Sweatt photo courtesy of the Center for American History at the University of Texas at Austin.

THE TEXAS CONNECTION

Supreme Court of

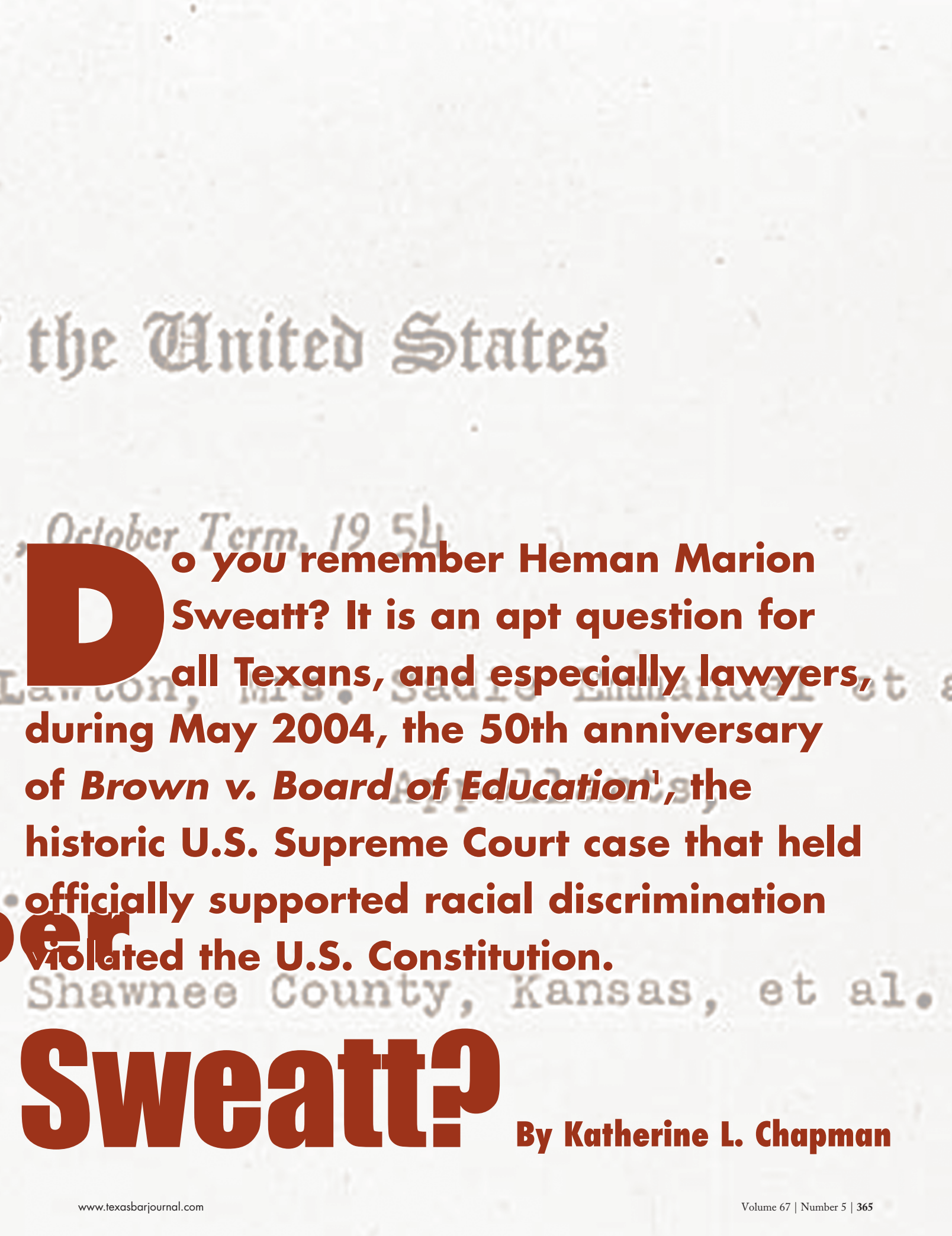
No. 1 ----

Oliver Brown, Mrs. Richard

Do You Rememb

Board of Education of Topeka,

Heman Marion



Do you remember Heman Marion Sweatt?

Do *you* remember Heman Marion Sweatt? It is an apt question for all Texans, and especially lawyers, during May 2004, the 50th anniversary of *Brown v. Board of Education*[1], the historic U.S. Supreme Court case that held officially supported racial discrimination violated the U.S. Constitution.

By Katherine L. Chapman

Chronology

Chronology excerpts courtesy of the NAACP Legal Defense and Educational Fund, Inc. and Texas Council for the Humanities. Please visit ***www.brownmatters.com*** *and* ***www.naacpldf.org*** *as well as* ***www.public-humanities.org/initiatives/parallel_class.htm***.

1933 Thurgood Marshall graduates first in his class from Howard University's School of Law. Oliver Hill, also a classmate and one of the *Brown* counsels, graduates second. Marshall and Hill were both mentored by the law school's vice-dean Charles Hamilton Houston.

1934 Houston joins the National Association for the Advancement of Colored People (NAACP) as part-time counsel.

1935 After having been denied admittance to the University of Maryland Law School, Marshall wins a case in the Maryland Court of Appeals against the law school, which gains admission for Donald Murray, the first black applicant to a southern law school.

1936 Marshall joins the NAACP's legal staff.

1938 *Missouri ex rel. Gaines v. Canada:* The U.S. Supreme Court invalidates state laws that required African-American students to attend out-of-state graduate schools to avoid admitting them to their states' all-white facilities or building separate graduate schools for them.

1940 *Alston v. School Board of City of Norfolk:* A federal appeals court orders that African-American teachers be paid salaries equal to those of white teachers.

1948 *Sipuel v. Oklahoma State Regents:* The Supreme Court rules that a state cannot bar an African-American student from its all-white law school on the grounds that she had not requested the state to provide a separate law school for black students.

