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Title
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Permalink
https://escholarship.org/uc/item/43t5940z

Journal
Chicana/o Latina/o Law Review, 25(1)

ISSN
1061-8899

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Publication Date
2005

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RACE AND COLORBLINDNESS AFTER *HERNANDEZ* AND *BROWN*†

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The fiftieth anniversary of *Brown v. Board of Education*[1] has been widely commemorated, but has also occasioned concern regarding the persistence of racism and racial inequality. *Brown* stands for some as the shining moment when the United States finally and fully committed itself to treating its citizens equally without regard to race; for others, it represents a failed promise, a moment of important but only partial transition when the United States moved from Jim Crow, not to equality, but only to a new, less overt, but hardly less oppressive or pervasive racism. Despite this disagreement, however, almost all view *Brown* as the first case in which Chief Justice Earl Warren unified the Supreme Court to begin dismantling Jim Crow. This quality of being "the first case" adds to *Brown's* prominence, whether that's understood as representing a complete rupture or heralding instead only a shift in racial practices.

But *Brown* is not the first case. Instead, that distinction belongs to a jury exclusion case decided two weeks earlier, *Hernandez v. Texas*.[2] *Hernandez* deserves our attention, not least for reasons of historical accuracy. The Mexican American community has long been an active participant in the struggle for racial justice in the United States, and *Hernandez* brings this fact to the fore. *Hernandez* also has contemporary relevance because it represents the first extension of constitutional protection to Latinos as a class, no small matter now that Hispanics constitute the larg-

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† This is a slightly different version of a paper of the same title which I presented at the American Anthropological Association's Conference on Race and Human Variation held in Alexandria, Virginia, in September 2004. The Association has kindly granted permission for the use of this paper.

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1. Brown v. Bd. of Educ., 347 U.S. 483, 496 (1954).

2. Hernandez v. Texas, 347 U.S. 475 (1954). For an earlier article on *Hernandez v. Texas*, see Ian Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1998); *see also* Ian Haney López, *Hernandez vs. Brown*, N. Y. TIMES, May 21, 2004, at A2.

est minority group in the United States. But I concentrate on *Hernandez* here for yet another reason: because it comes much closer than *Brown* to explaining when and why the Constitution should concern itself with race. *Hernandez* unambiguously insists, in a way that *Brown* does not, that it is race as subordination, rather than race per se, that demands constitutional intervention.

In the first half of this paper, I bring *Hernandez v. Texas* out from behind the shadow of *Brown*. The second half then uses the lessons of *Hernandez* to critique the colorblind racial ideology that now dominates the constitutional jurisprudence of race.

Hernandez and Race

Hernandez represents the first effort by the newly constituted Warren Court to dismantle Jim Crow segregation. And yet, this presents a paradox, for the opinion, written by Chief Justice Warren himself, disclaims race as a basis for its analysis. *Hernandez v. Texas* centers on Jim Crow practices, and yet it is not explicitly a race case.

After a two day trial and less than three hours of deliberation, an all white jury in Jackson County, Texas, in 1951, convicted Pete Hernández of murder and sentenced him to life in prison. The jury's racial composition was not an aberration. The county stipulated at trial that no person with a Spanish surname had served on a trial or grand jury in more than a quarter century; more than six thousand jurors had been seated, but in a county over fifteen percent Mexican American, none had been from that group.

In deciding whether impermissible discrimination occurred, the Court considered a veritable catalog of Jim Crow oppressions. The Court noted that a restaurant in the county seat prominently displayed a sign saying "No Mexicans Served." In addition, Jackson County residents routinely distinguished between "whites" and "Mexicans." Business and civic groups almost entirely excluded Mexican American members. The schools were segregated, at least through the fourth grade, after which almost all Mexican Americans were forced out of school altogether. Finally, the opinion also recorded that on the Jackson County courthouse grounds, there were two men's bathrooms. One was unmarked. The other said "Colored Men" and "Hombres Aquí," meaning, "Men Here."

