COMMENTS

IMPLIED FUNDAMENTAL RIGHTS AND THE RIGHT TO TRAVEL WITH ARMS FOR SELF-DEFENSE: AN APPLICATION OF *GLUCKSBERG* TO ANGLO-AMERICAN HISTORY AND TRADITION

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The Supreme Court's decisions in District of Columbia v. Heller *and* McDonald v. City of Chicago *affirmed that the Second Amendment protects an individual right to keep functional firearms in the home. As many commentators have predicted, these holdings prompted the question of whether the Second Amendment protects a right to carry firearms outside of the home as well. Many thought the issue had arrived when, in January 2019, the Supreme Court granted certiorari in* New York State Rifle & Pistol Ass'n v. City of New York. *The issue in that case is whether a New York City permitting scheme requiring permit holders to keep their firearms only in the premises listed on the license violated the Second Amendment rights of permit holders to transport firearms outside of New York City to second homes or firearms ranges.*

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Although the Second Amendment represents the most obvious avenue for bolstering individuals' rights to carry firearms outside of the home, the Supreme Court's implied fundamental rights doctrine—crystallized in Washington v. Glucksberg*—provides an alternative method for protecting the carrying of firearms outside of the home in certain limited circumstances.*

This Comment argues that Glucksberg *recognizes an implied fundamental right to travel with lawful arms for the purpose of self-defense.* Glucksberg *articulated a two-prong test for recognizing implied fundamental rights. The test requires showing that the claimed right is both deeply rooted in history and tradition and described carefully so that it connects tightly with the historical record. Since at least the fourteenth century in England, a narrow right to travel with arms for self-defense has existed, and today every state either allows qualified individuals to carry a firearm absent an intent to harm others or has a state licensing scheme that permits qualified citizens to carry a firearm outside of the home. Moreover, this right bears a careful description that does not deviate from historical practices. Lower court cases show that failing to tether a claimed right closely to the history underlying the claim will fail the second prong of the* Glucksberg *test. However, the right to travel with arms for self-defense is formulated so that it closely tracks the historical record beginning in fourteenth century England, and it therefore adheres sufficiently close to the underlying history that it meets the careful description prong. As such, the right to travel with arms for self-defense is fundamental and belongs within the Supreme Court's pantheon of other implied fundamental rights.*

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INTRODUCTION

On February 23, 2018, the Second Circuit held in *New York State Rifle & Pistol Ass'n v. City of New York*[1] that a New York City handgun permitting scheme that required holders of premises licenses to keep their firearms only within the address listed on their premises license did not violate the Second Amendment[2] or the implied right to travel.[3] Almost a year later, the Supreme Court granted certiorari to review the case.[4]

At once, the legal debates defining the scope of firearm protections outside of the home, which had been bubbling up in the circuit

1. 883 F.3d 45 (2d Cir. 2018).
2. U.S. CONST. amend. II ("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.").
3. *N.Y. State Rifle & Pistol Ass'n*, 883 F.3d at 53, 64, 66–67.
4. N.Y. State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939 (2019).

courts,[5] spilled over into national news.[6] As nearly a decade has elapsed since the Supreme Court's last major firearms case,[7] many thought the stage was set for the Supreme Court to issue another ruling further defining the scope of the Second Amendment.[8]

Even though the focus of *New York State Rifle & Pistol Ass'n* has recently shifted away from the Second Amendment and towards the mootness doctrine,[9] at some future date, the Court will have to squarely address what protections exist for carrying firearms outside of the home.[10] When that time arrives, one must remember that the Second Amendment is not the only avenue for sourcing a constitutional right to carry arms in public.[11] Over the last century, the Supreme Court engaged in a series of robust debates on the question of how to apply certain enumerated rights within the Bill of Rights against the states,[12]

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5. *Compare* Wrenn v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017) (striking down Washington, D.C.'s ban on carrying handguns outside of the home unless the person carrying the handgun has a "good[]reason"), *with* Peruta v. Cty. of San Diego, 824 F.3d 919, 942 (9th Cir. 2016) (en banc) (concluding that "the Second Amendment does not protect, in any degree, the carrying of concealed firearms by members of the general public").

6. Jess Bravin, *Supreme Court Accepts First Gun Case in Nearly a Decade*, WALL ST. J. (Jan. 23, 2019), https://www.wsj.com/articles/supreme-court-agrees-to-examine-new-york-city-gun-rules-11548170410; Adam Liptak, *Supreme Court Will Review New York City Gun Law*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/us/politics/supreme-court-guns-nyc-license.html?searchResultPosition=18.

7. *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (holding that the Second Amendment applies against the states through the Fourteenth Amendment's Due Process Clause).

8. *See* Garrett Epps, *Supersizing the Second Amendment*, ATLANTIC: IDEAS (Jan. 23, 2019), https://www.theatlantic.com/ideas/archive/2019/01/court-hears-gun-rights-case-ny-rifle-pistol-association-v-city-ny/581017 [https://perma.cc/XLW9-DKLK] (arguing that the court in *New York State Rifle & Pistol Ass'n* might expand the Second Amendment in ways that "could undermine long-standing restrictions on concealed carry in America's major cities").

9. Stephen Wermiel, *SCOTUS for Law Students: Battling over Mootness*, SCOTUSBLOG (Aug. 29, 2019), https://www.scotusblog.com/2019/08/scotus-for-law-students-battling-over-mootness [https://perma.cc/KC6W-R49Z].

10. *See* Peruta v. California, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting) ("Even if other Members of the Court do not agree that the Second Amendment likely protects a right to public carry, the time has come for the Court to answer this important question definitively.").

11. *See* Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997) (explaining that the Fourteenth Amendment's Due Process Clause protects certain rights even if not specifically stated within the Bill of Rights).

12. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1195–96 (1992) (noting the importance of the incorporation cases for the development of constitutional law).

and then later, whether and how to grant constitutional protection to certain unenumerated or implied rights.[13] By the end of the twentieth century, the Supreme Court had articulated a legal standard for recognizing implied fundamental rights.[14]

The significance of elevating an unenumerated right to fundamental status is well known. When the Supreme Court recognizes a right as fundamental, governmental attempts to regulate that right must satisfy the Supreme Court's most exacting scrutiny.[15] For the regulation to be upheld, then, the government must have a compelling state interest to justify the regulation, and it must also employ means that are least restrictive on the exercise of that fundamental right.[16] Failing to establish these requirements renders the regulation unconstitutional.[17]

Washington v. Glucksberg[18] inaugurated the modern test for granting constitutional protection to implied fundamental rights.[19] The test has two prongs, and it requires first that the claimed right be "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if they were sacrificed.'"[20] The second prong requires a "'careful description' of the asserted fundamental liberty interest."[21]

Considering this alternative method for protecting certain liberties, this Comment argues that an implied fundamental right exists within the Fourteenth Amendment's Due Process Clause[22] for individuals to travel with lawful arms for self-defense. This claim is deeply rooted in

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13. *See* Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 216 (2007) (outlining seven different ways the Supreme Court has used history to protect certain implied fundamental rights).

14. *See, e.g.*, *Glucksberg*, 521 U.S. at 720–21 (articulating a two-prong test for recognizing implied fundamental rights).

15. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16–17 (1973) (noting that strict scrutiny is appropriate when reviewing legislation that interferes with fundamental rights).

16. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

17. *See id.*

18. 521 U.S. 702 (1997).

19. *Id.* at 720–21.

20. *Id.* (internal citations omitted) (first quoting Moore v. City of East Cleveland, 431 U.S. 502, 503 (1977); and then quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

21. *Id.* at 721.

22. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .").

the traditions of Anglo-American history, and it is narrowly described so that it recognizes only such a right that is tightly tethered to Anglo-American traditions. This individual right is distinct from any other protection potentially offered by the Second Amendment.

Section I.A provides the legal backdrop for the two-prong *Glucksberg* test, including examples of cases applying the two-prong test; Section I.B explains the Anglo-American historical traditions of traveling with arms for self-defense; Section I.C describes the implied fundamental right to interstate travel; and Section I.D summarizes the tradition of common law self-defense in the United States. Part II is then organized into three sections. Section II.A affirms the continued viability of *Glucksberg*'s two-prong test in light of more recent Supreme Court decisions calling its use into question. Section II.B then analyzes the historical arguments discussed in Section I.B. Finally, Section II.C applies *Glucksberg*'s two-prong test to the Anglo-American history and traditions of traveling with arms for self-defense, concluding that there exists an implied fundamental right to travel with arms for self-defense.

I. BACKGROUND

Applying *Glucksberg*'s two-prong test to the history and tradition of traveling with arms for self-defense first requires examining that history. Thus, the following sections will explain the legal background preceding *Glucksberg*, the Anglo-American history of traveling with arms, the American interstate travel right, and the tradition of American common law self-defense.

A. Legal Background

Washington v. Glucksberg articulated the two-prong test courts use when analyzing implied fundamental rights claims under the Fourteenth Amendment's Due Process Clause. This two-prong test derives from a long line of cases beginning in the early twentieth century.

1. Historical development of Glucksberg*'s two-prong test*

The early twentieth century case law explored whether to apply certain federal rights against the states. Then, in the latter half of the twentieth century, the Court's focus shifted to an examination of how best to protect implied fundamental rights—those rights not specifically enumerated within the Bill of Rights. The methodology used in the early cases helped inform the Court's treatment of the implied fundamental rights cases. These cases culminated in *Glucksberg*'s two-prong test.

a. The incorporation debates

The language used in *Glucksberg*'s two-prong test originated in the legal debates over the question of incorporating enumerated rights. Beginning in the early twentieth century, the Supreme Court heard a series of cases arguing that certain protections in the Bill of Rights were applicable to the states through the Fourteenth Amendment's Due Process Clause.[23] In *Twining v. New Jersey*,[24] the Court addressed whether the right against self-incrimination was so important that due process prevented a state court from issuing instructions allowing the jury to infer guilt based on a defendant's lack of testimony.[25] To answer this question, the Court asked: "Is [exemption from self-incrimination] a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?"[26] Ultimately, the Court held that the right against self-incrimination did not belong within the meaning of due process, for the Court's survey of early state and colonial practices suggested it was not a widely recognized protection.[27]

Almost three decades later, in *Palko v. Connecticut*,[28] the Supreme Court addressed whether a defendant lost his Fourteenth Amendment due process rights when Connecticut sought to retry him after the first trial contained legal errors that prejudiced the State's case, an action the defendant claimed placed him in double jeopardy.[29] The defendant argued that the entire Bill of Rights applied against the states through the Fourteenth Amendment's Due Process Clause.[30] Yet, Justice Cardozo, writing on behalf of the Court, rejected this broad view and instead held that certain protections recognized in the Bill of Rights could restrain state action only if they were "implicit in the concept of ordered liberty" or so important "that neither liberty nor justice would

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23. *See e.g.*, Adamson v. California, 332 U.S. 46, 50 (1947) (right against self-incrimination); Palko v. Connecticut, 302 U.S. 319, 322 (1937) (right against double jeopardy); Twining v. New Jersey, 211 U.S. 78, 99 (1908) (right against self-incrimination).

24. 211 U.S. 78 (1908).

25. *Id.* at 90, 99. Notably, the *Twining* Court chose not to frame the issue as whether the Fifth Amendment's protection against self-incrimination required incorporation through the Fourteenth Amendment; instead, the Court asked whether the general right against self-incrimination was so fundamental that—independent of any Fifth Amendment protections—the Fourteenth Amendment's Due Process Clause required state recognition of the right. *Id.* at 99.

26. *Id.* at 106.

27. *Id.* at 110.

28. 302 U.S. 319 (1937).

29. *Id.* at 320, 322, 324.

30. *Id.* at 323.

exist if they were sacrificed."[31] While Justice Cardozo then asked whether the defendant's double jeopardy claim fell within these principles,[32] his reasoning sidestepped the question of whether the double jeopardy protection counted as sufficiently fundamental to be incorporated into the Fourteenth Amendment.[33] Nevertheless, despite not applying the "implicit in the concept of ordered liberty" standard in this case, the language of Justice Cardozo's incorporation standard lives on.[34]

A decade after *Palko*, the Supreme Court heard *Adamson v. California*,[35] a case similar to *Twining*. In *Adamson*, the Court confronted whether a California law permitting a jury to make inferences from a defendant's silence after receiving an opportunity to contradict the evidence against him violated the Fourteenth Amendment.[36] The defendant challenged the California law on the grounds that it violated a "fundamental national privilege or immunity" that protects defendants from self-incrimination, and that the law violated his due process rights.[37] The Court reaffirmed *Twining*, explaining that there was no right against self-incrimination inherent in national citizenship and that California's law did not violate due process.[38] In dissent, however, Justice Black denounced the Court's reaffirmation of *Twining* because it recognized a legal principle giving the Court broad authority to decide which rights were so fundamental that the Constitution required states to recognize them.[39]

To a large degree, these cases demonstrate how the Supreme Court dealt with arguments seeking to expand the applicability of certain protections

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31. *Id.* at 325–26.

32. *Id.* at 328.

33. *See id.* (explaining that the Court has "no occasion to consider" whether double jeopardy violates fundamental principles of justice and liberty because the statute at issue only permitted the state to retry the accused when the original trial was "infected with error," rather than when it was error-free).

34. *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citing and quoting Justice Cardozo's *Palko* language to create the two-prong test); Roe v. Wade, 410 U.S. 113, 152 (1973) (same); Gallagher v. City of Clayton, 699 F.3d 1013, 1017 (8th Cir. 2012) (same).

35. 332 U.S. 46 (1947).

36. *Id.* at 48, 50.

37. *Id.* at 49–50.

38. *Id.* at 53–54.

39. *Id.* at 70–71 (Black, J., dissenting) ("I think that [*Twining*] and the 'natural law' theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise."); *see also* Amar, *supra* note 12, at 1196 (explaining that Justice Black viewed the Fourteenth Amendment as completely incorporating the first eight amendments of the Bill of Rights against the states).

in the Bill of Rights. Thus, when the Supreme Court confronted its next challenge—whether and how to recognize implied constitutional rights—it relied on the incorporation cases, which had already begun to identify historical evidence as a paramount consideration.[40]

b. The implied fundamental rights cases

Despite the Bill of Rights's protection of enumerated rights, the Supreme Court has long recognized that the Constitution protects certain unenumerated rights as well—most notably, those rights affecting children, marriage, and family. For example, in *Meyer v. Nebraska*,[41] the Court struck down a Nebraska statute that prohibited schoolteachers from teaching students languages other than English unless the student had passed the eighth grade.[42] The Court reasoned that the right of parents to choose how best to educate their children fell within the Fourteenth Amendment's protection because Americans, since 1787, recognized the importance of properly educating children to foster happiness and good governance.[43] Additionally, in *Skinner v. Oklahoma ex rel. Williamson*,[44] the Court invalidated an Oklahoma law prescribing compulsory sterilization for certain criminal offenders who had committed two or more qualifying felonies.[45] The Court found that sterilization was impermissible in part because it affected an individual's right to bear children, which the Court labeled as "fundamental to the very existence and survival of the race."[46] Further, in

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40. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) (articulating a standard requiring that the right be "implicit in the concept of ordered liberty"); Twining v. New Jersey, 211 U.S. 78, 110 (1908) (rejecting the petitioner's claim for lacking widespread evidence of historical practice).

