A Practical Guide To Race And Gun Control

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Introduction

In 1995, the Kansas Journal of Law and Public Policy published historian Clayton Cramer's groundbreaking work, "The Racist Roots Of Gun Control" (http://www.law.ukans.edu/jrnl/cramer.htm). TRROGC opened many people's eyes to the historical injustices that led to the majority of the gun control laws in the US, and the possibility that not all of the racism in gun control is "history" — some of it could be decidedly contemporary.

Yet as of this writing, what Clayton discovered hasn't made any significant "mainstream impact", either in court or in the court of public opinion.

I think that needs to change.

I believe there are two different areas of law that can be affected by a study of US racism in gun control. These are:

1. The debate surrounding the 14th Amendment "privileges and immunities" clause and its impact on the Bill Of Rights (including the 2nd Amendment).

2. Overturning state gun control laws that were enacted with racist intent, and are having a current racially disparate impact despite that impact being (possibly) accidental in modern times — in other words, use of the 14th Amendment "equal protection clause".

Part One: The 14th Amendment Privileges And Immunities Clause And The RKBA

CASES

(Note: URLs are to a free, non-subscription area of Findlaw.)

Dred Scott vs. Stanford, 60 U.S. 393 (1856) http://laws.findlaw.com/us/60/393.html

United States v. Cruikshank, 92 U.S. 542, 553 (1875)
http://laws.findlaw.com/us/92/542.html

LAW REVIEW ARTICLES

PERSONAL SECURITY, PERSONAL LIBERTY, AND THE CONSTITUTIONAL RIGHT TO BEAR ARMS: VISIONS OF THE FRAMERS OF THE FOURTEENTH AMENDMENT — Stephen Halbrook Ph.D., Seton Hall Constitutional Journal (1995) — http://www.constitution.org/2ll/2ndschol/35halv.pdf — (Adobe Acrobat format, download free Acrobat reader at http://www.adobe.com as needed.)

THE FOURTEENTH AMENDMENT AND THE RIGHT TO KEEP AND BEAR ARMS: THE INTENT OF THE FRAMERS, Stephen Halbrook Ph.D., Senate Report (1982) — This report summarizes the "privileges and immunities" argument in 13 highly readable pages. His arguments have

now been adopted by Yale prof. Akhil Reed Amar (1998 “The Bill Of Rights”) and a number of other scholars such as Aynes, below.
http://www.constitution.org/2ll/2ndschol/42senh.pdf — (Adobe Acrobat format, download free Acrobat reader at http://www.adobe.com as needed.)

ON MISREADING JOHN BINGHAM AND THE FOURTEENTH AMENDMENT — Richard L. Aynes, Yale Law Journal, October 1993, Page 57 — http://www.saf.org/LawReviews/Aynes1.html

THE SECOND AMENDMENT: TOWARD AN AFRO-AMERICANIST RECONSIDERATION — Robert J. Cottrol and Raymond T. Diamond, 1991 Georgetown Law Journal, 80 Geo. L.J. 1991, 309-361 — http://www.guncite.com/journals/cd-recon.html

DISCUSSION

The opening paragraph of the 14th Amendment, effective in 1868, states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States**; nor shall any State deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws.**

Within the span of a few decades of this amendment’s establishment, the two provisions highlighted above in **bold** were gutted by the US Supreme Court.

We’ve mostly got the equal protection part (second bolded chunk) back, starting in 1954 (Brown vs. Board of Education and the subsequent civil rights battles).

But the “Privileges And Immunities Clause” remains “damaged goods”, gutted since approximately 1876 and the Cruikshank decision. The court in Cruikshank said of the 2nd Amendment:

> "This is one of the amendments that has no other effect than to restrict the powers of the National government."

The court found that a Klan group with state gov’t links that ran around stripping blacks of arms couldn’t be sued under Federal law. We’ll go into more detail on the racist history of the USSC in the second portion of this document, on equal protection (Williams vs. State of Mississippi 1898 cited in part two, or the infamous Plessy vs. Fergusen (legalizing “separate but equal” in the same period as Williams)). What the courts finally did in the 20th Century was “selective incorporation” to restore state respect to only those parts of the Bill Of Rights they were comfortable with at any one time — and the right to arms remains “unincorporated” at present, along with the Grand Jury requirement for indictment.

