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Q&A

Historians and the Courts

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Abstract
This Q&A explores the benefits of and challenges to translating historical scholarship for a legal audience. MAH *editorial board member Sarah A. Seo (NYU Law School) asked historian-experts Laura Edwards (Princeton University), Jennifer Mittelstadt (Rutgers University–New Brunswick), collaborators Samuel Erman (University of Michigan Law School) and Nathan Perl-Rosenthal (University of Southern California), as well as Maggie Blackhawk (NYU Law School) and Ned Blackhawk (Yale University) to reflect on their experiences.*

Introduction

Can you tell us about a legal case in which you became involved and the specific issue your brief or testimony addressed?

Laura Edwards: I worked on the historians' brief in *United States v. Rahimi*, which considered whether legislation limiting domestic violence offenders' access to firearms violated the Second Amendment. According to recent U.S. Supreme Court rulings, the constitutionality of gun regulation depends on whether there is a direct analogy with regulations from the founding era; if there is no direct analogy, then there has to be compelling evidence of some profound social change that would explain its absence. The historians' brief offered history relevant to both of these points. The Court ultimately upheld the federal regulation at issue.

Jennifer Mittelstadt: In 2016, the Obama administration allowed the inclusion of transgender troops, following a military review that had determined that their service was compatible with military readiness and effectiveness. The Trump administration rejected that assessment, however, and President Trump announced his intention to ban transgender people from serving on social media in July 2017. He followed up the next month with a formal ban issued by the Pentagon. *Jane Doe 2 v. Donald J. Trump* challenged this decision.

Samuel Erman & Nathan Perl-Rosenthal: In 2012, Lene Tuaua brought a federal lawsuit seeking recognition as a U.S. citizen. He was born in the United States territory of American Samoa, and everyone agreed that he was an American—of some kind. A congressional statute categorized him as a special sort of American: a noncitizen U.S. national. Tuaua disagreed. He argued that he held the U.S. citizenship that the Fourteenth Amendment Citizenship Clause guarantees to everyone "born … in the United States and subject to the jurisdiction thereof."

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The complication was that American Samoa was (and is) a so-called unincorporated U.S. territory where the Constitution applies somewhat differently. According to the government, American Samoa was not "in the United States" in the relevant sense.

Our brief centered on the history of birthplace-based citizenship in the United States. We explained that the Citizenship Clause codified a longstanding common law rule that birth within the borders and allegiance to the sovereign made one a U.S. citizen (and, before the Revolution, a British subject). That rule applied throughout the sovereign's territory. We also described how advocates of U.S. empire invented the category of the noncitizen U.S. national in the early twentieth century, but the Supreme Court had never accepted it.

Maggie Blackhawk & Ned Blackhawk: One of the most prominent briefs we've submitted with the NYU–Yale American Indian Sovereignty Project was in *Haaland v. Brackeen* (decided in 2023), on behalf of the Organization of American Historians and the American Historical Association—their first appearance as amici in a federal Indian law case. The issue we addressed centered on the legal history of the Indian Child Welfare Act of 1978. Our aim was to provide the Court with historical context for deciding the statute's constitutionality, which it did in a majority opinion. The history we provided in our brief was, indeed, helpful. The brief was cited a number of times in a beautiful and moving concurrence written by Justice Gorsuch. It was a wonder to see the historical work cited and quoted so heavily.

How did you decide to be involved? Have you ever declined to participate in a case, and if so, why?

Edwards: At first, I watched from the sidelines, as I have done in similar cases involving firearms. My own research does not deal directly with constitutional law or guns, although it does deal with public law and regulation in the early republic. Because of that work, I have been asked to sign historians' amicus briefs dealing with the Second Amendment. But I mainly did so in a supporting role because the focus of the briefs, which had been on legal materials—published treatises, statutes, and appellate decisions—are not my area of expertise. My scholarship deals, primarily, with local legal venues, the evidence of which is unpublished and located in archives. When I was asked to participate in an amicus brief for *Rahimi*, I assumed that my involvement would be the same as in the past.