Consider more fully the underlying claim of jury exclusion. The League of United Latin American Citizens, or LULAC, then the most prominent Mexican American civil rights group in the country, agreed to argue Pete Hernández's case as part of a

larger legal strategy to attack three pernicious practices: school segregation, racially restrictive covenants, and jury exclusion. What ranked jury exclusion with school and residential segregation? To be sure, all-white juries imperiled Mexican American defendants who, like Pete Hernández himself, risked conviction by hostile and biased juries. Moreover, the Mexican American community suffered because white juries rarely and reluctantly convicted whites for depredations against Mexican Americans. But LULAC's determined opposition to jury exclusion arose first and foremost because of its symbolism.[3] Trial by jury rests on the idea of peers judging and being judged by peers. In the context of Texas race politics, however, to put Mexican Americans on juries was tantamount to elevating them to equal status with whites. The idea that "Mexicans" might judge whites deeply violated Texas' racial caste system. LULAC hoped *Hernandez* would help to topple a key pillar of Jim Crow: the belief that whites should judge all, but be judged by none but themselves.

Hernandez v. Texas challenged a Jim Crow practice. Yet, the Supreme Court did not decide *Hernandez* as a race case. At the outset of his opinion, Chief Justice Warren observed that while the Constitution's Fourteenth Amendment primarily protected groups marked by "differences in race and color,"[4] he also noted that "the exclusion of a class of persons from jury service on grounds *other* than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws."[5] Why did Warren say that this case concerned something *other* than race or color? The answer is simple, though perhaps startling: every party in *Hernandez* argued that Mexican Americans were white.

As the evidence in *Hernandez* demonstrates, Anglos in Texas in the 1950s considered Mexicans an inferior race. This belief originated during the Anglo expansion into the Southwest in the early to mid-1800s that culminated in the expropriation of the northern half of Mexico.[6] During this era, a consensus emerged among Anglos that Mexicans were "mongrels," a degenerate mixture of Spanish and indigenous American ancestry. Applying established prejudices regarding miscegenation and dark skin to Mexicans, Anglos denigrated that group as dark, filthy, lazy, cowardly, and criminal — with each of these calumnies informing the most common anti-Mexican epithet, "dirty greaser." Need-

3. Clare Sheridan, *"Another White Race:" Mexican Americans and the Paradox of Whiteness in Jury Selection*, 21 LAW & HIST. REV. 109, 138-39 (2003).

4. *Hernandez*, 347 U.S. at 478.

5. *Id.* at 477 (emphasis added).

6. I discuss the early racialization of Mexicans at length in IAN HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003).

less to say, in articulating an inferior racial identity for Mexicans, Anglos concomitantly elaborated a superior identity for themselves. It was Anglo expansion into the Southwest that most directly gave rise to the racial ideology of Manifest Destiny.[7]

Mexicans in the United States, or at least the community's leaders, initially resisted their racial subordination by constructing themselves as Mexican nationals and by envisioning an eventual return to Mexico. Rather than directly challenging the racial logic that depicted them as inferiors, they sought to evade it by holding themselves apart from American society. In the 1920s and 1930s, however, broad swaths of the U.S. Mexican community came to see themselves as Americans. During this epoch, Mexican community leaders embraced an assimilationist ideology; indeed, the label "Mexican American" emerged from this period and encapsulated the effort to both retain pride in the community's Mexican cultural origins and to express an American national identity. Inseparable from this new assimilationist identity, however, was an engagement with American racial logic. On this score, the community leaders were certain: Mexican Americans were white.

Not all U.S. Mexicans embraced a white racial identity. The elite's ability to claim a white identity partly reflected their elevated class standing and their relatively fair features, attributes that stemmed from race politics not only in the Southwest but also in Mexico. Those who were poor or who had dark features were much less likely to insist they were white. Similarly, recent immigrants were more likely to identify in cultural or national, rather than racial, terms. No homogenous racial identity existed within the U.S. Mexican community. Nevertheless, whiteness formed a central component of elite Mexican identity in the Southwest at mid-century.