41. 262 U.S. 390 (1923).

42. *Id.* at 396–97, 403.

43. *Id.* at 400–01.

44. 316 U.S. 535 (1942).

45. *Id.* at 536–37, 541.

46. *Id.* at 541. In an earlier case, the Court upheld a sterilization law from attack on Fourteenth Amendment grounds. *See* Buck v. Bell, 274 U.S. 200, 207–08 (1927). In *Buck*, the sterilization law applied only to those adjudicated "feeble minded" by Virginia courts, and it also included some procedural safeguards for the individual. *Id.* at 205–07. While the law in *Skinner* contained some procedural safeguards except a right of the accused to be heard before a judge, *see* 316 U.S. at 538, the Court in *Skinner* invalidated the law on equal protection grounds because the law permitted sterilization for certain classes of criminal offenders but did not permit sterilization for other classes of criminal offenders. *Id.* at 541–43. Because the state failed to offer a good reason for this distinction, the Court found that Oklahoma's law denied equal protection of the exercise of a fundamental right to the class of criminal offenders subject to the sterilization law. *See id.*

Loving v. Virginia,[47] the Court rendered unconstitutional a Virginia law that barred whites from marrying nonwhites.[48] In so doing, the Court affirmed *Skinner*'s holding that marriage was a fundamental right, stating that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[49] On this basis, the Court held that Virginia's anti-miscegenation law denied the petitioners due process under the Fourteenth Amendment.[50] Finally, in *Moore v. City of East Cleveland*,[51] the Court struck down a housing ordinance limiting the occupancy of single-family dwellings to members of the nuclear family.[52] In striking down this law, the Court explained that the significance of the family is "deeply rooted in this Nation's history and tradition."[53] The Court noted further that this significance is not isolated only to nuclear families, for living with members of the extended family "has roots equally venerable and equally deserving of constitutional recognition."[54]

Beyond recognizing implied rights involving children, marriage, and family, the Supreme Court has held that the Fourteenth Amendment also protects certain unenumerated rights involving privacy. In *Griswold v. Connecticut*,[55] the Court struck down a Connecticut statute that criminalized the use of contraceptives and sanctioned those who would assist others in using them.[56] The Court claimed this statute affronted a right to privacy, a right that the Court reasoned emanated from the "penumbras" of the "specific guarantees in the Bill of Rights."[57] Within this protected sphere existed some rights of marital privacy that predated the Bill of Rights, and therefore the Court found the Connecticut statute unconstitutional.[58] Several years later, in *Eisenstadt v. Baird*,[59] the Court extended the right of privacy that allowed married couples to use contraceptives to unmarried people.[60] And, the following

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47. 388 U.S. 1 (1967).
48. *Id.* at 2, 4, 12.
49. *Id.* at 12.
50. *Id.*
51. 431 U.S. 494 (1977).
52. *Id.* at 496, 506.
53. *Id.* at 503.
54. *Id.* at 504.
55. 381 U.S. 479 (1965).
56. *Id.* at 480, 485.
57. *Id.* at 484–85.
58. *See id.* at 485–86.
59. 405 U.S. 438 (1972).
60. *See id.* at 454 (holding that denying unmarried people the right to use contraceptives violates the Equal Protection Clause).

year, in *Roe v. Wade*,[61] the Court held that this privacy right included the right of women to obtain abortions.[62] In reaching this result, the Court noted, inter alia, that the common law did not criminalize abortion before the moment a woman feels her unborn child's first movements, and that the American states did not begin to legislate penalties for abortions after first fetal movement until the nineteenth century.[63] Moreover, the Court implied that the Fourteenth Amendment protected a woman's right to obtain an abortion because of the hardship she might endure—whether from stress or stigma—if the state required her to carry an unborn child to term.[64] Nineteen years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[65] the Court reaffirmed the central holding of *Roe*, namely that the Fourteenth Amendment's privacy guaranties still protected women's right to obtain an abortion.[66]

These cases laid the foundation for the Court's eventual articulation of the two-prong test in *Glucksberg*, which recognizes implied fundamental rights through the Fourteenth Amendment.[67] In each of these cases, the Court professed the importance of history and tradition when attempting to discern which claimed rights deserved constitutional protection.[68]

2. The Glucksberg *two-prong test*

In 1997, the Supreme Court granted certiorari in *Washington v. Glucksberg*, a case that promised to be one of the most controversial the Court would hear that term.[69] The case involved a group of doctors in Washington who claimed they would provide physician-assisted suicides for terminally ill patients but for Washington's ban on the

61. 410 U.S. 113 (1973).
62. *Id.* at 153.
63. *Id.* at 132–33, 138.
64. *See id.* at 153 (listing all the potential harms that may afflict a woman were she not able to abort her unborn child and suggesting that such harms support recognizing that the Fourteenth Amendment's privacy protections cover this right).
65. 505 U.S. 833 (1992).
66. *Id.* at 846, 851.
67. Washington v. Glucksberg, 521 U.S. 702, 719–21 (1997).
68. *See supra* Sections I.A.1.a–b (discussing the incorporation debate cases and the implied fundamental rights cases, which emphasize the importance of historical practice when examining implied fundamental rights claims).
69. *See* Linda Greenhouse, *High Court to Decide If the Dying Have a Right to Assisted Suicide*, N.Y. TIMES (Oct. 2, 1996), https://www.nytimes.com/1996/10/02/us/high-court-to-decide-if-the-dying-have-a-right-to-assisted-suicide.html ("The public, as well as the medical profession, appears to be deeply split on the issue [of assisted suicide].").

practice.[70] Before the Supreme Court, the group of doctors argued for an implied right that would protect their ability to administer physician-assisted suicides.[71]

Following many of the cases from the incorporation debates and the implied fundamental rights cases, the *Glucksberg* Court fashioned the two-prong test for implied fundamental rights claims.[72] To succeed, the claimant must demonstrate that the claimed right is "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[73] Second, the claimant of the implied right must narrowly and carefully describe the fundamental right.[74] As the two-prong test requires consulting history, the *Glucksberg* Court examined the history and traditions of three time periods: Anglo-American common law, early American history, and contemporary American attitudes.[75]

First, the Court explained there was a seven-hundred-year-old common law tradition frowning on suicides and assisted suicides.[76] The Court discussed the works of Henry de Bracton, a thirteenth-century legal scholar, and William Blackstone for the proposition that killing oneself constituted a felony that was punishable by forfeiture of certain

70. *Glucksberg*, 521 U.S. at 707–08.

71. *See id.* at 708.

72. *Id.* at 719–21.

73. *Id.* at 720–21 (internal citations omitted) (first quoting Moore v. City of E. Cleveland, 431 U.S. 502, 503 (1977); and then quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

74. *Id.* at 721 (citing Reno v. Flores, 507 U.S. 292, 302 (1993) (right of a child to a "willing-and-able private custodian")); Collins v. City of Harker Heights, 503 U.S. 115, 125–26 (1992) (right to a safe working environment); Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 277–78 (1990) (right to die). For another possible example of what the Supreme Court meant by including a narrow framing element, see *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). In this case, Justices Scalia and Brennan argued over the level of specificity required for a claimed right to receive constitutional protection. *Compare id.* at 122, 127 n.6 (plurality opinion) (advocating for a limited, circumscribed description of a claimed right that is achieved by examining not only what sorts of liberties are fundamental but also whether such liberties have traditionally received protection from society), *with id.* at 139–40 (Brennan, J., dissenting) (countering Justice Scalia's plurality opinion by explaining that prior cases involving fundamental liberties have not asked for specified evidence of traditional protection).

75. *See Glucksberg*, 521 U.S. at 711–13, 715–16, 719.

76. *Id.* at 711.

property.[77] Additionally, many of the early colonies followed these English common law principles.[78]

Second, throughout the eighteenth and nineteenth centuries, the American colonies and states retained prohibitions on suicide, but they moderated the penalties for the offense because they recognized that property forfeiture harmed the deceased's family.[79] Additionally, many state courts held that a person who assisted another in killing himself—despite the decedent's consent—was liable in some degree for the homicide.[80] Dating back to 1828, states also began enacting statutes proscribing assisted suicide.[81] These state statutes, originating in the eastern states, later served as models for more western states and territories.[82]

Third, during the twentieth century, many states re-examined and then reaffirmed their prohibitions on assisted suicide. Even though Oregon adopted the Death with Dignity Act in 1994, which permitted physician-assisted suicide for mentally competent, terminally ill adults, many other states rejected similar proposals.[83] In light of this history, the Court found that a right to perform physician-assisted suicides was not deeply rooted and therefore not fundamental.[84] Since then, courts have continued to rely on the two-prong test, which is discussed in the following section.

3. Case law applying Glucksberg

Since *Glucksberg*, courts have frequently relied on the two-prong test to analyze plaintiffs' implied fundamental rights claims. Generally, these courts have refused to recognize new implied fundamental rights unless the claims rest on robust historical roots.

The Supreme Court recently heard two cases involving a *Glucksberg* analysis. First, in *Obergefell v. Hodges*,[85] several petitioners asked the Supreme Court to declare that the fundamental right to marriage

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77. *See id.* at 711–12.

78. *Id.* at 712–13 (explaining that Rhode Island made suicide an offense punishable by forfeiture of property, and Virginia prescribed "ignominious burial[s]" and forfeiture of land for killing oneself).

79. *Id.* at 713–14.

80. *See id.* at 714–15.

81. *Id.* at 715–16.

82. *Id.*

83. *Id.* at 716–19.

84. *Id.* at 728 ("The history of the law's treatment of assisted suicide in this country has been and continues to be one of rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.").

85. 135 S. Ct. 2584 (2015).

applies to same-sex couples through the Fourteenth Amendment's Due Process Clause.[86] In affirming this view, Justice Kennedy explained that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries."[87] While acknowledging that *Glucksberg* crystalized the implied fundamental rights methodology that had evolved prior to *Obergefell*, Justice Kennedy declined to apply the two-prong test, writing instead that:

> *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.[88]

In dissent, Chief Justice Roberts noted that Justice Kennedy's opinion required overruling *Glucksberg*.[89] Yet, despite Chief Justice Roberts' warning, the lower courts still apply *Glucksberg* in cases not dealing with marriage or intimacy.[90]

Second, in *Kerry v. Din*,[91] a U.S. citizen and resident argued that the State Department denied her the implied fundamental right to live in the United States with her nonresident, noncitizen husband when the State Department refused the husband a visa.[92] The plurality opinion applied *Glucksberg*'s two-prong test to the citizen-wife's claim, noting specifically the importance of whether the claim was "supported by 'this Nation's history and practice,'" and ultimately found that history and tradition evinced no deprivation of her fundamental rights.[93] The plurality rested its holding on the nation's history of strict immigration

86. *Id.* at 2593.

87. *Id.* at 2598 (citing Lawrence v. Texas, 539 U.S. 558, 572 (2003)).

88. *Id.* at 2602.

89. *Id.* at 2620–21 (Roberts, C.J., dissenting) ("Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the 'careful' approach to implied fundamental rights taken by this Court in *Glucksberg*. It is revealing that the majority's position requires it to effectively overrule *Glucksberg* . . . ." (citation omitted)).

90. *See, e.g.*, Holland v. Rosen, 895 F.3d 272, 292–96 (3d Cir. 2018) (applying *Glucksberg*'s two-prong test to a claim that argued for a fundamental right to obtain a cash bail or corporate surety bond).

91. 135 S. Ct. 2128 (2015).

92. *Id.* at 2131, 2133–34 (plurality opinion).

93. *Id.* at 2133–36 (quoting Washington v. Glucksberg, 524 U.S. 702, 724 (1997)).

laws and the lack of any tradition affording citizens the right to bring their nonresident, noncitizen spouses into the country.[94]

The lower courts have also relied on *Glucksberg*'s two-prong test to analyze implied fundamental rights cases in a wide variety of contexts. Convicted sex-offenders have frequently challenged state statutes on the grounds that they deprive the sex-offenders of a claimed implied fundamental right. For example, in *Doe v. Miller*,[95] the Eighth Circuit rejected a claim brought by a group of convicted sex offenders that an Iowa law, which restricted where convicted sex offenders could reside, violated the right "to live where you want."[96] The Eighth Circuit rejected this right because the group of convicted sex offenders not only failed to provide adequate arguments that this right was deeply rooted and implicit in the concept of ordered liberty,[97] but the court also implied that the group of sex offenders framed their claimed right too broadly.[98]

In *Doe v. Moore*,[99] the Eleventh Circuit upheld a Florida sex-offender registry and DNA collection statute against a challenge by several sex offenders.[100] The sex offenders here claimed that the statute violated their fundamental "rights to family association, to be free of threats to their persons and members of their immediate families, to be free of interference with their religious practices, to find and/or keep any housing, and . . . to find and/or keep any employment."[101] The Eleventh Circuit, finding this asserted right was overly broad, reframed it to adhere more closely to the facts of the case.[102] In so doing, the court claimed the sex offenders more accurately sought a right to avoid registering their names and photographs with the state.[103] Yet, because other courts had previously ruled against sex offenders bringing similar claims in other circuits, and because there was no historical

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94. *Id.* at 2135–36.

95. 405 F.3d 700 (8th Cir. 2005).

96. *Id.* at 705, 713–14.

97. *Id.* at 714.

98. *See id.* at 713–14 ("This ambitious articulation of a proposed unenumerated right calls to mind the Supreme Court's caution that we should proceed with restraint in the area of substantive due process . . . .").

99. 410 F.3d 1337 (11th Cir. 2005).

100. *Id.* at 1339–41 (applying Glucksberg's two-prong test to sex-offender registration).

101. *Id.* at 1343.

102. *Id.* at 1343–44.

103. *See id.* at 1344.

support for this claim, the court concluded that the sex offenders had no fundamental right to avoid registration.[104]

And, in *Doe v. City of Lafayette*,[105] the Seventh Circuit rejected a convicted sex offender's claim that sought a "right to enter . . . parks to loiter or for other innocent purposes."[106] However, because the sex offender had previously been to parks to leer at children, the court thought the facts better suggested that the sex offender sought a "right to enter parks to prey on children."[107] Of course, this right conflicted with a request to enter parks for innocent purposes,[108] and the court concluded that the "right to enter parks to prey on children" was not a fundamental right.[109]

The lower courts have also applied the two-prong test to challenges against laws regulating healthcare, reproduction, or LGBT issues. For instance, in *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*,[110] a group of terminally ill patients claimed an implied fundamental right to access experimental drugs when those drugs had passed the FDA's preliminary safety checks and when there existed no other treatment options.[111] While the group of terminally ill patients claimed regulating the efficacy of drugs began only in 1962, the court noted that safety regulations had been in place since 1736, when colonial Virginia curtailed the supply of "dangerous and intolerable" drugs.[112] Moreover, the court concluded that early colonial and state practices failed to illustrate "a tradition of protecting a right of access to drugs" but, instead, evinced a tradition of regulating new drugs because they presented novel risks.[113] And finally, the court noted that

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104. *Id.* at 1344–45.