That changed when I read the first draft of the brief. As I mentioned earlier, the brief had to be framed in terms of the legal directives of previous cases decided by the U.S. Supreme Court. Accordingly, the first part of the brief focused on establishing an analogy to colonial and early state statutes dealing with guns. The second part, on domestic violence, argued that there was not a direct analogy because domestic violence had been legally sanctioned until Second Wave feminism produced legislation in the 1970s.

When I got done, I found that I could not breathe. The brief was so far removed from the way the law actually worked in the past that it was difficult to read. The first section failed to mention that the paucity of written evidence did not establish the absence of regulation. There were few statutes because colonial and state legislatures did not involve themselves in mundane matters involving the public order. Local jurisdictions did, using legal principles that were not documented in writing and that allowed for punitive intervention when individuals threatened "the peace" of the community. To put it in more direct terms, folks in the late-eighteenth century were not big on anti-social behavior. When someone was waving guns around and scaring people, that person was arrested, charged, and disciplined, which could mean that they were put in jail or driven from town.

The analysis in the second section was even more problematic. Wife-beating was not legally sanctioned in the late-eighteenth century. To the contrary, local jurisdictions regularly acted on wives' complaints of domestic violence, using the same logic as applied to other threats to "the

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peace" of the community. While wives did not have legal standing to prosecute cases in their own names, local officials proceeded with charges as an offense against the public order, not a violation of wives' rights as individuals. Those principles were stated clearly but tersely in magistrates' handbooks, but their power was best expressed in practice. Cases addressing domestic violence were numerous, even in places where you might not expect them, like the rural South. Sometimes, offenders were charged with assault. But local officials also acted on threats of violence, arresting husbands, requiring them to post a sizable bond to keep the peace, and jailing them if they could not. Bond was not a get-out-of-jail-free card. It was posted by sureties, usually family members or neighbors, who were charged with monitoring the offenders' behavior. Sureties lost their money if the offender engaged in any disruptive behavior again. Evidence of the prosecution of domestic violence provided the kind of direct analogy in the past that is now required to sanction current regulations.

Surely, I thought, the legal power of this history would be obvious. With that hope, I took a more active role.

Mittelstadt: When Trump issued the ban on transgender military personnel, I had just started a year at the U.S. Army War College serving as the Harold K. Johnson Chair in Military History, a visiting civilian position designed to bring scholars into closer contact with the military. Historian Ronit Stahl (UC Berkeley) contacted me in August of 2017 to ask whether I would join her in crafting a historical opinion piece, as it struck us that the Trump administration's attempt to ban transgender soldiers was based more on politically conservative attacks on gender non-conformance than on military readiness. Worse, the ban's language and justification distorted historical understanding, ignoring the history of the military's many spurious exclusions or segregation over many decades, which were all followed by revision and subsequent inclusions of African Americans, women, as well as gay and lesbian people.

In the fall of 2017, Ronit and I talked to the legal team at GLBTQ Legal Advocates & Defenders (GLAD) about the historical inaccuracies imbedded in the ban, and we agreed that if the case went to the appeals process, we would join the case as friends of the court on behalf of the Organization of American Historians and forty-seven historians of the military, national security, and foreign relations.

I had provided historical documents and background for legal cases regarding military service before, but I had never served as a witness nor joined a case as a friend of the court. But Ronit and I felt confident about joining this case because we had both deeply researched the history of the discourses and practices surrounding citizenship and military service on which, we believed, this case hinged. We understood our job as historically contextualizing the exclusion and inclusion of diverse military personnel over time and believed that, as authors and teachers, we were in a good position to do that. Both of us also had many contacts in the military history community, among whom we pre-circulated the draft, and we knew that other signers—themselves expert historians—would also provide additional input if necessary.