1950 *McLaurin v. Oklahoma State Regents:* The Supreme Court holds that an African-American student admitted to a formerly all-white graduate school could

Why remember Mr. Sweatt or, for that matter, Donald Murray, Lloyd Lionel Gaines, or Ada Lois Sipuel? In the words of former U.S. Supreme Court Justice Thurgood Marshall:

> It is useful … to recall their stories, not to dwell on the past, but to see concrete evidence of what *was* (emphasis added) in order to gain inspiration for what can be.[2]

Thurgood Marshall made this statement — one of his last public statements before retirement — on July 4, 1992, in Philadelphia, upon receiving the Medal of Liberty.[3] Sharing with the audience stories of people he believed understood the meaning of liberty because of the risks they took and the courage they displayed, Heman Marion Sweatt's name was the first he mentioned. And this was 45 years after the trial in which he was plaintiff.[4]

"Heman Sweat," he said, "was an ordinary person, but he had an extraordinary dream to live in a world in which Afro-Americans and whites alike were afforded equal opportunity to sharpen their skills and to hone their skills, to sharpen their minds."[5]

So, let's recall Heman Marion Sweatt's story in order to remember what *was*.

Sweatt was a veteran and employee of the U.S. Post Office living in Houston when he decided he wanted to be a lawyer. A graduate of Wiley College, he thought about becoming a physician. But after working with attorneys and civil rights advocates, including his father, he decided law would be most useful. At the time he applied for admission to the University of Texas School of Law (UT), Feb. 26, 1946, there were only 23 black lawyers in Texas although the black population exceeded 800,000.[6]

Prior to 1946, legal education was not available to African-Americans in a public college or university in Texas.[7] African-Americans who desired a legal education either studied in a law office or attended a black out-of-state law school.[8]

Susan Zukanovic, Galindo Elementary, Austin

Heman Marion Sweatt had seen the National Association for the Advancement of Colored People (NAACP)[9] successfully challenge the constitutionality of state-sanctioned segregation, one step at a time, beginning in the 1930s. Charles Hamilton Houston,[10] the NAACP's first full-time counsel,[11] had devised the "equalization strategy": the filing of cases claiming that southern states were in violation of equal protection based on inferior or unequal facilities provided for blacks. He would challenge states to "live up to the equalization, the equal part of the *Plessy* [sep-

arate but equal] formula."[12] Houston also decided to focus on professional and graduate schools, figuring southern states were the most vulnerable there.[13]

The State of Maryland produced the first victory for the equalization strategy in *Pearson v. Murray*.[14] There the state courts ordered that Donald Murray, an Amherst College graduate who had been denied admission to the state's only law school solely because of race, be admitted.[15] Rejecting Maryland's policy of providing scholarships for black students to attend law school outside the state, the court of appeals determined that the policy did not provide "substantial equality"[16] since there was no assurance that a particular black applicant would receive a scholarship; the scholarship did not cover housing, travel, or incidental expenses; and the student could not study Maryland law in the out-of-state school.[17] Donald Murray was admitted to The University of Maryland School of Law, graduated, and accepted an attorney position with the Maryland Attorney General's Office.[18] His attorneys were Charles Hamilton Houston and a young Thurgood Marshall.[19]

Though a significant success for Donald Murray and the NAACP lawyers representing him, including Thurgood Marshall, whose home state was Maryland, the new law arising from the case applied only in Maryland. Thereafter, other plaintiffs were located and additional cases were filed, including *Missouri ex rel. Gaines v. Canada*[20] involving Lloyd Lionel Gaines and the University of Missouri School of Law.

Gaines was a top graduate of Lincoln University, a black school operated by the State of Missouri. The state courts denied relief to Gaines because Missouri had agreed to establish a law school for blacks in the future and, in the interim, would provide scholarships for black students to attend law schools in adjacent states.

When the case reached the U.S. Supreme Court, the chief justice relied on the Maryland Court of Appeals opinion in *Murray* that held that Lloyd Gaines had the same personal right to a legal education within the State of Missouri as did whites.[21] If Missouri did not have a law school for blacks, the state would have to permit Gaines to attend the otherwise all white law school.[22] The Missouri law requiring separate but equal educational facilities for blacks and whites was struck down as unconstitutional.

In response, the State of Missouri established a law school for blacks at Lincoln University (which lasted four years and produced several lawyers who passed the bar exam and practiced law). During the pendency of the suit and before the hearing where the equality of the two separate schools was to be judged, Gaines had earned a masters degree in economics from the University of Michigan. He was living in a fraternity house on campus when he went out to buy stamps and vanished, never to be seen again or to be accounted for. Because of his disappearance, Thurgood

Abstract

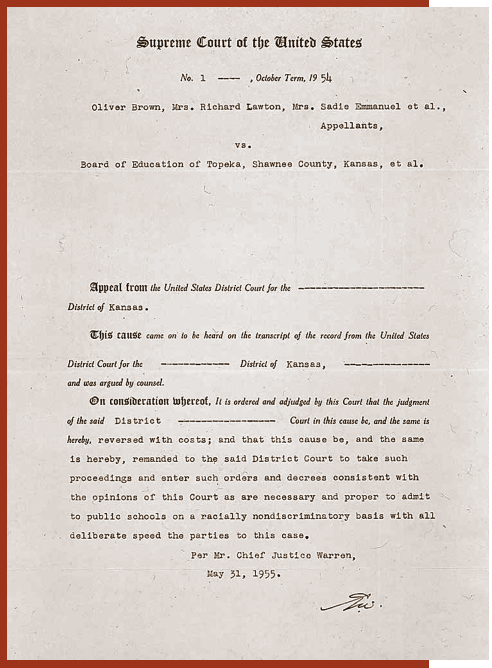
Brown v. Board of Education of Topeka

347 U.S. 483 (1954)

Docket Number: 1
Argued: December 8, 1952
Reargued: December 7, 1953
Decided: May 17, 1954

Facts of the Case

Black children were denied admission to public schools attended by white children under laws requiring or permitting segregation according to the races. The white and black schools approached equality in terms of buildings, curricula, qualifications, and teacher salaries. This case was decided together with *Briggs v. Elliott* and *Davis v. County School Board of Prince Edward County*.



