a drafting body consisting of representatives chosen by the people was far more central to asserting legitimacy than an up/down popular vote. Only if there was doubt about said legitimacy, Adams wrote, should a convention then feel some obligation to "send out their project of a constitution, to the people in their several towns, counties, or districts" in order to "make the acceptance of it their [the people's] own act." Upon arriving at the conclusion that Virginia's state constitution was illegitimate, Jefferson similarly advocated not for popular ratification but for a special convention to be called to draft a new constitution. "[The] people must delegate persons with special powers," he wrote, echoing Adams, to render a form of government unalterable.

Even in Pennsylvania, arguably the most populist of the original thirteen colonies, we see what little impact the experience of federal ratification had at the state level. While the product of the 1789-90 Pennsylvania Constitutional Convention was submitted for public opinion, this was not tantamount at all to a public vote. There was, in fact, no debate or discussion resultant to the process of soliciting what people thought, and as political opposites James Wilson and Albert Gallatin described, while consent was essential, there was no mandate on what form it should take. For Wilson, it was the "uninterrupted experience" of the drafting process, and for Gallatin, it was the sincerity of delegates' discussion and deliberation that allowed them to consider the constitution universally approved.



Teacher, Preacher, Soldier Spy: The Civil Wars of John R. Kelso

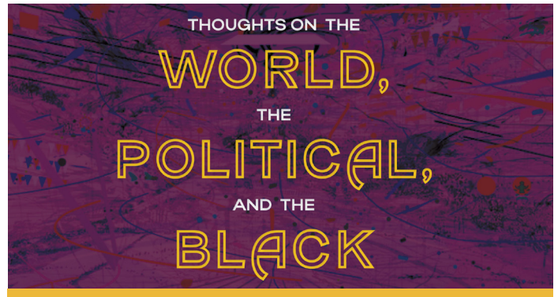
Brown University Professor of History Christopher Grasso

In the introduction to his 2021 biography of John R. Kelso, Brown University historian **Christopher Grasso** describes his subject as possessing Whitman-like multiplicity. As Prof. Grasso's March 11 talk at the Kinder Institute made abundantly clear, as capacious as Whitman was, this introduction might still be an understatement. Born in a backwoods cabin in Southwest Missouri in 1831, Kelso became a teacher and evangelical preacher in 1850, only to lose his faith upon the collapse of his first marriage. It was around this time that Missouri was becoming a hotly contested Civil War borderland, and after hopping on the stage at an 1861 pro-secessionist rally to declare his Union ties, Kelso entered the war's murderous fray. A "ghost in the night," whose supporters described him as "brave to the point of recklessness" and whose foes described him as a "remorseless, ferocious, inhuman rebel killer," Kelso spent the war years cutting across Missouri, spying on enemy encampments and seeking revenge on the faceless Confederate guerillas who drove residents out of his hometown to their snowy deaths and burned Kelso's house and barn on their way out (he made good, by all accounts, on his pledge to kill 25 guerillas).

The legend of his battlefield exploits—immortalized, if also embellished, in newspapers from New York to Springfield—led to his election to the first Reconstruction Congress, where he aligned with radical Republicans to promote universal political rights, universal equality before the law, and severe punishment of the Confederate States (he, along with a Missouri colleague, were the first to call for the impeachment of Andrew Johnson). He ran again in 1868 on a platform of African American political equality and lost deeply, a sobering result that he saw as an affront to his fanatical belief in a union perfectible through politics. And as Prof. Grasso explained, his commitment to equality—political and legal, though not social equality, it must be noted—in a time of hardening conservatism might account for why fellow Missourians like Jesse James and fellow violent Bushwhacker foils like Wild Bill Hickok became folk heroes while Kelso's star faded.

After the death of two of his sons, Kelso left Missouri in 1872 and headed west to Modesto, CA. It was during this third act, Prof. Grasso showed, that we can begin to see the fascinating ways in which Kelso's story, in its totality, connected aspects of 19th-century life that are rarely placed in conversation with one another. Once a religious revivalist, Kelso continued in the studies that moved him from Christianity to atheism while in California, eventually becoming an outspoken critic of conventional attitudes toward sex and marriage and adopting Spiritualism as a guiding principle. Always a fiery champion of the laborer, his radicalism on this front intensified when he moved to the Wild West of Colorado, to the point that he took on the mantle of anarchist in his final book, *Government Analyzed*, in which he denounced his erstwhile patriotism as misguided righteousness that led to state-sanctioned slaughter. The Civil War, for Kelso, could no longer be seen as a sacred means for justly reconstructing the nation and delivering on the promises of the Declaration of Independence. Its outcome was, instead, a cruel joke about how easily tyranny can be re-packaged as oligarchy.

