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Jim Crow, Mexican Americans, and the Anti-Subordination Constitution: The Story of *Hernandez v. Texas*

**Introduction**

*Brown v. Board of Education* has been widely celebrated as the first decision in which the Supreme Court, newly unified under the leadership of Chief Justice Earl Warren, set out to dismantle Jim Crow segregation. But it was not. That distinction belongs to an almost entirely forgotten jury exclusion case decided two weeks earlier: *Hernandez v. Texas.* *Hernandez* deserves the honor of being recognized as the first civil rights decision of the Warren Court. It is also the first Supreme

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blacks, this result bespeaks discrimination, whether or not we can identify a particular biased actor? Race is not merely a word or a skin pigment, but a social identity deeply connected to history and power, privilege and disadvantage. It makes a travesty of the Fourteenth Amendment to refuse to see McCleskey’s case as rooted in the context of a Georgia penal system steeped in racial oppression.

If the Court’s pinched conception of race lends support to an intent test, it also allows the Court to equate race-conscious remedies with racism. Under a colorblind standard, nothing differentiates racism from affirmative action, Jim Crow from racial remediation. Witness Justice Clarence Thomas’s declaration that “there is a moral [and] constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.”20 How can affirmative action be the equivalent of the segregated juries, schools, restaurants, and bathrooms in Jackson County, Texas? The answer again lies in the colorblind Court’s artificially empty conception of race. When the Court abstracts race from social context and group conflict, it reduces the harm of racism to a violation of liberal norms. Under this conception, to treat someone differently on the basis of race amounts to favoring or disadvantaging individuals on the basis of criteria over which they have little or no control. This is, to be sure, a potential issue with affirmative action, as it is with a wide range of distinctions our society commonly makes—most commonly, those associated with wealth. But a more impoverished understanding of the harms of Jim Crow can scarcely be conjured. The lawyers for Hernández spent hours on the road every morning traveling to the Jackson County seat to argue the case; they left every evening, for lack of accommodations available to Mexican Americans and because they feared for their safety should they remain.21 As Hernández emphatically demonstrates, the principal harm of racism involves violent subordination, not the transgression of meritocratic norms.

Today’s Court gets racism backwards. The Justices deny that racism operates, no matter how stark the impact, if no state actor specifically invokes race, even though most racism now occurs through institutionalized practices.22 At the same time, under strict scrutiny the Court concludes that virtually any explicit use of race amounts to racism. In fact, though, efforts to counteract racial oppression’s extensive harms


121 Garcia, supra note 33.

must refer to race and should not be presumptively suspect. This misunderstanding of racism is anchored by a narrow conception of race. It is race-as-a-word-that-must-be-uttered-for-it-to-exist, race-as-skin-color-disconnected-from-social-practice-or-national-history, which undergirds colorblindness. We can best oppose this understanding of race, and the perverse constitutional results it justifies, by insisting on the deep connection between race and social inequality. Herein lies the single most important insight of *Hernandez v. Texas*. The core issue is not whether officers of the state directly invoked race, as the current Court would require. In considering whether equal protection commands the Court's intervention, Chief Justice Warren clearly stated in *Hernandez* that the key constitutional questions centered on whether "a distinct class" suffered "different treatment"—which is to say, whether the group seeking protection was treated as inferior by community practices, and whether the challenged practice formed part of that larger web of subordination. The Fourteenth Amendment cannot be returned to the task of racial emancipation until the Supreme Court recognizes that *Hernandez v. Texas* raised the correct concerns and begins asking these questions anew.

**Epilogue**

Just as the important lessons of *Hernandez* have been largely forgotten, so too has the fate of the defendant Pete Hernández. On May 7, 1954, four days after the Supreme Court issued its decision, the Texas Department of Corrections notified the Jackson County Sheriff that Hernández, prisoner number 124147, was to be remanded to Jackson County for retrial.\(^{132}\) Because he suffered from a severely clubbed foot, Hernández had never been handed over to a state prison or put into the general population; instead, he had been sequestered in the Jackson County jail during the entire appeal process. On September 28, 1954, Hernández was re-indicted, and on October 16, Gus García filed a motion for a change of venue. When he prevailed, the new trial was moved to Refugio County, near Corpus Christi.\(^{133}\) On November 15, 1954, the second trial was held, with García arguing the case.\(^{133}\) Despite the

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\(^{132}\) *Pete Hernandez is Re-Indicted By Jury*, Edna Herald, Sept. 28, 1954, at 1. On June 10, 1954, the case was formally remanded to the Texas Court of Criminal Appeals, and four days later the remanded case was filed there. *Id.*

\(^{133}\) *Id.; Garcia Will Ask For Venue Change in Pete Hernandez Trial*, Edna Herald, May 27, 1954, at 1. The article lists all the indictments handed down by that grand jury, which included twelve persons, two of them with Hispanic names (Isabel Barron and Sesoria Rodriguez). See also *Murder Trial May Be Nov. 15*, Edna Herald, Oct. 21, 1954, at 1. Refugio County is near Corpus Christi, and has a long history of anti-Mexican prejudice. *See generally Hubart Huson, Refugio: A Comprehensive History of Refugio County from Aboriginal Times to 1953* (1953 & 1955).

\(^{134}\) *Hernandez Due Parole*, La Prensa (San Antonio), June 15, 1960, at 1.