To understand the Privileges And Immunities clause, we have to look at the infamous Dred Scott decision of 1856, and it’s post-civil-war implications.

The court in Dred Scott decided that since the US had been a racist nation since it’s inception, a racist law in 1856 could not be challenged by a black gent, since he lacked the “privileges and immunities of US Citizenship” as held by the group “the people” mentioned in the Constitution.

The court used the complete phrase “privileges and immunities” over 30 times, and exhaustively defined it. To the court in Dred Scott, the “privileges and immunities of US citizenship” included the entire Bill Of Rights just for starters. The court hypothesized what would happen if such “privileges and immunities” were declared held by blacks:

> For if they were so received, **and entitled to the privileges and immunities of citizens**, it would exempt them [blacks] from the operation of the special laws and from the police

> regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, **and to keep and carry arms wherever they went**. [emphasis added]

It is critical to understand that the ruling in Dred Scott was **not** invalidated by the Civil War 1861-1865 and the deaths of over 500,000. Indeed, the slaves may have been freed by Lincoln's order and then the 13th Amendment, but the court's holding on racist laws being in harmony with the Founder's intent still stood.

Hence the South began writing specifically racist laws, the infamous "Black Codes"...virtually all of which contained special race-specific restrictions on arms:

> **1.** That it shall not be lawful for any freedman, mulatto, or free person of color in this State, to own fire-arms, or carry about his person a pistol or other deadly weapon.
>
> **2.** That after the 20th day of January, 1866, any person thus offending may be arrested upon the warrant of any acting justice of the peace, and upon conviction fined any sum not exceeding $100 or imprisoned in the county jail, or put to labor on the public works of any county, incorporated town, city, or village, for any term not exceeding three months.
>
> **3.** That if any gun, pistol or other deadly weapon be found in the possession of any freedman, mulatto or free person of color, the same may by any justice of the peace, sheriff, or constable be taken from such freedman, mulatto, or free person of color; and if such person is proved to be the owner thereof, the same shall, upon an order of any justice of the peace, be sold, and the proceeds thereof paid over to such freedman, mulatto, or person of color owning the same. [Ed. note: the off-duty fashion choices of "justices of the peace, sheriffs, or constables" at that time tended toward an ensemble of basic white bedsheets with eyeholes...especially at night.]
>
> **4.** That it shall not be lawful for any person to sell, give, or lend fire-arms or ammunition of any description whatever, to any freedman, free negro or mulatto; and any person so violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined in the sum of not less than fifty nor more than one hundred dollars, at the discretion of the jury trying the case.
>
> Alabama statute of 1865, from "The Second Amendment: Towards An African-Americanist Reconsideration", footnote 178 — two more state-level examples precede that one.

Per Dred Scott, this was perfectly acceptable.

The only way the 1868 legislature could fix that was to overturn the US Supreme Court — which meant a Constitutional Amendment, the 14th.

Which is why they borrowed Dred Scott's phrasing — they started out by making it clear blacks were citizens, and then forbade states from violating the rights of citizens. In doing so, framers of the 14th such as Ohio Republican John Bingham knew that they were carrying out the court's worst "fears", allowing the freemen to "keep and carry arms wherever they went" (among other things). See the Halbrook cites above — Bingham and company made no secret of this during the debates on the 14th and the various acts that led up to it and supported it.

So what does all this mean?

1. If the 14th "reinforced" an individual right to arms, it strengthens the arguments for an "individual right" interpretation ("standard model") as recently supported by the 5th Circuit in US vs. Emerson. Even if the right to bear arms was **originally** primarily to "ensure a militia" with no "personal right" intended (which is ludicrous to anyone who studies the Founders' writings closely), that cannot have been the case in 1868 because no Southern state was going to voluntarily put blacks under organized arms! The uniforms of "State Militias" in the south of that time ran toward modified bedsheets. So we're talking about a right to personal arms for private defense, against both criminals **and** the state itself.