Supreme Court of the United States

No. 1 ——, October Term, 19 54

Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emmanuel et al., Appellants,

vs.

Board of Education of Topeka, Shawnee County, Kansas, et al.

Appeal from the United States District Court for the ———— District of Kansas.

This cause came on to be heard on the transcript of the record from the United States District Court for the ———— District of Kansas, ———— and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District ———— Court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said District Court to take such proceedings and enter such orders and decrees consistent with the opinions of this Court as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to this case.

Per Mr. Chief Justice Warren,
May 31, 1955.

ON MAY 31, 1955, THE U.S. SUPREME COURT HANDED DOWN BROWN II ORDERING THAT DESEGREGATION OCCUR WITH "ALL DELIBERATE SPEED."

Question Presented

Does the segregation of children in public schools solely on the basis of race deprive the minority children of the equal protection of the laws guaranteed by the 14th Amendment?

Conclusion

Yes. Despite the equalization of the schools by "objective" factors, intangible issues foster and maintain inequality. Racial segregation in public education has a detrimental effect on minority children because it is interpreted as a sign of inferiority. The long-held doctrine that separate facilities were permissible provided they were equal was rejected. Separate but equal is inherently unequal in the context of public education. The unanimous opinion sounded the death-knell for all forms of state-maintained racial separation.

Chief Justice Warren delivered the opinion of the Court.

Oyez: U.S. Supreme Court Multimedia (www.oyez.com)

Chronology

not be subjected to practices of segregation that interfered with meaningful classroom instruction and interaction with other students, such as making a student sit in the classroom doorway, isolated from the professor and other students.

1950 *Sweatt v. Painter:* The Supreme Court rules that a separate law school hastily established for black students to prevent their having to be admitted to the University of Texas School of Law could not provide a legal education "equal" to that available to white students. The court orders the admission of Heman Marion Sweatt to the University of Texas Law School.

1952 Huston-Tillotson College formed in Austin by merger of Samuel Huston College and Tillotson College

1954 *Brown v. Board of Education:* The Supreme Court rules that racial segregation in public schools violates the 14th Amendment, which guarantees equal protection, and the Fifth Amendment, which guarantees due process. This landmark case overturned the "separate but equal" doctrine that underpinned legal segregation.

1955 *Brown v. Board of Education (II):* Court orders desegregation to proceed with "all deliberate speed."

1955 *Lucy v. Adams:* A federal district court orders the admission of Autherine Lucy to the University of Alabama, and the Supreme Court quickly affirms the decision.

1955 Rosa Parks refuses to give her bus seat to a white passenger and move to the back. Ms. Park's arrest sparks the 382-day Montgomery, Ala., bus boycott and the civil rights movement.

1957 President Eisenhower orders National Guard to Little Rock, Ark., to escort nine black students to Central High School to enforce Brown.

1958 *Cooper v. Aaron:* Supreme Court ruling barred Arkansas Governor Orval Faubus from interfering with the desegrega-

Marshall sadly reported, "that case could not be followed through and ended with the establishment of a Jim Crow law school."[23]

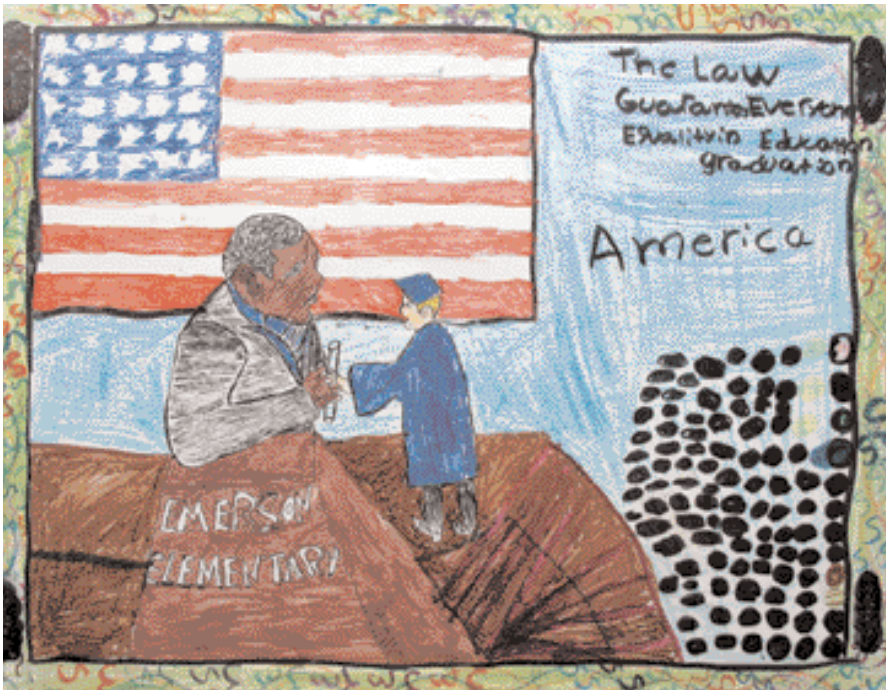
The NAACP then filed a case "virtually on all fours with *Gaines*" in Oklahoma. Ada Lois Sipuel, an honor graduate of Langston University, an Oklahoma state college for blacks that offered no graduate or professional training, was refused admission to the University of Oklahoma Law School solely because of her race. She filed suit against the university and in a *per curiam* opinion issued only four days after oral argument, the U.S. Supreme Court ordered Oklahoma to provide her with a legal education "in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group."[24] The court's order cited only one case — *Gaines*.[25]

The State of Oklahoma responded by finding a part of its Capitol to use as the Langston University Law School for black students. Ada Sipuel attempted to challenge the action by filing an original action for mandamus in the Supreme Court, but the court stated that its earlier decision had not addressed the issue of the constitutional adequacy of separate educational institutions, and it could not now consider the method of compliance with the original order.[26]