Invoking another 19th-century literary giant, Prof. Grasso noted that, in his Whitmanian multiplicity, Kelso ultimately morphed into one of Emerson's "representative men." This is true, on one hand, because of how the spheres of public life that Kelso occupied—religious, political, military—and the facets of his private life with which he most wrestled—marriage, race, mourning, sexuality, gender politics—map onto the larger narrative of the era. The same can be said of the modes of character he embodied and the systems in which they were enmeshed: evangelical Christian, sentimental war hero, enlightened critic, radical reformer. In a theme that Prof. Grasso returned to throughout his talk, by zooming out and thinking in these terms, we can see how the method in which a story is told is, in many respects, as important as the story itself. In her article "Historians Who Love Too Much," Jill Lepore distinguishes between biographies, which for Lepore reflect on the singularity of an individual's contribution to history, and microhistories, those works which use a single life as an allegory for the culture of a given time. Pushing back against this, Prof. Grasso described how, in constellating the sources through which Kelso's life story revealed itself—newspapers, diaries, Kelso's political and religious tracts, and, most notably, his three separate autobiographical memoirs—he realized that we needn't choose between Lepore's two categories. The irreducible singularity of Kelso's biography is, Prof. Grass concluded, precisely what makes it a micro-historical window into the times of crisis and reform through which he lived.



Thoughts on the World, the Political, and the Black

Brown University Assistant Professor of Africana Studies Ainsley LeSure

Are politics inimical to Black life? That was the question that concluded the abstract for Brown University political theorist **Ainsley LeSure's** March 18 talk at the Kinder Institute, which she began by placing her work in conversation with those in the field of Black Studies who would answer this question, 'yes.'

At its core, the ongoing debate in the field—one that Prof. LeSure recently found her work in the middle of—centers on a constitutive exclusion of Blackness within the world of politics that can be traced back to the Transatlantic Slave Trade's transformation of Black subjects into objects of property, an ontological assault whose ramifications continue in the present. For Afropessimists—those thinkers who do find politics anti-Black—that the ontological status of Black people thus exists in a perpetual state of question leaves no option but to categorically refuse political ideals like equality or political designations like citizen as adequate remedies for the terror that Black people experience at the hands of the state apparatus, as well as on a more micro-level via daily interactions with the nonblack subject. Within this construct, politics aren't simply incapable of addressing the aforementioned ontological assault but are actively complicit in producing and compounding it. For many, as a result of this, one must turn away from the political toward the social to conceive of a means by which the promise of Black freedom or Black liberation can be brought about.

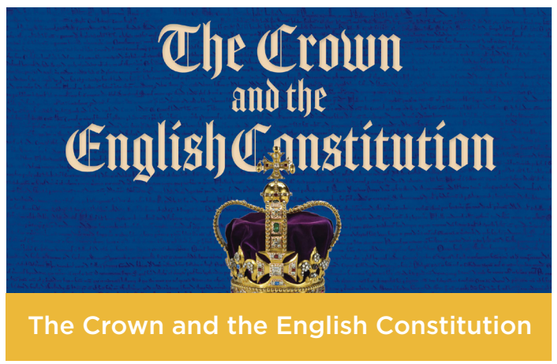
Saidiya Hartman's argument in *Scenes of Subjection*, Prof. LeSure demonstrated, exemplifies this critique. For Hartman, while emancipation did challenge the conceptualization of whiteness as a property essential to the integrity of citizenship, the transformative potential of this gesture was almost immediately undermined when anti-discrimination clauses were stricken from the 14th Amendment and the Civil Rights

Act of 1866. Under these terms, Hartman contends, the promise of equal protection did nothing to challenge racial sentiment but instead introduced racial distinction as a social placeholder that re-created structural forms of legal subjugation exercised via the state's police powers. In other words, because law had (and has) no choice but to affirm sentiment, the public good came to be defined by white comfort, which normalized indifference to Black suffering and horror at interracial proximity; in turn, this opened up gaps between the formal articulation and actual exercise of rights, and between the abstract notion of equality and extant social relations. Returning to the debate where the talk started, since the universal principles of politics—most specifically, humanistic equality—are thus underwritten by racially exclusive norms, remedy cannot come through conventionally political channels, such as legislation or civil society, which ultimately perpetuate "the stigmatic injuries" that stem from slavery.

Or, perhaps more accurately, in looking at the subjection of enslaved people and how it was intensified by misrepresentations of consent and will, Hartman found some capacity for redress in re-imagining politics through the prism of a social order in which—through exercises of agency like stealing away—the ontological crisis of Black people and the Black body was addressed, and can again be addressed, through the genuine performance of empathy. It is, Hartman acknowledges, a contained, impermanent vision of autonomy but likewise one that has some transformative and healing potential precisely because it doesn't trade in illusions of wholeness but accepts the inherent incompleteness of the restitutive project.

As Prof. LeSure showed, in his intervention in Danielle Allen and Hannah Arendt's debate about the significance of Elizabeth Eckford's place in the history of post-*Brown* school desegregation, Fred Moten addresses the dilemma of impermanence in Hartman by outright refusing ontology, subjectivity, and politics alike. In Eckford, who fled a white segregationist mob in terror after being denied entry to Little Rock Central, Allen sees an embodiment of the Black politics of sacrifice necessary to bring about an equal society. In her reading of Arendt's "Reflections on Little Rock," Prof. LeSure described how she sees, on the one hand, the degree to which Arendt's antiblackness prevents her from understanding "the treasure black study and black students offer toward antiracist world-making." At the same time, though, she noted how she sees Arendt's use of the social—specifically, how Arendt believed the ruling in *Brown* could not achieve equality because of how it was at fatal odds with entrenched white customs and white racial common sense—as demonstrating an acute understanding of antiblack racism in the U.S. As for Moten, while Eckford's appearance and the subsequent wordlessness that encapsulated her psychological suffering reveal the degree to which politics is inimical to Black life, it likewise shows how the radically dislocated self, in consenting not to be a single being, becomes part of a great, metaphysically distinct Black social ensemble in which the world making possibilities of Blackness reside.

