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In 1899, three years after the "separate but equal" decision of Plessy v. Ferguson, the U.S. Supreme Court for the first time confronted the problem of racial discrimination in education. Writing for a unanimous court, Justice John Marshall Harlan, whose recently refurbished reputation rests chiefly on his liberal opinions in Negro rights cases, decided in effect that the judiciary would do no more to guarantee equality in public services than it had to stop legalized segregation. "The education of the people in schools maintained by state taxation is a matter belonging to the respective states," the erstwhile nationalist Justice concluded, "and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined . . ."[1] Attracting even less attention at the time than Plessy did, the case of Joseph W. Cumming, James S. Harper, and John C. Ladeveze v. School Board of Richmond County, Ga. has never received the attention Plessy gained in the wake of the outlawing of segregation in the 1954 Brown decision.[2] The leading case on educational discrimination for four decades, Cumming has neither been specifically overruled by judges nor subjected to more than passing mention by legal scholars or historians.[3] A thorough analysis of the Cumming case will cast new light on the nature of race relations, racial politics, and the character of the black elite in the postbellum South; raise serious questions about Justice Harlan's devotion to civil rights; and contribute to the growing tendency to substitute a broader social history for the narrow study of abstract legalistic principles which has until recently constituted the history of law.[4]

Four factors shaped the course of black education in Augusta and the surrounding county of Richmond in the late nineteenth century: the black masses' strong desire for education, black political power, the activities of the black elite, and the attitudes of white leaders. Denied an education, at least in law, before 1865, the former slaves and free people of color developed "an almost limitless faith in the possibilities of advancement through schooling."[5] As early as June, 1866, the blacks' push to learn led the local Inferior Court, which served at the time as Augusta's school board, to hold a public meeting to offer local financial support for a few schools for Negroes until the legislature could set up a formal state-funded system. At the

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urging of spokesman Robert Augustus Harper, the blacks at the meeting agreed to accept the Court's proposal as a gesture of good faith. Though it is unclear from surviving records whether the whites followed through completely on their promise, the fact that they gave it does indicate a desire on their part to conciliate the blacks or at least to keep control of the Negroes' education in the hands of the Southern whites.[6] But since the 1866 Johnsonian legislature confined fiscal support to white schools and the turbulence of Congressional Reconstruction in Georgia prevented the establishment of a stable state educational system, schooling for Augusta blacks in the 1860s and early seventies depended entirely on the efforts of the local community, the Freedmen's Bureau, and Northern missionary societies.[7] Only after the Democrats regained control of Georgia in 1871-2 was the biracial public school system put on a firm footing in Richmond County.

Black political power left its impress on the state legislature's 1872 passage of a bill, drawn up by a local committee of nineteen whites, which established a county-wide system of education in Richmond County and granted its school board extraordinary powers.[8] Section 9 of the bill, though mandating segregation, specifically provided that the Richmond County School Board "shall provide the same facilities for both [white and Negro children], both as regards schoolhouses and fixtures, attainments and abilities of teachers, length of term time, and all other matters appertaining to education . . ." Unlike most other school boards in Georgia, the Richmond County board could establish high schools (section 10) and levy local taxes without

a referendum, and no general law on education could supersede the 1872 special act. Furthermore, Richmond County was expressly excused from the 1877 state constitution's prohibition on public high schools.[9]

Their rights guaranteed in law, black leaders pressed for full implementation by the board. Pointing out that the buildings allocated to blacks could not accommodate all those who sought admission during the 1872-3 term, former Freedmen's Bureau agent William Jefferson White offered the Richmond County Board three buildings which had been owned by the Bureau and two rooms in the black Harmony Baptist Church, of which he was pastor.[10] Stressing both student demand and the need to train teachers for the elementary schools, White also petitioned for a black public high school. In response, the city's leading newspaper noted the provisions of the law and endorsed White's request as "just and fair." "If the whites have high schools, grammar, intermediate and primary schools," the Chronicle's editorial continued, "let the colored children have them also. Let no children, white or colored, be turned away for want of teachers, or school rooms, or books, whose parents or guardians are desirous that they should receive an education. Give both races exactly the same opportunities and equal advantages."[11]

Described by the Negro Atlanta Age as "the father of (Negro) education" in Georgia, White had started Augusta Baptist Institute in 1867 in an abandoned railway car which the Freedmen's Bureau placed in Robert Harper's backyard. Originally devoted to upgrading the meager educational attainments of black Baptist ministers, the Institute seems to have functioned primarily as a high school for the black

community during the 1870s. When its trustees decided in 1879 that a move to Atlanta would put the school on a firmer financial footing, the long-delayed issue of a public high school for blacks came to head.[12]

Richmond County in 1880 supported one semi-public and two public high schools for whites and from time to time had partially subsidized the venerable Academy of Richmond County for boys.[13] It was, therefore, obvious to county school commissioner William H. Fleming that the 1872 law required the school board to take positive action on a July, 1880 petition requesting a black public high school. Appointed at a mass meeting of the black population, the committee of five leading Negroes, which included William J. White, Robert Harper's son, James S. Harper, and Colored Methodist Bishop Lucius Holsey, "respectfully but earnestly" called for compliance with the law. In response, Fleming, an outspoken racial moderate whose views did not prevent his later election as Speaker of the state House of Representatives and U.S. Congressman from Augusta, reminded the Board of section 9 of the 1872 law and reiterated his previous recommendation in favor of a black high school. "To grant to-day the petition of the colored people," Fleming announced, "would be only an act of tardy justice."[14]