Erman & Perl-Rosenthal: There were a whole series of reasons that we decided to participate in the litigation. First, we had relevant expertise to share with the court: judges considering *Tuaua* should have cared whether birthplace-based citizenship historically had geographical exceptions and whether or not the category of the noncitizen U.S. national was in fact a longstanding and doctrinally rooted one. Second, the question was interesting. We anticipated (correctly, it turned out) that diving into it would lead in interesting scholarly directions. Third, we were excited to collaborate. That was also a prescient impulse, given that our collaboration now clocks in at a decade plus and counting. A final reason that we decided to participate, frankly, was that we worried that judges themselves might make poor or inaccurate use of history if scholars did not weigh in on the conversation.

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Blackhawk & Blackhawk: The Sovereignty Project's involvement in *Brackeen* was driven by the case's exceptional significance. It raised constitutional challenges that threatened to unravel much of the legal framework governing the U.S. colonial administration of Indian Country. We also believed we had something both novel and essential to contribute—an approach that guides all of our decisions to participate. We routinely decline to brief cases where our contributions would be duplicative or peripheral.

The lower court proceedings in *Brackeen* had already generated an extensive and complex record. The en banc decision alone spanned hundreds of pages and attracted substantial briefing from a range of perspectives. Initially, we assumed that the depth of the lower-court briefing had likely exhausted all meaningful avenues of argument. Yet we were struck by a notable omission: the lack of legal and legislative history on the Indian Child Welfare Act (ICWA). While one brief addressed the statute through an originalists' lens, no historians' brief was filed, and the historical context offered was surprisingly limited, especially for a twentieth century statute. Even key secondary scholarship was absent.

As we began researching, it became increasingly clear that the statute's historical record could illuminate important legal arguments that had not yet been raised. One example stands out: in combing through archives, we uncovered contracts between the United States and various states—particularly those with large Native populations—that had effectively embedded ICWA-like provisions decades before the statute's formal enactment. States renewed these contracts even though they contained terms that were challenged as unconstitutional in *Brackeen*. This kind of historical evidence, we believed, was crucial for the Court to consider—and was unlikely to reach the Court without our involvement.

Process

Michael Grossberg, professor of history and law at Indiana University, once said that historians' briefs "should be recognized as a distinctive kind of historical analysis and one that ought to be critiqued accordingly."[1] What do you think makes academic history writing different from a historians' brief? What are the terms on which historians' briefs should be critiqued?

Blackhawk & Blackhawk: All historical work is shaped by its context and intended audience. For instance, public history—like that found on a sign in a national park—is typically brief, tailored to the attention span and interests of casual visitors. It avoids complex historiographical debates and focuses on the immediate relevance of the site. This kind of audience-driven adaptation is familiar to anyone trained in the humanities.

Historical work for courts operates differently from public history. Amicus briefs are not simply informative for the sake of conveying information; they convey information to support a particular outcome. Judges expect briefs to speak directly to the legal questions at hand. That means history presented in these briefs must align with what judges find legally relevant.

This is what distinguishes amicus briefs from academic writing: not their commitment to evidence, but the historical questions they address. Academic history tends to focus on causation and methodology; amicus briefs must engage the legal relevance of history. Of course, judges differ in what they consider relevant. Some value legislative history, others focus on Founding-era sources, and many are influenced by broader views of American law and history. These views—often unspoken—shape which historical claims and narratives are seen as legitimate and relevant.

This brings us to the second question: how should historians' amicus briefs be evaluated, particularly in comparison to scholarship in academic journals? At a minimum, they should

[1]Michael Grossberg, "Friends of the Court: A New Role for Historians," *Perspectives*, Nov. 1, 2010, https://www.historians.org/perspectives-article/friends-of-the-court-a-new-role-for-historians-november-2010/ (accessed July 29, 2025).

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reflect the best-supported interpretation of the historical evidence or the scholarly consensus where one exists. They should avoid discredited claims and adhere to rigorous standards of evidence and interpretation, just as any serious historical work should.