2. And we're no longer talking about flintlock muskets, are we? Revolvers were common as fleas by then, with working models available since 1836. In fact, used specimens were affordable to freemen. The Mormon security forces prior to their move to Utah were well known for packing .44cal percussion revolvers with barrels chopped to 3" or so, carried concealed. And rifles of up to 15shot capacity were available, as were the first Gatling Guns(!) patented 1862.

3. Better yet, we see that the right to arms is protected from STATE infringement.

4. Best of all, the framers of the 14th would have known that for freemen to safely "bear arms wherever they went", the arms in question would of necessity be concealed! Anybody want to guess what a Southern cop of 1869 would think of a melanin-enhanced gent doing open-carry? (Last time the NYPD thought they had an armed black dude in sight, they opened up with 41 rounds, and that was in our more "modern, enlightened age".) This particular "logic chain" is the only path I know of to gaining a Constitutional right to bear CONCEALED arms that the courts may one day adopt, once they abandon the horrific racism of Cruikshank.

Part Two: 14th Amendment Equal Protection as a Path to Gun Control Reform

In the last section, we discussed use of one part of the 14th Amendment to affect gun control reforms. Problem is, the "privileges and immunities" language STILL isn't properly understood as a deliberate reversal of Dred Scott, so you'd need to go all the way to the USSC to win.

But the Equal Protection clause of the 14th is another matter entirely, well supported and understood! In this section, I'll show how current case law can be used to overturn California's discretionary CCW system and an unknown number of other gun control laws.

Herein, I'll show that this isn't just theory, it's *already happened at least once* in People vs. Rappard.

One KEY thing: WE MUST have a MINORITY CO-PLAINTIFF TO PULL THIS OFF!

OVERVIEW

In 1985, the US Supreme Court in Hunter vs. Underwood ruled that a state law that was drafted for racist purposes and was having an **accidental** effect on racial parity should be thrown completely off the books.

It is my intent to apply this precedent to discretionary CCW, by going into Federal Court with at least one obviously minority co-plaintiff and attacking Penal Code 12050's "may issue" CCW system.

But there's one possible problem: Hunter was about a law that involved voting rights, which has been declared a "fundamental personal right" in a way that the 2nd Amendment hasn't. I believe I can show here that due to later US Supreme Court precedent based on Hunter and it's relatives and ancestors (Arlington Heights in particular), that isn't a problem.

CASES

(Note: URLs are to a free, non-subscription area of Findlaw. All cases are US Supreme Court unless otherwise noted.)

WILLIAMS v. STATE OF MISSISSIPPI, 170 U.S. 213 (1898)
http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/170/213.html

ARLINGTON HEIGHTS v. METROPOLITAN HOUSING CORP., 429 U.S. 252 (1977)
http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=429&invol=252

HUNTER v. UNDERWOOD, 471 U.S. 222 (1985)
http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/471/222.html

CLEBURNE v. CLEBURNE LIVING CENTER, INC., 473 U.S. 432 (1985)
http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/473/432.html

CASTANEDA v. PARTIDA, 430 U.S. 482 (1977)
http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/430/482.html

EX PARTE RAMIREZ 193 Cal 633 (1924) (California Supreme Court, not online, described in text below)

ARNETT v CALIFORNIA PERS 9815574 (9th Circuit, 1999)
http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/9th/9815574.html

RICHARDSON v CC HONOLULU No. 9416041 (9th Circuit, 1997)
http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/9th/9416041.html

PEOPLE v. RAPPARD , 28 Cal.App.3d 302 (Calif. Appellate Court, 1972) (NOTE: This case overturned Ex Parte Ramirez, and large sections of that case are quoted within Rappard — special thanks to Clayton Cramer for finding this case!)
http://www.ninehundred.com/~equalccw/rappard.txt

PUBLISHED SCHOLARSHIP

Racist Roots Of Gun Control by Clayton Cramer, 4 Kansas J. of L. & Pub. Pol. 17-25 (1995):
http://www.law.ukans.edu/jrnl/cramer.htm

