

Guns In Government Parks & Buildings— Municipal Enforcement Of Safety Rules Without Running Afoul Of State Preemption

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ABSTRACT

Section 6120 of Pennsylvania’s Uniform Firearms Act prohibits counties and municipalities from ‘regulating’ firearms. On the basis of this restriction, special interest groups have begun an assault on gun-bans in local parks and town-halls, arguing that rules prohibiting guns in children’s playgrounds and in government buildings constitute impermissible ‘regulation.’ Because of the statutory provision that awards successful citizen-litigants their attorneys’ fees, cash-strapped municipal governments have been reluctant to defend their policies and, as a result, there is little case law defining the ambit of permissible municipal rule-making. This Article argues that, on the basis of nearly identical provisions in Pennsylvania’s Game Law (which prohibits municipal ‘regulation’ of hunting,) a municipal government does not impermissibly ‘regulate’ unless its rules apply equally throughout the municipal jurisdiction. Instead, this Article suggests that municipalities have the same rights as private landowners to promulgate rules for invitees on government-owned property.

VIOLENCE ON GOVERNMENT PROPERTY

On August 5, 2013, Rockne Newell attended the Ross Township meeting in Saylorville, Monroe County, Pennsylvania.¹ He fired close to thirty rounds from a legally purchased and possessed rifle into the crowd, killing two attendees and the

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1. Allison Steele & Ben Finley, *Police: Poconos Shooter Said ‘I Wish I Killed More,’* Philadelphia Inquirer (Aug. 8, 2013).

Township Zoning Officer, and wounding three more.² Residents tackled Newell *en route* to his car, where he had gone to retrieve a revolver and more ammunition.³ Following his arrest, he explained to police that he had targeted the meeting because “it was the only time he could get all of the township supervisors and the solicitor in a single location,” and that he wished he had “killed more of them.”⁴

Before he became notorious, Newell already had an acrimonious history with Ross Township. In 2002, the Township won an \$8,000 judgment against Newell for back taxes.⁵ Later that year, Newell gave an interview to the Pocono Record in which he characterized himself as a junk collector, and called the Township’s complaints about his property harassment.⁶ In the same article, the Zoning Officer commented that he was concerned that, if he traveled onto Newell’s property, he would be attacked by Newell or injured by his booby-traps.⁷ In 2012, after a battle that lasted nearly two decades, the Court of Common Pleas of Monroe County finally ordered Newell off the property.⁸

Newell was not the first disgruntled citizen to attack local government officials. On the contrary, on October 6, 1998, a recently fired chess coach opened fire into a township conference room in Riverside, New Jersey.⁹ He injured six township officials in the process.¹⁰ On July 24, 2003, a New York City Councilman was killed inside City Hall by a political opponent.¹¹ On February 7, 2008, Charles Lee Thornton killed two police officers and three officials he had “spared with” in the past at a City Council meeting in Kirkwood, Missouri.¹² And on July 26 of 2013, a police officer was shot inside the City Hall in Beaverton, Oregon.¹³

PSATS’ advice to Townships, at present, is that when “an active shooter is on the loose, barricading a door and hiding under a desk could help save your life.”

Chilling Effects of State Legislation

Unlike schools,¹⁴ courts,¹⁵ and the state capitol,¹⁶ Pennsylvania state law does not prohibit guns in local government buildings. As a result, Pennsylvania’s counties, townships, boroughs, and cities have attempted to enact their own gun-control ordinances.¹⁷ Those ordinances have been opposed—largely successfully—by the National Rifle Association’s ongoing drive to preempt local regulation in favor of

2. *Id.*

3. *Id.*

4. *Id.*

5. *Ross Township v. Rockne Newell*, MJ-43402-CV-0000105-2002.

6. Kevin Amerman, *Resident Calls it a ‘Collection,’ Township Calls it an ‘Eyesore,’* Pocono Record (Jul. 4, 2002).

7. *Id.*

8. Andrew Scott, *Ross Township Wins 17-Year Battle to Evict ‘Eyesore’ Owner*, Pocono Record, (Aug. 21, 2012).

9. Tom Gorman, *6 Wounded in Shootout at Riverside City Hall*, The LA Times (Oct. 7, 1998).

10. *Id.*

11. Cooper, Michael, *Shooting at City Hall*, The New York Times (Jul. 24, 2003).

12. Greg Jonsson, *6 Dead in Shootings at Kirkwood City Hall*, St. Louis Post-Dispatch (Feb. 7, 2008).

13. Jeff Kirsch, *Shot fired, Officer Injured at Beaverton Police Department*, KPTV.com (Jul. 26, 2013).

14. 18 Pa.C.S. §912.

15. 18 Pa.C.S. §913.