For Prof. LeSure's discussion of where her work fits into this conversation, visit the Kinder Institute YouTube page, where a full recording of the talk can be found.



The Crown and the English Constitution

Oxford, Corpus Christi College, Professor of Later Medieval History John Watts

In his March 21 talk at the State Historical Society of Missouri, a rare Monday colloquium which doubled as a send-off of sorts for our undergraduates headed to the U.K. over Spring Break to study at his academic home, Oxford's **John Watts** provided a new take on the rise of the United Kingdom's liberal constitutional order. On many fronts, he explained, his is a seemingly counterintuitive narrative, starting with the fact that it pushes back against the dominant, Whiggish interpretation of English history which, since at least the 19th century, has celebrated the 1689 Glorious Revolution as the beginning of the current liberal political system because of how it resulted in restrictions being placed on the monarchy that finally achieved a stable balance between royal and legislative power. In his alternate timeline, though, a *de jure* system of liberal government had already been established by the 17th century, and it only fell apart when Charles I ignored his customary obligations to share government power. These obligations, Prof. Watts continued, date back centuries before 1689, to a period in the Late Middle Ages when kings were attempting to extend their power, and it was out of their efforts, not the Glorious Revolution, that the three key features of the English constitutional order—Parliament, royal charters, and the common law—were born.

As for Parliament, in significant ways, and in ways that would appear to contradict his telling of this history, the institution was designed to limit royal power. However, Prof. Watts noted that, even if it might seem paradoxical, one reason Parliament endured better than other representative governmental bodies from the Late Middle Ages was that it also meaningfully *extended* royal power. The King, for example, was able to compel attendance at Parliament, and with representatives of local authority regularly (and centrally) convened, it became easier both to spread knowledge of and to enforce the law beyond London. Similarly, if the extension of Parliament's authority was accomplished by binding together a network of political colleagues from across the entire kingdom, their links, particularly when compounded by patronage politics, could and often did function as a conduit through which royal power and influence traveled throughout the land.

Continuing with the theme of counter-intuitiveness, Prof. Watts then showed how royal charters such as the Magna Carta likewise secured the power of the Crown by simultaneously restraining it. While the Magna Carta is famous for the substantive restrictions it initially placed on the power of King John to command English aristocrats, we often forget how swiftly this was undone. King John abandoned the charter within a year and was only obligated to recommit to *some* of its principles a decade later, when he needed more taxes than he could easily get his hands on. Perhaps unsurprisingly, the reinstated version of the Magna Carta was stripped of many of its most revolutionary limitations on royal power, a remaking that sparked political battle and rekindled interest,

in subsequent Late Middle Ages charters, in resurrecting monarchical restraint. The nature of and intention behind this restraint, Prof. Watts added, should be carefully considered. In particular, we should take note of how it was supporters of monarchical power who were lobbying for charters that advocated for the Crown's power to be limited by that of local aristocrats. Why? Giving nonroyal elites more of a say in government allowed for the king to be portrayed as an executive ruling by the will of the people. In this, the arrangement functioned not only as a restriction of royal power but also as a utilitarian justification for its preservation.

Lastly, and less counterintuitively, the permeation of common law throughout the kingdom was a naked extension of royal power. While, today, we correctly think of common law as an institution which upholds individual liberties, this ignores how it was introduced primarily to serve the interests of the Crown, not its subjects. Regularized justice generally benefited the common good by facilitating commerce and creating a more professional judiciary. The extension of common law throughout the kingdom, on the other hand, displaced local institutions of justice, meaning that the judicial power of local elites was reallocated to royal appointees whose interests were in line with the Crown.

Professor Watts concluded with some reflections on the legacy of monarchical power in the government of the United Kingdom. To be sure, the authority of the monarch is largely symbolic in 2022. That said, many of the most significant traditional powers of English kings have been transferred to modern day Prime Ministers, and their retention of powers beyond what most parliamentary executives wield is a reflection of how, while government institutions may have changed, innovations from far in the past are still influential in England's political history.

LECTURES AND SYMPOSIA

Recaps for one late-fall lecture and one early-spring symposium follow, but this section could have easily been double the length. Due to too much happening at once—a good problem to have, to be sure—our regular beat reporter unfortunately had to miss a pair of co-sponsored events: Mizzou alum **Taylor Meehan's** February 11 talk on "The Third Branch" at the MU Law School and University of Tennessee Professor of History **Monica Black's** March 15 lecture on her 2020 book, *A Demon-Haunted Land: Witches, Wonder Doctors, and the Ghosts of the Past in Post-WW II Germany.*

The Hidden History of the American Revolution

University of South Carolina McCausland Professor of History Woody Holton

Given the willful mysteriousness of the subtitle for his most recent book, *Liberty is Sweet: The Hidden History of the American Revolution*, University of South Carolina Prof. **Woody Holton** noted in beginning his November 11 lecture at the State Historical Society of Missouri that his goal for the talk was to provide some context for what, exactly, he was trying to unhide. So often, he prefaced, the book's central task of revealing what's been lost (or what was never known in the first place) involved reintegrating those figures—Indigenous peoples, free and enslaved African Americans, and women—into a revolutionary narrative they've long been left out of.