The emergence of a white identity among Mexican Americans appears rooted in the development of a notion of "ethnicity" in the early twentieth-century, as well as a concomitant expansion in the popular conception regarding who counted as white. Ethnicity arose as a term of group difference in the early 1900s, when it emerged as a form of identity that would allow expressions of group pride while avoiding the hierarchy central to racial thinking. Ethnicity developed, particularly among Zionists, as a way of capturing what was thought to be "good" about race — a sense of group identity, transmitted by descent, and worthy of loyalty and pride — while eschewing the "bad," the

7. *See* REGINALD HORSMAN, RACE AND MANIFEST DESTINY RACE: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM (1981).

ordering of races and their super- and subordination.[8] Mexican leaders embraced a version of ethnicity in proclaiming at once that they were racially white and so deserved to be free from discrimination, but simultaneously Mexican as a matter of group culture, pride, and political mobilization.

These ideas found clear expression in LULAC's arguments in *Hernandez v. Texas*. As in other cases, LULAC followed what it termed its "other white" legal strategy, protesting not segregation itself, but the inappropriate segregation of Mexican Americans as a white racial group.[9] Thus, LULAC objected in its brief to the Supreme Court that, "while legally white," in Jackson County "frequently the term white excludes the Mexicans and is reserved for the rest of the non-Negro population."[10] Hernández's lawyers did not argue principally that segregation was legally wrong, but that Mexican Americans were legally white. In this, as one of the lead attorneys in the case explained to the Mexican American public, Mexicans were in no different position than other white ethnic groups that had overcome prejudice:

> We are not passing through anything different from that endured at one time or another by other unassimilated population groups: the Irish in Boston (damned micks, they were derisively called); the Polish in the Detroit area (their designation was bohunks and polackers); the Italians in New York (referred to as stinking little wops, dagoes and guineas); the Germans in many sections of the country (call dumb squareheads and krauts); and our much maligned friends of the Jewish faith, who have been persecuted even here, in the land of the free, because to the bigoted they were just "lousy kikes."[11]

The notion of a white ethnic, as opposed to a nonwhite racial, identity was at the root of LULAC's legal challenge to Mexican jury exclusion in Texas.

Texas, meanwhile, also adopted the claim that Mexican Americans were white — though to preserve segregation. Beginning in 1931, LULAC and others had brought at least seven challenges to jury exclusion in Texas before *Hernandez*. In the initial cases, Texas courts had upheld the all-white juries after accepting

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8. *See generally* THEORIES OF ETHNICITY: A CLASSICAL READER (Werner Sollors ed., 1996); MATHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1998).

9. On the "other white" legal strategy, see Steven H. Wilson, Brown *over "Other White": Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HIST. REV. 145 (2003).

10. Brief for Petitioner at 38, Hernandez v. Texas, 347 U.S. 475 (1954) (No. 406). *See also* Neil Foley, *Becoming Hispanic: Mexican Americans and the Faustian Pact with Whiteness, in* REFLEXIONES 1997: NEW DIRECTIONS IN MEXICAN AMERICAN STUDIES. 53 (Neil Foley ed., 1997).

11. Gustavo C. García, *An Informal Report to the People*, in A COTTON PICKER FINDS JUSTICE: THE SAGA OF THE *HERNANDEZ* CASE (Ruben Munguia ed., 1954).

evidence that no Mexican Americans qualified for jury service. For example, one court quoted a jury commissioner as saying that "he did not consider the Mexicans . . . as being intelligent enough to make good jurors, so that [he] just disregarded the whole Mexican list and did not consider any of them."[12] The court cited this as showing that "there was no evidence that there was any Mexican in the County who possessed the statutory qualifications of a juror," and thus concluded that there had been no discrimination "against the Mexican race."[13]