16. Management Directive 625.10 (Amended).

17. Robert Cahall writes that “the overwhelming majority of all constitutionally problematic regulations originate at the local, rather than state, level.” Robert J. Cahall, *Local Gun Control Laws After District of Columbia v. Heller: Silver Bullets or Shooting Blanks? The Case for Strong State Preemption of Local Gun Control Laws*, 7 Rutgers J.L. & Pub. Pol’y 359, 388-90 (2010).

laxer state gun control laws.¹⁸ Now, after three-and-a-half decades of litigation against cash-strapped municipalities,¹⁹ “frequent, ill-founded, and rarely pursued threats to challenge the enactment of local firearm regulations in court have had a substantial chilling effect on local governments.”²⁰

For example, the Pennsylvania State Association of Township Supervisors has concluded that state preemption is so complete that local governments may not even “prohibit firearms from being carried into a township meeting.”²¹ Instead, the State Association advises Townships that, when “an active shooter is on the loose, barricading a door and hiding under a desk could help save your life.”²² Authors like Robert Cahall argue that this enforced local government impotence is the best way to protect the Second Amendment.²³ Others, like Eric Gorovitz, lament that the “tragedy of firearm injury would be compounded if the gun lobby were successful at tying the hands of local governments seeking to address the problem.”²⁴

This Article argues that Pennsylvania’s preemption statute is not so draconian. Instead, a careful review of the relevant case law makes clear that Pennsylvania’s General Assembly reserved local governments’ authority to control guns brought into government buildings, so long as they do not purport to “regulate” guns throughout their territorial jurisdiction.

SCOPE OF LIMITATIONS ON THE RIGHT TO BEAR ARMS

The Second Amendment to the United States Constitution provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.²⁵

On its face, that clear prohibition suggests that governments—including municipal governments—may not regulate the possession of arms at all. Not surprisingly, however, federal and state courts have uniformly held that some kinds of regulation are appropriate, within certain limits.²⁶ Thus, “the right to bear arms is not unlim-

18. The National Rifle Association’s legislative agenda in this regard is self-acknowledged, and no secret among commentators. “The NRA continues to recognize preemption as the major legislative safeguard to prevent local anti-gun action and to guarantee all citizens their right to own and use firearms for legitimate purposes. For this reason, enacting firearm preemption in those states without this legislative safeguard remains the top legislative priority. . . . While the NRA has traditionally believed that the government most representative of the people is best, the recent popularity of restrictive local ordinances has created the need for states to preempt such action.” Darwin Farrar, *In Defense of Home Rule: California’s Preemption of Local Firearms Regulation*, 7 Stan. L. & Pol’y Rev. 51, 53-54 (1996) (quoting INSTITUTE FOR LEGISLATIVE ACTION, NAT’L RIFLE ASSOC. OF AMERICA, NRA-ILA STATE LEGISLATIVE ISSUE BRIEF (1986)); also Eric Gorovitz, *California Dreamin’: The Myth of State Preemption of Local Firearm Regulation*, 30 U.S.F. L. Rev. 395, 397 (1996) (“ . . . the pro-gun lobby has led an assault on local government power by promoting state and federal legislation designed to preempt effective local regulation of firearms.”). The NRA has also brought suit on its own behalf to invalidate gun-control ordinances passed by the City of Philadelphia, discussed below.

19. “Beginning in the early 1980s, the National Rifle Association (NRA) explicitly sought to convince state legislatures to enact firearm preemption laws. Today, more than forty states preempt localities from enacting some or all types of their own firearm laws.” Jon S. Vernick, J.D., M.P.H. & Julie Samia Mair, J.D., M.P.H., *State Laws Forbidding Municipalities from Suing the Firearm Industry: Will Firearm Immunity Laws Close the Courthouse Door?*, 4 J. Health Care L. & Pol’y 126, 127 (2000).

20. Darwin Farrar, *In Defense of Home Rule: California’s Preemption of Local Firearms Regulation*, 7 Stan. L. & Pol’y Rev. 51, 57 (1996).

21. Jill Ercolino, “Firearm & Safety Q&As,” PA TownshipNews (Oct. 2013).

22. *Id.*

23. Cahall argues that “a strong and comprehensive statutory system of state preemption of local legislation should be enacted in all fifty states.” Cahall, 7 Rutgers J.L. & Pub. Pol’y at 388-90.

24. Eric Gorovitz, *California Dreamin’: The Myth of State Preemption of Local Firearm Regulation*, 30 U.S.F. L. Rev. 395, 426 (1996).