Sipuel refused to enroll in the law school for blacks; it went out of existence on June 30, 1949. Sipuel was ultimately admitted to the previously all white University of Oklahoma School of Law in June 1949. She received her law degree in 1951 and practiced law with an Oklahoma City firm. Later she returned to Langston University as an administrator, then faculty member and department chair, and served on the board of regents of the University of Oklahoma.[27]

Heman Sweatt's turn had come. The young man with the "yen to be a lawyer"[28] had decided to fight. His case, *Sweatt v. Painter*,[29] is perhaps the most significant of the cases preliminary to *Brown*, which were part of the NAACP's carefully planned strategy designed to chip away at "separate but equal."[30]

Sweatt applied for admission to the University of Texas School of Law (UT) on Feb. 26, 1946, after his attorneys met with university officials. Since the Texas Constitution required separate schools



Alfonso Alvarez, Emerson Elementary, Houston

for white and black students,[31] UT denied Sweatt's application solely because he was black.[32] President Theophilus S. Painter wrote Sweatt's rejection letter, informing him that Texas would provide him with the opportunity to pursue legal education by "creating a 'colored' law school."[33] Sweatt declined the offer and filed suit against UT. The case was filed in Austin as a mandamus action to compel UT to admit him. Initially Sweatt was represented by attorney W.J. Durham of Dallas, a cooperating attorney for the NAACP, and later by Thurgood Marshall. Both men eventually argued the case before the Texas Supreme Court, and Robert L. Carter, Williams R. Ming, Jr., James M. Nabrit, and Franklin H. Williams assisted with the brief.[34] A number of black attorneys in Texas provided invaluable volunteer assistance to the NAACP in handling this, and the other education cases, from pre-trial to the U.S. Supreme Court.

The issue of higher education for blacks was already a topic of discussion in Texas when Sweatt applied for admission to UT. In fact, the Texas Legislature had passed a law providing for the establishment, whenever there was demand for it, of black-only professional education programs that were substantially equivalent to those offered at UT. Because no law school for blacks had yet been established, the trial court in *Sweatt* delayed the case for six months so that Texas could establish one.[35]

"At the expiration of the six months, on Dec. 17, 1946, the trial court denied the writ on the showing that the 'A&M Board had provided for the first year law school at Houston to open with the February 1947 semester, as a branch of Prairie View University.'[36] While [Sweatt's] appeal was pending, [he] refused to register therein. The Texas Court of Civil Appeals set aside the trial court's judgment and ordered the cause remanded … to the trial court for further proceedings. On remand, [the cause was again tried], on the issue of the equality of the educational facilities at the newly established [interim School of Law of the Texas State University for Negroes in Austin] as compared with [UT]."[37]

Perhaps realizing how unconvincing

Lifetime Achievement

National Council of School Attorneys Honors Frels

Kelly Frels, a partner in Bracewell & Patterson, L.L.P. and State Bar president-elect, received the first-ever Chairman's Award for Lifetime Achievement from the National School Boards Association Council of School Attorneys.

"It is a special honor to receive this award in 2004 — the year we celebrate the 50th anniversary of the *Brown* decision," said Frels. "I believe *Brown* is probably the seminal school law case in that it defines the role of public schools in our society. It set the stage for how the Supreme Court was going to treat public education in the future."

Frels began assisting the Houston Independent School Distrrict with its integration efforts in 1971. He helped the district craft a desegregation remedy of magnet schools. The district's vision was to create magnet schools that offered the kinds of educational programming that students would be glad to get on a bus to attend. The comprehensive plan was a success and began a trend of magnet schools nationwide.

Chronology

tion of Little Rock's Central High School. The decision affirms Brown as the law of the land nationwide.

1959 Prince Edward County, Va. closes all of its public schools rather than desegregate them.

1960 *Borders v. Rippy*: Federal ruling begins the desegregation of Dallas schools.

1960–1965 With the sit-ins in North Carolina and Tennessee, the Freedom Rides to Alabama and Mississippi, and the voter registration program in the Deep South, the Civil Rights Movement rivets the nation.

1961 President John F. Kennedy appoints Thurgood Marshall to the United States Court of Appeals for the Second Circuit.

1961 *Holmes v. Danner:* LDF wins admission to the University of Georgia for two African Americans: Charlayne Hunter and Hamilton Holmes.

1962 *Meredith v. Fair:* James Meredith finally succeeds in becoming the first African-American student to be admitted to the University of Mississippi.

1964 The Civil Rights Act of 1964 is passed by Congress. It bans discrimination in voting, public accommodations, schools, and employment.

1965 The Voting Rights Act is passed by Congress.

1967 Thurgood Marshall is the first African-American appointed to the U.S. Supreme Court.

1968 The Fair Housing Act is passed by Congress, prohibiting discrimination in the sale and rental of housing.

1968 *Green v. County School Board of New Kent County* (Virginia): The Supreme Court holds that "freedom of choice" plans were ineffective at producing actual school desegregation and had to be replaced with more effective strategies.

1970 *U.S. v. Texas*: U.S. District Court orders Texas Education Agency to assume responsibility for desegregating Texas public schools.

1970 *Turner v. Fouche:* The Supreme Court holds unconstitutional

Joy Lin, McMeans Junior High, Katy

the state's actions at creating separate but equal law schools would be on appeal, shortly after his election as governor and prior to the second trial, Beauford Jester proposed creating a university of the first class for blacks, equivalent to UT. The 50th Texas Legislature, in 1947, established the Texas State University for Negroes,[38] and "with the impending *Sweatt* case, the [board of directors] made a special effort with the law school because the state stood no chance of its case if a first class law school were not created at Texas State before the Supreme Court heard oral arguments."[39] (Three years later the name was changed to Texas Southern University, which survives today.)[40] The board of directors recruited faculty members vigorously and determined to obtain accreditation for the new law school as quickly as possible.[41]

As *Sweatt* made its way through the Texas courts, the NAACP lawyers' assessment was that even though Texas could provide evidence of a separate law school for blacks, it could not prove that a new law school was identical or substantially equal to the famed UT School of Law. Even such seemingly objective factors as student-faculty ratio, class size, and library holdings might rationally be evaluated differently. To the extent that subjective criteria such as prestige and tradition entered the equation, the outcome became even less predictable. The plaintiff's burden was not light.[42] But the NAACP was still optimistic if only they could get the case to the U.S. Supreme Court.