Eventually, this approach proved troubling for the Texas courts, as their evidence regarding the lack of qualified Mexican Americans seemed to demonstrate rather the prevalence of racial prejudice. By the late 1940s, the Texas courts shifted to a new basis for excluding Mexican Americans: they would accept the claim that Mexican Americans were white, but hold that since so too were all of the jurors, there was no discrimination. As the decision under appeal in *Hernandez* reasoned, "Mexicans are white people . . . . The grand jury that indicted [Hernández] and the petit jury that tried him being composed of members of his race, it cannot be said . . . that appellant has been discriminated against in the organization of such juries."[14]

Confronted with contending parties who nevertheless agreed that Mexican Americans were white, how did the Supreme Court react? Immediately, it jettisoned an explicitly racial analysis. The case, Warren said, did not turn on "race or color." But Warren did not then attempt to decide the case in terms of some other form of difference, for instance national origin, ancestry or ethnicity. Rather, the Court approached this case as concerning group subordination generally. "Community prejudices are not static," Warren wrote, "and from time to time other differences from the community norm may define other groups which need the same [constitutional] protection. Whether such a group exists within a community is a question of fact." In this context, Warren reasoned, Hernández's "initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from 'whites.' One method by which this may be demonstrated is by showing the attitude of the community."[15]

Hernandez articulated a simple test for when a class deserves constitutional protection: In the context of the local situa-

12. Ramirez v. State, 40 S.W.2d 138, 138 (Tex. Crim. App. 1931).
13. *Id.* at 139-40.
14. Hernandez v. State, 251 S.W.2d 531, 536 (Tex. Crim. App. 1951), *rev'd*, 347 U.S. 475 (1954).
15. Hernandez v. Texas, 347 U.S. 475, 478-79 (1954).

tion, was the group mistreated? To answer this question, the Court catalogued the Jim Crow system that defined race relations in Jackson County. *Hernandez* struck down jury discrimination against Mexican Americans not because Mexican Americans were nominally a race, but because in the context of mid-century Texas they were a subordinated group.

There's a wonderful irony to *Hernandez v. Texas*: All parties sought to avoid a racial analysis, and the Court claimed to decide the case as if race was not an issue; and yet the case's holding is perhaps the single most insightful Supreme Court opinion on race ever handed down. *Hernandez* understands (even if Chief Justice Warren as the opinion's author did not quite) that race is ultimately a question of community norms and practices — that is, a social construction. No Supreme Court opinion before or since has come so close to this understanding, nor perceived so clearly that subordination should be the touchstone for invoking constitutional intervention when a state distinguishes between groups.

From *Hernandez*, we can extract three fundamental points about race. First, race is constituted through ideas. By asking about community norms in Jackson County, the Court correctly directed attention to how people thought about race and identity. In this regard, though, note that the Court did not confine itself to seeking expressions of clear prejudice; the Court's examination of community norms did not reduce to a search for intentional animus. Instead, the Court found relevant seemingly non-hierarchical norms, such as the fact that community members routinely distinguished between whites and Mexicans. Though the Court did not make this point, it should be clear that racial ideas often form part of an overarching ideology about group difference and social hierarchy. Racial ideas are not limited to a few discrete misconceptions, but form part of a web of beliefs. Moreover, large components of racial ideology operate not consciously but as background beliefs that people take for granted.[16] The vast majority of Anglos in Jackson County probably accepted without considered examination most of the ideas swirling around the bromide that they were white and Mexicans were inferior.