25. U.S. Const. Am. 2.

26. See, e.g., *Lehman v. Pennsylvania State Police*, 839 A.2d 265, 273 (Pa. 2003) (“While the right to bear arms enjoys constitutional protection, like many other constitutional rights, it is not beyond regulation.”).

ited; it may be restricted in the exercise of police power for the good order of society and protection of citizens.”²⁷

The constitutional limits of firearm regulations were considered in *D.C. v. Heller*.²⁸ In that case, the Supreme Court of the United States considered the District of Columbia’s ban on handguns.²⁹ After a lengthy textual analysis, Justice Scalia, writing for the majority, concluded that the plain meaning of the Second Amendment gives individuals the right to own weapons for self-defense and in defense against tyranny.³⁰ Turning to the handgun ban itself, the Court observed that it “amounts to a prohibition of an entire class of ‘arms’” used by the majority of owners for a lawful purpose.³¹ The Court further noted with disapproval that the “prohibition extends . . . to the home, where the need for defense of self, family, and property is most acute.”³² Thus, because of the handgun ban’s all-encompassing sweep, the Court concluded that it could not pass constitutional muster under any level of scrutiny.³³

The Court did not foreclose all gun-control measures, however. Instead, it observed that the “Constitution leaves the District of Columbia a variety of tools for combating [gun violence], including some measures regulating handguns.”³⁴ Among those measures, the Court noted, are “laws forbidding the carrying of firearms in sensitive places such as schools and *government buildings*.”³⁵

Article I, Section 21 of the Pennsylvania Constitution also guarantees the right to bear arms, and provides that the “right of the citizens to bear arms in defence of themselves and the State shall not be questioned.”³⁶ Pennsylvania Courts have not considered whether Article I Section 21 is coextensive with the Second Amendment.³⁷ Nevertheless, Pennsylvania Courts have repeatedly held that, like the Second Amendment, Article I, Section 21 provides no absolute guarantee against regulation by the state.³⁸ And, importantly, state courts have repeatedly underscored the *Heller* Court’s observation that the right to bear arms may be circumscribed in government buildings.³⁹ To that end, Pennsylvania’s ban on weapons in courthouses has been upheld as constitutional.⁴⁰ So too has the Commonwealth’s ban on weapons in schools.⁴¹

Pursuant to its authority to regulate arms, therefore, Pennsylvania has enacted the Uniform Firearms Act.⁴² That Act creates licensure requirements⁴³ and sets forth

27. *R.H.S. v. Allegheny Cnty. Dep’t of Human Servs., Office of Mental Health*, 936 A.2d 1218, 1229 (Pa. Cmwlth. 2007).

28. 554 U.S. 570 (2008).

29. Prior to the *Heller* decision, the “District of Columbia generally prohibit[ed] the possession of handguns.” 554 U.S. 570, 574 (2008).

30. *Id.*

31. *Id.* at 628.

32. *Id.*

33. *Id.*

34. *Id.* at 636.

35. *Id.* at 626 (emphasis added).

36. Pa. Const. Art. I §21.

37. This issue is important, because other Sections of the Pennsylvania Constitution have been held to provide *greater* protection than their federal counterparts. See, e.g., *Commonwealth v. Enimpah*, 62 A.3d 1028, 1031 (Pa. Super. 2013) (“ . . . the Pennsylvania Supreme Court has held that the Pennsylvania Constitution provides a higher level of protection than the Fourth Amendment as interpreted by the United States Supreme Court.”).

38. See *Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996) (Reasonable regulation in gun control law is valid exercise of police power of Commonwealth).

39. *Perry v. State Civil Serv. Comm’n (Dep’t of Labor & Indus.)*, 38 A.3d 942, 955 (Pa. Cmwlth. 2011) (quoting *Heller*; also *McDonald v. City of Chicago, Illinois*, 130 S.Ct. 3020, 3047 (2010)).

40. 18 Pa.C.S. §913 (prohibiting possession of firearms or dangerous weapons in court facilities); *Minich v. Cnty. of Jefferson*, 919 A.2d 356 (Pa. Cmwlth. 2007) (upholding Section 913 as constitutional), *infra*.

41. 18 Pa.C.S. §912 (possession of weapons in schools a misdemeanor).

42. 18 Pa.C.S. §6101, *et seq.*

penalties for illegal possession of firearms,⁴⁴ and related statutes create sentencing enhancements for crimes committed with firearms.⁴⁵

The Uniform Firearms Act also provides, at Section 6120 of Title 18, that no:

... county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth.⁴⁶

It is Section 6120, therefore, not the Second Amendment or its State Constitution counterpart that has heretofore prevented Pennsylvania's municipalities from regulating firearms.⁴⁷

An amendment to Section 6120 was recently passed such that:

(a.2) Relief.—A person adversely affected by an ordinance, a resolution, regulation, rule, practice or any other action promulgated or enforced by a county, municipality or township prohibited under subsection (a) or 53 Pa.C.S. §2962 (g) (relating to limitation on municipal powers) may seek declaratory or injunctive relief and actual damages in an appropriate court.

(a.3) Reasonable expenses.—A court shall award reasonable expenses to a person adversely affected in an action under subsection (a.2) for any of the following:

(1) A final determination by the court is granted in favor of the person adversely affected.

