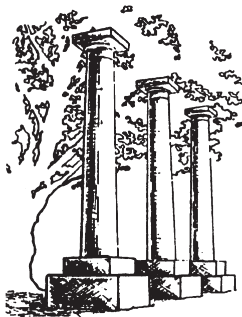

Southern Studies

An Interdisciplinary Journal of the South

Sweatt v Painter (1950) and Why Sweatt Won His Case: A Chronicle of Judicial Appointments

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Office of Admissions
The University of Texas at Austin

New Series
Volume XIX
Number I

Southern Studies: An Interdisciplinary Journal of the South
Spring/Summer 2012 • 19(1): 1-23

Sweatt v. Painter (1950) and Why Sweatt Won His Case: A Chronicle of Judicial Appointments

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Background

On February 26, 1946, an African American mail carrier from Houston named Heman Marion Sweatt entered room one of the landmark University of Texas Tower and confronted university officials, including the university's President Theophilus S. Painter, with an application and credentials that met all of the academic and residency requirements for entrance to the school of law. Painter calmly informed Sweatt that he would seek an attorney general's opinion as to how to proceed.[1] Three weeks later, the Texas Attorney General directed Painter not to admit Sweatt. Both Painter's request and the AG's opinion made it clear that Sweatt was denied admission because he was African American—and for no other reason.[2]

The resulting case, *Sweatt v. Painter* (1950), navigated its way through the Texas judiciary as the state argued that the makeshift law school it set up for African Americans, on the ground floor of a building occupied by a petroleum engineering firm, was "substantially equal" to that provided for whites at the University of Texas. Precedent for the state's argument, of course, centered on *Plessy v. Ferguson* (1896) and a host of subsequent cases supporting unfettered states' rights.[3]

The Historical and Current Importance of Sweatt

Until *Sweatt*, American jurisprudence had used tangible, objective measures such as wages, budgets, buildings, books, and student-teacher ratios to quantify "equality." Over time, the "equality" standard had been subsumed to what some considered the oxymoronic "substantial equality." On June 5, 1950, the U. S. Supreme Court unanimously ruled in Sweatt's favor. However, the Court stopped short of an explicit condemnation of racial segregation as inherently unconstitutional. Instead, in *Sweatt*, Chief Justice Fred Vinson revolutionized the definition of substantial equality by attaching the consideration of "intangibles."

> What is more important, the *University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective*

> *measurement but which make for greatness in a law school.* Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. (Citations omitted and italics added for emphasis)[4]

The Vinson Court knew very well that it was impossible to create a law school for African Americans, where none had existed before, with equal intangibles like the "position and influence of the alumni" with "traditions and prestige." To hammer the theme of impossibility of equality in a segregated setting, Chief Justice Vinson lectured Texas, and by association all of the southern attorneys general submitting amici, on what they all knew—the realities of a legal education.

> "Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in *isolation from the individuals and institutions* with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the *interplay of ideas and the exchange of views* with which the law is concerned." [Italics added for emphasis]

The *Sweatt* opinion did implicitly what *Brown v. Board of Education* would eventually do explicitly. No one in the legal profession could explain the material difference between "isolation from individuals and institutions" and enforced segregation. And so, *Sweatt* became the single-most valuable precedent for explicitly ending racial segregation in Brown only four years later. *Sweatt* made it clear that a law student could be exposed to the "interplay of ideas and exchange of views" under one condition only—a racially-integrated setting. Sweatt's attorney, Thurgood Marshall, carefully crafted a record in *Sweatt* that established that, according to the U.S. Census, Texas wanted to separate Heman Sweatt from classmates representing 85% of the state's population and all but about two to three dozen of the thousands of lawyers and judges in Texas. "With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School." Chief Justice Vinson's court did not rule on Thurgood Marshall's direct attack on racial segregation because the separate law schools were so obviously unequal.[5]

Heman Marion Sweatt became the first African American ordered admitted to an all-white institution in spite of the separate-but-equal doctrine.[6] The *Sweatt* case opened the doors to graduate and professional schools for all African Americans. Indeed, in *Brown*, Chief Justice Earl Warren wrote:

> "In *Sweatt v. Painter*, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." *Such considerations apply with added force to children in grade and high schools."* (Citations omitted and italics added for emphasis)[7]

Perhaps Associate Justice Tom Clark, who voted with a unanimous Court in both the *Sweatt* and *Brown* cases, put it best during an oral history interview when he said, "In fact, not in *Brown* as people say, did we overrule [the separate-but-equal doctrine in] *Plessy*. We implicitly overruled *Plessy* in *Sweatt and Painter*..."[8] Robert L. Carter, Marshall's NAACP assistant, wrote in his autobiography that *Sweatt* (and its two companion cases) left the separate-but-equal doctrine "moribund."[9]

The importance of *Brown* speaks for itself, but the story of *Sweatt v. Painter* is more than an interesting historical artifact. It continues to guide us, particularly in the affirmative action debate, in ways *Brown* does not. In a recent post on InsideHigherEd.com Professor Gary Orfield of UCLA wrote that

> "The *Sweatt* decision offered a deeper analysis of segregation and integration in some important respects than *Brown*. Because the judges were very familiar with the operations of the legal profession the decision emphasized the lifelong impacts of the networks and understandings formed through sharing education in schools with excellent professors, powerful reputations, and links to future opportunities. *Brown* tended to put more emphasis on the psychological impacts of segregation. The networking and persistence issues became important in desegregation research since the 1970s and are, in many ways, more important that [than?] test score data in understanding the damage caused by segregation and the transformative opportunities created by integration."[10]

Today there is no serious question or discussion about government-enforced racial segregation; *Brown* did its job. But a volatile and active discussion about access to ideas, diversity, and how they benefit both individuals and institutions, rages in the form of affirmative action litigation and civil rights complaints. Eric Hoover points out in the *Chronicle of Higher Education* that the intangibles first

articulated in *Sweatt* "entwine with the [present] conventional understanding of college applicants. Just as institutions offer benefits to their students that are not measurable, students bring qualities to campuses that their grades and test scores cannot reflect."[11] Jonathan Alger, the General Counsel of Rutgers University, recently wrote that the *Sweatt* case foreshadowed the current argument, articulated in *Bakke* (1978) and then in the *Grutter* and *Gratz* affirmative action cases of 2003 in Michigan, that there are educational benefits for all students when they are exposed to a diversity of ideas.[12]

In short, beginning with *Sweatt v. Painter* (1950) access to *ideas* largely replaced the sums of bricks and mortar, books, and money, first as a measure of equality, and currently as a compelling interest universities have for reaping the educational benefits of diversity.