The Second Amendment: Toward an Afro-Americanist Reconsideration, Robert J. Cottrol and Raymond T. Diamond, 80 Geo. L.J 1991, 309-361 (1991):
http://www.guncite.com/journals/cd-recon.html

Text of Penal Code 12050-54 (California's CCW laws, originally enacted 1923 and mildly revised since):
http://www.ninehundred.com/~equalccw/thelaw.html

“Strict Scrutiny” vs. “Rational Basis” Defined

In any equal protection case, the courts assume that the government CAN indeed “discriminate”, but only if it can be justified. The level of justification needed varies...for our purposes, between “rational basis” and “strict scrutiny”.

If a law, government agent, policy or similar discriminates against different people along the basis of race, religion, or national origin, it will be subject to “strict scrutiny”, translated as “there'd better be a damned good reason for it”. Limited racial profiling for closer scrutiny at airports post 9/11 might pass such muster, as one example.

If the discrimination is along economic lines, such as “favoritism to the wealthy”, then no “protected class” is involved and the government defendant in an equal protection lawsuit must come up with a “rational basis” for the law, policy, enforcement practice or whatever. This is a much less stringent standard to meet.

Make no mistake: it’s not possible to win a gun case on rational basis — the courts are too liberal, and will automatically defer to authority, at the 9th Circuit level if not at district court. Don Kates told me that years ago, I didn’t listen, so I got my butt handed to me on the wooden plate that holds a Federal Judge’s gavel.

The trick to beating a gun control law on equal protection is to get it subjected to “strict scrutiny”.

Comparing PC12050 to the Hunter vs. Underwood Scenario

Hunter vs. Underwood involved two plaintiffs, one black and one white. They were challenging a provision of the Alabama Constitution enacted in 1901 that labeled certain misdemeanor crimes "offenses of moral turpitude" and provided that those convicted of such were to be stripped of voting rights. Among the offenses were misdemeanor bad check passing.

The plaintiffs successfully showed that the law was passed during a special constitutional convention in which stripping blacks of the vote was the key goal; this constitutional amendment was one of the results. The plaintiffs then showed that because many of the crimes involved affected those of lower income, the law was having a racially disparate effect as planned by the original law's authors, but NOT in a manner intended by those administering the law today.

Nevertheless, the law was junked by the courts. Because there was a black co-plaintiff involved that could raise the racial question, strict scrutiny was applied and the law didn't survive such. The law also had an effect on lower-income whites, but if the only plaintiff(s) had been white, it would have been a "rational basis" test at best and the law would have probably survived.

Hunter (1985) didn't happen all of a sudden; the exact same criteria for junking a law (racist intent when enacted, racist effect in enforcement even when accidental) was described in Arlington Heights (1977) although in that case, the plaintiffs weren't able to prove a racist origin of a local zoning ordinance.

Use of discretionary gun permits to specifically disarm blacks by name can be traced back to 1841 in Virginia (see Clayton's 1995 paper). In the post-civil-war period of 1865-1868, numerous Southern states passed "black codes" that included specific disarmament via discretionary gun permits; these were ended in forms that specifically named blacks by the 14th Amendment of 1868. The Diamond/Cottrol paper at footnotes 176-178 includes three such codes, from Louisiana, Alabama and this Mississippi statute of 1865:

> "[N]o freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep

> or carry fire-arms of any kind, or any ammunition, dirk or bowie knife, and on conviction thereof in the county court shall be punished by fine, not exceeding ten dollars, and pay the cost of such proceedings, and all such arms or ammunition shall be forfeited to the informer; and it shall be the duty of every civil and military officer to arrest any freedman, free negro, or mulatto found with any such arms or ammunition, and cause him or her to be committed to trial in default of bail."