The case became even more complicated because the Texas Legislature, while establishing the new law school for blacks in Houston in 1947, authorized the new school to be operated on an interim basis in Austin. At the time of the second state court trial, only the temporary law school had begun operation. It was located in an office building across the street from the state capitol. Although unaccredited, its faculty consisted of three or four professors from UT, and the dean, registrar and librarian of UT served in the same capacity for the interim law school. With a few books in the library and 10,000 on order, the black students were permitted to use the law library in the capitol. The interim law school of the Texas State University for Negroes opened with two students.

Heman Marion Sweatt refused to attend, asserting that it was not "equal" to UT, which was a nationally distinguished law school with a faculty of 16 full-time and three part-time professors, a student body of 850, a library of 65,000 volumes, a law review, moot court, extracurricular activities, and a large corps of prominent graduates.[43]

At the trial, both sides called prominent legal academics to give opinions on the equality of the two law schools. Thurgood Marshall called Earl G. Harrison, dean of the University of Pennsylvania Law School and Malcolm P. Sharp, professor of law at the University of Chicago. UT's attorneys, Texas Attorney General Price Daniel, and First Assistant Attorney General Joe R. Greenhill, used Dean Charles T. McCormick and Professor A.W. Walker, Jr. from UT. Much of the testimony and arguments concerned the equality of the schools' physical facilities. Though larger in every respect than Texas State, UT was severely overcrowded, with twice as many students using its classrooms, library, and other facilities as the buildings were designed to accommodate.

Thurgood Marshall devoted most of his case to establishing the existence of more subtle qualitative differences between the two law schools, such as the difference in class size and the resulting fewer opportunities for discussions and learning from other students. Testimony conflicted. Dean McCormick said small classes, such as those at Texas State University law school, presented students with unusual opportunities for personal instruction while Dean Harrison said it was absurd to call an institution with one student a law school.

Sweatt's experts regarded the chief shortcomings of Texas State to be the all-black restriction which "would deny its students the benefits of interchange and association with a community that reflected diverse viewpoints and experiences of the general populace,"[44] "the extremely small size of the class [which] would prevent effective instruction in the case method and the maintenance of a law review, moot court, full-time faculty, and other indicia of an outstanding law school,"[45] and "the complete absence of upperclassmen during Sweatt's first year [which] would deny him important educational benefits, a loss that would defeat his personal right to legal training equal to that provided at [UT]."[46] Other experts testified about the effect of segre-

Quotable

From Chief Justice Warren's Decision in *Brown*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Chief Justice Warren
(Brown v. Board of Education, 347 U.S. 483 (1954))

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Taliaferro County's (Georgia) requirement of real property ownership for grand jurors and school board members.

1971 *Swann v. Charlotte-Mecklenberg Board of Education:* The Supreme Court upholds the use of busing as a means of desegregating public schools.

1973 *Norwood v. Harrison:* The Supreme Court rules that states could not provide free textbooks to segregated private schools established to allow whites to avoid public school desegregation.

1973 *Keyes v. School District No. 1, Denver:* The Supreme Court establishes legal rules for governing school desegregation cases outside of the South, holding that where deliberate segregation was shown to have affected a substantial part of a school system, the entire district must ordinarily be desegregated.

1973 *Adams v. Richardson:* A federal appeals court approves a district court order requiring federal education officials to enforce Title VI of the 1964 Civil Rights Act (which bars discrimination by recipients of federal funds) against state universities, public schools, and other institutions that receive federal money.

1974 *Milliken v. Bradley:* The Supreme Court rules that, in almost all cases, a federal court cannot impose an inter-district remedy between a city and its surrounding suburbs in order to integrate city schools.

1978 *Bakke v. Regents of the University of California:* The Supreme Court rules that schools can take race into account in admissions, but cannot use quotas.

1982 *Bob Jones University v. U.S.; Goldboro Christian Schools v. U.S.:* The Supreme Court appoints LDF Board Chair William T. Coleman, Jr. as "friend of the court" and upholds his argument against granting tax exemptions to religious schools that discriminate.

1984 *Geier v. Alexander:* As part of a settlement of a case requiring

gation on the learning process.[47]

"The significance of Thurgood Marshall's trial strategy cannot be exaggerated."[48] He focused upon the benefits of an education in integrated schools and upon the negatives of students trying to learn in segregated settings. He steered the legal debate away from comparison of purely physical facilities to comparison of the subtleties of the individual's learning experience.

The trial court focused on the state's moral and financial commitment to the establishment of a new law school of "substantially equal" facilities to UT, and to the identical entrance and graduation requirements and curriculum. The court stated that Sweatt would be afforded "equal if not better opportunities for the study of law in [the] separate [law] school"[49] at Texas State University for Negroes. The Court of Civil Appeals affirmed the judgment,[50] and the Texas Supreme Court denied the application for writ of error on Sept. 29, 1948.[51]

Finally, Marshall believed he had the right case in the U.S. Supreme Court and he presented only one question for review in his petition for certiorari filed on March 23, 1949: "May the State of Texas consistently with the requirements of the 14th Amendment refuse to admit

Jonathon Frost, Pattison Elementary, Houston

[Heman Marion Sweatt] because of race and color to the University of Texas School of Law?"[52]

The Supreme Court granted review and scheduled *Sweatt* for consideration along with *Henderson v. United States*[53] and *McLaurin v. Oklahoma State Regents for Higher Education*,[54] both cases involving physical isolation of blacks admitted to schools for whites.

Quotable

From an Oral History of Judge Barefoot Sanders:

Q: *Are there any cases that stand out?*

A: Well, of course, I had the Dallas school desegregation suit, which I inherited through a draw from the hat [in 1981]. … Back then, there was a lot of controversy about busing. … I didn't order much more busing. I re-zoned a few school areas, which added some to the mix of integration. I did not feel, in this big city, that it was worthwhile trying to bus kindergarten through third grade. We had time-distance studies showing that it was going to take 45 minutes each way. That is just too much. We went through all that and then we cut out most of the busing in 1985 and 1986, because as it developed, African-American children from South Dallas were going to school in Northeast Dallas with other African-Americans. That made no sense at all, so we brought them back. We established what we called Learning Centers with more emphasis on smaller classes.