Asserting that the law compelled the establishment of a black high school eventually, but not immediately, the lawyer for the Board and chairman of its high school committee, Joseph Ganahl, moved successfully to "accept" rather than "adopt" Fleming's report, and it appeared that the Board would bury the blacks' petition in committee. Between the July and October board meetings, however, the issue of black schools agitated both state and national elections. Reminding

his audience at a political rally that black as well as white taxes supported the white high schools, 1880 GOP national convention delegate and former state legislator Edwin Belcher condemned the Board: "The school law says equal facilities shall be given white and colored children. Now the white children have a high school and the colored have none . . . That will not do."[15] The Eighth Congressional District Republican Convention, moreover, heard its Chairman, William J. White, denounce "the discrimination against colored children and colored teachers in many of the counties of the State." And in the hotly contested gubernational race between Alfred Colquitt and Thomas Norwood, the young Tom Watson claimed in an Augusta speech that blacks should support Norwood because he would give them "a fair share in education." Because there was no registration law and the poll tax prerequisite was seldom strictly enforced (an 1881 grand jury investigation showed that only 30 percent of the voters in the 1880 municipal election had paid their taxes), the blacks voted freely in local as well as state and national elections, and, according to the Chronicle, "their votes were sought by all the candidates," Democrats as well as Republicans. Perhaps responding to the pressure of the black electorate, the School Board at its October, 1880 meeting voted to establish a black high school, overriding the objection of one Board member that the shortage of places in black primary schools should be alleviated before allocating money to the higher branches.[16]

The black community demonstrated its control over its own schools immediately, as William J. White was allowed to recruit perhaps the best-qualified black teacher in the state as the high

school's principal-teacher. Born a slave in 1855, the new principal, Richard R. Wright, had been valedictorian of the first class to graduate from Atlanta University, and by 1880 had established himself as one of the leading Republican politicians in the state as well as a teacher and newspaper editor in the small town of Cuthbert. Despite his irascibility, youthful political radicalism, and deeply suspicious attitude toward light-skinned Negroes, the dark-skinned Wright fit in well, at least at first, with the predominantly mulatto Afro-American elite in Augusta, and gained the respect of the white school board.[17] As if to underline the independence of the high school from Southern white control, Wright named it for his mentor, the Massachusetts-born Freedman's Bureau officer who founded and served as President of the then highly controversial Atlanta University, Edmund Asa Ware.[18]

Ware High, which offered the same classical curriculum as the white schools, quickly became a "complete success," in the words of 1881 County School Commissioner Benjamin Neely. It was the only public high school for Negroes in Georgia before 1915 and one of perhaps four in the eleven ex-Confederate states in 1880. Providing comparatively well-trained teachers for Richmond and the surrounding counties, the school served as well as a source of pride and an avenue of mobility for Augusta's energetic, striving black community.[19] Although sectarian pride and the insatiable black demand for education led the Baptists, Methodists, and Presbyterians to open separate black high schools in Augusta over the next dozen years (at least one of which unsuccessfully petitioned for a subsidy from the school board) Ware remained, according to the Chronicle, "the leading high school among the colored people of this state."[20]

Both blacks and whites took pride in Richmond County's Negro schools. Black teachers, who were often Ware graduates, edited newspapers, staffed political, civic, and benevolent organizations, and served as spokesmen for the black community before the city council.[21] That community, in turn, demonstrated both its concern for the schools and its power over them by convincing the Board to fire teachers whom the blacks found morally unsuitable. Leaders of both racial communities donated money for prizes to the best Negro students. Moreover, the white school administrators voiced fairly liberal views, for the South at the time, on black education. Despite his belief that "the right kind of education for the Negro is to teach him with reference to his being a better workman, to instruct him every day as if he was destined for labor," Lawton B. Evans, who served as County School Commissioner from 1882 to 1932, was willing before 1897 to support Ware High in order to educate "some Negroes of exceptional capacity" to serve as "teachers and leaders of their race."[22]

Ware High served political as well as educational purposes. Straining for every vote in his three Congressional contests with Tom Watson, Democrat James C. C. Black appealed for Negro votes in Augusta on the grounds that in Richmond County, "the colored girls and colored boys are educated at the expense of the whites and given the benefits not only of a common school, but a high school education." The $800 yearly net expense of Ware High was, so long as Negroes voted, a good investment for the Democrats. In response to Black, Watson claimed that Negroes paid approximately as much through direct and indirect taxes as they received for schools. The Populists, Watson

asserted, would allocate to Negroes their "share of the public school fund" on grounds of simple justice, without the Democrats' "misleading" and specious pretentions to paternalism.[23]

In fact, the Democratic claims were exaggerated, for Augusta's black schools were by no means equal to those for whites. Housed in the 1880s in four "disreputable structures" which had been used for hospitals during the Civil War, the black schools, despite some upgrading during the 1890s, could not hold all the children who wished to attend. In 1897, the Board owned or rented forty-one schools worth an average of $4,621.95 for whites, but only twenty-two worth about $1,100 each for blacks. As Commissioner Evans noted repeatedly in his annual reports, the primary schools each year had to turn away 300-1000 Negro children for lack of seats, and more probably would have attempted to register if the Board had overriden efforts, led by Joseph Ganahl, to keep tax rates low.[24] Enrollment figures support Evans's statements. Although the percentage of Richmond County's six to eighteen-year-old blacks enrolled rose from 18 percent in 1881 to 34 percent in 1897, the whites retained a comfortable lead, enrolling 47 percent in 1881 and 59 percent in 1897. Moreover, black children, who comprised a slight majority of Richmond's school-age population, had half as many teachers as the whites: in 1881, there were 212 blacks age six to eighteen for every black teacher, and only 97 whites; in 1897, 151 and 76; in 1900, 171 and 71; and in 1910, 173 and 66. And the black teachers were less well paid. In 1877, the white teachers received an average of $40 per month to the blacks' $25; in 1888, the range for whites was $35 to $50 a month, while the blacks got $20 to $40; in 1897, the whites averaged $43,

compared to $30 for the Negroes; and in 1907, the figures were $50 and $25, respectively.[25]