105. 377 F.3d 757 (7th Cir. 2004) (en banc).

106. *Id.* at 769.

107. *See id.* at 769–70 n.11. Because the Seventh Circuit reviewed this case after the district court granted summary judgment in favor of the City of Lafayette, the court had to construe the facts in Doe's claim in his favor. *Id.* at 758, 769 n.11. However, even accepting Doe's claimed right as true, which the court doubted heavily, the court still found his claimed right lacking any historical support, and therefore incapable of becoming a fundamental right. *See id.* at 771 ("The historical and precedential support for a fundamental right to enter parks for enjoyment is . . . oblique. Notably, Mr. Doe's argument contained a dearth of historical sources.").

108. *See id.*

109. *Id.* at 772–73.

110. 495 F.3d 695 (D.C. Cir. 2007) (en banc).

111. *Id.* at 697, 701.

112. *Id.* at 703–04 (quoting EDWARD KREMERS, KREMERS AND URDANG'S HISTORY OF PHARMACY 158 (4th ed. 1976)).

113. *Id.* at 704.

existing regulations prohibited public distribution of drugs not yet having completed safety tests.[114] Therefore, the court held that the claimed implied right was not fundamental.[115]

Furthermore, in *Stormans, Inc. v. Wiesman*,[116] the Ninth Circuit rejected an implied fundamental rights claim from a pharmacist who maintained religious objections against providing emergency contraceptives.[117] Washington issued a regulation requiring pharmacists to provide emergency contraception, and the pharmacist sought to enjoin the regulation on the grounds that it violated the "right to refrain from taking human life."[118] The court characterized this framing of the right as overly broad and rejected it since the regulation applied not to every person but only to "pharmacies, which are professional businesses subjected to licensing and regulatory requirements."[119] While the court acknowledged there existed some historical support for individuals to refrain from activities they believed to cause death, the court asserted that the pharmacists provided no support showing that businesses maintained a similar right.[120]

Finally, in *Students & Parents for Privacy v. U.S. Department of Education*,[121] the district court denied the claim of a group of high school students who did not want to share restrooms with transgender students.[122] The group of high school students claimed an implied fundamental "right to privacy in one's fully or partially unclothed body . . . [and] the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex."[123] While the court reframed the plaintiffs' claim, it still rejected finding this implied right in part because the claim conflicted with federal regulations that prohibit federal agencies from denying transgender individuals the ability to use bathrooms consistent with their gender identity.[124]

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114. *See id.* at 705–06.
115. *Id.* at 711–12; *see also* Richards v. Holder, No. 13-13195-LTS, 2014 WL 2805280, at *1, *3–4 (D. Mass. June 19, 2014) (applying the two-prong test to strike down a claim seeking a right "to encourage donation of organs by offering cash payments" because the plaintiff failed to provide historical evidence to support this claim).
116. 794 F.3d 1064 (9th Cir. 2015).
117. *See id.* at 1071.
118. *Id.* at 1071, 1085.
119. *Id.* at 1086–87.
120. *Id.* at 1087.
121. No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016).
122. *Id.* at *26–27.
123. *Id.* at *22 (citation omitted).
124. *See id.* at *26.

The lower courts have applied *Glucksberg* in other factual contexts as well. In *Gallagher v. City of Clayton*,[125] the Eighth Circuit upheld the dismissal of a claim arguing that smoking outdoors in public areas was a fundamental right.[126] The plaintiff there pointed to the long American history of smoking and tobacco use.[127] However, the Eighth Circuit held that even if this right were deeply rooted, it was not "implicit in the concept of ordered liberty."[128] Moreover, the court further implied that its decision rested on judicial self-restraint since there had been a recent Eighth Circuit case that declined to recognize a right to smoke.[129]

In *Holland v. Rosen*,[130] the Third Circuit rejected a criminal defendant's claimed "right to have the option to deposit money or obtain a corporate surety bond to secure his future [court] appearance" before subjecting him to pretrial detention.[131] In reaching this conclusion, the court canvassed the historical practice of cash bail and corporate surety bonds.[132] It found that cash bail generally required statutory authorization; if a jurisdiction did not authorize cash bail bonds, then a criminal defendant could not acquire one.[133] As for corporate surety bonds, the court found they were a "relatively modern practice" that had waned in the face of reform legislation.[134] As such, the court concluded such a right lacked the requisite historical roots to be considered fundamental.[135]

In part, these cases reveal the futility of claiming an implied fundamental right without robust historical support.[136] The analysis in

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125. 699 F.3d 1013 (8th Cir. 2012).

126. *See id.* at 1016–18.

127. *Id.* at 1017.

128. *Id.* at 1018 (applying *Glucksberg*'s two-prong test).

129. *Id.* at 1017–18 (referencing Steele v. Cty. of Beltrami, 238 F. App'x 180, 181 (8th Cir. 2007) (per curiam), as the authority that declined to recognize a right to smoke); *see also* Giordano v. Conn. Valley Hosp., 588 F. Supp. 2d 306, 308, 310, 318, 321 (D. Conn. 2008) (utilizing *Glucksberg*'s two-prong test to reject a cleverly crafted claim essentially seeking a right to smoke because the asserted right was not properly framed and because courts have already decided there exists no fundamental right to smoke).

130. 895 F.3d 272 (3d Cir. 2018).

131. *Id.* at 293, 296.

132. *Id.* at 293–96.

133. *Id.* at 295.

134. *Id.* at 295–96.

135. *Id.* at 296; *see also* Dawson v. Bd. of Cty. Comm'rs, 732 F. App'x 624, 630–31 (10th Cir. 2018) (finding that a "right to be free from pre-trial detention" was not deeply rooted because Supreme Court case law has consistently held against this position).

136. *See supra* Section I.A.3 (chronicling many cases applying the two-prong test and not finding one successful claim).

these cases frequently highlighted lackluster historical evidence or an imprecise derivation of the asserted right from the history used to support it.[137] However, there is an extensive history of the right to travel with arms for self-defense, and therefore, it is essential to explore that history.

B. Historical Background

The courts in the previous cases emphasized the requirements of an extensive historical record and a tight connection between the asserted right and historical traditions and practice. Now, it is necessary to survey the relevant history and traditions of traveling with arms for self-defense.

1. The history and traditions of traveling with arms for self-defense

Glucksberg explained the history and traditions of physician-assisted suicide by examining Anglo-American common law, early American practices, and modern American views on the subject.[138] This Section will follow that same structure and examine the history and traditions of traveling with arms for self-defense across four time periods: English history and tradition, early American history and tradition, nineteenth century American attitudes, and contemporary American attitudes.

a. English history and tradition

The English have a long history regulating the carrying of arms, including who may carry arms and for what purposes certain persons may carry them. In 1328, England passed the Northampton Statute,[139] which made it a crime, under certain circumstances, for a person to be

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137. *See, e.g.*, Holland v. Rosen, 895 F.3d 272, 295–96 (3d Cir. 2018) (rejecting plaintiff's asserted right to a corporate surety bond in part because corporate surety bonds were a "relatively modern practice"); Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1086–87 (9th Cir. 2015) (reframing plaintiff's asserted right to "refrain from taking human life" to a narrower right for pharmacies to refuse provision of contraceptives).

138. Washington v. Glucksberg, 521 U.S. 702, 710–19 (1997) (detailing the Anglo-American antipathies towards suicide, which also manifested in contemporary American laws prohibiting physician-assisted suicide despite pushes for legalization in certain states).

139. 2 Edw. 3, c. 3 (1328) (Eng.) (mandating, under penalty of imprisonment and giving up one's arms, "that no man great nor small, of what condition soever he be, except the King's Servants in his presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also [upon a Cry made for Arms to keep the Peace, and the same in such places where such Acts happen,] be so hardy to come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere").

in public with "force and arms."[140] The Northampton Statute could be read as a broad prohibition on carrying arms in public, for parts of the statute note application to everyone except those conducting business on behalf of the King or Queen,[141] and other parts seem to prohibit the carrying of arms everywhere.[142] Yet, elsewhere the Northampton Statute suggests an application only to those carrying arms in public to confront the King or Queen's officials, committing the common law crime of affray,[143] or appearing armed in fairs or markets.[144] Moreover, the intent behind the statute is murky. Saul Cornell has described the Northampton Statute as "[o]ne of the most significant constraints on armed travel."[145] Another scholar, David Kopel, claimed the statute passed when "[t]he monarchy's ability to enforce the law was close to non-existent," so the statute assuaged the unpopular Queen Isabella's fears that armed nobles would come to Parliament to overthrow her government.[146]

However, the English courts later clarified the Northampton Statute's intent. During England's political and religious struggles throughout the 1680s, the Crown sought to prosecute Sir John Knight, an aristocrat, for violating the Northampton Statute.[147] The indictment charged Knight with "walk[ing] about the streets armed with guns" before entering a church service "with a gun, to terrify the King's subjects."[148] The jury acquitted Knight, and the court explained that the Northampton Statute was designed to punish those who carried

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140. *Id.*

141. *Id.* (describing the applicability of the statute as "no Man great nor small, of what Condition soever he be, except the King's Servants in his presence . . . and such as be in their Company assisting them").

142. *Id.* (explaining that arms could be brought "in no part elsewhere").

143. *Affray*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A noisy fight in a public place . . . to the terror of onlookers.").

144. 2 Edw. 3, c. 3 (Eng.) (stating that no person except for the Monarch's officials shall "be so hardy to come before the King's Justices . . . with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed . . . in Fairs [or] Markets"); *see also* Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 L. & CONTEMP. PROBS. 11, 21 (2017) (describing the "three distinctive components" to the Northampton Statute).

145. Cornell, *supra* note 144, at 18.

146. David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL'Y 127, 133–34 (2016).

147. Sir John Knight's Case (1686) 87 Eng. Rep. 75, 75–76; *see also* Cornell, *supra* note 144, at 26–27; Kopel, *supra* note 146, at 135.

148. 87 Eng. Rep. at 76.

arms to terrify others.[149] Another reporter for this same case noted that the Northampton Statute had essentially become useless except in cases where the defendant acted with malicious intent;[150] this reporter also paraphrased the Chief Justice's opinion that there currently existed a "general connivance to gentleman to ride armed for their security."[151]

Kopel elaborates that Knight was acquitted because he carried arms absent an intent to terrorize the people.[152] On the other hand, Cornell ascribes Knight's acquittal to jury nullification since Knight (who Cornell labels a "militant Protestant") sat before a jury filled with "other militant Protestants drawn from Knight's community."[153] Yet, whether the jury acquitted Knight because he lacked the intent to terrorize members of the public or because the jury sympathized with

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149. *See id.* ("[T]he meaning of the statute . . . was to punish people who go armed to terrify the King's subjects.").

150. Rex v. Knight (1686) 90 Eng. Rep. 330, 330.

151. *Id.*

152. Kopel, *supra* note 146, at 135–36 n.46. Cornell claims that the common law crime of affray could be committed merely by wearing arms in public, even without an intent to terrify others. *See* Cornell, *supra* note 144, at 22. To support this view, Cornell points to Joseph Keble's 1689 manual written for justices of the peace that states, "Yet may an Affray be, without word or blow given; as if a man shall shew himself furnished with Armour or Weapon which is not usually worn, it will strike a fear upon others that be not armed as he is; and therefore both the Statutes of Northampton made against wearing Armour, do speak of it . . . ." *Id.* (citing JOSEPH KEBLE, AN ASSISTANCE TO JUSTICES OF THE PEACE, FOR THE EASIER PERFORMANCE OF THEIR DUTY 147 (1683)). Cornell apparently seeks to establish that justices of the peace contemporary to *Sir John Knight's Case* did not read a specific intent requirement into the common law crime of affray because certain justice of the peace manuals do not mention this additional element. *Id.* If true, this argument would establish an offense for the mere act of appearing armed in public even absent an intent to harm others. *Id.* ("[T]he act of riding armed was the crime that created a terror to the people, not a specific intent to terrorize."). Cornell claims this conclusion follows from the premise that "the mere act of arming oneself created an asymmetry of power between the individual armed and those unarmed, a situation that caused terror to the people." *Id.* However, Keble's justice of the peace manual does not support this view because Keble explains that the illegality of an affray—causing public terror—stems not from bearing any arms in public but instead from appearing publicly armed with unusual weapons that give one a strong comparative advantage against another who is not similarly armed. *Id.* (referencing KEBLE, *supra*, at 147 ("[A]s if a man shall shew himself furnished with Armour or Weapon which is not usually worn, it will strike a fear upon others that be not armed as he is.")); *see also* Cornell, *supra* note 144, at 22. Thus, contrary to Cornell's conclusions, the crime of affray—even absent a specific intent element—derives from the comparative advantage of publicly bearing unusual weapons and not from the mere public presence of any weapons. *See* Cornell, *supra* note 144, at 22.

153. Cornell, *supra* note 144, at 26.

his religious views, even Cornell admits that members of the English aristocracy could travel armed without violating the Northampton Statute because the public generally recognized that armed aristocrats would not produce public fear or panic.[154]

After the English Protestants wrested the crown from the English Catholics in 1688 and 1689, a newly elected English Parliament convened to write a new charter of English rights.[155] Their final product, commonly known as the Declaration of Rights or the English Bill of Rights of 1689, included a resolution stating, "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law."[156] Scholars have debated what conclusions ought to be drawn from the English Bill of Rights and its recognition of a right to keep arms. Joyce Lee Malcolm argues that the right to have arms for defense was entirely new in English law since Englishmen's prior ownership of arms stemmed not from a right to possess arms but rather from a monarchical imposition of a duty to keep them.[157] Malcolm explains that Englishmen had long been required to keep and train with certain weapons to assist local law enforcement efforts.[158] Additionally, Lois Schwoerer asserts that this right was so qualified by the phrases, "suitable to their condition" and "as allowed by law," that only about two percent of Englishmen could lawfully own firearms.[159] However, other scholars have suggested that this right was more expansive. Stephen Halbrook argues that the right to arms clause in the English Bill of Rights provided a "private individual[] right" to carry arms so long as that person did not use them to terrify others.[160]

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154. *Id.* at 25 ("Wearing Arms, if not accompanied with Circumstances of Terror, is not within this Statute; therefore People of Rank and Distinction do not offend by wearing common Weapons." (quoting THEODORE BARLOW, THE JUSTICE OF PEACE: A TREATISE CONTAINING THE POWER AND DUTY OF THAT MAGISTRATE 12 (1745))).

155. *See* LOIS G. SCHWOERER, GUN CULTURE IN EARLY MODERN ENGLAND 158–59 (2016).