Historians writing for courts must also adhere to legal standards. Amicus briefs thus inhabit a distinct genre: they translate complex historical work into legal arguments framed by judicial expectations. Evaluating briefs demands attention to both their scholarly rigor and their relevance to the case. That dual demand is what distinguishes them from academic scholarship, where judicial, and even societal, expectations can be properly unpacked without violating legal and judicial norms of relevance.

One of the differences is a simple one: briefs are a lot shorter than the articles and books historians write. This difference stems from a few things: briefs usually have word limits, and they are limited to the specific legal question at issue. Even historical writing has to be selective, but historical brief writing is even more so. Kwame Appiah once wrote that "for the sake of a 'usable past,'" some aspects of history "get the yellow-highlighter treatment[,]" while others get "the Wite-Out."[2] Did you encounter the tradeoffs between selectivity and simplification on the one hand, and complexity and nuance on the other? What was your approach in dealing with this challenge?

Mittelstadt: Appiah is right that the need for a taut, legally useful brief meant that a good deal of what Ronit and I wrote ended up on the cutting room floor, to use a film metaphor. We struggled with the deletions and exclusions in the usual way that historians do, lamenting the loss of detail and evidence that we felt provided a strong *historical* case. We encountered a deeper conundrum, however, not in the cutting of examples but in the possible flattening of historical complexity. The lawyers often asked, "can this be asserted, yes or no?" Our answers to such stark questions were usually "yes AND no."

We especially struggled with this when portraying the broadening of military service. Our goal was to demonstrate that the Trump administration's charge—that incorporating transgender people into the military threatened military effectiveness—ignored the full and accurate history of previous military exclusions and subsequent inclusions. The U.S. military had historically discriminated on the basis of race and sex using "official readiness assessments," but it had, over time, changed its assessments and successfully incorporated more and more diverse personnel. The transgender ban acted as if this whole history never existed. We sought to correct that.

But at the same time, we knew, as historians, that subsequent inclusions of non-white, women, and gay and lesbian troops, important as they were, had not proceeded easily for them. While the military officially determined that non-discrimination was necessary for military effectiveness, it was also true that newly included service members—African Americans in desegregated units, women in the All-Volunteer force, gay and lesbian soldiers after the revocation of the ban on homosexuality and after the rescinding of Don't Ask Don't Tell—all continued to face barriers in military service through unofficial discrimination and harassment, as well as social and cultural pressures. As historians, Ronit and I grappled with how to include this messier, more complex history.

Erman & Perl-Rosenthal: We have devoted an essay to this question: "Historians' Amicus Briefs: Practice and Prospects."[3] In it, we emphasize that historian amici participate in judicial proceedings as outside experts, not as citizen lobbyists. Their role is to assist the court in its work

[2]Kwame Anthony Appiah, "Stonewall and the Myth of Self-Deliverance," *New York Times*, June 23, 2019, SR4, https://www.nytimes.com/2019/06/22/opinion/sunday/stonewall-myth.html (accessed Sept. 5, 2025).

[3]Sam Erman and Nathan Perl-Rosenthal, "Historians' Amicus Briefs: Practice and Prospects," in *Oxford Handbook of Legal History* Markus Dubber & Christopher Tomlins eds., (New York, 2018), 1095–114.

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by providing valuable, specialized information. They should speak in legible ways on topics that matter to the court without intruding on the court's distinct area of authority. To that end, we recommend several strategies.

One is to respect the disciplinary divide between law and history. While history can be relevant to judicial decision making, it is for judges to resolve the ultimate issues in litigation. So, for example, curating participation in amicus briefs, so that only scholars whose research is most relevant to the question at hand are involved, makes it more likely that judges will read the submission as a genuine expert submission—and accord it some degree of authority.

Another strategy is to bridge the disciplinary divide. Brief writers can identify claims and historical narratives that judges may confront or be tempted to use, then explain which ones are likely contradicted or supported by the best historical research.

Historian amici are also well advised to explain their methods. Courts already muster historical narratives to legitimize their legal reasoning. Where they may lack relative expertise is in knowing which narratives will withstand historians' scrutiny. By explaining why historians believe that this event occurred or that that text was intended in a specific way, historian amici re-valorize those methods as useful expertise.