(2) The regulation in question is rescinded, repealed or otherwise abrogated after suit has been filed under subsection (a.2) but before the final determination by the court.⁴⁸

In other words, the new statutory provision permits private citizens to file suit to strike local ordinances that regulate firearms, and to recover their actual damages, together with (1) attorneys' fees, (2) costs of suit, and (3) a civil penalty not to exceed \$5,000.⁴⁹ The result of the newly passed legislation was a chilling effect on municipal attempts to defend existing gun rules. Regardless, the amendment was stricken by the Commonwealth Court of Pennsylvania on June 25, 2015, as violative of the single-subject and original purpose clauses of Pennsylvania's state constitution.⁵⁰ At present, it is unclear whether the legislature will move to reenact the same provisions without the procedural flaws.

43. 18 Pa.C.S. §6109 (applications shall be made to county sheriff or Philadelphia chief of police, shall not exceed one page in length, and shall require applicants to affirm that they have never been convicted of a disabling offense).

44. 18 Pa.C.S. §6106 (prohibiting unlicensed concealed possession of firearms); 18 Pa.C.S. §6105 (prohibiting possession of firearms by persons convicted of disabling offenses); 18 Pa.C.S. §6107 (prohibiting possession of firearms on public streets during declared emergencies); 18 Pa.C.S. §6110.1 (prohibiting possession of firearms by minors); 18 Pa.C.S. §6110.2 (prohibiting possession of firearms with altered serial numbers).

45. 42 Pa.C.S. §9712.

46. 18 Pa.C.S. §6120(a).

47. Adding to the confusion that prompts this article, the Third Class City Code offers Pennsylvania's fifty-three third class cities the authority to "Regulate guns, et cetera.—To regulate, prohibit, and prevent the discharge of guns, rockets, powder, or any other dangerous instrument or combustible material within the city, and to prevent the carrying of concealed deadly weapons." 53 P.S. §37403(26). No case has cited to Section 37403(26) in the context of a prohibition on firearms, so the extent to which Section 6120 supersedes Section 37403 is unclear.

48. 2014 Pa. Legis. Serv. Act 2014-192 (H.B. 80).

49. *Id.*

50. *Leach v. Commonwealth*, ___ A.3d ___ (Pa. Cmwlth. 2015) ("Based on our determinations that Act 192 violates Pennsylvania Constitution Article III, Section 1 and Section 3, relating to original purpose and single subject, we grant Petitioners' motion for summary relief, and we declare Act 192 unconstitutional and void. The Commonwealth is enjoined from enforcing any provisions of Act 192 or taking any actions in accordance with Act 192.").

In spite of Section 6120's prohibition, Philadelphia enforced its own gun-control ordinance well into the 1970s.⁵¹ That ordinance precluded the purchase, sale, and possession of firearms in the City absent a license from Philadelphia's Department of Licenses and Inspections, and was challenged for the first time in *Schneck v. City of Philadelphia*.⁵² Schneck argued that the ordinance was a regulation of the lawful ownership, possession, or transportation of firearms, and was "therefore preempted by state legislation which provides for the comprehensive regulation of the sale, licensing, transfer, and delivery of firearms throughout the state."⁵³ In other words, Schneck contended that Philadelphia's gun-control ordinance was preempted by Section 6120. The trial court denied the plaintiffs' an injunction, and they appealed.

The Commonwealth Court began its analysis by observing that the City of Philadelphia, "as a municipal corporation created by the state, possesses only the powers specifically granted to it by the legislature."⁵⁴ The Court went on to observe that Philadelphia's Home Rule Charter further limited the City's authority such that it could not exercise its powers to circumvent laws that were otherwise applicable in every part of the Commonwealth; the Uniform Firearm Act, the Court noted, was one such law.⁵⁵ Based on the City's limited powers and the clear language of Section 6120, the Court concluded that the ordinance improperly regulated firearms and struck the ordinance as invalid.⁵⁶

In 1993, the cities of Philadelphia and Pittsburg tried, again, to regulate firearms on a more limited scale.⁵⁷ Specifically, the Mayors of those two cities banned the possession of certain assault weapons within city limits.⁵⁸ After the ban was passed, the Pennsylvania General Assembly passed House Bill 185, which amended Section 6120 to more specifically include assault weapons in that law's proscription of local regulation.⁵⁹ In response, local leaders and civic groups filed an anticipatory declaratory action to enjoin preemption of the statute by the Uniform Firearms Act in general, and the newly amended Section 6120 in particular.⁶⁰

The declaratory action reached the Pennsylvania Supreme Court in *Ortiz v. Commonwealth*.⁶¹ Like in *Schneck*, a majority of the Pennsylvania Supreme Court concluded that, absent a compelling reason to the contrary, the plain language of Section 6120 precluded the City's wholesale ban.⁶² The Court went on to dismiss the cities' arguments to the contrary *seriatim*.

First, the cities argued that their home-rule charters only restricted their authority with respect to laws that are uniformly applicable throughout the Commonwealth.⁶³ Because one of the subsections of the Uniform Firearms Act specifically requires a license for open-carry on the streets of Philadelphia (and nowhere else in

51. *Schneck v. City of Philadelphia*, 383 A.2d 227 (Pa. Cmwlth. 1978).