His first example, however, was something quite known about the history of the Revolution: the 1763 Stamp Act. Known, but at the same time, he argued, widely misunderstood. Rather than using funds generated from the Stamp Act to offset debt incurred during the Seven Years' War, as textbooks would have us believe, the British deployed tax revenue from the legislation to strengthen their peacekeeping military presence on the colonies' western border. The thought was that doing so would both protect colonists from the Indigenous nations of the North American interior and protect these nations' lands from profiteering colonial speculators. This wasn't, Prof. Holton stressed, undertaken out of any newfound sense of enlightenment among imperial administrators when it came to Indigenous lands; it was, instead, merely a way to not do the most expensive thing a government can do—go to war. This human wall of garrisons which colonists couldn't cross—and, importantly, which these same colonists funded—would remain intact even after the Virginia Assembly, whose membership included Washington and Jefferson, petitioned in 1769 for a repeal of the Stamp Act and a subsequent opening up of the western territories. In response to the threat of colonial expansion, women peace chiefs living in villages along the Wabash River sent out wampum belts to neighboring tribes with the goal of establishing a coalition capable of resisting what appeared to be a looming, violent push for displacement from the East. After finding out that these efforts were successful at allying nations north and south of the Ohio River, the British government, realizing that the last thing it wanted was to fight such a coalition, rejected the Assembly's petition. As Prof. Holton noted, without Indigenous peoples, there would have been no Stamp Act; and without the Stamp Act, there would have been one less primary point of colonial dissatisfaction with Parliament in the decades leading up to the war.

In turning his attention to unpacking African Americans' role in alienating white colonists against the British government, Prof. Holton first underscored how important it is to remember that, at least for the first twelve years of resistance (1763-1774), these colonists' contention was with Parliament, not the crown: for restricting westward expansion; for making the colonies foot the bill for this restriction; and additionally, for cracking down on such practices as molasses smuggling. In other words, it wasn't independence the colonists sought during this period, but only the rolling back of changes in policies related to the "Big Three T's": territory, taxes, and trade.

Why does 1774 mark such a touchstone when it comes to dating the transition of colonial sentiment from a desire to restore "the good old days of 1762" to a desire to exit the British empire? Because it was at this point that reports began to arise—from Abigail Adams in Massachusetts, for example, and later that year, from James Madison in Virginia—that an informal alliance was coalescing between freedom-seeking African Americans and a British government desperate for soldiers. These rumors that colonial governors up and down the seaboard were taking seriously the proposition of arming, training, and eventually liberating enslaved persons would grow louder throughout 1774 and would become reality in 1775, with the passage of Lord Dunmore's Emancipation Proclamation in Virginia and the emergence of similar, if also unofficial, agreements elsewhere. The significance of these agreements as instigators for the colonial push for independence can't be overstated. Though merely a recruitment tool for the British, colonists repeatedly treated the crown's offer of emancipation to the enslaved as tantamount to an appeal that they kill their enslavers. It was as if, many colonial accounts read, the British were "aiming a dagger at our throats through the hands of our slaves," and it should thus come as no surprise, Prof. Holton offered, that the final grievance of the Declaration of Independence reads, "he [the King] has excited domestic insurrection [among the enslaved] against us."

If, in this, African Americans played a sizable role in bringing about the Declaration, likewise did they have a huge hand in reshaping its meaning. More than anything, Prof. Holton explained, colonists initially saw abandoning affiliation with Great Britain as a way to draw the French Navy to their side. However, an alternate, far more aspirational vision for the Declaration would become clear almost immediately after it was reprinted in newspapers. In the epigraph of his 1776 "Liberty Further Extended," Lemuel Haynes, a free African American who was serving in Washington's Continental Army when he produced the anti-slavery pamphlet, quoted—for the first time in print—the document's famous opening lines on self-evident truths. Such citation of "all men are created equal" would become a hallmark of the writings of African American and white abolitionists alike, a turn of rhetoric that transformed the Declaration from a mere document of secession into what Prof. Holton dubbed the world's "finest statement of human rights."

In regard to *Liberty Is Sweet's* final hidden history, both as the colonies progressed toward Revolution and as the Revolution progressed, women's roles in the war effort became increasingly pronounced. Take Hannah Griffitts' 1768 poem "The Female Patriots," in which she castigates Philadelphia merchants for their non-participation in tea boycotts. "If the Sons, so degenerate, the Blessings despise," the poem reads, "Let the Daughters of Liberty nobly arise." Simply put, the more the poem circulated, the more pressure merchants in port towns all over the thirteen colonies felt to join the boycotts, and the more the boycotts succeeded. A similar lesson can be drawn from cloth boycotts of the era and the domestic cloth production they necessitated. Though perceived as disreputable—the domain of spinsters, poor women, and enslaved women—spinning cloth became a collective occasion in the northeast, and reports of the spinning bees that were taking place throughout the region emphasized the degree to which respectable women participated in them. And then, as the war reached its nadir for the colonies with the capture of Charleston, Esther Reed organized women in Philadelphia to knock on doors and raise money for the soldiers. Her May 1780 broadside "Sentiments of an American Woman" was published to pre-emptively push back against cultural norms which held that women should do no such thing by pointing to women in history—Queen Elizabeth, Catherine the Great—who acted boldly when the situation demanded it. Important on its own, to be sure, but doubly so when we acknowledge that it was through Reed's broadside, and *not* Thomas Jefferson's December 1780 letter to George Rogers Clark, that "empire of liberty" entered the American lexicon. (Though we can't be sure that Jefferson stole the phrase from Reed, we can say for certain that Martha Jefferson received a copy of "Sentiments" and let our assumptions be guided from there.)