When the fragmentary figures on the salaries paid to the teachers of each race are divided by the numbers of each race within the school ages, the degree of discrimination becomes clearer. As Table 1 shows, Richmond County spent three or four times as much on each white as each black pupil, and if the figures on expenses for buildings and maintenance were available by race, the measured degree of discrimination would no doubt rise. In 1907 and 1908, for instance, the Board made no physical improvements on its black schools, but completed two new white schools valued at $85,000 and $100,000 respectively. Finally, despite giant strides in imparting bare literacy to Augusta teenagers, discrimination in the outputs of the school system paralleled discrimination in service levels: in 1894, 5 percent of the white and 13 percent of the black youths over ten in Richmond County could not read and write; in 1898, the figures were 4 percent and 12 percent, in 1908, 0.2 percent and 2 percent.[26]

And though whites appear to have partially subsidized black schools in Augusta, James C. C. Black greatly exaggerated when he claimed that Negroes were educated "at the expense of the whites." Assuming that Negroes paid indirect taxes (chiefly on liquor and railroads) in proportion to their numbers, rather than their wealth, we can compute the blacks' share of total taxes. Column 1, Table 2 gives the figure for the years around the turn of the century for which both tax and expenditure statistics are available. Column 2 of the table shows the proportion of teachers' salaries which went to Negroes,

TABLE 1

EXPENDITURES ON TEACHERS' SALARIES PER SCHOOL-AGE CHILD

RICHMOND COUNTY, GEORGIA

Year	White	Black	Ratio of White to Black
1877	$ 6.48	$ 1.66	3.90
1895	6.69	1.46	4.58
1897	5.14	1.80	2.86
1899	6.34	2.04	3.11
1900	6.30	1.84	3.42
1901	6.89	1.61	4.28
1907	7.72	1.69	4.57

TABLE 2

PROPORTION OF TAXES PAID AND EXPENDITURES ON BLACKS IN RICHMOND COUNTY, AMOUNT OF WHITE SUBSIDY, AND INCREASE IN TAX RATE FOR WHITES DUE TO BLACK SUBSIDY

Year	Percent Taxes Paid by Blacks	Percent Expenditures on Blacks	White Subsidy	Change in white tax rate (in mills)
1895	15.2	19.7	$ 3,415.32	0.15
1897	14.8	28.0	10,152.29	0.47
1900	10.9	24.2	10,667.82	0.47
1901	11.4	20.3	7,407.28	0.33

column 3 the resultant white "subsidy" in dollars, and column 4 the increase in the tax rate, in mills, which whites in the county had to pay because of their subsidy to black schools. It cost the average white male adult in Richmond County, who owned $3,018.89 worth of property, only $1.42 per year to subsidize the black schools at the height of the subsidy in 1900, and if statistics for buildings and maintenance existed, even this subsidy would probably disappear.[27]

In 1897, seventeen-year-old Ware High was thriving, having doubled the number of students and added an assistant teacher over its life span. Its principal since 1891, H. L. Walker, had organized the Negro State Teachers' Association and served as its President for a decade, and was highly regarded by both the Augusta black community and the School Board. Since Ware, like the white public high schools, charged tuition, the black high school's net cost to the Board in 1897 came to only $842.50, which amounted to less than 1 percent of the Board's total expenditures or approximately 5 percent of the money spent on black schools. Yet on July 10, 1897, the Board, pointing to the need for more black primary schools and claiming that the schools were financially hard-pressed, voted to terminate Ware and use the $842.50 to hire four elementary teachers to teach fifty students for $25 a month.[28]

Announced without previous public discussion, the Board's decision aroused a storm of protest in the black community. Within five days, 155 Augusta blacks signed a petition, which cited the egalitarian requirement of section 9 of the 1872 Act and quietly punctured the Board's declaration of poverty by pointing out that

the increase in funds for 1898 recently voted by the state legislature would allow the Board easily to satisfy the needs for both primary and secondary schools for blacks. Although agreeing to meet in special session to consider the petition, the Board rejected both the petition and oral presentations by John C. Ladeveze and William J. White and reaffirmed its decision, 23-3 with two abstentions.[29] It is significant that all three of the dissenters represented the fifth ward, a lower-class factory area which was the strongest Populist ward in the city, and that at least one of the pro-Ware Board members, a former Grand Master Workman of The Knights of Labor, M. M. Connor, was an active member of the People's Party.[30] Although a compromise had been rumored before the meeting, the Board merely offered to restore Ware when economic conditions permitted. Recognizing the hollowness of this promise, the blacks immediately brought two suits in the local Superior Court.

