

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

September 8, 2022

[Cite as 09/08/2022 Case Announcements #5, 2022-Ohio-3155.]

MOTION AND PROCEDURAL RULINGS

2019-1215. State v. Philpotts.

Cuyahoga App. No. 107374, **2019-Ohio-2911**. Sua sponte, parties ordered to file supplemental briefs addressing the impact, if any, of *New York State Rifle & Pistol Assn., Inc. v. Bruen*, ___ U.S. ___, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022). Supplemental briefs are not to exceed 20 pages, and each side's brief shall be filed within 14 days. No reply briefs, stipulations, or requests for extension of time shall be filed, and the clerk of the court shall refuse to file any stipulations or requests for extension of time.

Brunner, J., dissents, with an opinion.

BRUNNER, J., dissenting.

{¶ 1} I dissent from this procedural order directing additional briefing based on *New York State Rifle & Pistol Assn., Inc. v. Bruen*, ___ U.S. ___, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022). I dissent because even considering whether to apply *Bruen* at this juncture implicates determining the United States' historical tradition of firearm regulation in relation to Ohio's gun laws. This will require the presentation of evidence that should not be examined in the first instance at the appellate level on an order for supplemental briefing. Determining what the historical record shows in relation to Ohio's gun laws involves determining facts, and the facts should be developed in and determined by a trial court, not an appellate court, especially when the parties have not made relevant arguments to support this examination nor requested that we make it.

{¶ 2} Further, I have concerns about how “history” or historiology can become part of a legal analysis, as this court embarks on the legal equivalent of asking whether a modern translation of the Bible accurately conveys the teachings of the original texts.

{¶ 3} History changes over time as historians uncover and analyze new information learned through the finding of artifacts, writings, photographs, and new methods of historical analysis. The National Council on Public History, headquartered on the campus of Indiana University-Purdue University in Indianapolis, writes:

People who are not professional historians sometimes assume that historical research is a once-and-for-all process that will eventually produce a single, final version of what happened in the past. We often hear charges of “revisionism” when a familiar history seems to be challenged or changed. **But revisiting and often revising earlier interpretations is actually at the very core of what historians do.** And that’s because the *present* is continually changing.

The kinds of people “doing history,” the kinds of questions they ask, and the tools and materials available to them are anything but static. It’s not simply that new facts come to light, but that the shape and meaning of historical events look quite different from different vantage points and time periods.

Historians recognize that individual facts and stories only give us part of the picture. Drawing on their existing knowledge of a time period and on previous scholarship about it, they continually reevaluate the facts and weigh them in relation to other kinds of information, questions and sources. This is inescapably a task of interpreting rather than simply collecting data. Just as with any important shared body of knowledge, then, history is always undergoing reexamination and reconsideration.

(Emphasis and boldface sic.) National Council on Public History, <https://ncph.org/what-is-public-history/how-historians-work/the-changing-past/> (accessed Sept. 8, 2022) [<https://perma.cc/L5LS-GVV4>].

{¶ 4} Determining what is “history” often starts with an examination of what are termed “primary sources.” Primary sources are similar to what is typically demonstrative evidence in a trial. Primary sources of history may be items such as letters, reports, photographs, artifacts, maps, posters, cartoons, videos, sound recordings, and artwork. *See* National Archives, “Understanding Perspective in Primary Sources,” <https://www.archives.gov/files/education/lessons/worksheets/understanding-perspective-worksheet.pdf> (accessed Sept. 8, 2022) [<https://perma.cc/7TXT-HD6Q>].

{¶ 5} Primary sources are “the documents or artifacts closest to the topic of investigation. Often they are created during the time period which is being studied * * * but they can also be produced later” by eyewitnesses or participants through memoirs or oral histories. Georgia State University Library, <https://research.library.gsu.edu/primaryhistory#:~:text=Primary%20sources%20are%20the%20raw%20materials%20of%20historical,or%20artifacts%20closest%20to%20the%20topic%20of%20investigation> (accessed Sept. 8, 2022) [<https://perma.cc/UD5T-C4MU>]; *see also* National Archives, “Understanding Perspective in Primary Sources,” <https://www.archives.gov/files/education/lessons/worksheets/understanding-perspective-worksheet.pdf> (accessed Sept. 8, 2022) [<https://perma.cc/7TXT-HD6Q>].¹

{¶ 6} It is doubtful that this court would examine primary sources in this case in determining the United States’ historical tradition of firearm regulation as it relates to gun regulation in Ohio. If we were to do so, our examination of these primary sources for history would require us to draw inferences, as a fact-finder must, and then use them to establish facts upon which to base law. Such an examination would result in our opinion in and of itself becoming a secondary source of history. *See* Georgia State University Library [<https://perma.cc/UD5T-C4MU>].

{¶ 7} But by declining to examine primary sources for history, our review would be relegated to secondary sources, which are “interpretations of events written after an examination of primary sources and usually other secondary sources, such as books and journal articles.” *Id.* Reviewing only *secondary* sources of the United States’ historical tradition of firearm regulation

1. The National Archives instructs that primary sources require fact-checking, which includes analyzing whether “other sources support or contradict” what is understood from the source. National Archives [<https://perma.cc/7TXT-HD6Q>]. The National Archives also instructs that the researcher should take care to understand what other perspectives should be obtained and engage in honest self-observation of the researcher’s perspective, including the researcher’s background and the time in which the research takes place. *Id.*

will still require that we factually judge whether inferences drawn by one expert from primary and secondary sources of history are superior to inferences drawn by another, recognizing that expert opinions often differ. Fundamentally, no *appellate* court should be the fact-finder in determining the tradition of gun regulations during different eras of our nation's history, including how and why guns may have been regulated.

{¶ 8} Importantly, the glaring flaw in *any* analysis of the United States' historical tradition of firearm regulation in relation to Ohio's gun laws is that no such analysis could account for what the United States' historical tradition of firearm regulation *would have been* if women and nonwhite people had been able to vote for the representatives who determined these regulations. How would this problem be addressed in any modern analysis of historical gun regulations? It cannot simply be ignored. And even if a court tries to take the views of women and nonwhite people into account, are there sufficient materials on their views available to enable reliable conclusions to be made?

{¶ 9} Further complicating the issue is the fact that, in his opinion for the United States Supreme Court in *Dist. of Columbia v. Heller*, Justice Scalia opined, based on the “ ‘necessity of self-protection to the person,’ ” that any such regulation was not even necessary and that the Second Amendment has been understood as securing an individual right unconnected with militia service. 554 U.S. 570, 619, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), quoting *Ordronaux, Constitutional Legislation in the United States* 241-242 (1891).

{¶ 10} And most troubling is that in *Heller*, Justice Scalia seemed to scorn history or the application of a textualist analysis:

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

(Citations omitted.) *Id.* at 582.

{¶ 11} To the extent that *Bruen* may implicate this case, it would be more appropriate to remand it for an evidentiary hearing by a trial court, which could then be followed by appropriate appellate review, would facilitate a more thorough and accurate decision concerning the Second Amendment to the United States Constitution. For the reasons stated above, I respectfully dissent from the order of the majority that directs gratuitous, ill-advised, and unnecessary briefing in this matter at this juncture.