There is, Prof. Holton pointed out in closing, much else about the Revolution's history that's hidden from public eye. Whereas national storytelling insists on positioning the colonists as underdogs in the war, for example, we would do well to at least take note of the fact that Howe declared the conflict unwinnable for the British as early as June 1775's Battle of Bunker Hill. And while the heroism of George Washington is so often feted, we might also do well to remember that Washington's greatest strategic victories arguably came when he listened to his officers and *didn't* pursue the aggressive attacks on Boston and New York that he so desperately wanted to.

To complete the scheduled twin-bill, Prof. Holton returned to the Kinder Institute on Friday afternoon for a free-flowing panel discussion, entitled "Reconsidering the Founders," with Kinder Institute Associate Director **Jeff Pasley**, Postdoctoral Fellow **Erin Holmes**, and Distinguished Faculty Fellow **Alan Gibson**. For more on everything from the decidedly non-adulatory, and at times intensely dark, tone of CBS' 1975-76 *Bicentennial Minutes*, to Charles Thomson's destruction of his 1,000-page history of the Revolution on the grounds that "I shall not undeceive [the] future generations" who will "admire the supposed wisdom and valor of our great men," visit the Kinder Institute YouTube page, where a recording of the panel is housed.

The Two Impeachments of Donald J. Trump

2022 *Missouri Law Review* Symposium

An annual tradition back after a hiatus year, the *Missouri Law Review* gathered 15 leading legal scholars, journalists, historians, and authors—along with two Congressional keynote speakers—on February 17-18 for a symposium unpacking the myriad questions and issues that were raised by the two impeachments of Donald Trump. Among those

involved was Kinder Institute Director **Justin Dyer**, who moderated a Friday morning panel featuring the following three distinguished scholars that addressed the quite fundamental, and also quite complicated, question: "What Is an Impeachable Offense?"

Keith Whittington, Princeton University William Nelson Cromwell Professor of Politics

In crafting a defense during his first impeachment trial, Trump's legal team landed on a strategy that was, Prof. Whittington noted, many things at once: unsurprising, given the nature of the allegations; familiar; and, as he showed in drawing on the origins of the impeachment power, rather ahistorical. While impeachment was unwarranted, Trump's team argued, because it [impeachment] was constitutionally limited to reckoning with criminal behavior, the literature and rhetoric surrounding the need for an impeachment power at the time of the United States' founding—and, moreover, the British practices that this literature and rhetoric drew on—say otherwise. Madison, for example, put the need for impeachment on the table quite quickly at the Constitutional Convention, given his concerns about both the extraordinary length of the proposed terms for presidents and the incredible magnitude of authority vested in the executive office. However, it was not criminality that impeachment safeguarded against, but, as Madison saw it, "the incapacity, negligence, or perfidy of the chief Magistrate." Even as the language of the Constitution was refined, the concerns about impeachable executive behavior remained expansive. Hamilton urged ratification because impeachment would be available to combat presidential abuse or violation of the public trust. James Wilson emphasized that impeachable offenses should be construed broadly, to include *political* crimes and misdemeanors, which Joseph Story further broadened to include offenses of political character.

To narrow, as Trump's defense team (and defenders) did, the answer to the question of "what is an impeachable offense" to "indictable crimes" would thus subvert the historical meaning and design of the impeachment power. It wasn't conceived, that is, as a constitutional check that could weed out criminal activity in the Oval Office, but rather as one that would ensure both that the president's behavior remained within constitutional bounds *and* that Congress was able to perform its duties without executive obstruction (the latter of which is quite relevant to the case study of Trump's first impeachment). Within the context of this framework, even if you don't believe that Trump's conduct rose to the standard of being impeachable, you still have to acknowledge the destructiveness of how his lawyers and supporters very much threatened the necessity of having a standard of conduct in place that, in interpreting "High Crimes and Misdemeanors," is both robust and wide-ranging enough to check future officials.

Michael W. McConnell, Stanford University Richard and Frances Mallery Professor of Law

In framing his discussion of the three articles of impeachment that spanned Trump's two trials, Prof. McConnell first noted how nicely they map onto what he sees as three rough (*not* legal or analytical, he stressed) categories that can help us make sense of impeachments as a whole: (1) Some behaviors are simply not impeachable, and when impeachment is pursued in these cases, it is likely the result of abusive partisan overreach; (2) Some behaviors are right on the line, to the point that reasonable minds could come to different conclusions regarding whether or not the conduct in question is just cause for removal from office; (3) Some behaviors are so clearly impeachment-worthy that acquittal represents Senators' failure to rise to the conditions of their oath to put aside partisan loyalties.