The flash of protest over Ware High's abolition momentarily illuminated the usually obscure outlines of postbellum Southern black society. The black community which produced the only case on racial discrimination to get all the way to the Supreme Court during this period was relatively wealthy, optimistic, and politically powerful. In 1897, Richmond County blacks had more wealth per adult male than those in any other Georgia county — $136.62, compared to $106.56 for Fulton County (Atlanta), $110.86 for Bibb County (Macon), $83.71 for Chatham County (Savannah), and $64.90 for the state as a whole. Moreover, it was possible, according to Channing H. Tobias, an Augusta

native who went on to become Chairman of the Board of the national N.A.A.C.P., for a Negro in Augusta in the 1880s and 90s "to aspire to the heights and to receive encouragement from white people in doing so." In a welcoming address to the state black teachers' association convention in 1894, Ware Principal H. L. Walker asserted that "In Augusta you will find two races of people living together in such accord and sympathy as are nowhere else to be found in all this Southland," and pointed out to the delegates that the excellent system of streetcars remained unsegregated. According to Silas X. Floyd, black editor and school teacher, "Augusta has long been regarded as the garden spot of the country so far as the relations of the races go." And until the late 1890s, blacks enjoyed sufficient political and social power in Richmond County to lend these glowing statements a degree of credibility. Seeking the franchises of the freely voting blacks in the hot campaign for mayor in 1897, Chronicle Editor Pat Walsh endorsed reopening Ware High and his campaigners, speaking to mass meetings of blacks, stressed the fact that High School Committee Chairman Ganahl, who had led the move to abolish Ware, was backing Walsh's opponent. When in 1898 the local streetcar company moved to enforce an existing but previously ignored segregation law, a black boycott reversed the decision. And from 1898 to 1905, the longtime Augusta black political leader, Judson Lyons, held the highest political post traditionally open to a Negro in the United States, the Registership of the Treasury.[31]

The leaders of the Ware protest were "the best and the brightest" of the city's persons of color, and detailed sketches of them will demonstrate the startling degree of openness in race relations in both the antebellum and postbellum Augusta and trace the outlines of the institutional development of the black community after the War.

The chief organizers of the "Educational Union of Richmond County," which was set up to fight the case, were first cousins whose families' intertwined personal, business, and church relationship predated the Civil War. Virtually indistinguishable in surviving photographs from men classed as Caucasians, John Carrie Ladeveze and James Snowden Harper employed the wealth, education, and consequent social position which comprised the legacy of their white ancestors to become pillars of black society, and, in this case, to fight against racial discrimination. Their common grandfather, Raymond Ladeveze, had, along with his uncle John Carrie (for whom John C. Ladeveze was named), fled the French and later the Haitian Revolutions and joined a small, but affluent and powerful Gallic community in Augusta. Lacking the racial prejudices of their English neighbors, Raymond Ladeveze and John Carrie "married" two sisters, Caroline and Mary Bouyer, whose family had been part of the mulatto upper class in San Domingo. Though Caroline bore Raymond two children, John Carrie's liason with Mary Bouyer produced no issue, and that part of Carrie's fortune which his black descendents managed, despite their shaky legal position, to shield from white assaults became the basis of the later prosperity of the Ladeveze and Harper families. Driven to New York by the burgeoning racial intolerance of the slave South, Raymond Ladeveze managed before his death in the late 1830s to provide his children, Charles and Laura, with enough education and wealth to place them,

when they returned to Augusta in the 1840s, in the top rank of free persons of color. Trained as a picture framer and cabinetmaker in the North, Charles Augustus Ladeveze established an art store which catered primarily to whites, and Laura married Charles's partner in the antebellum store, Robert A. Harper.

The same shade of color as his wife, Robert Harper was the son of a free colored woman and a Northern white man who had arranged for his son's education in Boston and New York as a musician and composer. Returning to Augusta, Robert found an outlet for his talents by organizing and serving as leader of the upper-class white "Oglethorpe Band," entertaining at impromptu concerts in the homes of members of the free colored community, and selling pianos at the art store. According to family tradition a secret abolitionist and conductor on the Underground Railroad, Robert was among the wealthiest one percent of the free people of color in antebellum Georgia and a natural leader of the black community after the War. One of the founders, along with Charles Ladeveze, of Trinity (Colored) Methodist Church, Robert was content to stay in the background of social and civic life, and never became a major figure in black politics.[32]

William J. White did. A close friend of Robert Harper, Charles Ladeveze, and the other leaders of the black community, White was the single most influential figure in postbellum black education in Augusta. He was black by choice. Born in 1832, the son of a white planter and an Indian girl who may have had some Negro genes, White was a cabinetmaker in antebellum Augusta when he fell in love with a slave girl whose master refused to let White purchase her.[33] Deciding

to marry her anyway, White cast his lot with her race. Having organized both a Sunday school and cladestine schools to teach blacks to read before the War, White became an ordained preacher in 1866 and as state school organizer for the Freedmen's Bureau in the late 1860s, stumped the state, braving numerous mobs, to bring the gospel of education to the freedmen. Active in the Republican party, White held several minor federal jobs, ran unsuccessfully for local and state office, was a delegate to three national and numerous state and local GOP conventions, and, after the eclipse of the party in Georgia, endorsed the Populists and later the Socialists. In 1880, he launched a weekly newspaper, the Georgia Baptist, which under his editorship blanketed the state and built up enough influence and circulation to survive long after his 1913 death. At the four statewide Afro-American conventions he called and led from 1880 through 1907, racial inequality in spending for public education was always a prime topic.[34]

Apparently a protégé of White, Robert Harper's son James graduated from Atlanta University, of which White was a trustee, in 1878, and became a teacher and political activist in Augusta in the early 1880s. Secretary of the 1880 state Republican convention, James Harper was rewarded for party service by an appointment as a railway postal clerk, a job which later gained civil service protection and in which he served for three decades. For nearly forty years the only black official of Paine Institute, a Negro private school in Augusta co-sponsored by the (white) Southern Methodist and Colored Methodist Episcopal churches, Harper and his

family, several of whom became school teachers, retained a strong interest in black education. Deeply devout, Harper was a leader in the social and religious life of the black community as the longtime deacon and treasurer of the Trinity C.M.E. Church. He was also a businessman, serving as President of the first black bank in Georgia, the Workingman's Loan and Building Association, from 1885 to 1912, and also of two institutions which appear to have grown out of the Association, the Penny Savings Bank and the Georgia Mutual Life and Health Insurance Company. By 1897, Harper owned $2,550 worth of property and had an interest in another $14,000.