In 1893, Florida was among several Southern states that enacted this type of code, for racist reasons, but deleted the explicit racial language so that on paper, it looked like it applied to the entire population. Clayton found a 1941 Florida Supreme Court reference by Justice Buford speaking for the majority while releasing a white gent for packing sans permit that shows what was really going on:

> "I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied." — Watson v. Stone, 4 So.2d 700, 703 (Fla. 1941) from Clayton Cramer's "Racist Roots Of Gun Control"

What really seals the intent chain was that by 1898, Mississippi took the idea of discretionary permits and extended it to voting rights — the code which stripped approximately 190,000 blacks of the vote (and a tiny number of whites) was extensively described (and supported) by the US Supreme Court in Williams vs. Mississippi 1898. And like the Florida 1893 and California 1923 discretionary gun permit laws, the Mississippi voting permit system was "facially race-neutral", so we can see a direct evolution in Mississippi of discretionary permit systems for racist purposes, from specifically naming blacks as needing the permit to dropping that language to "slip beneath Fed scrutiny" under the 14th.

California adopted Florida-style discretion in 1923, at the height of "Jim Crow". Clayton has identified a 1923 newspaper article wherein an officer in a Sacramento area gun club affiliated with the NRA praised the new carry permit law as necessary "to control violence by Asian and Latino gangs". California's racial climate during this period was horrendous, with bans on ownership of land by Asian immigrants, Asians still stripped of the ability to testify against whites in court, and a host of other ills.

But that's not the only evidence of racial purpose behind California's CCW system.

When enacted in 1923, the new law also included the penalties for packing without the new permits. As is the case today, packing without a prior criminal record isn't a major problem but if a felon packs, it's a serious charge. The difference is, back in '23 when the law was new, legal alien residents were **always** penalized to the same degree a violent felon would be, even if the alien resident had no priors.

Worse yet, legal alien residents were barred from even seeking the permit, OR EVEN OWNING A HANDGUN. These elements of the statute were supported by the California Supreme Court in Ex Parte Ramirez (1924) — and Mr. Ramirez did five years hard time for packing sans permit despite a clean record.

Both of these provisions were obviously enacted for racial purposes. Given the rest of the racial history behind the discretionary element, and the two other racial bits already identified by the courts in the law, a racial intent behind discretion is a slam dunk.

The holding in Ramirez restricting the right to arms to resident aliens was dismantled by a California Appellate court in People vs. Rappard (1972), which held that the provisions limiting alien resident gun rights could not be supported under "rational basis" and that they were enacted for racist reasons. There was one dissenter who showed particular stupidity in mentioning that at the same period, there were restrictions on alien ownership of land. The two majority justices rebutted thus:

> FN 2. In this connection we note that our dissenting colleague includes in his first quotation from Rameriz the following statement: "If rights in land may be denied to aliens by the state there would seem no reason why in the exercise of its police power it might not also protect itself against the ownership, traffic in and use of firearms by aliens." Yet, our alien land law, referred to in the quotation, was declared unconstitutional by our Supreme Court as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution over 20 years ago on a rationale essentially identical to that we rely upon here. (See Sei Fujii v. State of California, 38 Cal.2d 718 http://login.findlaw.com/scripts/callaw?dest=ca/cal2d/38/718.html, 728 [242 P.2d 617].)

In other words, the majority in Rappard was judging the legislative intent of the law in question in a fashion entirely consistent with the later Hunter! And the law being judged as racist was the SAME law in 1923 that created California's discretionary CCW system. Best of all, the majority was applying a "racial purpose test" and junking part of the law even though they recognized that it wasn't a fundamental right at play, they raised the matter to "strict scrutiny" because of the racism:

> The People and our dissenting colleague rely, nevertheless, upon In re Rameriz, 193 Cal. 633 [226 P. 914, 34 A.L.R. 51], a 1924 California Supreme Court decision which upheld this same statute against an equal protection challenge. This case is not controlling for two reasons. First, as the People admit, some of the grounds upon which Rameriz' conclusion of constitutionality rested have been explicitly rejected in Raffaelli as valid grounds for distinguishing between citizens and aliens. (Compare In re Rameriz, supra, at p. 645 with Raffaelli v. Committee of Bar Examiners, supra, 7 Cal.3d at pp. 296-300.) Second, recent developments in the law of equal protection, confirmed in Takahashi v. Fish Comm'n., 334 U.S. 410 [92 L.Ed. 1478, 68 S.Ct. 1138], dictate that a stricter standard of judicial review than the permissive rational basis test used in Rameriz [28 Cal.App.3d 306] be applied to classifications based upon the suspect factor of alienage. fn. 2 (See Purdy & Fitzpatrick v. State of California, supra, 71 Cal.2d 566 http://login.findlaw.com/scripts/callaw?dest=ca/cal2d/71/566.html, 582; see also, Graham v. Richardson, supra, 403 U.S. 365; Truax v. Raich, 239 U.S. 33 [60 L.Ed. 131, 36 S.Ct. 7]; Yick Wo v. Hopkins, 118 U.S. 356 [30 L.Ed. 220, 6 S.Ct. 1064].) Accordingly, Penal Code section 12021, as it applies to aliens, is declared unconstitutional. The judgment is reversed.

Finally, in 1927 Michigan copied our system specifically to prevent lawful self defense by blacks against lynch mobs, and the legislation was lobbied for by the KKK following an acquittal on self defense grounds in 1925 of members of a black family who shot up a lynch mob — see also:

> http://www.law.umkc.edu/faculty/projects/ftrials/sweet/sweet.html — unfortunately, the page showing the causative link between the Sweet incident and the 1927 CCW law that basically copied California's has dropped off the web. I'll do more research on that point.

Broad Applicability of Hunter

The case that really saves our bacon is the US Supreme Court case Cleburne (1985), decided only months after Hunter.

In Cleburne, the plaintiffs wanted to open up a group home for the mentally retarded, apparently people with no violent or criminal past. The local zoning board blocked them. The US Supreme Court began by denying the plaintiff's attempt to use the mental status of the affected people to raise the issue to "strict scrutiny" the same way race or religion would. In other words, the Supremes specifically said that the case should be decided on a rational basis test.

They then noted that the zoning ordinance dating to the 1920's talked about controlling zoning for "hospitals for the feeble-minded" and that the term itself was offensive. The original ordinance was

therefore viewed as stemming from non-rational historical discrimination against the retarded, and due to that discriminatory past, the ordinance should not control this situation. The Plaintiffs won.

Justices Marshall, Blackmon and Brennon joined a concurring opinion in which they agreed with the majority as to the results, but discussed in more detail the "why" of the decision — and they cited Hunter vs. Underwood extensively in footnote 17 and especially 25.

That suggests that Hunter can apply in a case where the rights involved are NOT "fundamental" the way the First Amendment has been ruled to be, and where “rational basis” otherwise dominates. It can apparently even apply to stenchful past legislation that wasn't racially nauseating.

It gets better. As we've seen, Arlington Heights was a direct ancestor of Hunter. In 1999, the 9th Circuit in Arnett vs. California Pers. decided that a situation whereby two cops injured on the job after the same brief service period could not receive different pension amounts based on their biological ages (23 versus 45) — and they cited Arlington Heights to determine whether the intent behind the pension plans mattered (it did). If I'm not mistaken, this particular age situation (with no racial issue involved) wasn't a "strict scrutiny case", so this meshes perfectly with the views of Marshall, Blackmon and Brennon in Cleburne.

In short, we see here multiple cases that use Arlington Heights as precedent to mean that laws must be scrutinized to make sure that their original intent was fair-minded, as opposed to being crafted with bigotry or bias not currently supported by our society, or laws. We would NEVER today call anything a "hospital for the feeble-minded", nor should we arbitrarily discriminate by age. California's CCW laws were not crafted with fairness in mind...and that matters.

In upholding a rent control ordinance, the 9th Circuit in Richardson held that challenging the ordinance on racial grounds would require analyzing the intent of the ordinance:

> [15] The Ordinance applies to condominiums regardless of whether the owner is Native Hawaiian or non-Hawaiian. It thus does not on its face draw a distinction on the basis of a suspect classification. Nonetheless, the landowners assert that the Ordinance is unconstitutional due to its discriminatory effects. To prevail, however, the Bishop Estate must show not only a discriminatory effect, but also discriminatory intent. Village of Arlington Heights v. Metropolitan Housing Dev. Co., 429 U.S. 252265, (1977).