The Long Road to "Spontaneous Enlightenment"

In 2010, the University of Texas Press released *Before Brown: Heman Marion Sweatt, Thurgood Marshall and the Long Road to Justice*, which chronicles the life of Heman Sweatt and the litigation of *Sweatt v. Painter* (1950). In a review for the *Austin American Statesman*, Professor Thomas D. Russell of the University of Denver Law School observed that "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."[13] Six years earlier Mark Strasser addressed a similar issue with "Was *Brown's* Declaration of the *per se* Invalidity Really Out of the Blue?" He reviewed the Court's major education cases from *Cumming* (1899) to *Brown* (1954) and argued that "*Brown* was not the departure from the existing jurisprudence that it is often claimed to be but, instead, was a logical development from then-existing jurisprudence."[14] The panorama of cases Strasser described did show a marked shift from reactionary, strict constructionist adherence to states' rights to an activist interpretation of the Fourteenth Amendment and its equal protection clause. In summary, during a fifty-year period the legacy of *Plessy* (1896) had been reinforced by *Cumming* (1899), *Berea College* (1908), and *Gong Lum* (1927). Then from the late 1930s through the mid-1950s the Court allowed for successful challenges to the separate-but-equal doctrine in *Missouri, ex rel. Gaines* (1938), *Sipuel* (1948), *McLaurin* (1950), *Sweatt* (1950), and finally, *Brown* (1954).[15]

No lawyer or historian will be surprised to learn that *Sweatt* and *Brown* were made possible through the judicial appointments of Franklin D. Roosevelt and Harry Truman. This article seeks to present a uniquely precise chronicle of *when* this change came about in each of the seats on the bench of the Supreme

Court. Through the prism of presidential appointments the remarkable change in jurisprudence, i.e., the linear process that led to *Sweatt*, becomes evident. Key cases in education and voting rights provide benchmarks to measure the shift from a near-complete adherence to a strict-constructionist, states rights focus, to a flexible, activist interpretation of the Fourteenth Amendment, and school access, in particular. Of course, this is not meant to be a comprehensive measurement of the Court's overall "liberal vs. conservative" direction, but in the context of *Sweatt* and *Brown* the benchmark cases used below begin with a unanimous denial of access to publicly-funded education to a non-white American citizen to a unanimous decision ordering access for a non-white American citizen. What is instructive to the contemporary affirmative action debate is the Court's abandonment of the exclusive use of tangible and mechanical measures to intangibles and "soft variables."

The First Benchmark: *Gong Lum v. Rice* (1927)

During Heman Sweatt's time, the ambiguities of state-codified racial classifications, first cited in *Plessy*, remained.[16] But what was a state to do with a citizen having neither one drop of black nor white blood? In the 1920s Mississippi's Rosedale Consolidated High School District faced that conundrum when Gong Lum, an Asian American, Mississippi citizen, business owner, and taxpayer, attempted to register his daughter, Martha, in the public school established for white students. At the opening of school the elder Lum successfully registered Martha at Rosedale High, but by noon recess the superintendent notified her that she would not be allowed to return because the district's board of trustees had decided that Rosedale was to be all-white. Martha, they said, belonged in the "colored" high school.[17]

Gong Lum refused to accept the school district's decision. His argument was not that segregation was wrong, but that Martha was not a member of a colored race, nor was she of mixed blood—she was "pure" Chinese. Lum took his complaint to a Mississippi district court and won when the judge issued a writ of mandamus ordering school officials to admit Martha to the white school. The Rosedale trustees won a reversal in Mississippi's Supreme Court.[18]

In 1927, former President and then Chief Justice William Howard Taft delivered the unanimous *Gong Lum* opinion for the U.S. Supreme Court. "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear," he wrote.

Using *Gong Lum* (1927) as a first benchmark, measuring change in the Court's judicial attitude towards school segregation makes the NAACP's victory in *Sweatt*, and later in *Brown*, more apparent. When they considered *Gong Lum*, the Taft Court consisted of seven Republican appointees and two

Democrats appointed by President Woodrow Wilson. Although often considered a progressive by historians, Wilson's record on segregation resembled that of a southern conservative. As President of Princeton University from 1900-10, he presided over the only major northern university that excluded African Americans. As Governor of New Jersey and President of the United States his "New Freedom" administration saw increased segregation of federal facilities and a nearly complete neglect of African American schools and institutions.[19] Of the seven Republican appointees on the Taft *Gong Lum* court, only one had not been appointed by Harding, Taft, or Coolidge—all strict constructionists and firm believers in states' rights and limited government.[20] The remaining associate justice, Oliver Wendell Holmes, Jr., had been appointed by Theodore Roosevelt, a President with a mixed record in race relations, but who nonetheless felt that "Blacks were better suited for service than suffrage."[21]

In *Gong Lum* Chief Justice William Howard Taft declared that segregation was a decision "... within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment." Though not as egregious as *Dred Scott* or *Plessy, Gong Lum* could be considered a low point in the history of civil rights before the U.S. Supreme Court in the twentieth century: a unanimous Court denied a non-white American citizen access to a publicly-funded school set aside for whites.[22]

Benchmark 2: *Missouri, ex. rel., Gaines v. Canada* (1938)

Lloyd Lionel Gaines was an African American citizen of Missouri who had earned a Bachelor of Arts degree in August 1935 from Lincoln University, Missouri's all-black institution. In June of 1935, two months before his graduation, he sent a request to the Registrar of the University of Missouri, Sy Woodson Canada, for a law school catalog. All Canada's staff knew was that the request came from 1000 Moreau Drive in Jefferson City; it was a routine request and the office sent the catalog. Charles Hamilton Houston, General Counsel for the NAACP, and a black, Harvard-educated St. Louis attorney named Sidney R. Redmond prepared for a legal challenge to Missouri's segregation of its higher educational institutions and professional schools.[23]

Since the University of Missouri was a white-only institution it was hardly necessary to ask an applicant for his race or ethnicity; it was not until Registrar Canada received Gaines' transcripts from Lincoln University that he realized Gaines was an African American. Gaines, Houston, and Redmond knew the application would eventually be rejected. Canada referred Gaines to the president of Lincoln University, who then communicated what everyone already knew: there was no law school at Lincoln or anywhere else in Missouri for its African American citizens. The president then referred Gaines to the

Superintendent of Missouri Schools to secure an application for an out-of-state "scholarship" as provided for blacks under Missouri law whenever the state failed to provide an educational opportunity that was otherwise available to whites. In court Missouri argued that it intended to meet the separate but equal test by elevating the quality of education of Lincoln University to the level of the state's flagship university—but it would take time, and in the meantime, Gaines should take the "scholarship" to become a lawyer. The state also admitted that in accordance with Missouri's constitution, state court rulings and laws, Gaines was rejected solely because he was African American.[24]

At the time, Charles Hamilton Houston viewed Gaines as the key to the NAACP effort to desegregate schools nationwide. It was the first educational suit the NAACP was prepared to take all the way to the U.S. Supreme Court. Houston advanced a compelling argument, using *Pearson v. Murray*, 169 Md. 478 (1936) as precedent, that if no separate schools existed for black students, integration was the only remedy. *Gaines* reached the U.S. Supreme Court during the 1938-39 term.[25]