Blackhawk & Blackhawk: The term "usable past" is often used critically to describe instrumental and perhaps even biased or distorted historical work. It is a close cousin of what some call "law office history"—history that is selective and strategic.

But in truth, all historical writing involves tradeoffs. Every effort at inscribing history is a tradeoff between selectivity and simplification on the one hand and complexity and nuance on the other. Making those choices does not automatically mean one is creating a "usable past" in the sense of bending history for present purposes.

Appiah used the phrase "usable past" to capture certain liberation narratives that highlight the self-emancipation or "self-deliverance" of oppressed people while downplaying the role of external support, such as help from powerful elites. He pointed out that while such histories can be empowering, they risk giving a misleading picture of how liberation typically happens. They can even lead to disappointment when people don't rise up unaided, as the story might suggest they should. For Appiah, then, "usable past" is a warning about how we interpret the past. His concern is more about methodology—how historians construct narratives—than about whether history is relevant to the legal standards at issue in a case.

To be sure, historians' briefs can also present selective versions of history, but their goal is different. They're not meant to inspire political action or to provide a lesson on how the world might work again. Instead, they offer historical evidence to help courts determine whether certain legal standards—such as the intent behind the passage of a law—have been met. For example, showing that a legislator crafted a law in a certain way out of animus for the affected population can help demonstrate its unconstitutionality. In these cases, history serves as a factual background, not as a guide for present behavior.

In this way, the problem of a "usable past" seems distinct from the problem of "relevance" for historians' briefs. A usable past involves shaping history to fit a particular narrative—often by selectively interpreting the archives. The issue of relevance, by contrast, arises from the legal system itself: historians writing briefs must tailor their arguments to address only the specific questions judges consider legally important. This limits what kinds of historical arguments and narratives can make it into the brief in the first instance, not because of bias or distortion, but because the legal framework constrains what is considered appropriate to submit to a court.

This distinction is particularly relevant in the context of federal Indian law and Native history. Efforts to create a usable past contribute to the erasure of Native people and American colonialism from dominant narratives of U.S. history. Contemporary American politics isn't willing to entertain a history of westward expansion that includes the dispossession of Native peoples.

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Native history as a field resists the distortions Appiah warned against in the pursuit of a "usable past." It aims not to inspire selective memory or political messaging, but to uncover the complexity of the past in order to shed light on the present. The Sovereignty Project provides courts with a more accurate vision of the past—a vision that often flies in the face of public belief.

Appiah's quote is in part a warning about turning history into a "usable past." Do you think there is a boundary between advocate and historian? If so, how did you navigate that boundary?

Erman & Perl-Rosenthal: As we mentioned above, we think it's crucial for historians to act as area experts and not as advocates if they are to retain credibility with courts and to be useful to judges. But it is also true that history is not neutral ground. Scholarship, institutional affiliations, disciplinary methods, and access to judicial decision makers are all forms of power that academics have sometimes abused in the past.

That became increasingly evident during litigation in *Tuaua v. United States* (2012–2016) and in a subsequent case in which we participated on the same question, *Fitisemanu v. United States* (2018–2022). Across this decade, the government of American Samoa filed a series of briefs opposing U.S. citizenship. In their view, we amici were the latest in a long line of self-styled outside experts whose plans to help an Indigenous community actually threatened its cultural survival. They warned that granting citizenship to Samoans could put wind in the sails of constitutional challenges to governance that was intended to protect their way of life.

We were unpersuaded that this was the necessary outcome of the case, and, at the time, the question of Fourteenth Amendment birthplace-based citizenship was highly relevant to Puerto Rico's potential paths to decolonization. Of course, good intentions are no guarantee of the right result. As one of us argued in a subsequent article,[4] the alternatives in *Tuaua* were stark: potential serious error or inaction before U.S. colonialism. That article concluded: "It is better to speak carefully, listen hard, recognize one's errors and fallibility, and acknowledge and correct one's mistakes."[5] Were we invited to participate in a third round of litigation on the issue, that would be our starting point.