156. English Bill of Rights 1689, 1 W. & M. c. 2.

157. *See* Joyce Lee Malcolm, *The Creation of a "True Antient and Indubitable" Right: The English Bill of Rights and the Right to Be Armed*, 32 J. BRIT. STUD. 226, 228–29 (1993) (positing that Englishmen had no right to bear arms until 1689 but rather had a preexisting duty to keep arms to engage in local peacekeeping efforts). *But cf.* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 136 (1999) (suggesting that the English codification of a right to bear arms in the English Bill of Rights recognized a prior right extending at least as far back as the twelfth century).

158. Malcolm, *supra* note 157, at 229.

159. *See* SCHWOERER, *supra* note 155, at 162–63, 170.

160. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 49 (2013).

Furthermore, Halbrook claims that the English Bill of Rights was foremost an attempt to restore to "Protestants the right to carry arms for self-defense."[161]

Moving into the eighteenth century, English legal scholars continued recognizing that Englishmen retained a right to possess arms for certain uses. William Blackstone pronounced in his *Commentaries on the Laws of England* that Englishmen retained "the right of having and using arms for self-preservation and defence."[162] Blackstone's recognition of this right traced from the English Bill of Rights.[163] Blackstone noted further that Englishmen have the right to do what is reasonable, subject only to "what would be pernicious either to ourselves or our fellow citizens."[164] John Ayliffe, another renowned English legal scholar, wrote a legal treatise discussing certain Roman principles of law adopted by English law, including that persons could have arms in their homes to be used when traveling.[165]

Nineteenth century English courts also commented on defending oneself while traveling. For instance, in *Rex v. Dewhurst*,[166] the court explained that "[a] man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purpose of business."[167] Many of these evolving views crossed the Atlantic and spread throughout the emerging American colonies.

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161. *Id.* at 46.

162. 1 WILLIAM BLACKSTONE, COMMENTARIES *144. In addition to recognizing the right to keep arms for self-preservation and defense, Blackstone earlier recognized that Englishmen have long held the right of "loco-motion, of changing situation or removing one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." *Id.* at *134. Blackstone speaks of each of these rights in the first chapter of his first book, entitled "Of the Absolute R[ights] of I[ndividuals]," and he notes within the chapter that these are among "the liberties of Englishmen." *Id.* at *121, *144.

163. *See* SCHWOERER, *supra* note 155, at 168 (explaining that Blackstone's reference to the English right to have and use arms derived from the English Bill of Rights of 1689).

164. *See* 1 BLACKSTONE, *supra* note 162, at *144.

165. JOHN AYLIFFE, A NEW PANDECT OF ROMAN CIVIL LAW 195 (1734) (noting that a "person might keep arms in his house or on his estate on the account of hunting, navigation, travelling, and on the score of selling them").

166. 1 State Trials, N.S. 529 (1820) (Eng.).

167. *Id.* at 601–02.

b. Early American history and tradition

Early American colonial statutes extended the English tradition of allowing individuals to carry arms in public under certain circumstances. In 1686, the same year an English court heard *Sir John Knight's Case*, the legislative body for the New Jersey province passed "An Act [A]gainst [W]earing Swords, &c."[168] This statute explained that carrying weapons was punishable by a fine, for several provincial citizens received injuries as a result of others carrying certain arms.[169] However, the statute exempted from the general prohibition on carrying arms those persons who peacefully traveled through the province.[170] Furthermore, a 1692 Massachusetts statute sought to punish those who disturbed the peace by carrying offensive weapons.[171] And a 1787 Virginia statute, entitled "An Act [F]orbidding and [P]unishing Affrays,"[172] mimicked the

168. New Jersey Act, ch. 9 (1686), *reprinted in* AARON LEAMING & JACOB SPICER, THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 289, 289–90 (1881) [hereinafter 1686 New Jersey Act] ("Whereas there hath been great complaint by the inhabitants of this Province, that several persons wearing swords, daggers, pistols, dirks, stilettoes, skeines, or any other unusual or unlawful weapons, by reason of which several persons in this Province, receive great abuses, and put in great fear and quarrels, and challenges made, to the great abuse of the inhabitants of this Province . . . And be it further enacted by the authority aforesaid, that no person or persons after publication hereof, shall presume privately to wear any pocket pistol, skeines, stilettoes, daggers or dirks, or other unusual or unlawful weapons within this Province . . . . And be it further enacted by the authority aforesaid, that no planter shall ride or go armed with sword, pistol, or dagger, upon the penalty of five pounds, to be levied as aforesaid, excepting all officers, civil and military, and soldiers while in actual service, as also all strangers, travelling upon their lawful occasions thro[ugh] this Province, behaving themselves peaceably.").

169. *Id.*

170. *Id.* at 290.

171. *An Act for the Punishing of Criminal Offenders, in* ACTS AND LAWS OF HIS MAJESTIES PROVINCE OF THE MASSACHUSETTS BAY, IN NEW ENGLAND 12, 14 (1699) [hereinafter 1692 Massachusetts Act] ("Further it is Enacted by the Authority aforesaid, That every Justice of the Peace in the County where the Offence is committed, may cause to be Staid and Arrested all Affrayers, Rioters, Disturbers or Breakers of the Peace, and such as shall ride, or go armed offensively before any of Their Majesties Justices, or other Their Officers or Ministers doing their Office, or elsewhere . . . .").

172. *Affrays, in* ABRIDGMENT OF THE PUBLIC PERMANENT LAWS OF VIRGINIA 8, 8 (1796) [hereinafter 1787 Virginia Law] ("No man, great nor small, of what condition soever he be, except the ministers of justice in executing the precepts of the courts of justice, or in executing of their office, and such as be in their company assisting them, be so hardy to come before the justices of any court, or other of their ministers of justice, doing their office, with force and arms, on pain, to forfeit their armour to the commonwealth, and their bodies to prison, at the pleasure of a court; nor go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the

Northampton Statute, but notably did not include the sweeping language suggesting that arms could be brought "in no place elsewhere."[173]

In addition to providing exemptions for armed travelers and seeking to punish only the offensive carrying of arms, many early American states adopted constitutions enumerating a right of citizens to keep arms for their security. According to the Supreme Court, nine states—Pennsylvania, Vermont, Kentucky, Ohio, Indiana, Mississippi, Connecticut, Alabama, and Missouri—adopted state constitutional provisions stipulating that the people retained the right to keep arms for self-defense.[174] These early colonial views proliferated as the young nation expanded.

c. Nineteenth century American attitudes

As the United States grew, more states enacted laws specifically exempting those traveling with arms from general prohibitions on the concealed carrying of arms in public. For instance, in 1813, Kentucky passed a law exempting those persons "traveling on a journey" from a law that otherwise prohibited carrying concealed any "pocket pistol, dirk, large knife, or sword in cane."[175] In 1819, Indiana passed a law making it a misdemeanor for a person to carry concealed any "dirk, pistol, sword in case, or any other unlawful weapon."[176] Yet, the law

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country, upon pain of being arrested and committed to prison by any justice on his own view, or proof of others, there to abide for so long a time as a jury, to be sworn for that purpose by the said justice, shall direct, and in like manner to forfeit his armour to the commonwealth; but no person shall be imprisoned for such offence by a longer space of time than one month.").

173. *Compare* Northampton Statute, 2 Edw. 3, c. 3 (1328) (Eng.) ("[N]or to go nor ride armed by night nor by day, in Fairs, Markets . . . nor in no part elsewhere . . . ."), *with* 1787 Virginia Law, *supra* note 172 ("[N]or go ride armed by night nor day, in fair or markets, or in other places . . . .").

174. Dist. of Columbia v. Heller, 554 U.S. 570, 584–85, 585 n.8 (2008).

175. Chap. LXXXIX: An Act to Prevent Persons in this Commonwealth from Wearing Concealed Arms, Except in Certain Cases, *in* ACTS PASSED AT THE FIRST SESSION OF THE TWENTY-FIRST GENERAL ASSEMBLY FOR THE COMMONWEALTH OF KENTUCKY 100, 100–01 (1813) [hereinafter 1813 Kentucky Act] ("Be it enacted by the General Assembly of the commonwealth of Kentucky, that any person in this commonwealth, who shall hereafter wear a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when traveling on a journey, shall be fined . . . .").

176. *Repository of Historical Gun Laws: 1819 Ind. Acts 39, An Act to Prohibit the Wearing of Concealed Weapons*, DUKE L., https://law.duke.edu/gunlaws/1820/indiana/467579 [https://perma.cc/SM2G-LRLC] [hereinafter 1819 Indiana Act] ("Be it enacted by the General Assembly of the State of Indiana, That any person wearing any dirk, pistol, sword in cane, or any other unlawful weapon, concealed, shall be deemed guilty of a

stipulated that it had no effect on travelers.[177] Alabama, Arkansas, and Tennessee also enacted similar provisions.[178]

State courts also commented on the individual's right to travel with arms. In 1874, the Texas Supreme Court heard *Texas v. Duke*,[179] wherein the State of Texas charged George Duke with "unlawfully carry[ing] on his person one pistol, known as a six-shooter."[180] Texas charged Duke under a statute that prohibited carrying weapons offensively or defensively unless one of the exceptions applied.[181] One such exception exempted people traveling through the state while carrying arms in their baggage.[182] The court held that the prosecution failed to demonstrate that Duke did not fall within one of the exceptions, and it therefore quashed the indictment.[183] The court also noted that the Texas legislature, by enacting this statute, did not intend

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misdemeanor, and on conviction thereof, by presentment or indictment, shall be fined in any sum not exceeding one hundred dollars, for the use of county seminaries: Provided however, that this act shall not be so construed as to affect travellers.").

177. *Id.*

178. *See* ALA. CODE § 3274 (1852) ("Any one who carries concealed about his person a pistol, or other description of fire arms, not being threatened with, or having good reason to apprehend an attack, or travelling, or setting out on a journey, must, on conviction, be fined . . . ."); ARK. CODE ANN. CHAP. 44, § 13 (1838) ("Every person who shall wear any pistol, dirk, butcher or large knife, or sword in a cane, concealed as a weapon, unless upon a journey, shall be adjudged guilty of a misdemeanor . . . ."); *Arms: 1821—Chapter 13* § 1, *reprinted in* ROBERT LOONEY CARUTHERS & ALFRED OSBORNE POPE NICHOLSON, A COMPILATION OF THE STATUTES OF TENNESSEE, OF A GENERAL AND PERMANENT NATURE, FROM THE COMMENCEMENT OF THE GOVERNMENT TO THE PRESENT TIME: WITH REFERENCES TO JUDICIAL DECISIONS, IN NOTES, TO WHICH IS APPENDED A NEW COLLECTION OF FORMS 100 (1836) [hereinafter 1821 Tennessee Act] ("Every person so degrading himself by carrying a dirk, sword cane, Spanish stiletto, belt or pocket pistols, either public or private, shall pay a fine of five dollars for every such offence, which may be recovered by warrant before any justice of the peace, in the name of the county for its use, in which the offence may have been committed; and it shall be the duty of a justice to issue a warrant on the application, on oath, of any person applying; and it shall be the duty of every judge, justice of the peace, sheriff, coroner, and constable within this state, to see that this act shall have its full effect: Provided, that nothing herein contained shall affect any person that may be on a journey to any place out of his county or state.").

179. 42 Tex. 455 (1875).

180. *Id.* at 456.

181. *See id.* at 456–57 (charging Duke under the first and second sections of the 1871 "Act to regulate the keeping and bearing of deadly weapons").

182. *Id.*

183. *See id.* at 460–62 (noting that "[i]n the absence of proof [that Duke did not fall within one of the exceptions], the presumption would be against the existence of facts so exceptional in their nature").

to entirely prohibit the carrying of arms; rather, it regulated the carrying of arms under certain conditions but otherwise left intact the people's right to carry arms in other settings, including traveling.[184] Over time, recognition of these exceptions transformed into more formal allowances.

d. Modern American attitudes

Today, every state except Vermont has a statutory scheme allowing citizens to receive licenses to carry handguns—whether open or concealed—about their person in certain public settings.[185] While Vermont has no licensing statute, a citizen of Vermont may carry a handgun absent any intent to harm others.[186] Table 1 catalogs state laws concerning licensing schemes to carry concealed or open handguns and provides a brief explanation of each jurisdiction's licensing model.

Table 1. Statutory Handgun Licensing Schemes in the United States and the District of Columbia

State	Statute	Notes
Alabama	ALA. CODE § 13A-11-75 (2019).	County sheriffs "shall issue" conceal carry permits to qualified individuals.
Alaska	ALASKA STAT. § 18.65.700 (2019).	Police departments "shall issue" concealed carry handgun permits to qualified individuals.
Arizona	ARIZ. REV. STAT. ANN. § 13-3112 (2019).	The department of public safety "shall issue" conceal carry permits to qualified individuals.

184. *See id.* at 460 ("The Legislature has not attempted to make the carrying of a pistol of itself an offense.").

185. *See* Shepard v. Madigan, 863 F. Supp. 2d 774, 776 n.1 (S.D. Ill. 2012) (acknowledging that forty-nine states have laws allowing qualified individuals to carry certain concealed weapons).

186. *See* VT. STAT. ANN. tit. 13, § 4003 (2019) (noting that carrying dangerous weapons with the intent to injure another is a crime). Of course, residents of Vermont do not have unlimited rights to travel with weapons. In *State v. Duranleau*, the Vermont Supreme Court held that the State Constitution's right to bear arms clause, Article 16, did not bar the State from enacting laws that criminalized the carrying of a loaded rifle or shotgun while in or on a vehicle moving along a public highway. 260 A.2d 383, 386 (Vt. 1969). However, the Vermont law at issue in this case does not criminalize the carrying of loaded handguns within a vehicle; instead, the statute seeks to prevent unlicensed hunters shooting firearms from moving vehicles while on public roads. VT. STAT. ANN. tit. 10, § 4705 (2019).