Q: *It must be gratifying to start out your career in the Texas Legislature in the early 1950s working on school desegregation and then at this point in your career being able to work on it even more effectively?*

A: Well, actually, down there, at that time, it was more than schools, it was the whole desegregation process in the Legislature, because the public hostility to desegregation was pretty big.

• • •

Q: *You're in a good position, then, to talk about all the changes that have happened over the legal field since you've been practicing?*

A: … I mentioned women, but the minorities coming into the profession, particularly African-Americans, has been another welcome change. I say "particularly" because that's where the thrust of discrimination was in this part of the state. … I remember the Dallas Bar finally let African-Americans in during the 1950s. But now there's a lot of emphasis and there should be. It is the whole diversity idea. I think it has added a whole lot to what we all know about the country and about the profession. It's a very good thing. Progress comes slowly, but it comes.

From an oral history of Judge Barefoot Sanders conducted by the Texas Bar Foundation in 2002 when Sanders was honored as an Outstanding 50-Year Lawyer. Special thanks to the Gov. Bill and Vara Daniel Center for Legal History.

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desegregation of its public higher education system, Tennessee agrees to identify 75 promising black sophomores each year and prepare them for later admission to the state's graduate and professional schools. A federal court of appeals approves this settlement in 1986.

1995 *Missouri v. Jenkins:* The Supreme Court rules that some disparities, such as poor achievement among African-American students, are beyond the authority of the federal courts to address. This decision reaffirms the Supreme Court's desire to end federal court supervision and return control of schools to local authorities.

1996 *Sheff v. O'Neill:* The Supreme Court of Connecticut finds the State liable for maintaining racial and ethnic isolation, and orders the legislative and executive branches to propose a remedy. LDF returned to the Court in 2003 to force the legislative body to fulfill that mandate.

1996 *Hopwood v. Texas:* Fifth Circuit of the Court of Appeals rules that the affirmative action plans used by Texas universities are unconstitutional; the Supreme Court refuses to review the case.

1999 Thirty years of court-supervised desegregation ends in Charlotte-Mecklenburg school district.

2003 *Gratz v. Bollinger; Grutter v. Bollinger:* The Supreme Court rules in favor of diversity as a compelling state interest in the University of Michigan admissions case.

Artwork throughout this special feature courtesy of 2004 State Bar Law Day Poster Contest participants.

Cassandra Garza, Foy H. Moody High, Corpus Christi

The State of Texas filed a 118-page brief in opposition to the petition for certiorari and a 235-page brief on the merits.[55] Eleven other states submitted an amicus curiae brief in support of Texas.[56]

Six amicus briefs were filed on Sweatt's behalf, including that of the U.S. Solicitor General on behalf of the United States and that of an ad hoc group of almost 200 law professors known as the Committee of Law Teachers Against Segregation in Legal Education.[57]

The NAACP's brief made three primary arguments. First, applying traditional constitutional doctrine, segregation lacks any rational purpose and hence is invalid. Second, unlike *Plessy v. Ferguson*, which set the constitutional standard of separate but equal in the context of rail transportation, education implies psychological, sociological, and spiritual factors in addition to physical measurements. Finally, even if separate but equal were the right legal standard, Texas had not provided and never could provide equality under segregation.[58]

Texas argued simply that the constitutionality of segregation had long since been settled by an unbroken line of federal and state judicial decisions, and that the lower courts in this case had correctly found the two law schools to be sub-

stantially equal.[59] The brief made the point that the principles in *Plessy* apply as strongly to education as to transportation, and that this type of segregation is "eminently reasonable."[60] The state also pointed out that since the trial, the permanent Texas State University for Negroes had opened in Houston and the interim law school in Austin had been closed. Texas State had been provisionally accredited by the American Bar Association, and its first graduate had been admitted to the State Bar of Texas. Texas's attorneys argued in conclusion that the State of Texas had obviously acted in good faith to provide the best possible education to all of its students.[61]

The court ultimately ruled unanimously in favor of the civil rights claims in all three cases. The opinion in *Sweatt*, written by Chief Justice Vinson, was brief and to the point. Avoiding the broader constitutional arguments of the parties, the court analyzed the differences between the two law schools, concluding that the State of Texas had not provided substantial equality of educational opportunities for black and white law students. Looking beyond the physical, tangible differences, UT "'possesse[d] to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school,' including faculty reputation, alumni influence and institutional prestige and tradition."[62] Justice Vinson said that no reasonable person who could choose freely between the two institutions would consider the question close. The court held that Sweatt had a personal and present right to a legal education equivalent to that offered by Texas to students of other races. Because Texas State did not afford him the quality of legal education provided in the all-white UT, the equal protection clause of the 14th Amendment required that he be admitted to UT.

The succinct opinion had extremely broad implications. The court did not by name overrule *Plessy*, and separate but equal continued to be the law, but the "equal" part of the rule was defined anew. After *Sweatt*, it seemed that separate law schools could never be equal. It would be hard for any other state to match the

Some Prominent African-American Texas Lawyers

Kim Askew — Askew currently serves as chair of the State Bar Board of Directors. She is the first African-American to hold that position.


Askew

L.A. Bedford — A 1946 alumnus of Prairie View A&M, Bedford had to travel to Brooklyn to attend law school. He returned to Texas and in 1966 became the first black judge to preside in Dallas County.


Bedford

C.B. Bunkley — Dallas attorney who, with W.J. Durham, helped Thurgood Marshall argue *Sweatt v. Painter* before the U.S. Supreme Court.

W.J. Durham — Local counsel for the NAACP who, with C.B. Bunkley, helped Thurgood Marshall argue *Sweatt v. Painter* before the U.S. Supreme Court.