Edwards: While there is wisdom in the past, it is not a guide to the future and certainly not a straitjacket that constrains our options in dealing with new challenges. We need to learn from the past and move on. As such, the past is always usable—sometimes because of its flaws. The questions are: What is there that we can use? What can we improve on? I believe strongly that we can learn from the past only if we let it be past: a different place, where people did things in ways that we can no longer duplicate and should no longer want to duplicate. Advocates who use examples from the past to support their current positions are not really using history effectively. They are making the past serve their present goals, instead of learning from it and making their own way. As such they are not really engaging in the past; it is simply the present offered as a truth beyond human agency so as to close down conversation about other possibilities and to win an argument.

Mittelstadt: If there is a boundary between advocacy and history, it is often honored in the breach. If we accept that history research and writing, like most human endeavors, are always somehow political, then history can rarely be decoupled from advocacy. And of course, Ronit and I were already engaged in advocacy of a kind before we wrote the legal brief, as we had written a national opinion editorial critiquing the Trump administration's transgender ban as a

[4]Sam Erman, "Status Manipulation and Spectral Sovereigns," *Columbia Human Rights Law Review* 53 (2022).
[5]Ibid.

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lamentable break with a long history of inclusion. Still, Ronit and I found there were lines that could not be crossed, and these were easy calls: no historian could mask historical evidence or distort historical truths. In our struggle to resist the law's demands for "yes or no," we continued to respond, yes and no, and in doing so understood clearly the limits of historical advocacy.

Blackhawk & Blackhawk: Pierre Bourdieu famously said, *"la sociologie est un sport de combat."*[6] By which he meant that rigorous empirical and theoretical methods could be used to defend against injustice. It is unclear whether that is a form of advocacy. But, if it is, the lesson might be that undermining rigorous empirical and theoretical methods to distort our understanding of the world, its past and present, might not defend against injustice in the ways that we expect. Having an accurate understanding of the world is its own form of justice.

What do you think are the types of legal questions for which history can provide guidance, and the legal questions for which historians cannot?

Erman & Perl-Rosenthal: Historians can be helpful to courts when a match occurs between a historical narrative, fact, or circumstance that a judge sees as relevant to reaching a legal decision and one that historians are in a position to validate or disprove. The question of what aspects of the past are relevant to judicial decision making is the judge's ken. (Though the historian will be excused for noting that judges' answers to that question are historical phenomena that have changed over time.) Historians can present and interpret the evidence for and against such understandings of the past.

Blackhawk & Blackhawk: History can provide examples of how the world has operated in the past, which can expand our horizons of possibility. It can also force people today to face the harmful consequences of past decisions and to inspire them to avoid similar decisions in the future. It cannot resolve questions about what values and principles we should hold today.

What was the most challenging, frustrating, or surprising aspect of writing for judges?

Edwards: What really struck me in working on the *Rahimi* brief was the difference in what historians and legal professionals consider to be compelling evidence. Initially, I did what any historian would when asked for evidence. I sent the relevant pages from my book and other historians' work referencing domestic violence cases. I sent images of justices' manuals that laid out the relevant legal principles. And, when it seemed like that material was insufficient, I sent information about the cases, all local court records in manuscript form, located in archives. But it became clear that the archival materials that I found so powerful—cases that featured married women who questioned their husbands' authority and turned extreme expressions of authority into crimes—had no power in this context because they were not published and, hence, not widely available. Handwritten legal evidence of wives' legal cases, located in distant archives, were not really "legal" and could not be cited in the brief. So, I ended up writing a blog post and a law review article that could be cited. A published account of the cases was more powerful than actual evidence of women's legal actions.

