Hernandez v. Brown

By Ian Haney López

BERKELEY, Calif. ith commemorations from coast to coast to remind them, most Ameralready icans that this know week was the 50th anniversary of Brown v. Board of Education. Unfortunately, what they don't realize is that the country missed an equally important anniversary two weeks ago, that of Hernandez v. Texas - the perennially overshadowed antecedent to Brown that was decided on May 3, 1954.

That case merits commemoration not just because the Supreme Court used it to finally extend constitutional protection to Mexican-Americans, important though that is, especially now that Latinos are the largest minority group. It's worth celebrating because Hernandez got right something that Brown did not: the standard for when the Constitution should bar group-based discrimination.

Hernandez involved jury discrimination, which the court had long prohibited. The question in Hernandez, unlike in Brown, was not whether the state's conduct was unconstitutional; it was whether the Constitution protected Mexican-Americans. But the dynamics of the case prevented the court from answering that question by reasoning that Mexican-Americans, like blacks, constituted a racial minority.

That's because the political and social leaders of the Mexican-American

Ian Haney López, a law professor at the University of California at Berkeley, is the author of "Racism on Trial: The Chicano Fight for Justice." community at that time argued for equality not on the ground that discrimination was wrong per se, but because they were white. Texas, in turn, harnessed this argument to its defense, pointing out that if Mexican-Americans were white, so too were the persons seated on Texas juries.

Because both sides insisted that Mexican-Americans were white, Hernandez v. Texas forced the court to confront directly a question it would sidestep in Brown: under precisely what circumstances did some groups deserve constitutional protection? Hernandez offered a concise answer: when groups suffer subordination.

"Differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws," the court wrote. But, it said, "other differences from the community norm may define other groups which need the same protection." Succor from state discrimination, the court reasoned, should apply to every group socially defined as different and, implicitly, as inferior, "Whether such a group exists within a community is a question of fact," the court said, one that may be demonstrated "by showing the attitude of the community."

How, then, did the Texas community where Hernandez arose regard Mexican-Americans? Here the court catalogued Jim Crow practices: business and community groups largely excluded Mexican-Americans; a local restaurant displayed a sign announcing "No Mexicans Served"; children of Mexican descent were shunted into a segregated school and then forced out altogether after the fourth grade; on the county courthouse grounds there were two men's toilets, one unmarked and the other marked "Colored Men" and

"Hombres Aquí" ("Men Here").

The same sort of caste system that oppressed blacks in Texas also harmed Mexican-Americans. But it was Jim Crow as group subordination, rather than as a set of "racial" distinctions, that called forth the Constitution's concern in Hernandez v. Texas.

Of course, Brown v. Board of Education also responded to group mistreatment. But the court did not state in sufficiently explicit terms that school segregation violated the Constitution because it constituted systematic oppression, rather than because it turned on race. This small lapse left open just enough space for the misreading of Brown that now dominates conservative thinking on antidiscrimination law - including on the Supreme Court. Brown, the majority now contends, stands for the proposition that the Constitution opposes not noxious practices of oppression but instead only the

What the little case got right that the big case got wrong.

state use of formal racial distinctions.

The anti-caste commitment of Brown lies today distorted, and its efficacy as constitutional law largely eroded. Treating every official use of race as akin to racism, the Supreme Court erects virtually insurmountable constitutional hurdles against all race-conscious government action. No statement better captures this misguided equation of Jim Crow and affir-

mative action than Justice Clarence Thomas's assertion 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."

Meanwhile, the court protects from constitutional challenge situations in which racism operates powerfully but not explicitly. For example, even after conceding that Georgia sentenced to death blacks who killed whites 22 times more often than blacks who killed blacks, the court upheld Georgia's death penalty machinery. Under 14th Amendment law, any use of race encounters the same constitutional hostility; but systematic discrimination, if not expressly based on race, receives the Constitution's blessing.

The current court reasons as if Brown held that it is race per se, rather than racism and maltreatment, that offends the Constitution. In this, Brown itself is partly to blame. Confident that the 14th Amendment protected blacks, Chief Justice Earl Warren in Brown did not expressly explain why this was so: not because they were a race, but because they were oppressed.

Under the title "What Brown v. Board of Education Should Have Said," Jack Balkin, a Yale law school professor, recently enlisted legal scholars to rewrite that decision in a manner that might have prevented the distortions that now mar constitutional antidiscrimination law. But the exercise is largely unnecessary. Chief Justice Warren already said what Brown should have. He did so two weeks earlier, in Hernandez v. Texas. After 50 years, the time has come for courts and scholars to install Hernandez where it belongs: at the center, with Brown, of a robust 14th Amendment law committed to ending racial subordination.