52. 383 A.2d 227, 228-29 (Pa. Cmwlth, 1978).

53. *Id.* at 229.

54. *Id.* at 230 (citing *School District of Philadelphia v. Zoning Board of Adjustment*, 207 A.2d 864 (Pa. 1965)).

55. *Id.* (citing 53 P.S. §13133).

56. *Id.*

57. *Ortiz v. Commonwealth*, 681 A.2d 152, 154 (Pa. 1996).

58. *Id.*

59. *Id.*; also, Jonathan M. Kopcsik, *Constitutional Law-Home Rule and Firearms Regulation: Philadelphia's Failed Assault Weapons Ban-Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996), 70 Temp. L. Rev. 1055 (1997) ("In 1993, the Philadelphia City Council passed an ordinance that prohibited the possession of assault weapons within the city limits. Responding swiftly to this initiative, the Pennsylvania General Assembly amended the Uniform Firearms Act in order to clarify its prohibition against local firearms regulation, and specifically, to prevent municipalities from regulating the possession of assault weapons.").

60. *Id.*

61. *Id.*

62. *Id.* at 155 ("18 Pa.C.S. §6120, the act limiting municipal regulation of firearms and ammunition, applies in every county including Philadelphia.").

63. *Id.* at 155 (citing the Home Rule Statute governing Cities of the First Class, 53 Pa.C.S. §13133).

the Commonwealth,) the cities argued that the Act as a whole was not uniform, and therefore did not preempt local regulation.⁶⁴ The High Court tersely concluded that this argument was:

. . . plainly without merit. The act limiting municipal regulation of firearms and ammunition, applies in every county including Philadelphia. The fact that one section of the Uniform Firearms Act does not apply in every county is immaterial.⁶⁵

Next, the cities argued that the General Assembly lacked the authority to promulgate laws that undermined their “ability to perform the basic administrative functions of a municipal government and the ability to fulfill a fundamental purpose for which the City government exists.”⁶⁶ To that end, the cities argued that “the right of a city to maintain the peace on its streets through the regulation of weapons is intrinsic to the existence of the government of that city and, accordingly, an irreducible ingredient of constitutionally protected Home Rule.”⁶⁷ The Pennsylvania Supreme Court summarily rejected this argument, too, by reference to the state constitution, which grants authority to the General Assembly to “limit the functions to be performed by home rule municipalities” without reference to the effect such limitations would have on city governance.⁶⁸

Finally, the cities pointed out that the constitutional provision relied on to rebut their prior argument—namely that the General Assembly is authorized to limit the functions performed by home rule municipalities—had been narrowed in prior decisions to apply only to issues of state-wide concern.⁶⁹ The Court rejected this point as well:

Because the ownership of firearms is constitutionally protected, its regulation is a matter of statewide concern. The constitution does not provide that the right to bear arms shall not be questioned in any part of the commonwealth except Philadelphia and Pittsburgh, where it may be abridged at will, but that it shall not be questioned in any part of the commonwealth. Thus, regulation of firearms is a matter of concern in all of Pennsylvania, not merely in Philadelphia and Pittsburgh, and the General Assembly, not city councils, is the proper forum for the imposition of such regulation.⁷⁰

In May of 2007, the City of Philadelphia tried, for a third time, to pass a series of gun-control regulations.⁷¹ Those regulations sought to (1) limit purchasers to a single firearm during any thirty-day period; (2) require owners to report lost or stolen firearms within twenty-four hours; (3) create a new kind of firearms license, available only from the Philadelphia police; (4) create a new reporting requirement for statewide firearms licenses; (5) permit confiscation of firearms from “anyone posing a risk of harm;” (6) prohibit the possession or transfer of assault weapons; and (7) created an ammunition registry.⁷² Again, the City brought an anticipatory declaratory action seeking to enforce the ordinances in spite of Section 6120. The matter reached the *Commonwealth Court* in *Clarke v. House of Representatives of Pennsylvania*.

In *Clarke*, Philadelphia argued that Section 6120’s use of the phrase “when carried or transported” restricted preemption to ordinances that specifically impinged on

64. *Id.*

65. *Id.* (internal citations omitted).

66. *Id.* at 155-56.

67. *Id.* at 156.

68. *Id.*

69. *Id.*

70. *Id.* Justice Nigro authored a short dissent. In that dissent he argued that because “Philadelphia County is besieged by a multitude of violent crimes which occur involving a variety of hand guns and automatic weapons it is fundamentally essential that the local government enact legislation to protect its citizens whenever the state legislature is unable or unwilling to do so.” *Id.* (Nigro, J., dissenting).

71. *Clarke v. House of Representatives of Pennsylvania*, 957 A.2d 361, 362 (Pa. Cmwlth., 2008).