Although less active in Republican politics than his cousin James Harper, John Ladeveze was one of only six blacks of a group of 250 leading Augustans sent to Atlanta in 1894 to lobby the virtually all-white legislature in behalf of Chronicle editor Pat Walsh's candidacy for reelection to the U.S. Senate. Inclusion in the group demonstrated his standing with the white establishment. A deacon at Union Baptist Church, which had been formed by upper-class Negroes seeking a more intellectual, less emotional mode of worship than the traditional churches provided, Ladeveze was firmly ensconsced in black society. Yet his business interests spanned both sides of the racial line, and he often lived in otherwise lily-white neighborhoods. Thus, although he owned a good deal of real estate in the predominately black sections of Augusta and was Vice-President of the Workingman's Loan and Building Association, the art store, which he took over after his father died in the early 1880s, had an overwhelmingly white clientele and was the only black business permanently located in the center of the white

business district during this period. Unlike middle-class black activists elsewhere in the South, then, Ladeveze was not so financially independent of whites as to be able to protest without fear of white reprisal. Despite his dependence on the goodwill of white customers, he did protest, and, as the eighth largest property-holder among Richmond county blacks in 1897, he was wealthy enough to join his cousin James Harper in carrying much of the burden of the approximately $1,000 cost of bringing the case.

The third plaintiff in the case, Joseph Watkins Cumming, was a "merchant tailor" and real estate man whose father was probably a member of one of Augusta's leading white families, whose surname he kept. Born in the late 1850s, the "bright" complexioned Cumming was a deacon of Union Baptist Church and Secretary of the Workingman's Loan and Building Association. The step-father-in-law of Ware principal H. L. Walker, Cumming does not seem to have been very active politically, though he did join Ladeveze on the junket to Atlanta in behalf of Pat Walsh in 1894. The owner in 1897 of $2,080 worth of property, which put him among the top 3 percent of black property owners in Richmond County, Cumming appears to have taken a less active role in the case than Harper or Ladeveze, and was listed first for purely alphabetic reasons.[35]

Comparatively wealthy and well-educated, used to dealing with whites in their professional lives, virtually undifferentiated in skin tone from the dominant race, Cumming, Harper, and Ladeveze may well have been particularly sensitive to racial discrimination. It is possible, too, that their ambivalent racial and social situation compelled them to

affirm their identification with the surpressed caste by taking advanced positions in protests against further suppression.[36] In any case, as important figures in the black community, they felt a responsibility to lead.

Their followers, the one hundred twenty-three men and thirty-two women who signed the petition to reestablish Ware, were solidly anchored in that center of stability in the turn-of-the-century Afro-American community, the skilled working class.[37] But the petitioner group also dipped down into the ranks of the unskilled, perhaps to demonstrate to the School Board that the high school enjoyed support from all classes of blacks. Of the one hundred fifty-five, one hundred and nineteen could be positively identified in the city directories for 1897 and 1898 (which listed less than half the blacks in Augusta), and seventy-six could be traced in the county tax rolls for 1897. Table 3 compares the occupations of the petition signers in 1897-8 with the occupations of persons of both races over ten years old in Augusta from the 1900 U.S. Census, and Table 4 compares the wealth of the petitioners with data on Richmond County blacks drawn from the manuscript tax digest of 1897. Clearly, the signers drew heavily from an elite group: not only did they have a larger percentage of professionals, white collar workers, and proprietors than the total Augusta population of both races, but they averaged considerably more wealth and a much larger proportion of property owners and comparatively wealth (over $1,000) property owners than the average for the black populace.

Most of the wealthiest of the signers were artisans or artisan-proprietors whose livelihood depended largely on white patronage.

TABLE 3

OCCUPATIONAL COMPARISON OF BLACK SIGNERS OF WARE PETITION IN 1897 AND PEOPLE OF BOTH RACES IN 1900

Occupation*	Petitioners, 1897		Both Races, 1900	
	Male	Female	Male	Female
1. Professional, White Collar	17%	---	9%	2%
2. Proprietor	12%	---	23%	1%
3. Skilled Laborer	38%	---		
4. Unskilled Laborer	15%	31%	49%	
5. Housewife	---	22%		
6. Unlisted	7%	38%	19%	58%
7. Unidentifiable	11%	9%		

* Groups include:

1. Physicians, salesmen, ministers, clerks, teachers
2. Small business owners
3. Carpenters, blacksmiths, masons, cotton samplers, tailors
4. Laborers, porters, sextons, personal service and domestic workers
6. Unlisted in directories
7. Illegible or several listings with similar names in directories