In *Gaines* the Court stopped short of striking down the separate but equal doctrine, but it did make its test of constitutionality much more difficult. First, Gaines' right to an education was a personal one. It did not matter if no other African Americans applied; Missouri had to provide an equal educational experience for Gaines. Second, the Court unambiguously struck down the practice of using out of state "scholarships" to satisfy the state's duty to provide a separate but equal education for African Americans. Finally, the Court made clear that the state's *promise* of future equality, i.e., the planned establishment of a separate law school for black Missourians, does not make temporary discrimination constitutional. The Supreme Court, in a 6-2 vote, sent Gaines back to Missouri with instructions to admit Lloyd Gaines to the University of Missouri Law School or provide a law school for him within its borders.[26]

Benchmark 3: *Sipuel v. Oklahoma Regents* (1948)

Ada Lois Sipuel's application to the University of Oklahoma Law School brought about a January 1948 U.S. Supreme Court ruling that rocked segregated states. Oklahoma's reaction to Sipuel's application was much like Missouri's to the Gaines application: the state set up a makeshift law school. Sipuel refused to attend. The oral arguments of Sipuel should have been instructive to segregated states when Justice Robert H. Jackson asked Oklahoma's counsel if he [counsel] *really* believed that a school set up for a single student could afford an acceptable education in the law. Ada Lois Sipuel remembered that when the state's attorney answered "yes," the astounded Justice responded that such foolishness was neither reasonable nor equitable.[27]

Only four days after oral arguments the Supreme Court's *per curiam* decision in *Sipuel* added to the duty the state had to provide equality for its African American citizens. *Gaines* required a state to provide for equality within its own borders. *Sipuel* added that "The state must provide it for [Sipuel]...as soon as it does for applicants of any other group."[28] (Italics added for emphasis)

Oklahoma responded, not by admitting Sipuel, but by setting up another makeshift law school in its state capitol. It was an adjunct of Langston University. *Sipuel* was a *per curiam* vote for equality, but the Court did not specifically order Oklahoma to enroll Ada Lois Sipuel.[29]

Benchmark 4: *Sweatt v. Painter's* Companion Case: *McLaurin v. Oklahoma Regents* (1950)[30]

On the same day of the *Sweatt* decision, the Court delivered its ruling in *McLaurin v. Oklahoma State Regents* (1950). During the course of that litigation the Graduate School of the University of Oklahoma assigned George W. McLaurin to observe classes from an anteroom that Thurgood Marshall called a "broom closet." Eventually, McLaurin was allowed inside the classroom and seated in an area labeled "reserved for colored." He was surrounded by a railing made of two-by-four inch pine construction studs. He was also assigned a table in the library and in the cafeteria.[31] Chief Justice Fred Vinson wrote for the unanimous Court. "In this case, we are faced with the question whether a state may, after admitting a student to graduate instruction in its state university, afford him different treatment from other students solely because of his race. We decide only this issue."[32]

The importance of *McLaurin* was that, indeed, the Court was not faced with the issue of substantial equality, but only the question of separation and differential treatment. Unlike *Sweatt*, there was no discussion of the quality of facilities or numbers of faculty, volumes, or capital outlay. In the separate but equal context, it was about as "equal" as a state could provide.

Chief Justice Vinson applied the same reasoning he used in *Sweatt* (described above) to declare that separate was incompatible with equal. "[George W. McLaurin] is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Again, the separation Chief Justice Vinson declared unconstitutional in *Sweatt* and *McLaurin* was the separation, not just from white students, but from ideas and points of view.

Parallel Benchmarks: Access to the ballot and the Texas White Primary Cases

Dr. Lawrence A. Nixon was a forty-one-year-old African American physician from El Paso who helped to establish one of the first NAACP Chapters in Texas.[33] On July 26, 1924 he stood before two election judges named C.C. Herndon and Charles Porras and asked for a ballot in a Democratic Party primary selecting candidates for both houses of Congress. He was denied because he was African American.[34]

Dr. Nixon sued Herndon, et al., and argued that the Texas White Primary Laws, enacted only one year earlier, were violations of the Fourteenth and Fifteenth Amendments.[35] The Court decided on March 3, 1927. After a lucid and cogent description of the intent of the Fourteenth Amendment, Justice Oliver Wendell Holmes, Jr. chastised Texas for such a clear constitutional violation. Then, incredibly, he "instructed" them on how to make their disenfranchisement constitutional: Texas violated the basic civil rights of African American Texans only because it did so statutorily. If the Democratic Party sought to do the same thing, it could do so as a private organization that is not a state actor.[36]

In 1927, the Legislature repealed what had been struck down and replaced it with disenfranchisement language guided by *Nixon v. Herndon*.[37] On July 28, 1928 Nixon again presented himself to election judges James Condon and C.H. Kolle. *Nixon v. Condon* was decided on May 2, 1932 and was one of Justice Benjamin Cardoza's first opinions. Just as Justice Holmes had done in *Herndon*, Justice Cardoza gave Jim Crow states "instructions" as to how to lawfully exclude blacks: "Whatever inherent power a state political party has to determine the content of its membership resides in the *state convention*." (Italics added)[38]

Less than three weeks after *Condon* was decided a Texas Democratic Party convention adopted a resolution that disenfranchised blacks from its primaries. The White Primary was so completely effective that no other method of disenfranchisement was necessary.[40] In 1932 the national office of the NAACP, namely secretary Walter White and Legal Committee Chairman Joel Spingarn, strongly believed that the Supreme Court was still too conservative to bring a successful challenge to the White Primary.[41] At the time, however, the NAACP had not established hegemony over civil rights struggles in Texas, and three young, impatient activists named Carter Wesley, J. Alston Atkins, and Richard Randolph Grovey partnered to attack the White Primary without the direction or blessing of the NAACP. Grovey presented himself to election officials and demanded an absentee ballot for the Texas Democratic primary elections held during the summer of 1934. Citing Texas Democratic Party rules, Harris County Clerk Albert Townsend refused. Grovey sued Townsend in a Justice of the Peace

Court in Harris County.[42]

On April 1, 1935, the Supreme Court decided *Grovey*. While not as egregious as *Dred Scott* and *Plessy*, it was the disenfranchisement-equivalent of Benchmark 1: *Gong Lum*. A crushing defeat by a unanimous court denying a non-white citizen access to the only ballot that mattered in Texas.