72. *Id.* at 365 (Smith-Ribner, dissenting).

carrying or transporting firearms.⁷³ Thus, the City argued, a reporting requirement for lost or stolen firearms lay outside of Section 6120's ambit—by definition an owner cannot carry or transport a lost or stolen firearm. Similarly, a limit on purchasing multiple firearms would not impinge on an owner's right to carry or transport the firearms he already owned.

The Commonwealth Court observed, however, that the challenged ordinances were not substantively different from the ordinances that had been stricken in *Schneck* and *Ortiz*.⁷⁴ The Court agreed that the specific argument offered by the City had not been raised in those cases, but noted that the *Ortiz* Court's holding was sufficiently broad to infer that, had the issue been raised, the High Court would have rejected it.⁷⁵ As a result, the Court declined to accept Philadelphia's newly proposed distinction.⁷⁶

Undeterred, Philadelphia re-passed a set of five amended ordinances in 2008.⁷⁷ This time, the City did not file suit preemptively but, instead, was sued by the National Rifle Association.⁷⁸ The matter again reached the Commonwealth Court in *National Rifle Association v. City of Philadelphia*.⁷⁹

The distinction between this attempt and its last, the City argued, was that the new ordinances only regulated conduct that was already proscribed by state statute. The City contended that the regulated conduct was therefore not the "lawful ownership, possession, transfer or transportation" that Section 6120 places beyond municipalities' authority to regulate.⁸⁰ The trial court rejected this distinction with respect to two of the five ordinances, but went on to conclude that the NRA lacked standing to challenge the remaining three regulations.⁸¹ The parties filed cross-appeals.

The Commonwealth Court rejected the City's new argument. It agreed that Section 6120 "appears to be limited to the *lawful* use of firearms by its very terms."⁸² Nevertheless, the Commonwealth Court observed that, when referring to Section 6120 in the *Ortiz* decision, the Pennsylvania Supreme Court had omitted the term "lawful" in its description of the Section's scope.⁸³ From this, the Court concluded that precedent had rendered that term mere surplussage.⁸⁴ It therefore declined to create a safe haven for municipalities to regulate *unlawful* possession, transportation, transfer, or sale of firearms.

73. *Id.* at 364.

74. *Id.*

75. *Id.*

76. *Id.* ("Section 6120 clearly preempts local governments from regulating the lawful ownership, possession and transportation of firearms. Thus we must conclude that binding precedent precludes our accepting Petitioners' argument on this point.") (internal citations omitted).

77. *National Rifle Association v. City of Philadelphia*, 977 A.2d 78, 79 (Pa. Cmwlth, 2009).

78. *Id.*

79. *Id.*

80. *Id.* at 81.

81. *Id.* at 80.

82. *Id.* at 82 (emphasis in original).

83. *Id.* ("... the crystal clear holding of our Supreme Court in *Ortiz* [is] that 'the General Assembly has [through enactment of §6120(a)] denied all municipalities the power to regulate the ownership, possession, transfer, or [transportation] of firearms,' precludes our acceptance of the City's argument and the trial court's thoughtful analysis on this point.")

Notably, although the *National Rifle Association* Court felt that the holding in *Ortiz* was "crystal clear," it nevertheless felt it necessary to insert a mid-sentence explanatory parenthetical, and correct the Supreme Court's typographical error by replacing a duplicate use of the term "possession" with "transportation" so as to appropriately follow the statute. The actual quotation from *Ortiz* should read "the General Assembly has denied all municipalities the power to regulate the ownership, possession, transfer or possession of firearms." 681 A.2d at 155.

84. *Id.*

The *National Rifle Association* decision, however, flies in the face of earlier precedent. Specifically, in *Minich v. County of Jefferson*, John Minich, Stanley Switzer, and Randy Keihl challenged a Jefferson County ordinance banning firearms from its courthouse, and subjecting every person entering that building to a metal detector search.⁸⁵ Like the NRA, the plaintiffs in *Minich* argued that “the Commonwealth has preempted the regulation of firearm possession in a court facility by the enactment of Section 6120 of the Crimes Code.”⁸⁶ The trial court agreed and struck the ordinance; the County appealed.

Unlike in *National Rifle Association*, the Commonwealth Court acknowledged that Section 6120’s narrow focus on the “lawful” possession of firearms *allowed* municipalities to regulate unlawful conduct.⁸⁷ “In other words,” the Court wrote, “if the County’s ordinance pertains only to the *unlawful* possession of firearms, *i.e.*, possession ‘prohibited by the laws of this Commonwealth,’ then Section 6120(a) of the Crimes Code does not preempt the County’s ordinance.”⁸⁸

The Court went on to observe that the Pennsylvania Crimes Code prohibits the knowing possession of a firearm in a court facility, including the courtroom, court clerks’ offices, and adjoining corridors.⁸⁹ Therefore, the Court concluded, Jefferson County was permitted to exclude firearms from the Jefferson County Courthouse because doing so did not affect the lawful possession, sale, transfer, or transportation of firearms.⁹⁰ In a confusing turn, the *Minich* Court specifically cited *Ortiz* for the proposition that Section 6120 does *not* conflict with ordinances that prohibit or regulate unlawful possession of firearms.⁹¹ In other words, *Minich* and *National Rifle Association* both rely on the *Ortiz* decision to reach opposite conclusions.