Arkansas	ARK. CODE ANN. § 5-73-120(c)(4) (2019).	"It is permissible to carry a weapon under this section if at the time of the act of carrying the weapon: . . . The person is carrying a weapon when upon a journey" unless it is through an airport.
California	CAL. PENAL CODE § 26150 (West 2019).	County sheriffs have "may issue" authority to grant conceal carry licenses to individuals proving various criteria.
Colorado	COLO. REV. STAT. § 18-12-203 (2019).	A sheriff "shall issue" a concealed carry permit to a person who meets the required criteria.
Connecticut	CONN. GEN. STAT. § 29-28 (2019).	Certain law enforcement personnel "may issue" temporary carry permits to qualified individuals who qualify under stringent criteria.
Delaware	DEL. CODE ANN. tit. 11, § 1441 (2019).	Citizens "may be licensed" to have conceal carry permits following rigid compliance with certain criteria.
District of Columbia	D.C. CODE § 22-4506 (2019).[187]	The Chief of Police "may . . . issue" concealed carry permits.
Florida	FLA. STAT. § 790.06(2) (2019).	The Department of Agriculture and Consumer Services must "shall issue" conceal carry permits to any individual who meets the qualification criteria.
Georgia	GA. CODE ANN. § 16-11-126 (2019); GA. CODE ANN. § 16-11-129 (2019).	The first statute allows individuals who do not have a carry license, but are otherwise eligible to receive one, to "transport a handgun . . . in any

187. This code provision was eventually invalidated by a federal circuit court. *See* Wrenn v. District of Columbia, 864 F.3d 650, 668 (D.C. Cir. 2017) (permanently enjoining Washington, D.C.'s ban on carrying handguns in public unless the individual who intends to carry a handgun presents a good reason for doing so).

		private passenger motor vehicle." The second statute states that the judge of each county's probate court "shall issue" a "weapons carry license" to individuals who meet the qualification criteria.
Hawaii	HAW. REV. STAT. § 134-9 (2019).[188]	The chief of police "may grant" in "an exceptional case" a conceal carry license to an individual meeting certain criteria.
Idaho	IDAHO CODE § 18-3302K (2019).	County sheriffs must issue conceal carry permits to those who meet the qualification criteria.
Illinois	430 ILL. COMP. STAT. 66/10 (2019).	The Department of Public Safety "shall issue" conceal carry permits to those who meet stringent criteria, including passing review by the Concealed Carry Licensing Review Board.
Indiana	IND. CODE § 35-47-2-3 (2019).	The Chief of Police or County Sheriff "shall issue" a license to carry a handgun to qualified individuals.
Iowa	IOWA CODE § 724.7 (2019).	Any person who meets the qualification criteria "shall be issued" a nonprofessional permit to carry weapons.
Kansas	KAN. STAT. ANN. § 75-7c03 (2019).	The state attorney general "shall issue" conceal carry permits to those who comply with certain requirements.
Kentucky	KY. REV. STAT. ANN. § 237.110(4) (West 2019).	The Department of Kentucky State Police "shall issue" permits to any person meeting the qualification criteria.

188. This Hawaii statute was invalidated by *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted* 915 F.3d 681 (9th Cir. 2019).

Louisiana	LA. STAT. ANN. § 40:1379.1.1 (2019).	The statute grants "the sheriff of a parish . . . the authority to issue a concealed handgun permit to any person."
Maine	ME. STAT. tit. 25, § 2003 (2019).	The "issuing authority shall . . . issue" conceal carry permits to any applicant meeting the qualification criteria.
Maryland	MD. CODE ANN., PUB. SAFETY § 5-306 (LexisNexis 2019).	The Secretary of State Police "shall issue" a carry permit to a person who meets the very stringent permitting criteria.
Massachusetts	MASS. GEN. LAWS ch. 140, § 131(e) (2019).	The licensing authority must approve or deny applications for carry licenses within forty days of receiving the application.
Michigan	MICH. COMP. LAWS § 28.422(3) (2019).	The chief of police of a locality "shall . . . issue" permits to carry handguns upon the applicant's demonstration of certain criteria.
Minnesota	MINN. STAT. § 624.714(2) (2019).	The sheriff "must issue" a carry permit upon a requisite showing of certain criteria.
Mississippi	MISS. CODE ANN. § 45-9-101(2) (2019).	The Department of Public Safety "shall issue" conceal carry permits upon a requisite showing of certain criteria.
Missouri	MO. REV. STAT. § 571.101(2) (2019).	The sheriff "shall issue" conceal carry permits upon an applicant's showing of certain criteria.
Montana	MONT. CODE ANN. § 45-8-321 (2019).	The county sheriff "shall . . . issue" conceal carry permits upon an applicant's showing of certain criteria.
Nebraska	NEB. REV. STAT. § 69-2430(3)(b) (2019).	Qualifying individuals "shall be issued" a concealed carry permit by the Nebraska State Patrol within forty-five days after receiving the application.

Nevada	NEV. REV. STAT. § 202.3657(3) (2019).	The sheriff "shall issue" a permit to carry a handgun provided that the person meets certain requirements.
New Hampshire	N.H. REV. STAT. ANN. § 159:6 (2019).	A designated official "shall issue" a handgun carry permit if the person meets certain criteria and demonstrates a proper purpose, which includes self-defense.
New Jersey	N.J. STAT. ANN. § 2C:58–4(c) (West 2019).	The chief police officer has authority to issue carry permits upon the individual's showing of a justifiable need.
New Mexico	N.M. STAT. ANN. § 29-19-4 (2019).	The department of public safety "shall issue" concealed handgun licenses to an applicant who meets the requisite criteria.
New York	N.Y. PENAL LAW § 400.00 (McKinney 2019).	The statute invests the licensing officer with discretion to "either deny the application for reasons specifically and concisely stated in writing or grant the application and issue the license."
North Carolina	N.C. GEN. STAT. § 14-415.11 (2018).	The sheriff "shall issue" conceal carry permits to any person meeting the requisite criteria.
North Dakota	N.D. CENT. CODE § 62.1-04-03 (2019).	The director of the bureau of criminal investigation "shall issue" licenses to carry concealed firearms upon the applicant's showing of certain criteria.
Ohio	OHIO REV. CODE ANN. § 2923.125(D)(1) (LexisNexis 2019).	The sheriff "shall issue" concealed handgun licenses to those who meet the qualification criteria.
Oklahoma	OKLA. STAT. tit. 21, § 1290.3 (2019).	The Oklahoma State Bureau of Investigation has the authority

		to license individuals to carry handguns, concealed or open.
Oregon	OR. REV. STAT. § 166.291 (2019).	County sheriffs "shall issue" concealed handgun licenses to applicants who meet certain criteria.
Pennsylvania	18 PA. CONS. STAT. § 6109(e),(g) (2019).	"A license to carry a firearm . . . shall be issued" by the sheriff if there is no "good cause . . . to deny the license."
Rhode Island	11 R.I. GEN. LAWS § 11-47-11 (2019).	The licensing authorities of any locality "shall . . . issue" permits to carry concealed pistols upon demonstrating certain criteria.
South Carolina	S.C. CODE ANN. § 23-31-215 (2019).	The South Carolina Law Enforcement Division (SLED) "must issue a permit" to carry a concealed handgun to qualified individuals.
South Dakota	S.D. CODIFIED LAWS § 23-7-7 (2019).	"A permit to carry a concealed pistol shall be issued to any [qualified] person by the sheriff of the county in which the applicant resides."
Tennessee	TENN. CODE ANN. § 39-17-1351 (2019).	The department of safety "shall issue" a handgun carry permit to those who meet the requisite criteria.
Texas	TEX. GOV'T CODE ANN. § 411.177(a) (West 2019).	"The department shall issue a license to carry a handgun to an applicant if the applicant meets all the eligibility requirements."
Utah	UTAH CODE ANN. § 53-5-704 (LexisNexis 2019).	"The bureau shall issue a permit to carry a concealed firearm for lawful self-defense" to a qualified person.
Virginia	VA. CODE ANN. § 18.2-308.04 (2019).	This statute requires a court to issue a conceal carry permit within forty-five days of receiving the application unless

		the applicant is somehow disqualified.
Washington	WASH. REV. CODE § 9.41.070 (2019).	"The chief of police . . . or sheriff of a county shall . . . issue a license to such person to carry a pistol concealed on his person . . . for the purposes of protection or . . . while traveling."
West Virginia	W. VA. CODE § 61-7-4(f) (2019).	"The sheriff shall issue a license unless he or she determines . . . that the applicant otherwise does not meet the requirements set forth in this section."
Wisconsin	WIS. STAT. § 175.60 (2019).	"The department shall issue a license to carry a concealed weapon to any individual who is not disqualified . . . ."
Wyoming	WYO. STAT. ANN. § 6-8-104(b) (2019).	"The attorney general . . . shall issue a permit to any person who" is not otherwise disqualified.

Furthermore, within the last decade, the lower courts began striking down state laws that entirely proscribed carrying arms outside of the home.[189] Since the 1980s, states have trended towards allowing their citizens to carry arms in public, generally by enacting statutory licensing schemes.[190]

States have typically enacted two kinds of licensing schemes, referred to as either "shall-issue" statutes or "may-issue" statutes.[191] "Shall-issue" laws require the state to issue permits to qualifying individuals whereas "may-issue" laws permit, but do not require, an authority head to issue carry permits.[192] "May-issue" states constitute less than twenty percent of the permitting statutes throughout the nation.[193]

After receiving one of these permits, an individual may take a firearm outside of the home subject to certain regulations.[194] Because traveling is one of these circumstances,[195] it is important to understand the constitutional roots of the right to travel.

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189. *See, e.g.*, Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (overturning Illinois' categorical ban on taking handguns outside of the home); Palmer v. District of Columbia, 59 F. Supp. 3d 173, 182–83 (D.D.C. 2014) (finding unconstitutional Washington, D.C.'s absolute ban on carrying handguns outside of the home); *see also* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 662 & n.397 (2012) (canvassing twentieth century state court cases that struck down laws barring the carrying of arms in certain public settings); *cf.* Wrenn v. District of Columbia., 864 F.3d 650, 668 (D.C. Cir. 2017) (enjoining permanently Washington, D.C.'s ban on carrying handguns in public unless the individual who intends to carry a handgun presents a good reason for doing so).

190. *See* MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 151 (2014) (highlighting that only eight states had "shall-issue" permitting schemes in 1986 whereas thirty-seven did in 2013).

191. *Concealed Carry*, GIFFORDS L. CTR., https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry [https://perma.cc/GKG9-XN3S] (explaining the mechanics of shall-issue laws versus may-issue laws).

192. *Id.* (describing how may-issue laws allow "the issuing authority wide discretion to deny a CCW permit to an applicant if, for example, the authority believes the applicant lacks good character or lacks a good reason for carrying a weapon in public").

193. *See id.* (explaining that only Washington, D.C. and eight other states have "may-issue" laws).

194. *See, e.g.*, CAL. PENAL CODE § 25300 (West 2019) (prohibiting a person from appearing publicly while carrying a firearm if that person wears a mask that conceals his face, and not exempting even those who have handgun carry licenses); TEX. GOV'T CODE ANN. § 411.2031 (West 2019) (allowing handgun license holders the ability to carry handguns on certain school campuses subject to some exceptions).

195. *See, e.g.*, ARK. CODE ANN. § 5-73-120(c)(4) (2019) ("It is permissible to carry a weapon under this section if at the time of the act of carrying the weapon . . . [t]he person is carrying a weapon when upon a journey" unless it is through an airport).

C. The Implied Fundamental Right to Interstate Travel

The Supreme Court has long recognized that citizens maintain a constitutional right to travel between the different states. Chief Justice Taney understood the Constitution protected this right, as he claimed "[w]e are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of [the country] without interruption, as freely as in our own States."[196] Yet, this understanding has deeper roots than nineteenth century case law. Indeed, the Articles of Confederation explicitly recognized this right when it stated that "the people of each State [s]hall have free ingre[s]s and regre[s]s to and from any other State."[197] Even though the new Constitution failed to explicitly include this provision once the framers discarded the Articles, the Supreme Court maintained that this omission likely occurred not because the framers no longer believed in a right to interstate travel but rather because this right was so basic that it inhered within the new Constitution.[198]

In modern parlance, the right to interstate travel is an implied fundamental right.[199] As such, the Supreme Court has held that states

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196. Smith v. Turner, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting). Eight years following the *Smith* case, Chief Justice Taney authored the primary opinion in *Scott v. Sandford*, the infamous case holding that black American slaves or those descended therefrom were not counted as citizens with the same privileges and immunities of citizenship as those enjoyed by white citizens. *See* Scott v. Sandford, 60 U.S. 393, 403–04 (1857) ("We think [black American slaves or those descended therefrom] are not . . . [citizens], and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."). Thus, while he makes no mention of it in *Smith*, one might reasonably suspect that Chief Justice Taney's eloquent prose describing the right of citizens to travel throughout the several states did not apply to black Americans. While the *Scott* case may have then impliedly limited Chief Justice Taney's words in *Smith*, the later adoption of the Fourteenth Amendment overruled any implied limitations that *Scott* overlaid onto *Smith*. *See* U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.").

197. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

198. United States v. Guest, 383 U.S. 745, 758 (1966) (clarifying that the right to interstate travel's absence from the Constitution occurred because "a right so elementary was conceived from the beginning to be a necessary concomitant of the strong Union the Constitution created").

199. *Id.* at 757 ("The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union.").

may not punish those who leave a state or impose barriers on newcomers who enter the state and seek certain state-provided benefits.[200]

Besides the long tradition of protecting interstate travel rights, some courts have also recognized an implied fundamental right to intrastate travel. In *King v. New Rochelle Municipal Housing Authority*,[201] the Second Circuit struck down a local ordinance that excluded individuals from public housing unless they had resided in the municipality for at least five years.[202] To reach this result, the court relied on *Shapiro v. Thompson*,[203] a case where the Supreme Court found that a state's attempt to delay providing welfare assistance to those newly entering the state infringed on the implied right to travel .[204] In response to arguments that *Shapiro* dealt solely with interstate as opposed to intrastate travel, the Second Circuit explained that it would be incongruous to recognize a fundamental right to interstate travel but ignore a "correlative constitutional right to travel within a state."[205] Additionally, in *Lutz v. City of York*,[206] the Third Circuit recognized that substantive due process protection exists for the "right to travel locally through public spaces and roadways" because such a right has deep historical roots.[207] Besides interstate and intrastate travel rights, the right to self-defense also has longstanding historical traditions.

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200. *See* Saenz v. Roe, 526 U.S. 489, 492, 502–05, 511 (1999) (holding that a California statute that reduced welfare benefits for newly-arrived California citizens compared to longer-residing citizens violated a component of the right to travel that is protected by the Fourteenth Amendment's Privileges and Immunities Clause); Shapiro v. Thompson, 394 U.S. 618, 629–33 (1969) (striking down state statutes that imposed waiting periods on the receipt of welfare assistance because these waiting periods impermissibly affected citizens' constitutional right to interstate travel); Crandall v. Nevada, 73 U.S. 35, 46 (1868) (explaining that if a state could tax itinerants a one dollar travel fee, it could also impose a one thousand dollar fee, which, if adopted by every other state, could "seriously burden all transportation of passengers from one part of the country to the other").

201. 442 F.2d 646 (2d Cir. 1971).

202. *Id.* at 646–48.

203. 394 U.S. 618 (1969).

204. *Id.* at 629–33.

205. *King*, 442 F.2d at 648.

206. 899 F.2d 255 (3d Cir. 1990).

207. *Id.* at 268. While the Court in *Lutz* did not explicitly reference any historical roots or traditions that would support a right to travel locally, this formulation of the right sounds familiar enough to Blackstone's *Commentaries* that it receives sufficient support there. Blackstone wrote that the second absolute right of all Englishmen was the "power of loco-motion of changing situation, or removing one's person to

D. Self-Defense

While the common law has generally frowned on the use of force against another,[208] it has always understood that self-defense comprises a part of human nature that cannot be eradicated by positive law.[209] Blackstone considered self-defense to be the "primary law of nature," and a natural reaction of a person who is attacked or of a person who sees an attack upon a close relative.[210] Self-defense was not a license to kill, but it would excuse the defender's role in breaching the peace or even killing the aggressor.[211] Yet, the defender could not use more force than was necessary to repel the threat.[212]

Courts have since refined these common law principles; today, a person who asserts self-defense in response to a homicide charge must establish the existence of several elements. According to the Model Penal Code, a person may use force for self-protection when harm is imminent; the person uses force that is reasonable to repel the attack, which cannot be deadly unless presented with deadly force; the person was not the original aggressor; and, in some cases, the person has no ability to retreat.[213] The federal government and the states generally adhere to these elements, yet they often do not require a duty to retreat, especially if the person uses self-defense on his property.[214] Moreover, some jurisdictions do not require a person to retreat at all,

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whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." *See* 1 BLACKSTONE, *supra* note 162, at *134.