Only six years after *Grovey*, the Court seemed to reverse itself on May 26, 1941 in *U.S. v. Classic*. The justices had before them, not a White Primary issue, but a clear-cut case of an attempt to steal a Louisiana congressional seat. If the Court followed the logic of *Grovey* and the *Nixon* cases, that a primary is not an election within the meaning of the Constitution, they would have to rule that election fraud in a primary is a private matter for the Democratic Party to resolve. In other words, the Court had to decide if stealing votes, in the only election that mattered in places like Louisiana and Texas, was a crime.[43] *Classic* implicitly overruled *Grovey* and is, arguably, commensurate with *Sweatt* and *McLaurin's* implicit overruling of *Gong Lum* and *Plessy*.[44]

The beginning of the end of the White Primary came when Dr. Lonnie Smith, a dentist from Houston, Texas, attempted to vote in a Democratic Primary that included the nomination of candidates for U.S. Senate and House of Representatives. S.E. Allwright, the election judge, refused to give Smith a ballot.[45] The resulting case was *Smith v. Allwright* (1944). On Monday, April 3, 1944, only nine years after *Grovey*, the Supreme Court finally put to rest the question about whether the White Primary was a violation of the Constitution, and more specifically, whether it violated the Fifteenth Amendment: "Here we are applying, contrary to the recent decision in *Grovey v. Townsend*, the well established principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen's right to vote. *Grovey v. Townsend* is overruled."[46]

It was as complete a victory as Thurgood Marshall could have hoped for. *Smith v. Allwright* had a majority of 8-1. The only dissenter was Justice Owen J. Roberts, the author of Grovey, and the only justice on the court who had not been appointed by President Franklin D. Roosevelt.

Applying the Benchmarks to Presidential Appointments

Below are brief histories of presidential appointments for each seat on the Court from the first benchmark (*Gong Lum*, 1927) to the time of the *Sweatt* (1950) decision.

Position 1: Chief Justice Fred Vinson (currently held by Chief Justice John Roberts) :

In the 1927 ruling in the *Gong Lum* case, the Chief Justice was former President William Howard Taft, a judicially-conservative, strict constructionist

Republican appointed by President Warren G. Harding. While Taft had a personal distaste for bigotry, it did not overcome his conviction that the legal profession's primary mission was to frustrate reform. His vote in *Gong Lum* reflected his stubborn defense of the *status quo*.[47] Taft was replaced in 1930 by a Hoover-appointee, Charles Evans Hughes, who voted in favor of access in *Gaines* but not for the ballot in *Grovey*. By the time the Court ruled in *Smith*, Harlan F. Stone was Chief Justice. Stone had been elevated to the Chief Justice position by Franklin Roosevelt. With Stone, FDR could appear to be non-partisan (Stone was a Republican) and still appoint a dependable vote to uphold New Deal initiatives. In 1946 Chief Justice Stone died while reading an opinion in session. He was replaced by a Truman appointee, Fred Vinson, shortly after Heman Sweatt made his application to the University of Texas Law School. By that time the new Vinson Court was nearly united in civil rights cases. Vinson's votes in *Sipuel* and his majority opinion in *Sweatt* were landmark precedents.

Position 2: Justice Hugo Black (currently held by Justice Anthony Kennedy):

Justice Willis Van Devanter, a conservative appointed by President William Howard Taft, was like Taft in that he had a personal distaste for racial bigotry but did not appreciate the personal toll it took on his fellow Americans. For example, in 1932 his vote in *Nixon v. Condon* was guided by his belief that a political party was a private organization. If it was not, then he feared the federal government could control any civic group. He was reportedly ready to retire as early as 1932, five years before he actually did so, but feared the "rashness" of FDR.[48] His fears were justified; FDR's appointment to Van Devanter's seat was the fifty-one year old Hugo Black, an Alabama populist and rabid New Dealer. Black's first case as a lawyer was the defense of a black convict who had been made to do hard labor for fifteen days beyond his court-imposed sentence. As a District Attorney he prosecuted the Bessemer (Alabama) Police Department for using a torture chamber to beat confessions out of black suspects. In 1923 he joined the Ku Klux Klan, but dropped out after two years. When former President Herbert Hoover heard of Hugo Black's appointment, he said that the Court was now "one-ninth packed."[49] Hugo Black joined the Court in August of 1937 and cast pro-civil rights votes in *Gaines, Sipuel, Sweatt*, and *Brown*.

Position 3: Justice Stanley Reed (currently held by Justice Ruth Bader Ginsburg)

Justice George Sutherland, a conservative appointed by President Warren Harding, eventually became, as David Burner wrote, the "intellectual spokesman for the Supreme Court Justices who opposed the New Deal." It is difficult to

conjure a purer example of a strict constructionist who believed it was the duty of justices to "declare the law as written" and "to place ourselves in the condition of those who framed and adopted [the Constitution."[50] Throughout his sixteen-year occupation of a seat on the bench, Sutherland constantly reinforced themes of dual federalism, and in *Gong Lum* that meant that educational access for Martha Lum was exclusively the business of the state of Mississippi. In January 1938, Sutherland retired and was replaced by Stanley Reed, another of FDR's young New Dealers. Generally considered a centrist on most issues, he could, nonetheless, be counted on to "attack the scandal of Negro inequality." Chief Justice Harlan Stone assigned the writing of the *Smith v. Allwright* opinion (which ended the White Primary) to Reed because, like Hugo Black, Reed was a southern populist. Justice Reed voted for access in *Gaines, Sipuel, Sweatt*, and *Brown*.[51]

Position 4: Justice Felix Frankfurter (currently held by Justice Stephen Breyer)

At the time of *Gong Lum* (1927), Oliver Wendell Holmes, Jr., a Theodore Roosevelt appointee, had already occupied a seat on the Court for twenty-five years. As Paul Freund wrote, Holmes did not see a constitutional prohibition against lawmakers, state or federal, making fools of themselves.[52] And perhaps that view manifested itself in *Gong Lum*, when Holmes voted to deny Martha Lum access to her home district's white high school. It was Holmes' longevity, however, that brought about one of the most wrenching episodes in the Court's history. On January 12, 1932, he resigned after a visit from Chief Justice Charles Evans Hughes, who had been convinced by other justices that he (Holmes) could no longer effectively function as a justice. Holmes' successor, Benjamin Cardozo, was appointed by Herbert Hoover and served for only five and one half terms, but those years saw the "court-packing" fight and a shift of the Court's attention from state legislation to the constitutionality of the New Deal.[53] Cardozo voted against access to the primary ballot in *Grovey* in 1935. He died of a stroke in 1938 before Gaines was decided, Felix Frankfurter assumed that seat in January of 1939: he was fifty-seven years old and would serve the Court for twenty-three years. No other seat on the Court more splendidly illustrates the impact of FDR's New Deal appointments. Few nominees had ever had more impressive pro-civil rights credentials: he was one of the founders of the Civil Liberties Union and a legal advisor for the NAACP.[54] In the context of this sampling of benchmark cases Justice Frankfurter's commitment to full citizenship rights is perfect: he cast pro-access votes against the White Primary in *Classic* and *Smith*. With regard to education he voted for access in *Sipuel, McLaurin, Sweatt*, and *Brown*.