First Impeachment, Article Two: As for why the second article in the first Trump impeachment trial falls into the "not impeachable" category, Prof. McConnell identified a procedural problem and a much deeper substantive problem. As for the former, while the article accused Trump of obstructing Congress' impeachment by allegedly instructing officials not to comply with information requests and subpoenas, there was the small issue of the fact that an impeachment inquiry hadn't yet been launched. The proper method, he added, would have been for the House to vote and then set up an impeachment committee which would have then had the authority to subpoena. As for the substantive problem, Prof. McConnell argued that presidents have the right to invoke executive privilege. This doesn't at all mean that they have the right to succeed in this but only that doing so is not in itself impeachable behavior. For it to rise to this standard, the House would have had to go through a series of very clear steps: subpoena witnesses, consider claims of privilege, vote them up or down, and, if voted down, hold witnesses in contempt, at which point it would have been impeachable for Trump to order subordinates to obstruct the process.

First Impeachment, Article One: At the heart of this article was conduct that Prof. McConnell deemed quite un-republican: Congress had appropriated funds for military protection in Ukraine; Trump threatened to withhold these funds. Alone, Prof. McConnell argued, this might be seen as borderline typical (if not becoming) presidential behavior. The problem, though, came in the 'why': i.e., that Trump threatened to withhold the funds until Ukrainian President Volodomyr Zelensky publicly announced an investigation into Hunter Biden. The use of power to investigate political opponents is already a serious, serious issue that should be done both for good reason and with the utmost transparency, but this is only the tip of the iceberg. To get a foreign power to do it is deeply problematic. To publicly announce it (Trump's real goal, Prof. McConnell contended) goes against the norms of law enforcement and courts public opprobrium vs. presumptions of innocence. And Trump's attempt to run all of this through his personal lawyer rather than the proper legal or diplomatic channels is simply wrong. Still, though, Prof. McConnell noted how he understood why Senators voted against impeachment: because nothing came of this, because Trump is the kind of person who just says stuff, because Ukraine clearly didn't fully comprehend what he was after, and, again, because Trump was far from the first president to manipulate appropriated funds for his own interests.

Second Impeachment: The only possible reason that Trump wasn't impeached for his actions on January 6—and, to be sure, he should have been, Prof. McConnell emphasized—was because of how poorly drafted the article of impeachment was. Instead of sitting down with sober minds and crafting an article that would have been virtually impossible for Republicans to vote against, the House tossed out words like incitement and insurrection (mentioned in the title of the article and never again) that invited controversy and gave Senators an out.

Kate Shaw, Professor of Law, Cardozo Law School

If you spend any time with the history of impeachments, Prof. Shaw noted in opening her panel presentation, it quickly becomes clear that the question of precedential force is a difficult and underexplored one. Because the courts haven't really weighed in on this matter, all we have is the history of argument, the slipperiness of which can be seen if we attend to the defenses that have been crafted in impeachment trials over time. Two defenses in particular, Prof. Shaw continued, stand out.

First Amendment Defense: Trump's second impeachment wasn't the only time that the First Amendment was front and center in such a trial. The tenth article in Andrew Johnson's impeachment was purely about speech, lambasting the *president* for his scandalous harangues against congressional adversaries. Prior to Nixon's resigning, the judiciary committee approved three articles of impeachment, the first of which regarded making false or misleading public statements. And the first Starr Report in the Clinton impeachment contained language framing abuses of power in terms of making public-facing statements for the purpose of deceiving the people with regard to misconduct.

As for what came of these claims, the track record is an interesting and mixed, if not altogether helpful, one. Senators never voted on the tenth article in Johnson's impeachment. "Who is to be the judge of whether [the President] speaks properly," his attorneys argued. After the smoking gun came out and Nixon resigned, Republican Congressmen who had initially voted against the first article admitted that they had come to accept it as impeachment-worthy. The judiciary committee in Clinton's case successfully introduced an amendment to remove language regarding "public lies" from the articles of impeachment but did so on the grounds that lies to conceal personal conduct aren't impeachable even if other lies are. And Trump's impeachment argument strung together a series of flimsy First Amendment defenses: that it's designed to protect private citizens from government and didn't apply to presidents in office; that Trump's speech couldn't satisfy the *Brandenburg* test (a misuse of judicial precedent, since there was no criminal defense in play). On one hand, in the success of these defenses, we see just how underdeveloped precedent is when it comes to First Amendment accusations. At the same time, though, if we look past the outcomes, we likewise see how meaningful a well-sculpted force of precedent it could be.

Permissible Conduct Defense: In the case of Trump's first impeachment, his attorneys simply trotted out the defense that there's nothing wrong with using privilege to advance political self-interest, that all politicians do it, and that it's thereby unimpeachable. As Prof. Shaw pointed out, what's interesting here, particularly from a standpoint of precedent, is that they could have but didn't cite Supreme Court history—*McDonnell* or *Citizens United*, for example—to underscore the real limits that are in place to prevent the law's ability to control the practice of politics, even unsavory politics.

Internship placements for our Kinder Scholars D.C. Summer Program are starting to roll in (see p. 19 for the *Columns* debut of our eighth D.C. cohort). Articles for our undergraduate *Journal on Constitutional Democracy* are taking final shape (see pp. 20-21). A group of 20-plus students are basking in the afterglow of spending Spring Break studying in the U.K. as part of Rich and Nancy Kinder Chair in Constitutional Democracy **Jay Sexton's** "Global History at Oxford" seminar, and while they were there, final acceptances for scholarships associated with the Kinder Institute Residential College, along with 2022-23 Society of Fellows applications, were wending their way through cyberspace to Jesse Hall.