THE MEANING OF REGULATION

The conflicting decisions in *Minich* and *National Rifle Association* have left it unclear whether municipalities may or may not regulate the otherwise “unlawful” possession, sale, transfer, and transportation of firearms. Further muddling the issue, however, the Uniform Firearms Act fails to define the term “regulate.”⁹²

One might infer the meaning of the term from the regulations that have already been invalidated in the *Schneck*, *Ortiz*, *Clarke*, and *National Rifle Association* cases.⁹³ By that logic, an ordinance that prohibits the possession and transfer of firearms absent a license is a regulation,⁹⁴ as is a ban on assault weapons.⁹⁵ So too are the imposition of waiting periods prior to purchase, reporting requirements for lost or stolen firearms, and supplemental licensing requirements.⁹⁶

Special interest groups have argued from these decisions that municipalities are “barred from enacting *any* gun control ordinance pursuant to statewide preemption under Section 6120 of the Firearms Act.”⁹⁷ Such an oversimplification, however, defies logic.

85. 869 A.2d 1141, 1142 (Pa. Cmwlth. 2005).

86. *Id.*

87. *Id.* at 1143.

88. *Id.* (emphasis in original).

89. *Id.* (citing 18 Pa.C.S. §913).

90. *Id.*

91. *Id.* at n. 3 (citing *Ortiz*, 681 A.2d 152 for the proposition that “the General Assembly may negate ordinances enacted by home rule municipalities only when the *conflicting* state statute concerns substantive matters of statewide concern” (emphasis in original)).

92. 18 Pa.C.S. §6102 (Definitions).

93. The *Schneck*, *Ortiz*, *Clarke*, and *National Rifle Association* Courts did not consider the meaning of the term, however, and thus it could be argued that this issue was not decided.

94. *Schneck*, 383 A.2d at 228.

95. *Ortiz*, 655 A.2d at 195.

96. *Clarke*, 957 A.2d at 365 (Smith-Ribner, dissenting).

97. *National Rifle Association*, 977 A.2d at 81.

It is beyond cavil, for instance, that municipalities are permitted to enact firearm safety protocols for police officers.⁹⁸ Thus, a police officer that violates a township's firearms policy is subject to termination even though the Police Tenure Act,⁹⁹ (which prevents municipalities from terminating police officers except in narrowly defined circumstances,) does not refer to such policies.¹⁰⁰ In other words, Pennsylvania recognizes the authority of local governments to "regulate" firearms that are possessed by government employees for government purposes.

By statute, local government may also prevent the construction of shooting ranges by enacting noise ordinances.¹⁰¹ Specifically, Pennsylvania's noise pollution statutes protect shooting ranges from noise-ordinances that take effect after they have begun operation, but specifically subjects them to local regulations already in place at the time of their construction.¹⁰² Municipalities are therefore permitted to create range-free zones by imposing strict noise ordinances.¹⁰³

In short, Section 6120's ambit seems largely to depend on the distinction between a governmental "policy" and a "regulation." Unfortunately, no Pennsylvania Court has specifically articulated the meaning of the term "regulate" as used by Section 6120. In considering an analogous issue, however, the Commonwealth Court has held that governmental conduct does not rise to the level of "regulation" when the government acts in its capacity as a private owner.

Specifically, in *Wolfe v. Township of Salisbury*, Virginia Wolfe argued that the Pennsylvania Game Law pre-empted Salisbury's ordinance banning hunting in its parks.¹⁰⁴ The trial court denied Wolfe's petition to enjoin enforcement of the municipal ordinance, and she appealed.

The Commonwealth Court concluded that Salisbury was not acting to "regulate" hunting, because its ordinance did not have township-wide effect. Instead, the Court observed that the Township was acting in its capacity as a private owner to—legally—restrict hunting on Township property. Inasmuch as a private entity would be permitted to ban hunting in their homes, the Township was similarly permitted to ban hunting in its parks. The Court held that:

Preemption is applicable where a township has acted to regulate hunting as a township; that is, throughout the municipality. This Ordinance, however, is applicable only to the properties owned by the Township itself. The Township has exercised its authority, as any other property owner may, to "regulate" hunting on its property, consistent with the Game Law. There is no authority to suggest that municipalities that own property are treated differently than individuals under the Game Law with respect to property ownership rights.¹⁰⁵

Of course, it is well-settled that private property owners may exclude guns from their homes, as well as hunting.¹⁰⁶ Thus, under the reasoning of *Wolfe*, Townships may exercise control over firearms on Township property like parks and township buildings without "regulating," so long as they do not impose similar restrictions on firearms elsewhere.