Position 5: Justice William O. Douglas (currently held by Justice Elena Kagan)

At the time of *Gong Lum*, Justice Louis D. Brandeis, already a legal legend, had been on the bench for eleven years. In his biography of Woodrow Wilson, John Milton Cooper, Jr. characterized Brandeis' appointment as "the strongest proof of [Wilson's] undiminished progressive zeal."[55] But like Wilson, Brandeis was a progressive (who could easily become an activist when government action curbed civil liberties) with an inconsistent commitment to civil rights. He voted to sustain the right of Mississippi to segregate its schools in *Gong Lum* in 1927, and eight years later he voted with a unanimous court to uphold the Texas White Primary in *Grovey*. But in 1938 he joined a majority to hold Missouri accountable for not providing Lloyd Gaines with a separate and equal law school education within its borders. At age forty-one Justice William O. Douglas was appointed to the Brandeis seat in April 1939. At the time he was considered a financial law expert, but he was also a New Deal insider and the fourth FDR appointee in two years. He would become the longest serving Supreme Court Justice in American history. Justice Douglas replaced Brandeis with a pure pro-civil rights record. He voted to undermine segregation in *Sipuel, Sweatt*, and *Brown*.[56]

Position 6: Justice Robert Jackson (currently held by Justice Antonin Scalia)

In 1927, Associate Justice Harlan Fiske Stone had voted with the Taft anti-civil rights majority in *Gong Lum*. Stone's position on segregation, however, proved to be rather nimble and tended to reflect the preferences of sitting presidents. As an associate justice appointed by Calvin Coolidge, Stone voted against access to the ballot in *Grovey* in 1935 (before FDR made any appointments to the Court). But, he supported the NAACP's argument in *Gaines* in 1938 (after FDR appointed Hugo Black and Stanley Reed). When FDR elevated Stone to the Chief Justice position, the associate's chair became vacant and was filled by Robert H. Jackson in July 1941. He took the seat on the Supreme Court that had been occupied by Republican appointees since the days of Abraham Lincoln, when the seat was created.

In Seattle in 2004, during remarks to the Loren B. Miller Bar Association, Texas Supreme Court Chief Justice Wallace Jefferson observed that Robert Jackson probably best typifies the fear that many justices had of a new "doctrine of constitutional interpretation [threatening] to bring discredit on the Court."[57] Jefferson described Jackson as an advocate of judicial restraint and generally

considered a moderate to conservative on the bench, but someone who struggled to reconcile his personal sense of justice with what he saw as the Court's role in interpreting the Constitution. In an uncirculated concurring opinion during the *Brown* litigation, apparently seen only by Chief Justice Earl Warren, Jackson wrote that "This Court must face the difficulties in the way of honestly saying that the states which have segregated schools have not, *until today*, been justified in their practice as unlawful. And the thoughtful layman, as well as the trained lawyer, must wonder how it is that a supposedly stable organic law of our nation *this morning* forbids what for *three quarters of a century* it has allowed." (emphasis by Chief Justice Jefferson) Justice Jackson nonetheless overcame his devotion to precedent to provide consistent pro-civil rights votes to the Court. He supported access in *Smith, Sipuel, Sweatt*, and *Brown*.[58]

Position 7: Justice Harold Burton (currently held by Justice Samuel Alito)

The seat held by Justice Edward Terry Sanford during *Gong Lum* (1927) had been created ninety years earlier when the Supreme Court expanded from seven to nine members. (It was the same seat held by John Marshall Harlan, the author of the famous dissent in *Plessy*.) Sanford, who had been educated in both northern and southern schools, as well as Europe, had been appointed by Warren Harding in 1923 after intense lobbying by Chief Justice William Howard Taft. If it was Taft's ambition to clone himself into another seat on the bench, he succeeded. *Gong Lum* was but one of many cases in which the two justices voted together. As David Burner observed, it was a fitting irony that William Howard Taft and Edward Sanford died on the same day (March 8, 1930).[59]

President Hoover filled Sanford's seat with a truly mechanistic justice. Owen J. Roberts believed that the Court had only one duty when it came to constitutional questions, and that was to compare the challenged law to the Constitution and determine "if the latter squares with the former." He had a tendency to rule that powers not expressly delegated to either the state or federal government could only be exercised at the state level.[60] And yet, the body of his civil liberty and civil rights rulings reveals a puzzling inconsistency.[61] He spoke for a unanimous Court in *Grovey* (1935) which denied blacks the right to vote in the Democratic Primary and was a lone dissenter when it was overturned in *Smith*. But in between those two cases he voted with the majority in the landmark *Gaines* education case.

Owen Roberts' resignation presented Harry Truman, only six months into his presidency, with his first opportunity to appoint a justice. President Truman was under intense pressure to appoint a Republican; all of FDR's appointments (save Stone's promotion to Chief Justice) had been Democratic. The appointee, Justice Harold Burton, may have been a Republican but his votes

did not differ significantly from Truman's future Democratic appointments. Although often identified with the "self-restraint" faction headed by Felix Frankfurter, Justice Burton was a dependable pro-civil rights Republican voted with the majorities in *Sipuel* and *Sweatt*.[62] He also authored the Court ruling in one of *Sweatt's* companion cases, *Henderson* (1950), but his decision to desegregate transportation facilities was based on the Interstate Commerce Act and not the Fourteenth Amendment. That notwithstanding, Burton's indictment of racial discrimination was rather apparent when he wrote, "We need not multiply instances in which these rules sanction unreasonable discriminations. The curtains, partitions and signs [separating colored from white passengers] emphasize the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility.[63]

Position 8: Justice Tom Clark (currently held by Justice Clarence Thomas)

Justice Pierce Butler had been on the Court for four years when the *Gong Lum* decision had been rendered in 1927. The seat had been created in 1870 and had been held by Republican appointees going back to President Ulysses S. Grant. Justice Butler had been appointed by President Harding, who had largely followed the advice of his corrupt Attorney General Henry Daugherty. Daugherty, in turn, had been completely influenced by Chief Justice William H. Taft, who wanted a strict constructionist and considered Butler a "reliable supporter of constitutional values."[64] Butler later became known as one of the infamous "Four Horsemen" consistently opposing New Deal legislation that came before the Court. Justice Butler has the distinction of being one of the most anti-intellectual Supreme Court Justices in American history. During his entire professional career he actively opposed and sought to purge "radical" professors at the University of Minnesota. It is perhaps not surprising that he was one of only two justices to vote to deny Lloyd Gaines even the possibility of admission to the University of Missouri Law School. He opposed Franklin Roosevelt with what David Burner called "unrelenting conservatism" until his death in 1939.[65]

On the morning of Butler's death, FDR turned to his Attorney General and informed him of his nomination to the Supreme Court.[66] Earlier, that AG had already convinced FDR that future appointments to the court should be persons who "have a philosophy based on history and on a theory of public welfare rather than to those who looked only at the text of a law."[67] It is difficult to conceive a greater dogmatic turnaround in the history of the Court than Pierce Butler's replacement, Attorney General Frank Murphy.[68] It was also Franklin Roosevelt's fifth (and majority) appointment. Although he served only nine years

on the Court, Murphy voted on two benchmark cases. He voted to destroy the White Primary in *Smith* and for access for Ada Lois Sipuel. Murphy's replacement in 1949 was another Attorney General. President Truman appointed Tom C. Clark, a native Texan and graduate of the University of Texas Law School.