TABLE 4

WEALTH COMPARISON OF BLACK SIGNERS OF WARE PETITION
WITH ALL RICHMOND COUNTY BLACKS, 1897

	Petitioners				All Black Property holders	All Black Male Adults
	Men[1]	Men[2]	All[2]	All[2]		
Percent property holders	70	58	64	49	100	27
Mean property value	$1,039	$862	$917	$704	$511	$137
Percent holding $1000 or more	35	29	31	23	10	3

[1] Excludes the unlisted and unidentifiable groups

[2] Includes the unlisted and unidentifiable groups

For instance, the richest signer, John Ladeveze's light-skinned uncle, Henry E. Osborne, owned a harness and saddle-making shop. Other wealthy petitioners with white clienteles included Robert R. Battey, a light brown blacksmith, wheelwright, and politician who was Judson Lyons's brother-in-law; Uriah H. Carr, a light-colored barkeeper and cousin to Harper and Ladeveze; John Hughes, a bricklayer; Felix Holmes, a self-employed barber whose shop was in the central white business district; and John R. Barefield, a light-skinned former schoolteacher, then a cabinetmaker for a white undertaking establishment. Less dependent on whites, and generally somewhat less wealthy signers included Albert S. Blodgett, a mulatto who owned a grocery in a largely black area; Francis M. Dugas, a dark-skinned undertaker; Theodore Estes, a black grocer; Othello J. Hutchinson, a light-brown printer at the Georgia Baptist newspaper; Nelson Mixon, a druggist in a black business area; and seven ministers of prominent black churches.

Three persons who taught in the public schools and two who taught at Paine Institute also endorsed the petition, but there were no signers from the other two sectarian high schools, Haines and Walker Institutes. Stepchildren, respectively, of the Presbyterian Board of Missions for Freedmen and the black Baptists, Haines and Walker were in perpetual financial trouble and stood to gain considerably from the tuition payments of erstwhile Ware students. Indeed, Channing H. Tobias later reported that the principal of Haines, Lucy Laney, had secretly urged the School Board to suspend Ware, thereby precipitating the whole controversy. In any case, Ms. Laney, probably the leading black educator in Augusta in 1897, did not sign the petition.[38]

The Negroes did not choose their counsel from among the leaders of the August bar, either because they could not afford or obtain their services, or because they preferred less flamboyant, more craftsmanlike lawyers. Nor did they choose one of the two black lawyers in Augusta.[39] Nor had the local lawyers they chose ever publicly exhibited any special sympathy for blacks. The only trait that Salem Dutcher, Jr., Hamilton Phinizy, and Joseph S. Reynolds shared was that they were all in some sense outsiders. Born in New York, the chief local counsel, Dutcher, had migrated to Tennessee and Virginia before the War, served in the Confederate army, settled in Augusta in the 1860s, and embraced his adopted state's racial prejudices. "The White Men are the State," he wrote in 1868. "Negro suffrage is the bastard son of the Bayonet and neither can, nor will, outlive its sire." A newspaperman, co-author of the standard history of Augusta, and author of scholarly treatises on proportional representation and Georgia state law, the intellectual Dutcher was something of an anomaly in the bustling, industrial city. Trading newsprint for law books, Dutcher was elected local district attorney for a term and became a legal scholar, if not an affluent practitioner of the law, thereafter. But though he campaigned extensively for the Democratic party during Reconstruction, became a close associate of reformist mayor Pat Walsh, and served as president of the local Confederate veterans group in the late 1890s, Dutcher was never really accepted by the Augusta Establishment: He converted to Catholicism, lost a bid for reelection as district attorney to a more solidly entrenched member of the bar, flirted with Populism, and lambasted

County Judge W. F. Eve, who was the eminence gris of Augusta politics during this period. Less wealthy than the blacks he defended, Dutcher probably needed the fee the case brought. Having shared a two-story building with Ladeveze's art store in the early 1890s, he was certainly known to the defenders of Ware. In sum, he was competent, probably alienated, and certainly available.[40]

Hamilton Phinizy's Italian great-grandfather had settled in Augusta in 1800, converted to Methodism, and spawned a family which included one of the South's wealthiest antebellum cotton merchants, and, by the 1890s, the town's leading banker and the publisher of one of the major newspapers. Born to affluence, social status, and fervid Protestantism, Hamilton became a "gentleman lawyer," an owner of several modest farms tenanted by blacks, a leader in social clubs, a minor political activist, and an open agnostic. According to family tradition, young Hamilton stood up in the Baptist church one day, professed his heresy, and left religion forever, a rather singular act in the South. Competent but not very prosperous as a lawyer, he seems to have represented black clients fairly frequently, but was not reputed to be particularly liberal on racial matters.[41]

In contrast to Phinizy, Joseph S. Reynolds was a self-made man, a rising young lawyer-politician in the late 1890s. Born in rural Burke County, Georgia, of a fairly well-to-do family which apparently fell on hard times, Reynolds left school quite young and became a druggist, a clerk, and a traveling salesman before he settled down to read law in Augusta. Though he lacked the important resources of wealth and local familial social status, Reynolds capitalized on

the acquaintances he gained and the salesmanship he developed as a "commercial traveler" to get himself elected to the state House of Representatives in 1898, where he became known as a "friend of labor." A florid orator, Reynolds was an outspoken segregationist who denounced the racial liberalism of Reconstruction in terms similar to those Dutcher had used. And like Dutcher, he ran for the district attorneyship against a much better established candidate. Despite the fact that his opponent was the grandson of a U.S. Senator and the nephew of Augusta's leading lawyer, and despite the man's endorsement of forty-six of the fifty lawyers in Augusta (including Dutcher and Phinizy), Reynolds won the 1900 contest and served in the post for a dozen years. In taking the Ware case, Reynolds must have calculated the effect of his open identification with blacks on his developing political career. If so, he correctly concluded that it would not interfere with those aspirations.[42]