Charlye O. Farris — Farris became the first African-American woman licensed to practice law in Texas when she passed the Texas bar examination in October 1953. Less than one year later, a county judge in Wichita Falls appointed Farris to serve in his place during his absence from the bench.


Farris

Trailblazers


Hunter

Judge Vanessa Gilmore — Gilmore was appointed to the U.S. District Court for the Southern District of Texas in 1994, becoming the youngest sitting federal judge in the nation.

Rhonda Hunter — In January 2004, Hunter became the first minority sworn in as president of the Dallas Bar Association.


Jefferson

Justice Wallace Jefferson — Jefferson was appointed to the Texas Supreme Court in March 2001, becoming the first African-American to serve on the court. He was elected to a full term in 2002.

Barbara Jordan — Jordan served in the U.S. House of Representatives from 1973 to 1979. She served as the only woman and the only African-American in the Texas Senate from 1966 to 1972. She was also the first black student at Boston University Law School (1956-59).


Wainwright

Gabrielle K. McDonald — McDonald became the first African-American woman from Texas to serve on the federal bench. In 1993, she was appointed to serve on the U.N. War Crimes Tribunal at The Hague.

Judge Harriet Murphy — Murphy became the first African-American woman to be appointed to a regular judgeship in Texas in 1973.

Judge Morris Overstreet — Overstreet became the first African-American elected to statewide office in Texas when he was elected to the Texas Court of Criminal Appeals in 1990.

Heman Sweatt — Sweatt was one of four African-Americans who entered the University of Texas School of Law in 1950. Though he did not graduate, the U.S. Supreme Court case that carries his name, *Sweatt v. Painter*, opened the doors of the professional and graduate schools of the University of Texas to African-Americans.

J.L. Turner — The namesake for the J.L. Turner Legal Association, an organization of African-American attorneys in Dallas, Turner opened a law practice in the city in 1896.

Justice Dale Wainwright — Wainwright was elected to the Supreme Court of Texas in 2002. Prior to serving on the Supreme Court, he served as the presiding judge of the 334th Civil District Court in Harris County.

Justice Carolyn Wright — Wright, who serves on the Fifth Court of Appeals, is the first African-American to serve as chair of the Texas Bar Foundation Board of Trustees.

tremendous effort made by Texas in creating a respectable and fully accredited institution in the shortest possible time.

However, the Supreme Court did not state overtly that all state-mandated segregation was unconstitutional. Thurgood Marshall told one of the expert witnesses he used in the law school cases that *Sweatt* and the other law school decisions were replete with road markings telling him where to go next.[63] Three weeks after *Sweatt* was decided, "Marshall convened a conference of lawyers to 'map … the legal machinery' for an 'all out attack' on segregation. At its conclusion, [he] announced, 'we are going to insist on nonsegregation in American public education from top to bottom — from law school to kindergarten.'"[64] The NAACP Board adopted a resolution containing this language in July 1950.

While *Sweatt v. Painter* "effectively outlawed segregated law schools and 'extensively undermine[d]' the 'separate but equal' doctrine,"[65] after the decision in *Brown v. Board of Education*, *Sweatt* faded from memory. Even leading constitutional law casebooks and other legal books relegate it to a footnote or do not mention it at all.[66] Yet, it is important to remember *Sweatt v. Painter* and the individuals involved,[67] especially on this 50-year anniversary of *Brown*, since the attorneys for Sweatt and the amicus curiae brief submitted in the case by nearly 200 law professors "*presented virtually all of the arguments that, in somewhat refined form, would prove decisive in [Brown v. Board of Education].*"[68] (Emphasis added.) So, during May 2004 when *Brown* is commemorated, remember Heman Marion Sweatt.[69]

Notes

1. 347 U.S. 483 (1954).
2. Thurgood Marshall, We Must Dissent, *reprinted in* Supreme Justice: Speeches and Writings: Thurgood Marshall, at 311 (J. Clay Smith, Jr. ed., University of Pennsylvania Press 2003) (emphasis added).
3. *Id.* at 311 unnumbered.
4. *See* Sweatt v. Painter, 339 U.S. 629 (1950).
5. Marshall, *supra* note 2.
6. Jonathan L. Entin, *Sweatt v. Painter, the End of Segregation, and the Transformation of Education Law*, 5 Rev. Litig. 3, 7 n.13 (1986).
7. The 1944 report of the Bi-Racial Committee on Education for Negroes in Texas (composed of the presidents of UT and Texas A&M Universi-

ty, and the State Superintendent of Public Instruction) reported that there were no professional schools in medicine, law, dentistry or pharmacy for Negroes. Douglas L. Jones, *The Sweatt Case and the Development of Legal Education for Negroes in Texas*, 47 Tex. L. Rev. 677, 679 (1969).