Of all of the justices considered here, Tom Clark had the most aggressive pro-civil rights record as a public servant prior to his appointment. He was a veteran of the Truman Administration's civil rights initiatives. His office in the Justice Department submitted an *amicus curiae* in *Shelley v. Kraemer* (1948), the case that outlawed state enforcement of restrictive covenants.[69] While Tom Clark's Supreme Court appointment did not alter the direction of the Court (since he replaced FDR-appointed Justice Frank Murphy) he helped to shape the *Sweatt* decision with a "Memo to the Court" in 1949.

It was natural for Justice Tom Clark to take a special interest in *Sweatt v. Painter*. "Since these cases [i.e., *Sweatt* and *McLaurin*] arise in 'my' part of the country it is proper and I hope helpful for me to express some views concerning them..."[70] Clark thought that Texas courts should be reversed in *Sweatt*. One way was to overrule *Plessy*, but he was not willing to go that far—yet. *Sweatt* could easily be distinguished from *Plessy* in that the latter did not involve education, and the metrics for what was equal were clearly not the same. In retrospect, Clark's concern for metrics is pivotal in civil rights history. He steered the Court away from the tedious statistics of counting books, desks, and bricks to a discussion of what every justice knew: those tangibles were not all a law school was about.

> "(1) white schools have higher standing in the community as well as nationally...; (2) the older and larger college has more alumni, which gives the graduate more professional opportunities; (3) the larger and older school attracts better professors; (4) competition among schools is much keener in the older and more established school...; (5) the larger and older institution attracts a cross section of the entire State in its student body—affords a wider exchange of ideas—and, in the combat of ideas, furnishes a greater variety of minds, backgrounds and opinions...; (6) it takes years and years to establish a professional school of top rank, affording law reviews, competitions, medals, societies...; (7) acquaintance is important in the professions and segregation prevents it...These and other reasons are those which I am sure have led all but nine of the States to abandon the 'separate but equal' doctrine at the graduate level."

None of Justice Clark's seven points could be measured in a standardized fashion or placed on a common scale. He moved the Court away from considering equality only as a measurable mathematical construct, such as equalizing pay for African American teachers, to what would become known as "intangibles."

He closed his memorandum with "If some say this undermines *Plessy* then let it fall, as have many Nineteenth Century oracles."[71] It was an approach to equality William Howard Taft and Pierce Butler would have considered heresy.

In *Sweatt*, Justice Tom Clark of Texas did not want to overrule *Plessy*; he wanted to "undermine" it. It was the compromise the justices were looking for and a monumental step toward *Brown* only four years later.

Position 9: Justice Sherman Minton (currently held by Justice Sonia Sotomayor)

During the *Gong Lum* and *Gaines* cases position nine had been held by a Woodrow Wilson appointee named James Clark McReynolds. In McReynolds' time "unrelenting conservatism" may have been the norm, but it is likely that no justice in the twentieth century ever displayed such unremorseful racism in his rulings, business dealings, and in his personal life. His bigotry was breath-taking, even causing Chief Justice Taft grief when he (McReynolds) refused to sit for a group picture of the Taft Court because he did not want to be photographed with Justice Brandeis, who was Jewish. He also refused to attend Justice Cardozo's funeral for the same reason.[72] In both *Gong Lum* and *Gaines* McReynolds cast anti-civil rights votes. He refused to acknowledge arguments presented by African American attorney Charles Hamilton Houston during the *Gaines* hearing. In a shameless display of childishness he turned his chair and faced the wall during the thirty-minute presentation. He had done the same to Franklin Roosevelt during a Gridiron dinner.[73]

When McReynolds retired in early 1941, FDR appointed James F. Byrnes to the bench, but that tenure lasted a little more than one year when he resigned to join FDR's war effort. FDR followed with his last Supreme Court appointment, Wiley Blount Rutledge, who served only six years, but long enough to vote for access in *Sipuel*. Rutledge died on September 10, 1949.

Rutledge's seat was filled five weeks later when Truman nominated Sherman Minton. In the 1930s Minton had been known as a "militant and outspoken New Dealer" and was one of the floor leaders of Franklin Roosevelt's ill-fated "Court-Packing" Plan. As a United States Senator he had shared a desk with Harry Truman and the two became close friends. He was widely considered a conservative insofar as he believed that individuals had a right to discriminate, but he had no such belief as far as government agencies.[74] Such an outlook is consistent with his anti-segregation votes in *Sweatt* and *Brown*.

Why Heman Sweatt Won

Sweatt v. Painter (1950) and *Brown v. Board of Education* (1954) were made possible by the presidential elections of 1932 through 1948. In a twenty-

year period, Presidents Franklin D. Roosevelt and Harry S. Truman appointed twelve justices to the Supreme Court—eleven of whom voted, without exception, to undermine racial segregation in education (and transportation and almost without exception for voting rights). The other justice, James F. Byrnes, served only one year and was never presented with an equalization or desegregation case. Nearly all were very young New Dealers believing in the power of the federal government and the flexibility of the Constitution to address serious challenges facing the country—such as the Great Depression. Franklin Roosevelt succeeded in "packing" the Supreme Court—it just took him about six years to do it. Harry Truman completed, not just a majority, but a unanimous court for Ada Lois Sipuel, George McLaurin, Heman Marion Sweatt, and finally the *Brown* plaintiffs.

As a group, the New and Square Dealers' ideas on civil liberties, business, and other issues before the Court could be diverse, and when considered *in toto,* there were identifiable liberals and conservatives. But, in the area of civil rights, and specifically the desegregation of public education, the FDR and Truman appointees voted unanimously to tumble walls constructed by equally unanimous court headed by William Howard Taft and his predecessors.[75]

If *Gong Lum* had been argued before Chief Justice Vinson and his Court, Martha Lum would have attended school with white children; if Thurgood Marshall had argued *Sweatt* in 1927 before Chief Justice Taft and his Court, he would have lost, and Heman Sweatt would have studied in a makeshift law school in the basement of a petroleum engineering firm on Thirteenthth Street in Austin.