208. 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 37 (1883) (arguing that the English still viewed killing in self-defense to be somewhat blameworthy because the person who killed in self-defense could only be acquitted by receiving a pardon from the King).

209. 3 WILLIAM BLACKSTONE, COMMENTARIES *4.

210. *Id.* at *3–4 ("The defence of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant.").

211. *Id.* at *4; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *201 (explaining that all homicides were murders, but that a killing could be excused on account of self-preservation, in which case the accused was required to demonstrate that the facts of the case supported the use of self-defense to "mitigate" his guilty actions).

212. *See* 3 BLACKSTONE, *supra* note 209, at *4.

213. *See* MODEL PENAL CODE § 3.04 (Am. Law Inst. 1985).

214. *See* Beard v. United States, 158 U.S. 550, 563–64 (1895) (holding that because the defendant met the requisite elements of self-defense that he was under no duty to retreat while on his own property despite not being within his dwelling house); Tennessee v. Renner, 912 S.W.2d 701, 703–04 (Tenn. 1995) (explaining that the Tennessee legislature eliminated the duty to retreat from the elements of self-defense).

even when out in public.[215] In sum, there is no prohibition on using deadly force outside of the home—no matter whether a person is under a duty to retreat—so long as the facts support the requisite elements.[216]

Additionally, the Supreme Court has proclaimed the importance of securing an individual's right to use arms for self-defense. For example, in *McDonald v. City of Chicago*,[217] the Supreme Court suggested that the right protected by *District of Columbia v. Heller*[218]—the right "to use [handguns] for the core lawful purpose of self-defense"—was a fundamental right.[219]

Viewed independently, the Anglo-American history of traveling with arms, the American interstate and intrastate travel rights, and the common law self-defense tradition appear unrelated. Yet, viewed collectively, these histories and traditions coalesce to support an implied fundamental right to travel with arms for self-defense.[220] Having canvassed the relevant history, the following section will argue that this right satisfies *Glucksberg*'s two-prong test so that it ranks as a fundamental right.[221]

II. ANALYSIS

Relying on the Supreme Court's implied fundamental rights methodology articulated by *Glucksberg*'s two-prong test, the Fourteenth Amendment's Due Process Clause protects an implied fundamental right for individuals to travel with arms for the purpose of self-defense.

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215. *See* Brown v. United States, 256 U.S. 335, 341–44 (1921) (overturning a second-degree murder conviction because the trial judge erroneously instructed the jury that the defendant was under a duty to retreat before shooting the decedent in self-defense and affirming that the defendant, who was not within his house, was under no duty to retreat before acting in self-defense); *In re* Y.K., 663 N.E.2d 313, 315 (N.Y. 1996) (holding that a juvenile who was pinned down near a subway station while receiving kicks and punches to the head was under no duty to retreat before using deadly force against her aggressors).

216. *See* MODEL PENAL CODE § 3.04(b)(ii)(A) (omitting any requirement that deadly force used in self-defense must occur within one's dwelling).

217. 561 U.S. 742 (2010).

218. 554 U.S. 570 (2008) (holding that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia and finding a statute prohibiting possession of handguns within a dwelling unconstitutional).

219. *McDonald*, 561 U.S. at 768 (quoting *Heller*, 554 U.S. at 630) ("*Heller* makes it clear that [the right to use handguns for self-defense] is 'deeply rooted in this Nation's history and tradition.'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

220. *See infra* Sections II.B.1–4.

221. *See infra* Section II.C.

This claim is deeply rooted in the history and traditions of American and English legal history, and it is narrowly described so that the right recognized derives tightly from its historical record.

The analysis will proceed in three parts. First, the analysis will explain the continued viability of *Glucksberg*'s two-prong test in the wake of *Obergefell*.[222] Second, it will analyze the history contained in Part I.[223] Third, it will apply *Glucksberg*'s two-prong test to Anglo-American history and traditions, the implied fundamental right to travel, and the common law traditions of self-defense.[224] This analysis will show that traveling with arms for self-defense is an implied fundamental right.

A. *The Continued Viability of the Two-Prong Test*

The majority opinion in *Obergefell* showered doubt on the continued use of *Glucksberg*'s two-prong test, for the opinion claimed the test was inapplicable in cases dealing with marriage and intimacy.[225] But did the majority effectively overrule the two-prong test as Chief Justice Roberts suggested?[226] Or did the test survive? Two observations suggest that *Glucksberg*'s two-prong test survived *Obergefell*.[227]

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222. *See infra* Section II.A.

223. *See infra* Section II.B.

224. *See infra* Section II.C.

225. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015); *see also* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 162 (2015) (questioning *Glucksberg*'s precedential value after *Obergefell*).

226. *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) ("It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process.").

227. While this Comment maintains that *Glucksberg*'s two-prong test is still operative for implied fundamental rights claims, if future courts decide to emphasize the *Obergefell* approach, which treated history as a starting point but focused more deeply on society's current understanding of the claimed right, then traveling with arms for self-defense would still achieve fundamental status because modern society has expanded opportunities for individuals to travel with arms for self-defense. *See id.* at 2602 (majority opinion) ("The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."); *see also supra* Section I.B.1.d (explaining that every state, to some degree, allows citizens to carry firearms in public for certain lawful purposes). The *Glucksberg* two-prong test is narrower and harder to meet than the *Obergefell* approach, as it requires a closer description of a claim that has longstanding historical recognition. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). Therefore, because *Obergefell* places less of an emphasis on traditions and more of an emphasis on modern understandings of liberty, the right to travel with arms for self-defense would more easily achieve fundamental status under an *Obergefell* approach.

First, the Court applied *Glucksberg*'s two-prong test in the same 2015 term that it decided *Obergefell*. In *Kerry v. Din*, a U.S. resident-citizen claimed that the State Department's denial of a visa to her nonresident-noncitizen husband violated her implied fundamental rights to live in the United States with her spouse.[228] Yet, the Court's plurality opinion relied on *Glucksberg*'s two-prong test to reject the resident-citizen's claim because the United States' history of immigration restriction weighed against recognizing such a right.[229]

Second, the lower courts have continued applying the two-prong test even after *Obergefell*. For example, in *Holland v. Rosen*, the Third Circuit employed *Glucksberg*'s two-prong test to strike down a plaintiff's claimed right to obtain a cash bail or corporate surety bond because there was no strong showing that history supported the plaintiff's claimed right.[230] After *Obergefell*, other courts have also applied the two-prong test.[231]

Thus, *Glucksberg*'s two-prong test will be used in the following analysis because the Supreme Court relied on the two-prong test in the same term as *Obergefell*,[232] and the lower courts have continued to apply that test even after *Obergefell*.[233] Additionally, *Obergefell* did not specifically overrule *Glucksberg*.[234]

Having clarified the appropriate legal standard, a brief historical analysis is necessary before starting the legal arguments in Section II.C.

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228. Kerry v. Din, 135 S. Ct. 2128, 2131 (2015) (plurality opinion).

229. *See id.* at 2133–36.

230. Holland v. Rosen, 895 F.3d 272, 295–96 (3d Cir. 2018); *see also supra* text accompanying notes 130–35 (explaining in more detail the court's rationale for refusing to find an implied fundamental right to cash bail or corporate surety bonds).

231. *See, e.g.*, Dawson v. Bd. of Cty. Comm'rs, 732 F. App'x 624, 629–30 (10th Cir. 2018) (describing both prongs of the *Glucksberg* test that will be applied to a defendant's claim that there exists a fundamental "right to be free from pretrial detention"); Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1085–88 (9th Cir. 2015) (alleging that the plaintiff's formulation of a "right to refrain from taking human life" is not narrowly described enough under *Glucksberg* to achieve status as a fundamental right); Students & Parents for Privacy v. U.S. Dep't of Educ., No. 16-cv-4945, 2016 WL 6134121, at *22–23 (N.D. Ill. Oct. 18, 2016) (articulating the narrow description and deeply rooted prongs of the *Glucksberg* test in response to plaintiff's claim that there exists a fundamental right to, inter alia, one's "privacy in one's fully or partially unclothed body").

232. *See supra* text accompanying notes 228–29.

233. *See supra* note 231 and accompanying text.

234. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (questioning the utility of *Glucksberg* in cases not dealing with "marriage and intimacy" but apparently not overruling it).

B. Historical Analysis

The Court's *Glucksberg* analysis traced the traditions of three distinct time periods when evaluating the history of physician-assisted suicide. This Comment will follow a similar structure in the following section by analyzing the legal traditions of four time periods: English history and tradition, early American history and tradition, nineteenth century American attitudes, and modern American attitudes.

1. English history and tradition

While the English have a long history of regulating arms—who can own them, which arms can be owned, and where they may be taken—they have not intended to categorically ban traveling with arms for self-defense. In fact, English history recognizes, as an exception, a narrow right to travel with arms for self-defense.

While the broad language of the 1328 Northampton Statute appears to completely ban traveling with arms under certain circumstances,[235] the statute's context suggests its intent was to punish those who would brandish arms in public to terrorize the people. Kopel explained that the Statute passed during a time of political turmoil soon after the unpopular English monarch, Queen Isabella, took the throne from her husband, Edward II.[236] Queen Isabella feared the English gentry would attempt to oust her, and the Northampton Statute was a convenient solution to prevent her confrontation with an armed opponent.[237]

By the seventeenth century, English courts understood that the Northampton Statute was not intended as a categorical ban on all forms of armed travel. In *Sir John Knight's Case*, the Chief Judge explained that the Northampton Statute sought to deter those with an intent to terrorize others; he also acknowledged that the gentry tended "to ride armed for their security."[238] The jury ultimately acquitted Knight on charges of entering a church in Bristol while armed to terrify the congregants.[239] While Cornell suggested that Knight was acquitted merely because he received a jury of friendly Protestant jurors,[240] he also conceded that aristocrats, like Knight, could travel with ordinary

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235. *See supra* notes 139–42 and accompanying text.
236. *See* Kopel, *supra* note 146, at 133.
237. *Id.* at 134.
238. Rex v. Knight (1686) 90 Eng. Rep. 330, 330 (explaining that while this statute is infrequently used, it retains force when a person acts in "malo animo").
239. *Id.*; Sir John Knight's Case (1686) 87 Eng. Rep. 75, 76.
240. *See* Cornell, *supra* note 144, at 26.

arms without violating the Northampton Statute since armed aristocrats were unlikely to terrify the people.[241] Thus, by the late seventeenth century, the English recognized a limited right to travel armed for self-defense, even if it was only accessible to aristocrats.

However, by 1689, the English recognized a more general right to "have Arms for their Defence suitable to their Conditions, and as allowed by Law."[242] While Schwoerer asserted this right was essentially meaningless because only two percent of Englishman could own firearms,[243] it does not follow that having arms for one's defense is contingent on one's access to firearms. Malcolm noted that the right to keep arms contained in the English Bill of Rights was a new right that had arisen out of a duty to keep arms.[244] Because a duty to keep arms existed for centuries prior to the enactment of the English Bill of Rights in 1689, individuals had long kept and maintained certain arms necessary to fulfill their peacekeeping duties to the Crown or local lord.[245] Even if Schwoerer is correct that only two percent of individuals could lawfully own firearms, the conclusion that only two percent of Englishmen could exercise the new right articulated in 1689 does not follow, for there were other types of arms available[246] and there was a

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241. *Id.* at 25. Cornell argues that there existed no general right to travel with arms because only aristocrats could arm themselves without violating the Northampton Statute. *Id.* Presumably, non-aristocrats who traveled with arms would violate the statute. *Id.* at 25 & n.104. Assuming, arguendo, this presumption is true, it does not necessarily negate the existence of a right to travel with arms for self-defense. Cornell's acknowledgment of the "broad consensus" that aristocrats could travel armed for self-defense shows that some individuals were allowed to travel armed for self-defense. *See id.* at 25. One could also interpret these facts to mean that a right to armed travel did exist, but that English society excluded some from exercising this right. *Id.* Going further, Cornell's argument would have less credence if a court were to emphasize *Obergefell* when conducting an implied fundamental rights analysis since that case rejected using evidence of historical practice to limit the modern exercise of rights because only certain groups could historically exercise those rights. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.").

242. English Bill of Rights 1689, 1 W. & M. c. 2.

243. *See* SCHWOERER, *supra* note 155, at 170.

244. *See* Malcolm, *supra* note 157, at 229.

245. *Id.* at 229–30.

246. *Id.* at 230 n.18 (explaining a thirteenth century statute that required an individual to have certain "arms suitable to his degree, down to the man who need but have bow and arrows").

long prior history of Englishmen keeping arms within their homes so they could fulfill their peacekeeping duties.[247]

Instead, Halbrook's interpretation of the English Bill of Rights is most accurate. Halbrook noted that the English Bill of Rights protected a "private individual's right to have and bear arms" so long as that individual did not use those arms to terrify the public.[248] This interpretation receives contemporaneous support, for it extends the opinion in *Sir John Knight's Case*, which recognized that aristocrats could travel with arms for their personal security absent an intent to harm or terrify others.[249] Thus, the 1689 Bill of Rights expanded this right beyond the aristocracy.

During the next two centuries, English case law and commentators continued to recognize a right to travel armed for self-defense. William Blackstone proclaimed in his *Commentaries on the Laws of England* that there were certain "absolute rights" retained by every Englishman.[250] Notably, some of these rights included the right of personal security,[251] the personal liberty of movement,[252] and the right of having arms for defense.[253] John Ayliffe observed that the English imported from Roman law the idea that Englishman could retain arms in their homes to be used when traveling.[254] In addition to these legal commentators, nineteenth century English courts also recognized the importance of allowing individuals to have arms outside of their homes.[255] In short, while the English understood that some arms regulations were permissible, a narrow right always existed to travel with arms. In the beginning, this right was only accessible to the wealthy, but over time, it expanded to include more people.

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247. *Id.* at 229 n.14 (approximating 1252 as the origination date of Englishmen's duty to keep arms for peacekeeping purposes).
248. HALBROOK, *supra* note 160, at 49.
249. *See supra* notes 147–54 and accompanying text.
250. 1 BLACKSTONE, *supra* note 162, at *127.
251. *Id.* at *129–30.
252. *Id.* at *134–35.
253. *Id.* at *143–44.
254. *See* AYLIFFE, *supra* note 165, at 195 ("Yet a Person might keep Arms in his House, or on his Estate, on the Account of . . . Travelling . . . .").
255. Rex v. Dewhurst (1820) 1 State Trials, N.S. 529, 601–02 ("A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purpose of business.").