Two things among the bustle that we want to spill a little extra ink on here. First, this year's undergraduate fellows have had an especially busy spring. IUPUI sociologist **Andrew Whitehead,** in town for the annual Paine Lecture on Religion and Public Life, stopped by the Kinder Institute offices in February to talk with the group about his research on the rise of Christian Nationalism in contemporary politics. They hit the cinema twice in March, on the 6th for a True/False screening of *After Sherman* and on the 15th to watch Mizzou alum Alana Marie's *Kinloch Doc*. And April will feature a dinner lecture with Distinguished Visiting Professor of Legal History **Anne Twitty** on her research into the history of slavery at the University of Mississippi and a trip to Rhynsburger to see the MU Theatre Department's production of *The Revolutionists*.

And while it's always a little bittersweet to celebrate news that requires bidding farewell to tremendous students, our graduating seniors are starting to fill us in on what their first post-Mizzou chapters will hold. **Noah Wright**, a member of the inaugural cohort of the Residential College and our first-ever Constitutional Democracy-only major, will be pursuing an MTS at Harvard Divinity School. **Megan Steinheimer,** also a KIRC inaugurator and a 2021 Kinder Scholar, will be heading to University of Pennsylvania Law School. 2020-21 Fellow **Brett Newberry** will be staying in Columbia as an MU Law 1L next year, and 2019-20 Fellow **Cassie Marks** will be moving a couple hours down I-70 to take a position as a Research Assistant at the St. Louis branch of the Federal Reserve. And in news we got just before this went to press, 2020-21 Fellow and KIRC PLA **Claire Wilkins** will be continuing a tradition of Kinder alum studying in the U.K. after graduation by pursuing an M.Stl. in English Literature at Cambridge. More news to come on this front in the summer newsletter, and congrats to our first responders!

KINDER SCHOLARS

After receiving a near record number of applications, conducting a delightful round of group interviews, and going through a positively brutal selection process, we're thrilled to announce the 2022 cohort of Kinder Scholars to our *Columns* readers. We'll update everyone with internship placements in the summer newsletter, but for now, names, grad dates, majors (M), and minors/certificates (m/c).

Jackson Bailey (May 2024, M: Constitutional Democracy, Political Science)

Lauren Bayne (May 2023, M: Elementary Education, Political Science, m/c: American Constitutional Democracy, Digital Global Studies)

Anna Cowden (May 2023, M: Journalism, Constitutional Democracy)

Grace Cunningham (May 2024, M: Environmental Science)

Hope Davis (May 2023, M: Journalism, m/c: American Constitutional Democracy, Political Science)

Leah Glasser (December 2022, M: Journalism, Political Science, m/c: Constitutional Democracy)

Mark Hood (May 2024, M: Business)

Jack Kunkel (May 2024, M: Political Science, Journalism)

James Langen (May 2024, M: Music, Public History, m/c: Spanish)

Mable Lewis (May 2023, M: Public Health)

Bailey Martin (May 2023, M: Constitutional Democracy, History, m/c: Black Studies, Women's & Gender Studies)

Grace Nielson (May 2023, M: Social Work, m/c: Leadership & Public Service, Multicultural Studies)

Sam Peterson (May 2024, M: Economics)

Maddie Reiser (May 2024, M: Political Science)

Adam Schwartz (May 2023, M: Political Science, Digital Storytelling, m/c: Journalism, Film Studies)

Shanley Silvey (May 2024, M: Journalism, m/c: Spanish, Political Science)

Olivia Skeans (May 2023, M: Quantitative Economics, m/c: Math)

Addie Von Drehle (May 2023, M: Constitutional Democracy, m/c: Philosophy, Psychology)

Lillie Williams (May 2023, M: Constitutional Democracy, Public History, m/c: Multicultural Studies, Political Science)

Maria Yepez Damian (May 2024, M: Political Science, International Studies)

On the faculty side, this class of Scholars will be joined by MU Profs. **Tommy Bennett** (KICD/Law), **Jay Dow** (KICD/Political Science), **Rudy Hernandez** (KICD/Political Science), **Catherine Rymph** (Honors College), and **Jen Selin** (Political Science/KICD/Public Affairs); out-of-town guests **Christa Dierksheide** (UVA) and **Marvin Overby** (Penn State-Harrisburg); and, in a full circle turn that we're just delighted about, **Fares Akremi**, a member of the inaugural cohort of the Kinder Scholars program in 2015 and a graduate of Stanford Law, who's currently clerking in the D.C. Circuit Court.

"The Right to Privacy in a Technological Age"

by Ben Kimchi

Senator Herman Talmadge: Do you remember when we were in law school, we studied a famous principle of law that came from England and also is well known in this country, that no matter how humble a man's cottage is, that even the King of England cannot enter without his consent.
Witness John Ehrlichman: I am afraid that has been considerably eroded over the years, has it not?
Senator Talmadge: Down in my country we still think of it as a pretty legitimate piece of law.

> United States Senate,
> Select Committee on Presidential Campaign Activities
> Hearings, Phase 1: Watergate Investigation
> Ninety-Third Congress, First Session, 1973 (p. 2601)

Almost a century after Prohibition was repealed in 1933, ending a decade-plus ban on alcohol, most people still consider the project a total failure. This understanding seems natural, given how the rise of bootlegging, speakeasies, and gangsterism during the 20s and 30s made a public spectacle of the constitutional amendment's shortcomings when it came to enforcement. I tend to see Prohibition in a similar light, as a misguided attempt at social reform doomed from the start by its impracticality. But Prohibition, in many ways, actually accomplished what it set out to achieve. In the years following ratification, it cut alcohol consumption as well as domestic violence complaints by over half.