The briefs which Dutcher, Phinizy, and Reynolds filed in the Superior Court in Cumming and a companion case, Albert S. Blodgett and Jerry M. Griffin v. School Board, focused directly on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. For the Board to continue to support the Tubman and Hephzibah high schools for whites, while eliminating Ware, they contended, was simply an unconstitutional denial of equal protection. If, as the School Board alleged, it lacked the means to extend black primary schools to all who desired to enroll, that condition arose from "the illegal action of said Board in appropriating to the white school population of said City largely more of the public school fund

than it is legally entitled to." Their clients having exhausted the available non-judicial remedies, counsel asked in the Blodgett case for a mandamus directing the Board to reinstate Ware, and in Cumming for injunctions to prevent the county Tax Collector from gathering that part of the school tax which went to high schools and to bar the Board from spending any money on white high schools unless they also continued Ware.[43]

The lawyers filed two separate cases because they disagreed about the appropriate mode of action in the complicated area of the 19th century "extraordinary remedies," such as writs of mandamus and injunction. Originally instituted in the English courts of equity and common law because general laws failed to do justice in particular cases, the writs circumvented the harsh principles and ponderous usages of the common law courts. Although the practices and procedures of law and equity courts had been gradually merged in the United States, and although the "extraordinary" remedies were fast becoming more ordinary in the late 19th century, the writs retained something of their special character. Neither writ would be issued until the petitioners had exhausted all other possible courses of legal action, and neither would be granted in "doubtful" cases. Moreover, an injunction was purely negative, an order by a court of equity designed to prevent someone from acting. By contrast, the common law writ of mandamus was an order to a public official to carry out some positive act, usually to do something he had refused to do, more rarely to rescind or reverse an action already taken. Of equal importance in the present cases, the circumstances in which courts would issue

writs of mandamus were changing in the late 19th century. Thus, a leading legal text of the era repeated the traditional view that "mandamus will lie to compel the performance of duties purely ministerial in their nature, when they are so clear and specific that no element of discretion is left in their performance," but also stated that "where a discretion is abused, and made to work injustice, it may be controlled by mandamus."[44]

Largely ignoring the Equal Protection Clause argument, School Board counsel Joseph Ganahl, who had been chairman of the Board's High School Committee since 1876, and Frank H. Miller, a respected legal craftsman in whose offices Dutcher, Phinizy, and Reynolds had all read law, concentrated on the question of how much discretion the Board had.[45] It was clear that under section 10 of the 1872 Act setting up the Richmond County schools the Board could establish, maintain, or close any number of high schools, set tuition fees at any sum, hire and fire high school personnel, erect or demolish high school buildings. And in fact, in 1878, the Board had dropped its subsidies to two previously semi-public high schools for whites, the Richmond and Summerville Academies. The question was whether section 9 of the 1872 Act or the Equal Protection Clause limited the Board's discretion in governing high schools. Arguing that section 9 applied only to the previous sections of the Act, which required the Board to establish a system of primary schools, and that section 10 on high schools granted the Board absolute discretion, Ganahl and Miller contended that the Board was within its rights in "temporarily" suspending Ware because of a lack of funds. Since it would have been

"unwise and unconscionable to keep up a High School for sixty pupils and turn away three hundred little [N]egroes who were asking to be taught their alphabet and to read and write," the Board's actions were also equitable. Therefore, the plaintiffs' contentions had no basis in either law or equity.

The Superior Court judge who heard the cases was an archetype of the successful blending of the old and new orders in the postbellum South. Born in 1862 on the large plantation in Wilkes County, Georgia, which his family had established in 1783, Enoch H. Calloway graduated from the University of Georgia, taught school, read law, and became a small-town mayor, Democratic party chairman of a rural county, and state senator before winning legislative appointment as judge of the Augusta circuit. Moving to Augusta in January, 1897, Calloway gained immediate respect for his firm defense of law and order, his knowledge of the law, and his political acumen: A year after the Ware decision he virtually commanded a grand jury to indict members of a white mob who had unsuccessfully attempted to lynch a Negro man accused of propositioning a white woman, and after resigning from the bench for financial reasons, he became the law partner of future U.S. Supreme Court Justice Joseph R. Lamar and chairman of the state Democratic Executive Committee. Clearly, the racial tolerance he exhibited in his court did not inhibit either his legal or political career.[46]

In a decision which the Chronicle termed "what most of those familiar with the law thought it must be," Calloway enjoined the Board, but denied other relief. Granting the contention of Ganahl and Miller that the Board had discretion to abolish all the high schools or tailor

them to fit the needs of students of different races and geographical areas, Callaway contended that once the Board did decide to open public high school facilities for whites, it had to offer them to blacks as well. Properly declining to rest his decision on a constitutional provision if a statutory basis was possible, Calloway argued that unless section 9 was read as limiting the Board's discretion under section 10, the whole scheme would contravene the Equal Protection clause. Therefore, solely on the basis of the statute, he enjoined the Board from spending any money on white high schools without reopening Ware. Yet since he admitted that the Board could, at its discretion, abolish the high schools entirely and since there was some doubt whether it had sufficient funds to run the high schools, Calloway declined to issue the mandamus called for in Blodgett. And because the tax levy for high schools was not separable from that for elementary schools, it would have been "unwise," according to the judge, for the court to engender confusion by enjoining the tax collector.

