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## **RACE AND COLORBLINDNESS AFTER *HERNANDEZ* AND *BROWN***

### **ABSTRACT**

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This year marks the fiftieth anniversary of *Brown v. Board of Education*, an anniversary that has been widely commemorated, but that has also occasioned renewed warnings regarding the persistence of racial inequality. Nevertheless, almost all agree that *Brown* marks the first case in which Chief Justice Earl Warren, writing for a unanimous Supreme Court, began to dismantle Jim Crow. But it is not. Instead, that distinction belongs to a case decided two weeks before *Brown*, a jury exclusion case called *Hernandez v. Texas*. *Hernandez* deserves our attention today partly for reasons of historical accuracy, but more importantly because it makes clear, in a way that *Brown* does not, that it is race as subordination, rather than race per se, that demands Constitutional concern.

When read together, *Hernandez* and *Brown* provide a powerful critique of colorblindness, the racial ideology now dominant on the Supreme Court and ascendant in American public life. Colorblindness claims a principled commitment to opposing racism; yet, in practice, colorblindness recognizes as racism only the state's explicit use of race, which now occurs almost solely in efforts to ameliorate racial inequality. This politics rests on an abstract conception of race stripped of historical context. Insisting that race is a social construction is an insufficient rejoinder; indeed, colorblindness will increasingly embrace a constructionist conception of race. Instead, as *Hernandez* suggests, race must be understood for legal purposes as a product of status conflict and social subordination.