2. Early American history and tradition

The early Americans took the emerging English traditions with them to the colonies. In 1686, New Jersey passed a statute that banned carrying arms.[256] Yet, in recognition of the developing law, the statute created an express exception for those traveling on a journey throughout the province.[257] Several years later, Massachusetts passed a law loosely mimicking the Northampton Statute, making it an offense for an individual to "ride or go armed Offensively before any" government officials.[258] Unlike the Northampton Statute, however, the Massachusetts law explicitly noted that the crime contained an offensive element, thereby implying that no crime existed for individuals to travel with arms for defensive purposes.[259]

In the late eighteenth and early nineteenth centuries, many of the newly formed American states recognized a right of citizens to have arms for lawful purposes. Pennsylvania, Vermont, Kentucky, Ohio, Indiana, Mississippi, Connecticut, Alabama, and Missouri incorporated provisions in their state constitutions that protected the people's right to have arms.[260] Early state statutes also contained similar elements to those found in New Jersey and Massachusetts. For example, a 1787 Virginia statute, titled "An Act [F]orbidding and [P]unishing Affrays," mimicked the Northampton Statute.[261] As the title of the Act suggests, however, the legislature intended to punish affrayers, those who would carry arms offensively in public with the purpose of terrifying others.[262] As the early United States formed, the new states expressly codified protections for individuals to have arms and retained English common law principles that sought to criminalize carrying arms in public only if the person intended to terrify others.

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256. 1686 New Jersey Act, *supra* note 168.

257. *Id.* at 290.

258. 1692 Massachusetts Act, *supra* note 171.

259. *Compare* Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.) ("[T]hat no Man . . . be so hardy to come before the King's Justices . . . with force and arms . . . nor go ride armed by night nor by day . . . ."), *with* 1692 Massachusetts Act, *supra* note 171 ("That every Justice of the Peace . . . may cause to be staid and arrested all [who] . . . shall ride or go armed Offensively before any of their Majesties Justices . . . .").

260. *See* District of Columbia v. Heller, 554 U.S. 570, 585 n.8 (2008) (canvassing different state constitutional amendments recognizing a right to bear arms around the turn of the eighteenth century).

261. 1787 Virginia Law, *supra* note 172 ("That no man . . . be so hardy to come before the King's Justices . . . with force and arms . . . nor go ride armed by night nor by day . . . .").

262. *Id.*

3. Nineteenth century American attitudes

Many states in nineteenth century America enacted statutes that explicitly exempted travelers from general prohibitions on carrying arms. Alabama,[263] Arkansas,[264] Indiana,[265] Kentucky,[266] and Tennessee[267] enacted statutes explicitly exempting traveling with arms.

Furthermore, state court cases during this period also recognized that individuals could travel with arms in certain circumstances. The Texas Supreme Court in 1874 quashed an indictment aimed at George Duke for violating a statute prohibiting carrying arms because the prosecution failed to negate all the statute's exceptions.[268] One of those exceptions allowed individuals to travel throughout the state with arms in one's baggage.[269]

4. Modern American attitudes

Modern American attitudes, as reflected through state legislation, have moved towards more permissive laws allowing individuals to carry arms outside of their homes. Every state, except Vermont, has a statutory scheme providing permits to carry arms outside of the home.[270] Despite Vermont's lack of a statutory licensing scheme, citizens of Vermont may still travel with arms for self-defense.[271] In short, every state contemplates that certain individuals will carry arms outside their homes for lawful purposes.[272] This history demonstrates

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263. ALA. CODE § 3274 (1852).

264. ARK. CODE ANN. Chap. 44, § 13 (1838).

265. 1819 Indiana Act, *supra* note 176.

266. 1813 Kentucky Act, *supra* note 175.

267. 1821 Tennessee Act, *supra* note 178.

268. State v. Duke, 42 Tex. 455, 456–57, 459–60 (1875).

269. *Id.* at 456–57.

270. *See supra* note 185 and accompanying text.

271. *See supra* note 186 (explaining that citizens of Vermont may carry arms publicly so long as they lack an intent to harm others).

272. Because every single state (except Vermont, which allows individuals to carry firearms so long as they lack intent to harm others) has a licensing scheme to permit individuals to carry firearms in certain circumstances, it is likely that each state recognizes that certain individuals will carry firearms outside of their homes. *See* Christopher Ingraham, *3 Million Americans Carry Loaded Handguns with Them Every Single Day, Study Finds*, WASH. POST (Oct. 19, 2017, 4:19 PM), https://www.washingtonpost.com/news/wonk/wp/2017/10/19/3-million-americans-carry-loaded-handguns-with-them-every-single-day-study-finds (explaining that as more states have passed more permissive conceal carry licensing statutes, the number of concealed carriers nationally has increased "from 2.7 million in 1999 to 14.5 million in 2016"). The fact that certain states make it exceedingly difficult to receive one of these carry permits does not negate their understanding that some

that the Anglo-American tradition has evolved to recognize a right of individuals to travel with arms for self-defense. Yet, to confirm this right within the pantheon of other implied fundamental rights—thus triggering heightened standards of judicial review—traveling with arms for self-defense must pass *Glucksberg*'s two-prong test.

C. Legal Analysis: Application of Glucksberg*'s Two-Prong Test*

Traveling with arms for self-defense is an implied fundamental right. A claimed right is considered fundamental if it satisfies *Glucksberg*'s two-prong test, which requires a claim that is "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if they were sacrificed.'"[273] Additionally, the claim must bear a "careful description" so that it connects tightly to or derives easily from its historical antecedents.[274]

1. Traveling with arms for self-defense has deep historical roots

The right to travel with arms for self-defense has deep roots that contrast sharply with the Supreme Court's application of the two-prong test in both *Glucksberg* and *Kerry*.

In *Glucksberg*, the Court asserted that the common law since the thirteenth century prohibited assisted suicides, and modern attitudes—while no longer punishing the family of one who committed suicide—still condemned the practice as reflected in state laws.[275] Based on this history, the Court concluded that a right to physician-assisted suicide was not deeply rooted.[276] Additionally, in *Kerry*, the plurality opinion rejected finding an implied fundamental right for resident-citizens to live in the United States with their nonresident-noncitizen spouses.[277] The plurality noted that Congress, while not

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small number of citizens will arm themselves in public. *See, e.g.*, 430 ILL. COMP. STAT. 66/10 (2019) (requiring the Department of Public Safety to issue conceal carry permits to those who meet stringent criteria, including passing review by the Concealed Carry Licensing Review Board).

273. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (internal citations omitted) (first quoting Moore v. City of E. Cleveland, 431 U.S. 502, 503 (1977); and then quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

274. *Id.* at 721.

275. *Glucksberg*, 521 U.S. at 711–16 (examining the history of suicide in English common law, pre-American Revolution common law, and early nineteenth century American statutes).

276. *Id.* at 728.

277. *See* Kerry v. Din, 135 S. Ct. 2128, 2136 (2015) (plurality opinion).

seriously regulating immigration before 1875, later fashioned a statutory scheme that heavily restricted a citizen's "ability to bring a spouse into the United States."[278] The Court concluded that the history and traditions allowing citizens to bring their spouses into the country were too modern to confer fundamental right status on the right asserted in the case.[279]

Conversely, traveling with arms for self-defense has ancient origins and deep roots. Although there have existed regulations on the carrying of arms since the fourteenth century, exceptions existed for those traveling with arms,[280] and the evolution of these exceptions has become more permissive.[281] Unlike *Glucksberg*, there has been no uniform common law tradition against traveling armed for self-defense.[282] And, in the latter half of the twentieth century, as states reaffirmed their opposition to physician-assisted suicide,[283] states simultaneously created statutory schemes to provide firearm licenses to qualified individuals who wanted to carry firearms outside of their homes.[284] Moreover, contrary to *Kerry*, where the court emphasized the tightening of immigration restrictions at the turn of the twentieth century, between the seventeenth century and today, the laws regulating traveling with arms have progressed from recognizing only an implied right of aristocrats to travel with arms, to every state creating a pathway for qualified citizens to carry a firearm outside of their home.[285]

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278. *Id.* at 2135.

279. *Id.* at 2136.

280. *See, e.g.*, ARK. CODE ANN. Chap. 44, § 13 (1838) (excluding travelers from a statute that otherwise prohibits the concealed carrying of certain weapons); 1686 New Jersey Act, *supra* note 168 (exempting those traveling through the province from a statute otherwise punishing those appearing armed in public).

281. *Compare* Sir John Knight's Case (1686) 87 Eng. Rep. 75, 75–76 (stating that by 1686 gentleman could ride armed for their security without violating the Northampton Statute), *and* Cornell, *supra* note 144, at 25 (confirming that by the late seventeenth century, aristocrats could appear in public with arms without terrifying the public), *with* Shepard v. Madigan, 863 F. Supp. 2d 774, 776 n.1 (S.D. Ill. 2012), *rev'd sub nom.* Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012) (stating that forty-nine states have laws allowing qualified individuals to conceal carry certain weapons).

282. *See supra* note 241 (arguing that one scholar's attempt to claim the Northampton Statute as a complete ban on traveling with arms for self-defense falls flat because there existed a right for aristocrats to ride with arms for self-defense because aristocrats carrying arms would not terrify the people).

283. *See* Washington v. Glucksberg, 521 U.S. 702, 716–19 (1997) (describing how the states that have reconsidered the illegality of physician-assisted suicide have almost all rejected calls for legalization).

284. *See supra* note 185 and accompanying text.

285. *See* Kerry v. Din, 135 S. Ct. 2128, 2135–36 (2015) (describing the "complicated web" of immigration restrictions enacted by Congress in the late nineteenth and early

Furthermore, the lower courts have rejected implied fundamental rights claims for lacking deep historical roots under two scenarios. First, courts will reject these claims if the claimant fails to provide any historical evidence to support the asserted claim.[286] Second, such claims will be denied if countervailing legal authorities contradict the claimant's assertion of the implied right.[287]

Yet, first, an implied fundamental right to travel with arms for self-defense boasts an impressive historical record. The Northampton Statute, as interpreted by seventeenth century English courts, limited its proscription to those carrying arms with an intent to terrorize others.[288] This understanding appeared more plainly in the early American colonies, as a 1686 New Jersey statute that banned the carrying of arms specifically exempted those "traveling upon their

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twentieth centuries); *compare* R v. Sir John Knight (1686) 90 Eng. Rep. 330, 330 (recognizing the accepted practice of "gentlemen" traveling with arms) *and* Cornell, *supra* note 144, at 25 (acknowledging that aristocrats were typically exempt from the Northampton Statute's broad prohibitions on armed travel), *with* Section I.B.1.d (explaining that every state allows its citizens to carry arms in public either through a statutory licensing scheme or so long as the individual lacks an intent to harm others).

286. *See, e.g.*, Doe v. Moore, 410 F.3d 1337, 1344–45 (11th Cir. 2005) (rejecting an implied fundamental right to avoid registration as a sex offender because the claim lacked any "history or tradition that would elevate . . . [the claim] to be a fundamental right"); Doe v. Miller, 405 F.3d 700, 713–14 (8th Cir. 2005) (denying the convicted sex offenders' claim of an implied right to "to live where you want" because they had not provided any evidence that such a right was rooted in history); Richards v. Holder, No. 13-13195-LTS, 2014 WL 2805280, at *4 (D. Mass. June 19, 2014) (rejecting an implied fundamental right to pay a donor for organs because the plaintiff there failed to demonstrate "a historical basis for the right to encourage donation of organs by offering cash payments").

287. *See, e.g.*, Dawson v. Bd. of Cty. Comm'rs, 732 F. App'x 624, 630, 632 (10th Cir. 2018) (rejecting plaintiff's claimed "right to be free from pretrial detention" when he had paid his bail because an earlier Supreme Court case refused to hold that pretrial detention violated a fundamental right); Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, 701, 705–06 (D.C. Cir. 2007) (en banc) (denying a group of terminally ill patients' claimed right to access experimental drugs that had passed the FDA's preliminary safety checks when there existed no other treatment options in part because existing federal regulations proscribed allowing patients to receive untested drugs); Students & Parents for Privacy v. U.S. Dep't of Educ., No. 16-cv-4945, 2016 WL 6134121, at *2 (N.D. Ill. Oct. 18, 2016) (finding no implied right for high school students to avoid sharing bathrooms with transgender students largely because such a right conflicted with federal regulations requiring federal agencies to allow individuals to use bathrooms "consistent with their gender identity").

288. *See* Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.); Sir John Knight's Case (1686) 87 Eng. Rep. 75, 75–76.

lawful occasions . . . behaving themselves peaceably,"[289] and a 1692 Massachusetts statute banned only the "offensive" carrying of arms, thereby implying the ability to travel with arms for defensive reasons.[290] In the nineteenth century, more states codified these exemptions when passing statutes banning the carrying of arms.[291] In the twentieth and twenty-first centuries, all states began to permit qualified citizens to carry arms in public under certain circumstances.[292] Furthermore, over eighty percent of states require the issuing authority to provide licenses to qualified individuals as opposed to investing the issuing authority with some discretion to issue permits to those otherwise qualified individuals.[293]

Second, contemporaneous legal authorities tend to evince near harmony with the right to travel with arms for self-defense. Every state allows its citizens to carry arms outside of their homes for certain lawful purposes, subject only to certain licensing requirements or the absence of an intent to harm others.[294] Moreover, when jurisdictions have enacted statutes inhibiting citizens' ability to carry arms outside of their homes, courts have rendered those laws unconstitutional.[295]

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289. 1686 New Jersey Act, *supra* note 168.

290. 1692 Massachusetts Act, *supra* note 171; *see supra* text accompanying note 259 (explaining the 1692 Massachusetts Act's textual distinctions from the Northampton Statute).

291. *See supra* notes 175–78 and accompanying text (explaining that Kentucky, Indiana, Alabama, Arkansas, and Tennessee all had statutes banning the carrying of arms—open or concealed—unless the person was traveling).

292. *See supra* notes 185–93 and accompanying text (discussing how every state allows citizens to carry arms in public and how more people are choosing to carry arms as state statutory licensing schemes become more permissive).

293. *See supra* text accompanying note 191–93 (explaining that only eight states and Washington, D.C. have "may-issue" laws).

294. *See supra* notes 185–86 and accompanying text (noting that every state contemplates that its citizens will arm themselves in public because every state either licenses individuals to carry handguns in public or allows individuals to carry absent an intent to harm others).

295. *See* Wrenn v. District of Columbia, 864 F.3d 650, 668 (D.C. Cir. 2017) (enjoining permanently Washington, D.C.'s ban on carrying handguns in public unless the individual who intends to carry a handgun presents a good reason for doing so); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (overturning Illinois' categorical ban on taking handguns outside of the home); Palmer v. District of Columbia, 59 F. Supp. 3d 173, 182–83 (D.D.C. 2014) (finding unconstitutional Washington, D.C.'s absolute ban on carrying handguns outside of the home). *But see* Peruta v. Cty. of San Diego, 824 F.3d 919, 942 (9th Cir. 2016) (en banc) (concluding that "the Second Amendment does not protect, in any degree, the carrying of concealed firearms by members of the general public").