My experience with *Rahimi* raised questions about the legal profession's use of history that go beyond current debates about the merits of originalism. Those debates focus on whether originalists get history "right" and whether the past should be abandoned altogether because it is merely a means of extending historical inequalities into the present. But I fear that the legal profession's evidentiary standards create an artificial view of the past that misses what it can teach us and that can also justify marginalization on new terms. A narrow focus on written

[6]dir. Pierre Carles, *La Sociologie est un sport de combat* (CP Productions et VF Films, 2001).

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materials excludes evidence from the parts of the legal system that were accessible to people on the margins. It excludes the efforts of people on the margins to bend the law to address their concerns because those efforts do not appear in the sources on which the legal profession now depends. In the case of *Rahimi*, this exclusion led to the presumption that domestic violence was legally sanctioned, when that was not the case. This is not to say that the past was more egalitarian. But it is to say that our past is richer and more varied than current conceptions of it. If we cannot include that evidence, that archive, and those voices in our legal system today, I fear for our present and our future.

Mittelstadt: Nothing was more challenging than the timeline. When we heard in fall 2018 that the federal appeal would go forward, my co-author and I worked at breakneck speed. We met with the legal team on and off for nearly six weeks, and at the end of those talks, the lawyers announced a deadline of three weeks to produce a full-length, fully documented historical brief. This is not the historians' usual timeline. The lawyers laughed when Ronit and I told them historians usually worked for months or a year on deeply researched, article-length projects such as this one. The lawyers thought one week would be adequate, and, in their view, they were giving us extra time! We solved the dilemma by turning to a team of fantastic graduate students at Rutgers who heroically began the process of gathering over one hundred relevant primary and secondary sources that would fill out the brief's argument.

Erman & Perl-Rosenthal: One of the challenges and frustrations of writing for judges is the bounded nature of their deference to historians' expertise. It is gratifying that many judges trust historians, often declining to decide cases on historical bases that historians as amici have undermined. But judges often remain confident of their ability to muster history on matters that no amici have addressed. Hence, the historian, who carefully explains why the historical arguments offered by one side in a case are off the mark, may find the case being decided by the judge on an even more outlandish theory that neither side ever argued. Where possible, historian amici will benefit from working with legal experts who can help them predict and address historical approaches that may appear attractive to judges.

Blackhawk & Blackhawk: Our work on amicus briefs faces the constraint of legal relevance. The core problem is that most judges—and much of the public—have been taught an inaccurate or incomplete version of U.S. history, particularly when it comes to Native peoples and the nature of American expansion. To tell the full story would require correcting vast parts of the national narrative.

And, even then, the legal system is ill equipped to hear that history. The United States has no legal framework that recognizes colonialism as a constitutional harm. Dispossession, forced governance, and the denial of self-determination are not, in themselves, legally cognizable. Instead, legal claims must be routed through recognized legal vehicles like treaty violations or the federal trust responsibility. These are connected to colonialism, but they don't name it directly because in the eyes of the law, colonialism itself is not the problem. Because U.S. law does not acknowledge American colonialism or its harms as legally cognizable wrongs, litigation largely avoids the subject. As a result, amicus briefs—bound by relevance requirements—rarely engage with these histories.

This disconnect distorts litigation in areas like federal Indian law and territorial law that address modern American colonies that are still subject to ongoing colonial administration. In *Aurelius v. Puerto Rico*, for instance, the real issue for many Puerto Ricans was colonial subjugation and the lack of meaningful self-governance. But the legal argument had to hinge on whether the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) oversight board complied with the Appointments Clause of the Constitution. The deeper

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political and historical realities were rendered irrelevant—not because they didn't matter, but because the law doesn't know how to recognize them.

We have made efforts to incorporate historical correctives into historians' briefs. But the constraints are real: limited word counts, and the need to address legally salient topics with depth and rigor ensure that histories of American colonialism are left on the cutting room floor. These narratives often don't make it into the brief—not because they are untrue, but because the legal framework has no place for them (and the judges might find these histories unpersuasive).

That task, then, falls back to academic writing: to lay bare the falsehood, or lie, that American colonialism is irrelevant to present-day legal disputes, and to insist on its historical and ongoing significance—even when the courts may be unwilling to hear it.