The landowners failed...but I believe we can meet that challenge where discretionary CCW is concerned, in California or elsewhere.

Remember, we have a major advantage over the Hunter situation: we have in Contra Costa County a situation where the Sheriff discriminates against those towns with a higher minority population. That in turn suggests that the modern racial inequity in overall county issuance could be deliberate, versus "accidental" as in Hunter. To win reforms in California's pathetic and highly-abused discretionary CCW laws and methodologies, we only need to prove that:

1. racial inequity is happening accidentally in modern times, and

2. that the law was enacted with racist intent.

I firmly believe we've got the ammo to do that.

Miscellaneous Cases In Equal Protection

Castaneda involved grand jury selection procedures in Texas which are discretionary in a fashion very similar to California's CCW system, right down to a "good character" requirement along with a literacy test. The result was 39% Latino grand juries in a majority-Latino county.

> "It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an `unequal application of the law . . . as to show intentional discrimination.' . . . A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, [430 U.S. 482, 494]. . . or with racially non-neutral selection procedures . . . . With a prima facie case made out, `the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.' Alexander [v. Louisiana, 405 U.S.,] at 632." 426 U.S., at 241

Significantly, this was a post-Arlington Heights case, and the court mentioned Arlington in their ruling. The court in Casteneda basically said that the racial disparity was so obvious, it didn't need analysis as to racist origins of the grand jury selection system.

This suggests a "backup plan" whereby we note that so far as we can tell, there's one black permitholder under Rupf out of about 200 permits, and the county is somewhere around 30% black. We can confirm low minority issuance rates via deposition. If the court doesn't buy the "racial origins" data on PC12050 (and it's 1923 ancestor), fine, we have here prima facie evidence of wild disparity and we have the Sheriff's own policy manual fully explaining how much of the disparity happened (town discrimination). Let HIM try and defend this mess — note the "burden shifts to the state" language in the Castaneda quote above! And the racial inequity statistics in Contra Costa and other counties will make Castaneda pale in comparison, pardon the pun — Fresno County is over 50% Latino, but has a 3% Latino surname rate among permitholders.

Note: I've gone through the first 50 US Supremes cases that cite Arlington Heights, and all those that cite Hunter, plus all of the 9th Circuit cases that cite those two. Those that seem relevant are mentioned so far and discussed above. I'll finish the rest of the US Supreme Court cases citing Arlington soon.

Possible Remedies

The court in Rappard gutted a portion of the original 1923 gun law that included discretionary CCW, alien disarmament and stricter penalties for alien gun ownership or carry. The court in Hunter stripped an entire section of the Alabama Constitution, and various courts such as in Arlington Heights and Richardson threatened to strip out a bad zoning decision and a rent control law, respectively (except that the "racial origin" aspect wasn't proven in those two). So the remedies, and the laws being controlled by Hunter and Arlington vary all over the map. Few are as complex as the 1923 California gun control law.

If we follow the Rappard gameplan, we can "gut the bad bit" (read: discretion) which has migrated to PC12050 over the years. That leaves the background check, training and similar.

The alternative is to scrap everything left of the 1923 code, which is the permit system and the penalties for packing sans permit. Which would at least briefly throw us into "Vermont carry"...until Sacramento panics and either bans carry completely, or puts in a shall-issue system.

The Democrats cannot kill off CCW completely without angering the ~40,000 current permitholders, which as a group has BIG money that they won't want to see diverted to the GOP.

Additional Research in Other Circuits

It might be useful to see how Arlington Heights and Hunter have been interpreted in your circuit.

To see a list of Circuit Court decisions based on Hunter, click here.

The same list for Arlington Heights:
http://caselaw.lp.findlaw.com/scripts/casesearch.pl?court=circs&CiRestriction=429+U.S.+252&

The lists show which circuit each case is in as part of the URL.

Go through these looking for uses of the cases in your circuit — you want uses (where possible) that don't involve the 1st Amendment or other recognized fundamental rights, but rather "basic fairness issues".