98. *Brown v. Tucci*, CIV.A. 12-1769, 2013 WL 2190145 (W.D. Pa. May 20, 2013) (Police officer terminated for violation of township firearms safety protocol).

99. 53 P.S. §812.

100. *Powell v. Middletown Twp. Bd. of Supervisors*, 782 A.2d 617, 618 (Pa. Cmwlth. 2001).

101. 35 P.S. §4501-02 (requiring firing ranges to comply with noise ordinances in effect at the time of their construction); also, *Pacurariu v. Commonwealth*, 744 A.2d 389, 393 (Pa. Cmwlth. 2000) (same).

102. *Id.*

103. *Id.*

104. 880 A.2d 62 (Pa. Cmwlth. 2005).

105. *Id.* at 69.

106. See, e.g., *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) ("States also permit private businesses and other private institutions (such as churches) to ban guns from their premises."). Also, *Florida Retail Fed'n, Inc. v. Attorney Gen. Of Florida*, 576 F. Supp. 2d 1281, 1295 (N.D. Fla. 2008). ("A private business's banning of guns on its own property plainly is not unconstitutional; there is no constitutional right to bear arms on private property against the owner's wishes.")

This understanding of the term “regulate,” moreover, does no violence to established precedent. On the contrary, each of the Philadelphia or Pittsburgh ordinances that the Courts have invalidated have had city-wide effect: the ban on assault weapons, for instance, was not limited to township buildings but, instead, reached into private homes, as well as state hunting land. Similarly, the reporting requirement was not triggered by theft that occurred on Philadelphia property but, instead, obliged gun-owners to report thefts that occurred from their houses, their cars, or at work. Conversely, although the *Minich* Court employed an alternative rationale, *Wolfe’s* holding is also consistent with the outcome of that case—namely, that local government may prohibit guns from buildings they own.

An interpretation that precludes local governments from prohibiting guns from their buildings, moreover, leads to an absurd result. It would mean that counties and townships that conduct their meetings in a building that adjoins a court, like in *Minich*, may exclude guns; local governments that conduct meetings in separate buildings would be forced to permit guns at township meetings. Similarly, meetings conducted at a local school would necessarily be gun-free, but meetings conducted at a sports stadium would not. In other words, an individual’s right to carry arms at a local government building would hinge on the ancillary state or educational services offered at that building. Such a random patchwork of gun-rights is plainly contrary to the basic rules of statutory construction.¹⁰⁷

Municipal bans on firearms in government buildings, moreover, do nothing to undermine the Second Amendment.¹⁰⁸ On the contrary, the Supreme Court has specifically noted that such “longstanding prohibitions” easily pass constitutional muster.¹⁰⁹ As such, an interpretation of Section 6120 that permits gun-bans on government property does not conflict with Robert Cahall’s thesis that state law preemption of municipal gun control is necessary to avoid municipal infringements on Second Amendment rights¹¹⁰; at the same time, such a ban takes an important step toward Gorovitz’ goal of re-empowering local governments to combat gun violence.¹¹¹

CONCLUSION

If Rockne Newell had lived in Jefferson County and targeted its local government, he would have been stopped by a metal detector and an armed sheriff before he entered the building.¹¹² If he had targeted the Commonwealth’s legislature or administrators, he would have been stopped by a metal detector and an armed Pennsylvania State Police Trooper.¹¹³ The residents and public officials of Ross Township and, indeed, every Pennsylvania municipality, are entitled to the same protection; neither the Second Amendment, the Pennsylvania Constitution, nor Section 6120 takes that right away from them.

107. 1 Pa.C.S. §1922(1) (“... General Assembly does not intend a result that is absurd, impossible of execution, or unreasonable.”).

108. *Heller*, 554 U.S. at 626.

109. *Id.* Importantly, the *Heller* Court limited such regulations to “longstanding prohibitions” and “laws forbidding the carrying of firearms in sensitive places[.]” It is unlikely, therefore, that municipalities could constitutionally enact backdoor regulations on the transportation and sale of firearms by, for instance, excluding them from locally owned *roads*. Such an ordinance would have the effect of prohibiting the importation of new firearms into the affected locality, and land-locking existing firearms in homes, shops, and armories, creating the same result as was expressly prohibited by *Heller*. As such, a constitutionally valid local ordinance would necessarily be restricted to the types of government property that are already subject to gun-bans at the state and federal level. *E.g. United States v. Masciandaro*, 638 F.3d 458, 473 (4th Cir. 2011) (Gun-ban in government owned park deemed constitutional).

110. Cahall, 7 Rutgers J.L. & Pub. Pol’y at 388-90.

111. Eric Gorovitz, *California Dreamin’: The Myth of State Preemption of Local Firearm Regulation*, 30 U.S.F. L. Rev. 395, 426 (1996).

112. *Minich*, 869 A.2d at 1142.

113. Pennsylvania Management Directive 625.10 (Amended) reiterates Pennsylvania’s longstanding prohibition against firearms in the capitol complex.