While debate over its efficacy is still surprisingly contentious amongst historians and political scientists alike, I will avoid those particular academic considerations here. Instead, what fascinates me about the era of Prohibition is the legal paradox that its enforcement created—one that says much about the difficulty of ensuring a predictable society via law, about the vulnerability of the private sphere, and about the technological encroachment of the state. The case I will ultimately focus on in examining this paradox, *Olmstead v. United States* (1928), was heard following state use of wiretapping to gather evidence of bootlegging by listening in on private conversations. In this, it weaves all three of the aforementioned issues—predictability, privacy, and technology—together. Zooming out, private conversations, and privacy more generally, have had a history of careful legal consideration in America—a history that took a sharp turn with the landmark *Olmstead* decision. According to Supreme Court Justice Louis Brandeis' opinion in *Olmstead*, the right to privacy refers to the individual's "right to be left alone," which is "the most comprehensive of rights and the right most valued by civilized men." By walking through some of the legal invocations of Prohibition, and doing so with Brandeis' definition in mind, we can substantively unpack the complex relationship between privacy and American law as it changed shape through each era of domestic law. Evaluating the ways in which past court cases come to bear in and on the present requires first walking down paths both familiar and, at least at first blush, less so.

Every day, we switch between the public and private spheres. In my own life, I wake up and get dressed in private before going to work in public. If at any point I want to be left alone, I can go home and separate myself from the public. What is important is that I control what parts of my life I make public and what parts I keep private. American law offers four key protections for the individual's ability to maintain this control and safeguard their vulnerable privacy: first, "the right of a person to be free from unwarranted publicity"; second, "the unwarranted appropriation or exploitation of one's personality"; third, "the publicizing of one's private affairs with which the public has no legitimate concern"; and fourth, "the wrongful intrusion into one's private activities" in such a manner that the individual whose activities are being intruded upon is significantly disturbed. Violations to the right to privacy boil down to two torts: the "unreasonable intrusion" upon the private life of someone (important here) and giving "unreasonable publicity" to what was private (not so much). These protections and violations should ring a bell for those familiar with the Constitution. Nearly all of what modern law has to say about privacy stems from the 4th Amendment right to be "secure…against unreasonable search and seizures," which potently responded to how British soldiers would physically enter and search through colonists' houses. And as far as preventing this practice goes, American law can be said to have been mostly successful. Soldiers and police cannot *legally* break into houses without a specific warrant for search. But as to what constitutes an "unreasonable" tort, there was—and is—a *lot* of legal wiggle room. That is to say, on the one hand, that judicial interpretation of "unreasonable" has long been hugely important for American law, a point which we will return to in a moment; conversely, the Fourth Amendment's particular phrasing meant that vague language could pose—and very much has posed—a serious threat to the private sphere. No aspect of privacy is as vulnerable as the fourth key protection against the "wrongful intrusion into one's private activities," as it underpins the whole notion of privacy in America. That pillar is the wall between what is personal or private and what is public, and in the case of the state, it's the barrier protecting the entirety of the rights of the individual.

Historically speaking, my guiding question is a simple one: Has American law been enough—and is American law currently enough—to protect privacy in the face of unforeseen challenges?

Trying to enforce Prohibition was in many ways an impossible task. The attempt, essentially, to bar bars by its very nature sought to govern how individuals act in private, ostensibly protected environments. For the police, legally gathering evidence of alcohol consumption or production was thus incredibly challenging, though just a decade prior, this would have been no problem. Why? Until 1914, courts allowed for the admission of illegally obtained evidence in criminal trials. There was no specific law that said to do this, but rather a doctrine that the "court will not take notice of the manner in which papers offered in evidence have been obtained" (another important point we will return to later). With *Weeks v. United States* (1914), however, this would change. In a unanimous ruling, the Supreme Court established the exclusionary rule, outright prohibiting any admission of illegally obtained evidence…


tute on
Democracy
THE UKRAINE CRISIS
AND WHY IT MATTERS TO US


Hic est dux Willelmus – from the Bayeux Tapestry
MIZZOU
TIGERS

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NEWS IN BRIEF

A series of congratulations, in ascending order of seniority . . . to 2022 Kinder Scholar **Grace Nielson** on being named a finalist for the Truman Scholarship . . . to 2021 Kinder Scholar **Olivia Evans** and **Paul Odu**, who's done everything we offer for undergrads, on being inducted into the Mizzou '39 ranks . . . to M.A. in Atlantic History & Politics Candidate **Julia Gilman** on her admission to Northwestern's Ph.D. program in History . . . to Kinder stalwart and all-star and History Ph.D. Candidate **Jordan Pellerito** for taking home the Graduate Student Paper Prize at the 2022 Missouri Conference on History . . . to Kinder Institute Ph.D. Fellow **Aric Gooch** on accepting a Lecturer position in the Baylor University Department of Political Science, starting Fall 2022 . . . finally, and with a somewhat heavy heart, to **Jen Selin**, who headed back to her former stomping grounds after the close of the fall semester to take a dream job as Co-Director of the D.C. Office of Wayne State University Law's Levin Center