The second point *Hernandez* drives home is that racial ideas produce and then are strengthened by settled practices and material reality. Consider Jackson County's segregated school system: although not mandated by state law, from the turn of the century, Texas school boards customarily segregated Mexican American children because they were, in the words of one school superin-

16. HANEY LÓPEZ, *supra* note 6, esp. chap. 5.

tendent, "an inferior race."[17] This routine practice translated into a hard reality for Mexican students in Jackson County. According to the testimony of one frustrated mother, the "Latin American school" noted by the Court was a decaying one-room wooden building that flooded repeatedly during the rains, with only a wood stove for heat and outside bathroom facilities, and with but one teacher for the four grades taught there.[18] Segregation's material consequences extended to the Mexican American population as a whole. Among the 645 Mexican American adults in Jackson County, only five had completed college, while 245 had no better than a fourth grade education, fully 175 had received no formal education whatsoever, and the median number of school years hovered at a dismal 3.2 years.[19]

It is not just that racial ideas have real consequences; those material manifestations in turn buttress racial ideas. The stereotype that Mexicans were not intelligent enough to serve on juries surely found support in the terrible under-education of Mexican Americans in Jackson County. More generally, the Mexican American population's low educational level conjoined with other aspects of their enforced subordination, such as their general status as manual laborers and their residence in segregated and impoverished enclaves, to confirm not the power of the pernicious social practices that immiserated them but rather the seemingly obvious fact of their racial inferiority. Racial ideas and practices create a skewed material world, only to have that world serve immediately as the surest evidence that race is real.

Finally, *Hernandez* tells us also that race is functional. All racial ideologies are inseparably bound up with social structures — they either justify those structures, the privileges they confer, and the miseries they impose, or they challenge them. In Jackson County, Anglo racial ideas cannot be understood except as an effort by whites to secure material and symbolic advantage, and to excuse the immiseration and brutalization they wreaked on others. Similarly, the rise of a white Mexican American identity reflected an effort to use racial ideas to challenge subordinating

17. GUADALUPE SAN MIGUEL, JR., "LET THEM ALL TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981, at 32 (1987).

18. Transcript of Hearing on Motion to Quash Jury Panel and Motion to Quash the Indictment at 84-87, State v. Hernandez (Dist. Ct. Jackson Co., Oct. 4, 1951) (No. 2091), *reprinted in* Transcript of Record at 74-75 (on file with author), Hernandez v. Texas, 347 U.S. 475 (1954) (No. 406). This testimony relates to experiences with the school in the early 1940s. By 1948, there were apparently two teachers and two rooms in the district's "Latin American school." *Id.* at 51. The Court relies on these latter figures. *Hernandez*, 347 U.S. at 479 n.10.

19. Brief for Petitioner at 19, Hernandez v. Texas, 347 U.S. 475 (1954) (No. 406); U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1950, VOLUME IV: SPECIAL REPORTS: PERSONS OF SPANISH SURNAMES, at 3C-67 (1953).

practices and to secure the privileges of whiteness. In Texas, the racialization of Mexicans, both outside and within that community, stemmed from the pursuit of social and material advantage.[20] I do not claim that race is *solely* driven by social forces such as class conflict, or that race is *always* consciously deployed by self-serving rational actors. Race is not only shaped by but shapes other forms of social competition, and racial ideas have a self-sustaining, taken-for-granted dynamic. Nevertheless, it is also true that race is functional: people engage and remake racial ideas in their own interests. Put more concretely, racial inequality benefits many people and groups, and they will fight to preserve their privilege.

COLORBLINDNESS

Compare *Hernandez* to *Brown v. Board of Education*. In *Hernandez*, at issue was whether the Fourteenth Amendment protected Mexican Americans; if it did, their exclusion from juries was clearly prohibited (jury exclusion was one of the few forms of segregation struck down by the Reconstruction Court).[21] But because the Court could not rely on race per se, it was forced to explain why some groups deserved constitutional protection, and thereby forced to recognize social practices rather than the nature of group identity as the core issue. In *Brown*, however, it was obvious that the Constitution protected African Americans; the troubling question was whether it prohibited school segregation. Blacks were indisputably the intended beneficiaries of the Fourteenth Amendment, and their legal protection required no particular justification. In contrast, segregated schools were the norm, and the Court hesitated to condemn such practices in strong terms, for fear of engendering a backlash. Hence, the Court equivocated. Any fair read of *Brown* would conclude that the case struck down school segregation because it oppressed blacks. But *Brown* did not strongly and unambiguously ground its decision on an anti-subordination rationale. That shortcoming opened the door to the misreading of *Brown* that now dominates constitutional race law: *Brown*, the contemporary Court insists, stands for the proposition that the Constitution prohibits, not subordination, but explicit state invocations of race.