And yet, it would be a mistake to marginalize the remarkable accomplishments of Charles Hamilton Houston, Thurgood Marshall, James Nabrit, Jr., Robert Carter and the hundreds of civil rights lawyers who fought the judicial battles leading to victories in *Sweatt v. Painter* and *Brown v. Board of Education*. These gifted men gave Americans a great historical gift. As Nelson Mandela said in his inaugural address as South Africa's President in 1994, "Out of the experience of an extraordinary human disaster that lasted too long, must be born a society of which all humanity will be proud." Charles Houston and Thurgood Marshall presented America with a vision of a society of which all humanity could be proud. Juan Williams called Thurgood Marshall an "American Revolutionary," but in a sense Marshall's accomplishments were not revolutionary since he brought America to its own often-stated lofty principles described in the 1776 Declaration of Independence and 1787 federal Constitution. In 1941, Ralph Bunche wrote that "It is the Constitution and the ideals of the American Revolution which gave the Negro the persistent belief that he was entitled to

equality of rights."[76] Bunche was writing about the Constitution we had—not a new one he or Thurgood Marshall wanted.

Charles Hamilton Houston and Thurgood Marshall understood that rights, above all, had to be guaranteed by law and the power of unambiguous words, such as are found in briefs, the record, and finally in court rulings. A necessary prerequisite to such a belief in the law is acceptance and confidence in existing governmental institutions such as the judiciary.

Indeed. A very large part of Thurgood Marshall's professional life was dedicated to getting the U.S. Supreme Court to write, "Separate educational facilities are inherently unequal." In 1954, *Brown* made those words law—as powerful and enforceable as a constitutional amendment.

NAACP-sponsored legal strategy and courtroom performances have been studied and documented as brilliant social engineering that long outlived the New Dealers on the Court. We are still living with and debating their work in affirmative action cases like *Bakke* (1978) and *Grutter* (2003). Charles Houston and the cadre of African American attorneys he inspired gave receptive Supreme Court justices what they needed to change America. But it was not just, as Heman Marion Sweatt contended, a lesson in Democracy. It was also a lesson in how the limits of Democracy can be overcome; and how the rights of minorities can be protected in a government that values the concept of majority rule.

NOTES:

[1] For a complete account of the meeting see Gary M. Lavergne, *Before Brown: Heman Marion Sweatt, Thurgood Marshall and the Long Road to Justice* (Austin: University of Texas Press, 2010), 97-109.

[2] The Texas Attorney General at the time was Grover Sellers and the Opinion is numbered O-7126 dated March 16, 1946. It is available online at: https://www.oag.state.tx.us/opinions/opinions/39sellers/op/1946/pdf/gs7126.pdf In his letter to Sellers, Painter wrote "This applicant is a citizen of Texas and duly qualified for admission into the Law School at the University of Texas, save and except for the fact that he is a negro." Theophilius Painter to Grover Sellers, February 26, 1946 in Charles McCormick Papers, Tarleton Law Library, The University of Texas at Austin.

[3] See *Plessy v. Ferguson* 163 U.S. 537 (1896). For an excellent Internet repository of Sweatt archives see http://www.houseofrussell.com/legalhistory/sweatt/

[4] See *Sweatt v. Painter*, 339 U.S. 629 (1950)

[5] Ibid.

[6] Juan Williams, *Thurgood Marshall: American Revolutionary* (New York: Times Books, 1998), 185.

[7] See *Brown v. Board of Education*, 347 U.S. 483 (1954).

[8] Justice Tom C. Clark, interviewed by Joe Frantz, October 7, 1969, 21 (LBJ Library); available at http://www.lbjlib.utexas.edu/Johnson/archives.hom/oralhistory.hom/Clark-T/Clark-T.pdf (accessed August 13, 2011).

[9] Robert L. Carter, *A Matter of Law* (New York: The New Press, 2005), 92.

[10] See: http://www.insidehighered.com/news/2010/09/08/brown#Comments

[11] See: http://chronicle.com/article/Diverse-in-the-Heart/125413/

[12] Jonathan R. Alger, "From Desegregation to Diversity and Beyond: Our Evolving Conversation on Race and Higher Education," *Journal of College and University Law,* vol. 36, no. 3 (2009): 983-1003.

[13] Thomas D. Russell quoted in *Austin American-Statesman*, October 17, 2010.

[14] Mark Strasser, "Was Brown's Declaration of per se Invalidity Really out of the Blue? The Evolving 'Separate But Equal' Education Jurisprudence from Cumming to Brown," *Howard Law School Journal,* vol. 47, no. 3 (Spring 2004): 769-794.

[15] Ibid.

[16] One of the best descriptions of how arbitrary racial classifications were in the United States is in *Plessy v. Ferguson* (1896) itself. See also Milton R. Konvitz, "The Extent and Character of Legally-Enforced Segregation," *Journal of Negro Education*, vol. 20, no. 3 (Summer 1951): 425-35.

[17] See *Gong Lum v. Rice*, 275 U.S. 78 (1927).

[18] Ibid.

[19] See A. Leon Higginbotham's forward in Genna Rae McNeil, *Groundwork* (Philadelphia: University of Pennsylvania Press, 1983), xvi-xvii.

[20] Much of my information on the Supreme Court is from Leon Friedman and Fred L. Israel, *The Justices of the United States Supreme Court, 1789-1978: Their Lives and Major Opinions,* Volumes I-V (New York: Chelsea House Publishers, 1969).

[21] For a general discussion of Theodore Roosevelt's record see Edmund Morris, *Theodore Rex*, (New York: Random House, 2001), 52-54, and for Roosevelt's place in the history of race relations see Morris's *Colonel Roosevelt* (New York: Random House, 2010), 569.

[22] See also Lavergne, *Before Brown*, 267-71.

[23] Douglas O. Linder, *Charles H. Houston and the Gaines Case*, University of Missouri at Kansas City Law School Website, http://law2.umkc.edu/faculty/projects/ftrials/trialheroes/charleshoustonessayf.html accessed August 13, 2011;

James Rawn, Jr., *Root and Branch: Charles Hamilton Houston, Thurgood Marshall and the Struggle to End Segregation* (New York: Bloomsbury Press, 2010), 104-117; *Missouri ex rel. Gaines v. Canada, et al.* 305 U.S. 337 (1938)

[24] *Missouri ex rel. Gaines v. Canada, etal* (1938).

[25] Linder, Charles H. Houston and the Gaines Case; *Missouri ex rel. Gaines v. Canada, et al.* (1938).

[26] Ibid.; James Rawn, Jr., *Root and Branch*, 117.

[27] Ada Lois Sipuel and Danney Goble, *A Matter of Black and White* (Norman: University of Oklahoma Press, 1996), 121.

[28] *Sipuel v. Board of Regents of University of Oklahoma*, 332 U.S. 631 (1948).

[29] John T. Hubbell, "The Desegregation of the University of Oklahoma," *Journal of Negro History*, vol. 57, no. 4 (October 1972): 373.

[30] On June 5, 1950 the Court also ruled in *Henderson v. U.S.*, 39 U.S. 816 (1950). It was a segregation case involving railroad dining cars.

[31] See *McLaurin v. Oklahoma*, 339 U.S. 637 (1950).

