

University of Denver

**Digital Commons @ DU**

---

Sturm College of Law: Faculty Scholarship

University of Denver Sturm College of Law

---

9-1-2012

## **UT Case was Stop on Road to Brown v. Board of Education**

Thomas D. Russell

Follow this and additional works at: [https://digitalcommons.du.edu/law\\_facpub](https://digitalcommons.du.edu/law_facpub)



Part of the [Law and Race Commons](#), and the [Legal History Commons](#)

---

---

## UT Case was Stop on Road to Brown v. Board of Education

### Publication Statement

Copyright is held by the author. User is responsible for all copyright compliance.

---

Review

Before Brown: Heman Marion Sweatt, Thurgood Marshall, and the Long Road to Justice

Gary M. Lavergne University of Texas Press; \$26.95

By Thomas D. Russell

Special to the American-Statesman

## **UT Case was Stop on Road to Brown v. Board of Education:**

Review of 'Before Brown,' a history of the fight to integrate UT's law school by Gary M. Lavergne.

Chief Justice Earl Warren issued the U.S. Supreme Court's unanimous opinion in *Brown v. Board of Education* on May 17, 1954. The court ruled in favor of plaintiffs who challenged school segregation, declared legalized racial segregation to be unconstitutional and overturned the "separate but equal" precedent set in 1896 in *Plessy v. Ferguson*.

"Before Brown: Heman Marion Sweatt, Thurgood Marshall, and the Long Road to Justice" is Gary Lavergne's treatment of *Sweatt v. Painter*, an important 1950 Supreme Court decision on the way to *Brown*. Lavergne, director of admissions research at the University of Texas, tells an interesting and important story that fills many gaps between *Plessy* and *Brown*.

The Texas Constitution of 1876 supplied the framework for Jim Crow education in Texas. The long fight of African-Americans to overcome constitutional apartheid and gain entrance to UT is Lavergne's story.

Heman Marion Sweatt sued UT and the state of Texas after being rejected for admission to UT's law school because he was African-American. Lavergne describes the NAACP's search for the right person to challenge the state and its "university of the first class." Sweatt, a Houston postal carrier, volunteered.

Being a plaintiff in a politically charged lawsuit is scary. Lavergne chronicles the "fatigue, fear, and tension" that Sweatt endured.

Lavergne presents a wealth of new biographical detail about Sweatt's neighborhood, his ancestry back to slavery days, his walk to elementary school, his family in Houston, his wife, Connie, his education, his mail route, and myriad other details consistent with the author's occasional tendency to empty his notebook into the text.

Sweatt's lawsuit, filed in 1946, was part of a concerted, multi-state strategy that Thurgood Marshall led for the NAACP. The academic literature concerning the NAACP's strategy is already well-developed.

Lavergne describes the NAACP's 1938 victory in *Missouri ex rel. Gaines v. Canada*, the case in which the Supreme Court declared unconstitutional the shipping of African-American graduate students out of state with a tuition check rather than supplying them an education in state. Lawless Texas ignored the unconstitutionality of the practice, creating an out-of-state scholarship fund in 1939.

In Oklahoma and Texas, the NAACP attacked segregation in law schools because, as Lavergne explains, judges were familiar with how law schools operated. Also, nearly all law students were men, which

reduced whites' fear of sexual competition by African-American students. Sweatt, to boot, was married, and Lavergne describes Sweatt's public reassurances that he was not looking for a wife at UT. (Alas, Connie Sweatt, exhausted and angered by the emotional and financial strain caused by her husband's admission to UT, left Heman on the evening before his first law school final.)

Lavergne's at his best placing Sweatt's struggle within the political split among African-Americans. Marshall, the NAACP, and eventually Sweatt believed that separate could never be equal. Lavergne recounts the acrid correspondence between Marshall and Carter Wesley, the owner/editor of the Houston Informer. Wesley favored equalization of existing and new African-American institutions. In 1947, more than 60 percent of Texas' African-Americans favored the creation of a black university over the desegregation of UT. Navigating this rift challenged the NAACP's lawyers.

Lavergne is weaker describing the interior institutional details of segregation's defenders. A portrait of Attorney General Price Daniel as a rabid segregationist emerges, and Lavergne reveals a mixed picture of Assistant Attorney General Joe Greenhill, who would later serve as chief justice of the Texas Supreme Court and who is still alive today. I wish that Lavergne had linked the office politics of the attorney general's office to the rich political detail that, for example, Dave McNeely and Jim Henderson offer in their 2008 biography, "Bob Bullock: God Bless Texas."

Surprisingly, Lavergne is weakest describing the ideology of the UT administrators and faculty who fought to keep Sweatt out. In my own UT research, I have been fascinated by middle managers doing the grunt work of sustaining segregation.

Twice, Sweatt and his lawyers are in the trial court in Austin. All knew that Judge Roy Archer would rule for Texas. Lavergne's account is lively and admiring of Sweatt's fine trial lawyers.

The state and university created a separate law school to meet Sweatt's challenge. Sweatt refused to consider enrolling in the new Texas State University for Negroes Law School near the Capitol. Lavergne reveals the absurdity and expense of the effort. The law school's dean, Charles McCormick, is today renowned as a great evidence scholar, but he debased himself testifying that the separate school equaled UT Law.

According to the grand plan, the NAACP took Sweatt's case to the Supreme Court after losing, as expected, in the trial court and all available Texas appellate courts. Lavergne shows that the attack broadened beyond graduate or professional schooling into a frontal attack on segregation.

Lavergne describes Greenhill's historical research showing that the framers of the 14th Amendment supported the segregation of education.

Greenhill also argued that desegregation would bring violence, a view that I understand infuriated Marshall. When Lavergne interviewed Greenhill, the former chief justice mentioned his 1997 visit to a UT seminar. I taught that class, and I asked Greenhill whose idea it was to argue that admitting Sweatt would lead to violence. Greenhill answered quickly — too quickly, I thought — that he did not remember. I had hoped that Lavergne might address questions that Greenhill's too-quick answer generated in my mind.

In June 1950, the U.S. Supreme Court ruled in Sweatt's favor. Chief Justice Fred Vinson relied upon intangibles — reputation, experience, prestige, influence and tradition — to show that the separate law

school could never be equal to UT's law school. Vinson did not reach out to strike down Plessy, but the NAACP's building blocks fell into place to show the way.

Lavergne describes Sweatt's enrollment in the law school in the fall of 1950. A new, young dean, W. Page Keeton, had replaced McCormick. During Sweatt's first semester, a cross burned on the law school property with KKK scrawled on the law school steps. No one was caught. Sweatt's account of his time at UT, Lavergne shows, does suffer from inconsistencies. After a year, Sweatt flunked out.

In law schools — including UT's law school when I taught there during the 1990s — many professors teach nothing about the political and social change between Plessy in 1896 and Brown in 1954. Students are left thinking that Brown sprang spontaneously from the heads of enlightened Supreme Court justices. Lavergne's "Before Brown" fills a gap in knowledge and also presents a well-researched and engaging tale of law, race and history in Texas.

*Thomas D. Russell is a law professor at the University of Denver Sturm College of Law. He was a professor at the UT School of Law from 1991 to 2000. Last spring, he authored a paper that led to the renaming of UT's Simkins Hall.*