Constitutional race law as it stands now is a disaster. On one side, the Court upholds even the most egregious instances of dis-

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20. NEIL FOLEY, THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE (1997); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986 (1987).

21. Strauder v. West Virginia, 100 U.S. 303 (1879).

crimination. *McCleskey v. Kemp* held that even though Georgia sentenced to death blacks who murdered whites at twenty-two times the rate it mandated death for blacks who killed blacks, there was no constitutional harm absent the identification of a particular biased actor.[22] On the other, the Court wields the Constitution to strike down almost every effort to ameliorate racism's legacy. Thus, *Richmond v. Croson* told us that, when the former capitol of the Confederacy adopted an affirmative action program to steer some of its construction dollars to minority owned firms, this was impermissible discrimination — even when, without the program, less than two-thirds of one percent of those dollars went to minorities in a city over fifty percent African American.[23] It is not too strong to say that the current Court uses the Constitution to protect the racial status quo: it principally condones discrimination against minorities, and virtually always condemns efforts to achieve greater racial equality.

The Supreme Court justifies much of its current racial jurisprudence in terms of what it extols as "colorblindness." Invoking the formal antiracism of the early civil rights movement, colorblindness calls for a principled refusal to recognize race in public life. Yet, in practice, colorblindness advances an abstracted conception of race that allows the Court to be aggressive, not in fighting racism, but in preserving the racial status quo. The colorblind Court refuses to stop discrimination against racial minorities, while it relentlessly condemns efforts to directly remedy racial inequality. Colorblindness as an ideology is committed to protecting racial inequality; its intellectual heart, however, is not a theory of racial inferiority, but of race as an abstract, meaningless category.

The Supreme Court recently handed down a second jury discrimination case involving Latinos, this one too entitled *Hernandez*.[24] *Hernandez v. New York*, in comparison to cases like *McCleskey* and *Croson*, is a minor case, but it puts into sharp relief the understanding of race that undergirds the Court's contemporary racial jurisprudence. In *Hernandez v. New York*, the prosecutor peremptorily struck from the jury every Latino in a case involving a Hispanic defendant and the use of a Spanish-language translator. He did so, he said, because he believed these potential jurors "could not" set aside their familiarity with Spanish. The phrase "could not," rather than "would not," is significant, for while the latter term suggests concern about individual temperament, the former invokes a sense of group disability.

22. McCleskey v. Kemp, 481 U.S. 279 (1987).
23. Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
24. Hernandez v. New York, 500 U.S. 352 (1991).

Also of concern, the prosecutor questioned only Hispanic potential jurors about their ability to speak Spanish.

Nevertheless, the Court upheld the exclusion, finding no bias on the part of the prosecutor. Justice O'Connor's rationale, offered in a concurring opinion, is particularly revealing. O'Connor thought it irrelevant that the basis for exclusion correlated closely to Hispanic identity and operated to exclude all and only Latinos. Because the strikes were not explicitly justified in racial terms, O'Connor reasoned, no basis existed for constitutional intervention. The strikes "may have acted like strikes based on race," O'Connor conceded, "but they were *not* based on race. *No matter how closely tied or significantly correlated to race* the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."[25] According to O'Connor, race is not at issue until and unless someone utters that term. Race exists in this conception almost as a magic word: say it, and race suddenly springs into being, but not otherwise. This magic word formalism strips race of all social meaning; more, it disconnects race from social practices of group conflict and subordination. This ethereal understanding of race provides the cornerstone of the Court's colorblind jurisprudence.