[32] Ibid.

[33] Darlene Clark Hine, *Black Victory* (Columbia: University of Missouri Press, 2003), 113-14; Texas History Online, Lawrence Aaron Nixon, accessed July 23, 2006.

[34] See *Nixon v. Herndon*, 273 U.S. 536 (1927); Ibid.; Robert V. Haynes, in Howard Beeth and Cary D. Winz, Black Dixie: *Afro-Texan History and Culture in Houston* (College Station: Texas A&M University Press, 1992), 195.

[35] *Nixon v. Herndon*, 273 U.S. 536 (1927).

[36] Ibid.

[37] *Nixon v. Condon*, 286 U.S. 73 (1932).

[38] Another example of the Supreme Court "instructing" states on how to make something constitutional was *Furman v. Georgia* (1972). In *Furman* the Court struck down death penalty laws, certainly a victory for death penalty opponents, but it also provided instructions as to how to make executions constitutional. Eventually, the result was more, not fewer, executions.

[39] *Smith v. Allwright*, 321 U.S. 649 (1944); Hine, *Black Victory*, 144; Darlene Clark Hine, "The Elusive Ballot: The Black Struggle Against the Texas White Primary, 1932-45" *Southwestern Historical Quarterly* 81 (April 1978): 371-92.

[40] Thurgood Marshall, "The Rise and Collapse of the White Democratic Primary," Journal of Negro Education, vol. 26 (Summer 1957), in Mark Tushnet, *Thurgood Marshall* (Chicago: Lawrence Hill Books, 2001), 165-66; Hine quoted in *Black Victory*, 193.

[41] Ralph Bunche, "The Negro in the Political Life of the United States", *Journal of Negro Education*, vol. 10, no. 3 (July 1941): 567-84; Darlene Clark Hine, *Southwestern Historical Quarterly* (April 1978): 371-92; Haynes in *Black Dixie*, 201.

[42] See *Grovey v. Townsend* (1935) and *Smith v. Allwright* (1944).

[43] *U.S. v. Classic* 313 U.S. 299 (1941).

[44] Thurgood Marshall, "The Rise and Collapse of the White Democratic Primary," *Journal of Negro Education* vol.26 (Summer 1957): 249-54.

[45] Charles William Grose, "Black Newspapers in Texas" (Ph.D. diss, University of Texas at Austin, (1972), 198; *City Directory1946-47,* and Verticel File, "Lonnie Smith," Houston Research Center, Houston Public Library; Roger Goldman and David Gallen, *Thurgood Marshall: Justice for All* (New York: carroll and Graf Publishers, Inc., 1992), 51; *Smith v Allwright* (1944).

[46] *Smith v. Allwright* (1944).

[47] Alpheus Thomas Mason, "William Howard Taft," in *The Justices of the Supreme Court*, Vol.; III, 2103-11.

[48] David Burner, "Willis Van Devanter," in *The Justices of the Supreme Court*, Vol. III, 1945-1952.

[49] John P. Frank, "Hugo L. Black," in *The Justices of the Supreme Court*, Vol. III, 2321-30.

[50] David Burner, "George Sutherland," in *The Justices of the Supreme Court*, Vol. III, 2133-38.

[51] Ibid., 2373-80.

[52] Paul A. Freund, "Oliver Wendell Holmes, Jr.," in *The Justices of the Supreme Court*, Vol. III, 1759.

[53] Andrew Kaufman, "Benjamin Cardozo," in *The Justices of the Supreme Court*, Vol. III, 2293-94.

[54] Albert M. Sacks, "Felix Frankfurter," in *The Justices of the Supreme Court*, Vol. III, 2403-04.

[55] John Milton Cooper, Jr., *Woodrow Wilson* (New York: Alfred A Knopf, 2009), 329; Alpheus Thomas Mason, "Louis D. Brandeis," in *The Justices of the Supreme Court*, Vol. III, 2043-57.

[56] Ibid., Vol. IV, 2453-55.

[57] Texas Chief Justice Wallace Jefferson's remarks before the Loren B. Miller Bar Association, Seattle, Washington, May 21, 2004. Provided to the author by the late Texas Chief Justice Joe Greenhill.

[58] Philip B. Kurland, "Robert H. Jackson," in *The Justices of the Supreme Court*, Vol. IV, 2549-63.

[59] David Burner, "Edward Terry Sanford," in *The Justices of the Supreme Court*,

Vol. III, 2204-09.

[60] Owen Roberts is quoted in Butler in Ibid., Vol. III, 2263.

[61] Augustus M. Burns III in Kermit L. Hall, *Oxford Companion to the Supreme Court of the United States*, 2nd ed. (New York: Oxford University Press, 2005), 860-61.

[62] Richard Kirkendall, "Harold Burton," in *The Justices of the Supreme Court*, Vol. IV, 2617-23.

[63] See Henderson (1950).

[64] Norman Rosenberg quoted in *Oxford Companion*, 131; Frances Russell, *The Shadow of Blooming Grove: Warren G. Harding and His Times* (New York: McGraw Hill, 1968), 507.

[65] David Burner quoted in "Pierce Butler," in *The Justices of the Supreme Court*, Vol. III, 2187.

[66] J. Woodford Howard, Jr., *Oxford Companion*, 659.

[67] Fred Israel quoted in "Wiley Rutledge," in *The Justices of the Supreme Court*, Vol. IV, 2596.

[68] Perhaps Justice Clarence Thomas replacing Justice Thurgood Marshall is comparable.

[69] Richard Kirkendall, "Tom C. Clark," in *The Justices of the Supreme Court*, Vol. IV, 2665-67.

[70] Memorandum to Supreme Court Justices, Box A2, Folder 3, U.S. Supreme case Files, Tom C. Clark Papers, Rare Books and Special Collections, Tarlton Library, University of Texas at Austin. The text of the memorandum is available at http://www.houseofrussell.com/legalhistory/sweatt/docs/clarkmemo.htm

[71] Ibid.; See also Lavergne, *Before Brown*, 249-50.

[72]"David Burner, and "James C. McReynolds," in *The Justices of the Supreme Court*, Vol. III, pgs 2023-24; James Rawn, Jr., *Root and Branch*, 115-16.

[73] James Rawn, Jr., *Root and Branch*, 115-16; David Burner, "James C. McReynolds," in *The Justices of the Supreme Court*, Vol. III, 2023-24.

[74] Richard Kirkendall, "Sherman Minton," in *The Justices of the Supreme Court*, Vol. IV, 2699-703.

[75] Ibid.; Whittington B. Johnson, "The Vinson Court and Racial Segregation," *Journal of Negro History*, vol. 63, no. 3 (July 1978): 220-230; Robert L. Carter, *A Matter of Law*, 131.

[76] Ralph Bunche quoted in "The Negro in the Political Life of the United States," *Journal of Negro History*, vol. 10, no. 3 (July 1941): 567-84.

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