8. *Id.* at 677.
9. The NAACP and the NAACP Legal Defense and Education Fund (LDF) started out as one organization. It legally separated at a later date but continued to function as a single organization with LDF serving as the legal arm of the NAACP. Much later they would entirely separate. In this article I refer to both as NAACP.
10. A brilliant man, Houston was Phi Beta Kappa at Amherst College, a WWI veteran, a Harvard Law graduate (top five percent), and the first African-American to serve on the Harvard Law Review. After graduation he worked with Felix Frankfurter, and obtained his doctor of juridical science degree. He became dean of Howard University Law School in the 1920s and is credited with training generations of civil rights lawyers, including Thurgood Marshall, and many of the lawyers active in the pre- and post-*Brown* civil rights lawsuits.
11. Leland Ware, *Louis Redding's Civil Rights Legacy*, 4 Del. L. Rev. 137, 140 (2001).
12. *A Symposium: Brown v. Board of Education: An Exercise in Advocacy*, 52 Mercer L. Rev. 581, 609 (Winter 2001).
13. Ware, *supra* note 10, at 140-141. The NAACP was simultaneously challenging discrimination in many areas of life other than education.
14. 182 A. 590 (Md. 1936).
15. *Id.*
16. Remember that the law of the land prior to the landmark cases discussed herein was *Plessy v. Ferguson*, 163 U.S. 537 (1896), which endorsed the "separate but equal" doctrine. Though *Plessy* was a transportation case, it was soon applied to education cases after Justice Henry B. Brown, in the majority opinion, used the establishment of separate schools for white and black children in states where political rights of blacks have long been earnestly enforced to support the proposition that enforced separation of the two races stamps the black race as inferior only because the blacks choose to put that construction on it.
17. *Pearson*, 182 A. 590, 593 (Md. 1936).
18. Entin, *supra* note 6, at 19.
19. Houston brought Thurgood Marshall onto the staff of the NAACP in 1936. Marshall had been one of Houston's most outstanding students at Howard University Law School, graduating first in his class while commuting from Baltimore. Upon graduation from Howard, Marshall set up a private practice in Baltimore and revitalized its local NAACP. He and Houston worked together at the NAACP until 1938 when Houston returned to the private practice of law and Marshall became the NAACP's lead attorney.
20. 305 U.S. 337 (1938).
21. *Id.* at 351.
22. *Id.* at 352.
23. Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. Negro Educ. 316 (1952), *reprinted in* Supreme Justice: Speeches and Writings: Thurgood Marshall 311 (J. Clay Smith, Jr. ed., University of Pennsylvania Press 2003).
24. *Sipuel v. Board of Regents*, 332 U.S. 631, 633 (1948).
25. Entin, *supra* note 6, at 21 n.110.
26. *Fisher v. Hurst*, 333 U.S. 147, 150 (1948); Entin, *supra* note 6, at 21.
27. *See generally* Ada Lois Sipuel Fisher, A Matter of Black and White: The Autobiography of Ada Lois Sipuel Fisher (1996).
28. Entin, *supra* note 6, at 7.
29. 339 U.S. 629 (1950).
30. *See generally* Katherine L. Chapman, *1954: The Beginning or the End?,* 3 Wesleyan Lawyer 25 (Spring 2004) (discussion of NAACP's litigation strategy).
31. "Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both." Tex. Const. art. 7 sec. 7 (repealed 1969). *See also* Entin, *supra* note 6, at 7.
32. Sweatt v. Painter, 339 U.S. 629, 630 (1950).
33. Entin, *supra* note 6.
34. Sweatt v. Painter, 339 U.S. 629 (1950).
35. *Id.* at 630; Entin, *supra* note 6, at 9.
36. Sweatt v. Painter, 210 S.W.2d 442, 446 (Tex. Civ. App. — Austin 1948).
37. Sweatt v. Painter, 339 U.S. 629, 632 (1950).
38. Marguerite L. Butler, *The History of Texas Southern University, Thurgood Marshall School of Law: "The House that Sweatt Built,"* 23 T. Marshall L. Rev. 45 (1997).
39. *Id*. at 47.
40. See generally, Marguerite L. Butler, *The History of Texas Southern University, Thurgood Marshall School of Law: "The House that Sweatt Built,"* 23 T. Marshall L. Rev. 45 (1997).
41. *Id.*
42. Entin, *supra* note 6, at 32.
43. *Id.* at 38; Sweatt v. Painter, 339 U.S. 629, 633-34 (1950).
44. Entin, *supra* note 6, at 35-36.
45. *Id.* at 36.
46. *Id.*
47. Id.
48. *Id*. at 38.
49. *Id.* at, 39 n.215.
50. Sweatt v. Painter, 210 S.W.2d 442 (Tex. Civ. App. — Austin, 1948).
51. Entin, *supra* note 6, at 39 n.220; Sweatt v. Painter, 339 U.S. 629, 632; Jones, *supra* note 7, at 686.
52. *Id* at 39 n.221.
53. 338 U.S. 865 (1949).
54. 339 U.S. 816 (1950).
55. E. Jacobson, Assistant Attorney General of Texas assisted Attorney General Price Daniel and First Assistant Attorney General Joe R. Greenhill on the brief.
56. The states were Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Virginia.
57. The law professors' brief can be found at 34 Minn. L. Rev. 289 (1950). Other briefs in support of Sweatt were filed by American Federation of Teachers, American Veterans Committee, American Jewish Congress and other Jewish organizations, and Texas Council of Negro Organizations.
58. Entin, *supra* note 6, at 44-45.
59. *Id.* at 51.
60. *Id.* at 52.
61. *Id.* at 53-54.
62. Sweatt v. Painter, 339 U.S.629 (1950); Entin, *supra* note 6, at 57-58.
63. Mark Tushnet, Brown v. Board of Education 135 (1995).
64. *Id.* at 136.
65. Entin, *supra* note 6, at 5.
66. *Id.* at 5 n.11. However, extensive resources are made available by Thomas D. Russell, professor of law at the University of Denver on his website: www.law.du.edu/Russell/lh/sweatt. This includes oral histories of Corwin Johnson, Joe Greenhill, Dean Page Keeton, and Oscar Mauzy as well as papers of Dean Charles T. McCormick, and the memorandum written by Justice Tom Clark. He has also gathered newspaper articles from that time period.
67. As did UT on Sweatt's own 50th anniversary in April 2000. *See generally* John Sirman, *Reflections of Black Law Students: UT Marks 50th Anniversary of Sweatt v. Painter*, 63 Tex. B. J. 650 (July 2000).
68. Entin, *supra,* note 6 at 5.
69. Sweatt did not ultimately graduate from UT. He left in his second year after a number of unfortunate occurrences, including his wife leaving him on the day of his first law school exam and health problems. He moved out of state, received a Master's Degree in Social Work and worked for many years in that field. He also remarried. Though stories are recounted of unfortunate incidents while he was at law school at UT, including a cross being burned on the law school grounds, reported in the Oct. 18, 1950 *Daily Texan* available on Prof. Russell's website (see note 60), there are also reports of Sweatt's positive experiences, such as his statement in the same *Daily Texan* article about the school day before the cross was burned, "I spent one of the more cordial days yet in Law School [.] In fact, several of the fellows were especially nice to me, and we had some interesting conversations about some of the problems that came up in class," and, such as his election by other first-year students to be the social chairman of their class.

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