It's not hopeless! We continue to be impressed at the centrality of historical inquiry to the federal courts and, at times, the nimbleness of judges to evaluate and be persuaded by cutting-edge historical claims. Our hope is that the chasm between what is "relevant" for amicus briefs and what can be written in academic scholarship will close over time.

Conclusion

Would you work on a historians' brief again? If so, would you do it differently? Do you have any advice for a historian thinking about working on legal cases?

Erman & Perl-Rosenthal: Absolutely! One of the great things about writing amicus briefs is that they can spark new directions in one's own historical scholarship. Part of writing an effective amicus brief is putting to one side the many wonderful discoveries and puzzles that appear in the process. Despair not! That material may be the stuff of exciting scholarship. We had this experience in researching the history of birthplace-based citizenship, which is commonly referred to as *jus soli*. In a pair of articles arising out of our work on briefs, we described the invention and rapid uptake of *jus soli* in the second half of the nineteenth century and the way in which racist lawyers inadvertently lodged it in U.S. constitutional law in 1898.[7]

In addition to the advice above, our main recommendation is to choose projects that you will find enjoyable, engaging, and productive. Good historians' briefs involve substantial work, so choose ones to which you are enthusiastic to contribute.

Mittelstadt: The rewards of writing the brief far outweighed the challenges. In the 2017 ban of transgender people from the military, the Trump administration revealed both animus and ambitions that have, unfortunately, only become more prevalent and pronounced in Trump's second term. *Jane Doe 2 v. Trump* became moot in early 2021 when President Joe Biden rescinded the transgender ban, but in the second Trump administration, the Pentagon reissued the ban, along with a host of defense policies designed to roll back all kinds of inclusion of diverse service personnel. The amicus brief's arguments remain relevant: all these new defense policies against inclusion ignore and deny historical fact and understanding, just as the first ban did.

In addition to the rewards of working on something of legal and historical relevance, the brief offered the opportunity to collaborate, an opportunity too rare in the historical profession. When Ronit and I wrote the brief, we were, in effect, writing a "state of the field" on the

[7]Nathan Perl Rosenthal and Sam Erman, "Inventing Birthright: The Nineteenth-Century Fabrication of Jus Soli and Jus Sanguinis," *Law and History Review* 42 (2024): 421; Sam Erman and Nathan Perl-Rosenthal, "Jus Soli Nation to Jus Soli Evasion: International Lawyers for White Supremacy and the Road through Wong Kim Ark," *Journal of American Constitutional History* 3 (2025): 615.

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historiography of military service, one that revealed a consensus among military historians about how and why military service widened in this country and the outcomes that followed. Such historiographical insights often arrive in the form of single-authored historiographical essays. Collaborating with others on a fast-paced legal brief was exciting—a rare instance of history writing in the moment.

Blackhawk & Blackhawk: If we have any advice to offer, it is that participating in legal cases as amici carries professional risks that may have been less pronounced in a less politically charged climate. As our work has gained visibility—especially in high-stakes contexts like Supreme Court litigation—we have encountered efforts to discredit it. These critiques often rely on selective readings of our scholarship, amounting to thinly veiled ad hominem attacks that sidestep actual arguments. Nonetheless, the work is too important to discontinue and offers additional complements to our core responsibilities of research, teaching, mentorship, and service.

Edwards: I will work on historians' briefs again when I have knowledge that can shed light on the issues. My general advice for other historians is to be aware of the profound disciplinary differences between history and law. Lawyers use history to win cases, and then they move on to the next case. The point is the win. That win takes the form of decisions, written by a judge or judges, which become law and are difficult to change. That is unlike the work of historians, who have a different temporal horizon and different professional goals. Our work takes longer. We spend time reconstructing the past, with the intent of capturing the details and meaning of individual lives and societies long gone. Our reputations depend on the content of what we find, we talk with each other about what we do, and we can and do change our minds over time as a result of those conversations and new evidence. Translating history into law is not as easy as it might seem at first glance.

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