Consider the current requirement that intentional discrimination be shown, exemplified in the *McCleskey* case. Since slavery, Georgia has run a dual system of crime and punishment, incarcerating and executing blacks at far greater rates than whites. When Warren McCleskey challenged his death sentence, he drew on one of the most extensive and sophisticated statistical analyses of capital punishment ever conducted to show that persons like himself, blacks who killed whites, were *twenty-two* times more likely to be condemned to die than blacks who killed blacks.[26] The Supreme Court assumed that the study's findings were accurate, but nevertheless upheld his death sentence because he failed to prove intentional discrimination. According to the Court, the study was "clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose."[27]

But what of the study's uncontroverted showing that racial disparities pervaded Georgia's death penalty system? The study clearly demonstrated, for instance, that race was as powerful a variable in predicting who would live or die in Georgia's death machinery as a prior murder conviction or acting as the principal

25. *Id.* at 375 (O'Connor, J., concurring) (emphasis added).
26. *McCleskey*, 481 U.S. at 327.
27. *Id.* at 297.

planner of a homicide.[28] "At most," the Court said, "the . . . study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system."[29] In dismissing McCleskey's challenge, the Court stated emphatically: "we decline to assume that what is unexplained is invidious."[30] For the Court, the uncontroverted fact that McCleskey was twenty-two times more likely to be executed because his victim had been white rather than black constituted no more than a mere "discrepancy," an "apparent disparity," something "unexplained" which it refused to assume was somehow invidious.

The intent test and the Court's resistance to connecting disparate treatment to racial discrimination tie back to the Court's narrow conception of race. If race reduces to a question of mere physical difference unconnected in any way to social hierarchy or history, then mistreatment on any basis not explicitly tied to physical difference or descent by definition is not racial discrimination. In this context, an intent test makes sense. Race becomes the basis for discrimination only when a party intends that result; otherwise, there is no discrimination, only the "discrepancies" of social life.

In *Hernandez*, Chief Justice Warren emphatically held that constitutional harm could be demonstrated absent a showing of intentional discrimination. Responding to the state's contention that no purposeful racism could be shown, Warren retorted "it taxes our credulity to say that mere chance resulted in their being no members of [the Mexican group] among the over six thousand jurors called in the past twenty-five years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner."[31] Cannot we say the same? Does it not tax our credulity to say that the racial disparities in Georgia's death penalty system resulted from mere chance? Race is not merely a word or skin pigment, it is 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 responses to racial inequality with racism. Under colorblindness, there is no difference between racism and affirmative action, be-

28. *Id.* at 326.
29. *Id.* at 312.
30. *Id.* at 312-13.
31. Hernandez v. Texas, 347 U.S. 475, 482 (1954).

tween Jim Crow and racial remediation. As Justice Clarence Thomas declares, "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."[32] 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 conception of race as just skin color. When race is abstracted from social context and group conflict, then the harm of racism is reduced to a violation of liberal norms. Under this conception, to treat someone differently on the basis of race is to treat them in an arbitrary manner unrelated to anything meaningful about them. This is, to be sure, a potential issue with affirmative action, as it is with a wide range of distinctions our society commonly makes. But it is hard to imagine a more impoverished understanding of the harms of Jim Crow. The lawyers for Hernández drove 100 miles every morning 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.[33] As *Hernandez* emphatically demonstrates, the principal harm of racism is violent subordination, not the transgression of meritocratic norms usually honored only in the breach.

Today's Court gets racism backwards: it claims racism amounts to any use of race, when in fact efforts to counteract racial oppression's extensive harms have no choice but to reference race. And it denies there is racism no matter how stark the impact if race is not specifically invoked by a state actor, even though most racism now occurs through institutionalized practices.[34] This misunderstanding of racism is anchored by a narrow, no-context conception of race. It is race-as-a-word-that-must-be-uttered-for-it-to-exist, race-as-skin-disconnected-from-social-practice-or-national-history, which undergirds colorblindness. This is no innocent error. Colorblindness is a new racial ideology geared to the preservation of racial inequality. It does so not by openly embracing white supremacy; on the contrary, it seeks legitimacy by vociferously decrying old-style racism. Rather, colorblindness rests — as all racial ideologies ultimately do — on a particular, consequential conception of race.

32. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

33. García, *supra* note 11.

34. Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

ANTI-CATEGORICAL POLITICS

Colorblindness usually presents race as merely blood or skin color to justify its regressive understanding of race as lacking any social meaning. One might suppose, then, that colorblindness can be attacked by showing that race is not a matter of physical differences, but instead a social construction. This tactic will fail, however, unless one emphasizes not the made-up nature of race, but race's continued vitality in structuring inequality in our society.

Colorblindness already contains within it an anti-categorical element, a drive to bring into doubt racial taxonomies. This politics has been most pronounced with respect to the existence of a white category, where it follows from the effort to distance race from the dynamics of group conflict. At least since 1976, the Court has reasoned as if whites do not exist as a race — except as victims of racism. In the *Bakke* affirmative action case, Justice Powell addressed whether the Court should defer when the state discriminated in favor of, rather than against, minorities. He began by acknowledging that the Fourteenth Amendment was originally crafted to protect African Americans. But, Powell averred, by the time of *Brown*, "the United States had become a Nation of minorities. Each had to struggle — and to some extent struggles still — to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups of whom it was said — perhaps unfairly in many cases — that a shared characteristic was a willingness to disadvantage other groups." Insisting that "the concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments," Justice Powell asserted that "the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only 'majority' left would be a new minority of white Anglo–Saxon Protestants."[35] In a few short paragraphs, Justice Powell erased whites as a dominant group — and conjured instead whites as potential victims in the brave new world of civil rights and racial remediation.

To be sure, this anti-categorical politics has not been in evidence with respect to most minorities. As you might expect where race is viewed as a matter of skin color, the Court's colorblind jurisprudence has largely reasoned as if black, yellow, and

35. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 292, 295-96 (1978).

red are unproblematic categories. Consider, for instance, Chief Justice Rehnquist, who consistently takes positions against Native American interests in federal Indian law cases — in one opinion, he approvingly quoted a description of Indians as "fine physical specimens" who "lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching."[36] This is not exactly the language of someone deeply skeptical about the existence of races.

Nevertheless, the Court's selective hostility to racial categories has been a prominent component of its colorblind jurisprudence, one that I suspect will gain in response to the spreading recognition that race is socially constructed. Constructionist arguments challenge the sort of physically-based reasoning that has been common on the Court. But directed merely at the contingent nature of racial ideas, such arguments will not topple colorblindness. The linchpin of colorblindness is not the claim that race reduces to physical differences, but that race is divorced from social meaning. Rather than recoil from constructionist arguments, the Court and colorblindness proponents generally will most likely seize on them to buttress their attacks on racial categories. Already, the colorblind refrain is shifting from the claim that race amounts to superficial differences to the notion that racial categories are egregious errors. Colorblindness is assisted rather than opposed by arguments that race lacks coherent meaning.

Not all who attack racial categories as contingent inventions aim to promote colorblind politics. Indeed, revealing the made-up nature of racial ideas is fundamental to counteracting regnant racial ideology. Nevertheless, we should be careful not to assume that deconstructing racial categories will necessarily disestablish race. Efforts to deconstruct racial categories, without more, lose sight of the fact that race is much more than a set of ideas; it is an on-going set of social practices and structures. We best oppose colorblind politics by insisting on the deep connection between ideas of race and social inequality. This, perhaps, is the single most important insight of *Hernandez v. Texas*. The core issue was not whether race was invoked directly, as the current Court would require, nor was it whether Mexican Americans did or did not constitute a race, as someone concerned with categorical coherence might ask. The core question for the Court was, and should be again: do social practices subordinate groups based

36. United States v. Sioux Nation of Indians, 448 U.S. 371, 436-37 (1980) (Rehnquist, J., dissenting).

upon ideas of racial difference? Then and now, the answer remains a tragic but resounding yes.