Finally, peripheral fundamental rights and historical practices coalesce to support an individual's right to travel with arms for self-defense. While the Supreme Court has not answered whether the Constitution protects the right to intrastate travel, it has implied that this right exists. In *Shapiro v. Thompson*, the Court quoted approvingly Chief Justice Taney's *Smith* dissent that recognized that citizens "must have the right to pass and repass through every part of [the country] without interruption, as freely as in our own States."[296] Chief Justice Taney's remark that the interstate travel right was comparable to the freedom one enjoys to travel within his own state suggests that individuals maintained a broad right to intrastate travel as well.[297] Besides traveling, the Supreme Court has also recognized the fundamental nature of self-defense, a right that is exercisable outside of one's home.[298] No less a legal authority than William Blackstone recognized self-defense as the "primary law of nature."[299] On top of this, cases dating back at least to the late seventeenth century imply the right to travel with arms for self-defense. The court in *Sir John Knight's Case* recognized the practice of gentlemen "rid[ing] armed for their security";[300] the court in *Rex v. Dewhurst* acknowledged that individuals could defend themselves while traveling;[301] and the court in *Texas v. Duke* recognized that the Texas legislature never intended to criminalize all forms of carrying arms in public, as it had exempted armed travel from a statute otherwise criminalizing the carrying of arms in public.[302] Thus, stitched together, these auxiliary fundamental rights and historical practices provide a broader legal context

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296. Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (quoting The Passenger Cases, 48 U.S. 283, 492 (1849)).

297. *See id.*

298. *See* McDonald v. City of Chicago, 561 U.S. 742, 768 (2010) (explaining that "*Heller* makes it clear that [using handguns for self-defense] is 'deeply rooted in this Nation's history and tradition'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))); Brown v. United States, 256 U.S. 335, 344 (1921) (overturning a second-degree murder conviction because the defendant was under no duty to retreat when he shot and killed an aggressor despite not being within his home); *see also* MODEL PENAL CODE § 3.04 (Am. Law Inst. 1985) (omitting any requirement that deadly force used in self-defense must occur within one's home).

299. 3 BLACKSTONE, *supra* note 209, at *4.

300. Rex v. Knight (1686) 90 Eng. Rep. 330, 330.

301. *See* Rex v. Dewhurst, 1 State Trials, N.S. 529, 601–02 (1820) (Eng.) ("A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purpose of business.").

302. *See* 42 Tex. 455, 460 (1875).

supporting the deep historical roots of an individual's right to travel armed for self-defense. However, to meet *Glucksberg*'s two-prong test, the right must also be crafted narrowly.

2. Traveling with arms for self-defense is carefully and deliberately described

In addition to the necessity of deep historical roots, *Glucksberg* also requires that implied fundamental rights claims bear a careful and deliberate description.[303] Since *Glucksberg*, the lower courts have interpreted this prong to require denying a fundamental rights claim if the underlying historical facts do not connect tightly with the asserted right; in other words, the claim will be rejected if the court can reasonably reframe the right to better match its historical antecedents.[304]

However, the right to travel with arms for self-defense bears a tight connection to its historical record. Dating back to 1686, states exempted traveling with arms from statutes otherwise banning the carrying of arms in public, and this exemption matches exactly the right argued for in this Comment, particularly when synthesized with the auxiliary fundamental right to self-defense.[305]

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303. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

304. *See, e.g.*, Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1085–87 (9th Cir. 2015) (reframing plaintiff's claimed "right to refrain from taking human life" to a "right to own, operate, or work at a licensed professional business free from regulations requiring the business to engage in activities that one sincerely believes lead to the taking of human life"); Doe v. City of Lafayette, 377 F.3d 757, 769 & n.11 (7th Cir. 2004) (construing the facts of the case to better support a right to "enter the parks to prey on children" despite the plaintiff's contention that he sought a "right to enter the parks to loiter or for other innocent purposes"); *cf.* Giordano v. Conn. Valley Hosp. 588 F. Supp. 2d 306, 318 (D. Conn. 2008) (reframing the plaintiffs' claimed right to avoid unwanted medical treatment, which they claimed they would be forced to accept if the hospital's smoking ban became enforceable since the absence of nicotine required undesired adjustments in the dosages of plaintiffs' prescribed medication, into a right to smoke).

305. *See, e.g.*, 1686 New Jersey Act, *supra* note 168 (exempting those traveling through the province from a general prohibition on carrying arms); *supra* Section I.D (canvassing the common law self-defense tradition and noting that *McDonald v. City of Chicago* claimed that self-defense is a fundamental right). Additionally, because traveling with arms for self-defense derives from a tradition expressly exempted in statutes dating back to the seventeenth century, it would be hard to envision how this framing of the right would not meet Justice Scalia's argument in *Michael H. v. Gerald D.* that new claimed rights require a description at their most specific level. 491 U.S. 110, 122, 127 n.6 (1989). Logically, having met Justice Scalia's proposed level of specificity, this right necessarily meets Justice Brennan's view that rights do not need to be described at their most specific level. *Id.* at 142 (Brennan, J., dissenting).

Furthermore, analyzing traveling with arms for self-defense alongside unsuccessful implied fundamental rights claims underscores the tight connection between the historical record and a modern right to travel with arms for self-defense. In *Stormans, Inc.*, the court claimed the plaintiff's asserted right was easily susceptible to reframing because the plaintiffs sought a personal right to be exercised in the context of operating a business.[306] In effect, the plaintiffs sought a broader right than that supported by the facts of the case since the plaintiffs asked for a "right to refrain from taking human life" when they really wanted their pharmacy to be exempt from a law requiring provision of contraceptives to the public.[307] In the case of traveling with arms for self-defense, however, the claimed right is not broader than the facts underlying it.[308] Notably, the modern evidence evinces the opposite conclusion because traveling with arms for self-defense represents one purpose of carrying arms that is narrower than the allowances authorized by state laws regulating the carrying of handguns.[309]

Also, unlike *Doe v. City of Lafayette*, where the sex-offender plaintiff sought a right to wander in parks despite having only been to the park on the night he was caught leering at children,[310] in this case, the right to travel with arms for self-defense is tightly connected to its historical precedents. Beginning in early American history and running through the nineteenth century, state statutes[311] and court cases[312] have expressly recognized that people may travel with arms.

The breadth of historical and traditional evidence supporting traveling with arms for self-defense and the close fit this right has to its

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306. *Stormans, Inc.*, 794 F.3d at 1086–87.

307. *Compare id.* at 1085 (explaining plaintiff's framing of the claimed right), *with id.* at 1087 (articulating the court's version of the right for which the plaintiffs actually seek protection).

308. As discussed in the preceding paragraph, the right argued for here matches exactly certain statutory exemptions allowing individuals to travel with arms through their state.

309. *See, e.g.*, FLA. STAT. § 790.06(12)(a) (2019) (enumerating the places in which a person may not carry a firearm, whether or open or concealed, and suggesting a broader range of uses is not limited only to traveling for self-defense).

310. Doe v. City of Lafayette, 377 F.3d 757, 769 & n.11 (7th Cir. 2004).

311. *See, e.g.*, 1821 Tennessee Act, *supra* note 178 (exempting those who are traveling from a statute otherwise banning carrying arms); 1819 Indiana Act, *supra* note 176 (same); 1813 Kentucky Act, *supra* note 175 (same).

312. *See* State v. Duke, 42 Tex. 455, 460–61 (1875) (noting the state legislature never intended to criminalize all forms of armed carrying when adjudicating a case under a statute creating an exception for those traveling throughout the state with arms in their luggage).

historical evidence contrasts with those cases where courts have rejected implied fundamental rights claims.[313] While this analysis importantly recognizes key differences with unsuccessful claims, examining the similarities between successful implied fundamental rights claims and traveling with arms for self-defense also underscores the historical significance inhering in this right.

3. Traveling with arms for self-defense is similar to other successful implied fundamental rights claims

The Supreme Court has recognized implied fundamental rights to engage in certain activities, which include choosing how best to raise one's children,[314] bearing children,[315] marrying another person,[316] living with one's close relatives,[317] and aborting an unborn child.[318] The Court conferred fundamental status on these rights throughout the twentieth century while grappling with how to protect certain unenumerated rights.[319] Evidence of widespread historical practice was paramount for reaching a determination that these established rights were fundamental, and the Court synthesized these holdings when standardizing the approach for implied fundamental rights claims in *Glucksberg*.[320] Following this tradition of implied fundamental rights, and in recognition that all of the heretofore established fundamental

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313. *Compare supra* Section I.B (describing the detailed history of traveling with arms for self-defense, *with* Doe v. Moore, 410 F.3d 1337, 1344–45 (11th Cir. 2005) (rejecting the implied fundamental right for a lack of historical support), *and* Doe v. Miller, 405 F.3d 700, 714 (8th Cir. 2005) (same).

314. Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

315. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (claiming that giving the government authority to use sterilization as a punishment could "forever deprive[] [one] of a basic liberty").

316. Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) (explaining that "the right to marry is a fundamental right" that cannot be denied to LGBT individuals).

317. Moore v. City of E. Cleveland, 431 U.S. 494, 505–06 (1977) ("[T]he Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.").

318. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (affirming one of *Roe*'s central holdings that women retain the right to abortion until viability); Roe v. Wade, 410 U.S. 113, 154 (1973) ("We, therefore, conclude that the right of privacy includes the abortion decision . . . .").

319. *See supra* Section I.A.1.b. (explaining the evolution of the implied fundamental rights cases preceding the decision in *Washington v. Glucksberg*).

320. *Id.*

rights were justified by having strong historical roots, the right to travel with arms for self-defense should be considered fundamental. Because the justifications for the established fundamental rights mentioned above are materially similar to those of the right to travel with arms for self-defense, the right to travel with arms for self-defense deserves placement alongside these other rights in Supreme Court's pantheon of implied fundamental rights.

In *Meyer*, *Skinner*, *Loving*, and *Moore*, the Court stressed the importance of long-standing and wide-ranging practice when labeling these rights fundamental.[321] Likewise, traveling with arms for self-defense boasts at least an equally long-standing and wide-ranging practice. This right arguably traces back to the fourteenth century when the English passed the Northampton Statute, which, in 1686, an English court interpreted to ban only the carrying of arms while possessing an intent to harm others; additionally, the English court recognized that aristocrats commonly traveled with arms for their personal security.[322] Also in the late seventeenth century, New Jersey banned carrying arms in public while explicitly exempting those traveling through the province[323] and Massachusetts legislated against riding armed only for offensive purposes.[324]

Moreover, the Supreme Court's justifications for the right to abort an unborn child provide extensive support for the right to travel with arms for self-defense. The Court in *Roe* justified the abortion right in part by recognizing that both the common law and nineteenth century American statutes recognized an exception for abortions performed before first fetal movement.[325] Likewise, the right to travel with arms

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321. *Moore*, 431 U.S. at 504 (noting the existence of an ancient tradition of extended families living together); *Loving*, 388 U.S. at 12 (adhering to the timeless notion that marriage has promoted human flourishing); *Skinner*, 316 U.S. at 541 (recognizing that bearing children has historically enabled the proliferation of the human race); *Meyer*, 262 U.S. at 400 (noting that parents had directed the upbringing of their children since at least 1787).

322. Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.); Rex v. Knight (1686) 90 Eng. Rep. 330, 330; Sir John Knight's Case (1686) 87 Eng. Rep. 75, 75–76.

323. 1686 New Jersey Act, *supra* note 168.

324. 1692 Massachusetts Act, *supra* note 171.

325. Roe v. Wade, 410 U.S. 113, 138–39 (1973). *Roe* also implied that the abortion right received partial justification from the lack of empowerment women might experience if the state could entirely prohibit abortion. *See id.* at 153. Similarly, advocates for legal carrying of firearms also describe a feeling of empowerment upon carrying arms for self-defense. *See* David French, *What Critics Don't Understand About Gun Culture*, ATLANTIC (Feb. 27, 2018), https://www.theatlantic.com/politics/

for self-defense has been a longstanding exception to general statutes otherwise prohibiting the carrying of arms. For instance, early American states frequently created exceptions for traveling armed,[326] and these exceptions have evolved into licenses allowing individuals to receive permits to carry firearms openly or concealed in every state for certain lawful purposes.[327]

The right to travel with arms for self-defense rests on materially similar justifications as other implied fundamental rights. Therefore, this right satisfies Glucksberg's two-prong test and should be considered a fundamental right.

CONCLUSION

Throughout the twentieth century, the Supreme Court articulated a method by which courts could read into the Fourteenth Amendment's Due Process Clause certain unenumerated rights that were not explicitly referenced in the Constitution. These unenumerated rights have been referred to as implied fundamental rights, and the methodology the Supreme Court used to recognize them derived from the Court's intellectual fights over incorporating enumerated rights against state governments.

Today, *Washington v. Glucksberg* represents the modern approach for incorporating implied fundamental rights. The *Glucksberg* test is a two-prong approach, and it directs courts to recognize claims of implied fundamental rights when the claimed right has deep historical roots and bears a narrow description.

Under *Glucksberg*'s two-prong test, traveling with arms for self-defense is a fundamental right because it is deeply rooted in the nation's history and traditions and narrowly described so that it connects tightly with its historical antecedents. First, since at least the fourteenth century, some individuals have maintained a right to travel armed for their security. This right has steadily expanded in both recognition and practice over the last five hundred years. Currently, every state allows its citizens to carry arms in public, a right that is

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archive/2018/02/gun-culture/554351 [https://perma.cc/9T59-Z9JG] ("And when you carry your weapon, you don't feel intimidated, you feel empowered. In a way that's tough to explain, the fact that you're so much less dependent on the state for your personal security and safety makes you feel more 'free' than you've ever felt before.").

326. *See* 1819 Indiana Act, *supra* note 176; 1813 Kentucky Act, *supra* note 175.

327. *See supra* notes 185–86 and accompanying text (explaining that all fifty states have statutory schemes allowing for concealing or openly carrying firearms).

broader than merely traveling with arms for self-defense. Furthermore, there currently exist peripheral fundamental rights to travel and self-defense, which, when attached to the historical record evinced in this Comment, coalesce to provide further support that traveling with arms for self-defense is deeply rooted in history. Second, this right is tightly connected to the history that supports it so that the claim of a right to travel with arms for self-defense bears a sufficiently narrow description. Unlike the rights claimed in some of the cases compared in the foregoing analysis, the right to travel with arms for self-defense is not susceptible to a court's revisions because there are constant references in the historical record to a right to travel, a right to self-defense, and a limited right to carry arms while traveling to ensure the capability of self-defense. Consequently, the Fourteenth Amendment's Due Process Clause protects an individual's right to travel with arms for self-defense because, having met the *Glucksberg* test, this right is fundamental.