Raising no new arguments in their briefs, counsel for both the Board and the blacks appealed the decisions to the Georgia Supreme Court. Speaking for a unanimous court, Chief Justice Thomas J. Simmons, a former Confederate Colonel and President of the State Senate, and a leading delegate to the 1877 state constitutional convention, ruled in favor of the Board. In an opinion studded with factual inaccuracies and petty technicalities, Simmons, who had gone far out of his way in an earlier case to declare constitutional the practice of refusing to spend on black schools in the town of Eatonton any money derived from local taxes on whites, overruled Calloway's construction of the 1872

act and blithely dismissed, without giving any reasons or citing any precedents, the equal protection argument. Section 9, in Simmons's view, had no effect on section 10, which granted the Board entirely unlimited discretion over high schools. Moreover, the black taxpayers had no more right to complain that they were taxed to support high schools without receiving any benefits from them than white taxpayers who had no children currently enrolled in the public high schools. Finally, the same arguments which he cited to dissolve the injunction dictated denial of the petition for mandamus against the Board.[47] Although it had expected the state Supreme Court to uphold Calloway, the Chronicle greeted Simmons's decision as providing "the greatest good for the greatest number." While the leading [N]egroes" who brought the case "were, no doubt, impelled by a desire to maintain the interests of their race as they saw them, they will in the end see that the board has acted wisely in the matter." It was better to give the black masses the "bread and meat" of primary schools, the paper believed, than to provide the "pate de fois gras" of high schools for the Negro elite.[48]

Ladeveze, Harper, and their compatriots did not dispair. Rather, they enlarged the scope of their fundraising and propaganda efforts, garnering, for example, the munificent sums of $5.06 from two churches in Savannah and $5.00 from Booker T. Washington, and recruited as their counsel for the appeal to the United States Supreme Court one of the country's outstanding constitutional lawyers, George F. Edmunds.[49] A United States Senator from Vermont from 1866 to 1891, Edmunds was an unreconstructed Radical Republican who, along with many other

Republicans of the late 19th century, believed that the Fourteenth Amendment was meant to protect human rights as well as those of corporations. Head of the Judiciary Committee for sixteen years, Republican caucus chairman and President Pro-Tem of the Senate, a close adviser to Presidents Grant and Hayes, a serious candidate for the Republican nomination for President in 1884, Edmunds had turned down two offers of appointment to the Supreme bench. Continuing his lucrative law practice while serving in the Senate, Edmunds became, according to his biographer, "one, if not the most prominent, of the important corporation and railroad lawyers in the country" and "one of the richest men in the Senate," who was on such chummy terms with the Justices of the Supreme Court that he regularly consulted them when he was unsure whether it would be proper for him as a Senator to accept a retainer from a particular corporation. One of the leading lawyers for the Southern Pacific Railroad in the important San Mateo and Santa Clara cases, which established the proposition that corporations were meant to be included as "persons" under the Fourteenth Amendment, and for the challengers of the federal income tax in Pollack v. Farmers' Loan and Trust, Edmunds had been one of the principal framers of the 1890 Sherman Antitrust Law, as well as the 1871 Ku Klux bill and the 1875 Civil Rights Act. Indeed, it was to Edmunds that Justice John Marshall Harlan had turned for consultation when he drafted his famous dissent in the 1883 Civil Rights Cases, and Harlan's opinion in that case closely followed the arguments and even some of the phraseology of Edmunds's earlier Senate speeches in defense of the Civil Rights Act. By 1897 in semi-retirement from his law practice,

Edmunds was wintering in Aiken, South Carolina, a resort town fifteen miles from Augusta which was then very popular with rich Yankees, when Harper approached him about the Ware case. Touched by the blacks' plight, Edmunds took the case without fee.[50] Thus, even before the founding of the N.A.A.C.P. in 1909, black litigants in civil rights cases were represented by well-qualified -- in this case, superlative -- counsel. The Supreme Court's repeated rulings against Negroes in this period did not, with one exception, result from inadequate lawyers.[51]

In what may have been a tactical error, Edmunds decided to appeal only Cumming, on which there was a full record of depositions, briefs, and decisions, but to let Blodgett go. Since Chief Justice Simmons had not bothered to file a full opinion in Blodgett, it was unclear on the face of the decision whether a "substantial federal question" was involved. Probably more importantly, the Georgia Supreme Court had ruled that the 1872 statute granted the Board complete discretion in governing high schools, and a mandamus, at least according to the traditional view, could not control a discretionary act. Since the federal courts would not overturn the highest state court's construction of its state's laws, the question of discretion must have seemed muddled, at the very least. Confident that he had a winnable case, Edmunds may have thought that the Cumming case raised the issues sufficiently that the question of the form of remedy made little difference.[52] And there was good reason for that confidence.

Though the Supreme Court had never before ruled on racial discrimination in education per se, its previous 14th Amendment

decisions seemed to support the position of Edmunds's clients. The Court had been willing to intervene to protect railroads and Chinese laundrymen from "arbitrary classifications" or discriminatory actions of legislative, executive, or judicial officers of the states, and to launch independent investigations to determine whether in fact the discretion allowed by various statutes had been employed in an "unjust" or "unethical" manner. Despite its negative phraseology, the Equal Protection Clause had been held to provide blacks with a "positive immunity" against legal discriminations which "lessen[ed] the security of their rights which others enjoy." Moreover, the Plessy case, on which Ganahl and Miller put so much emphasis, actually allowed racial distinctions only if the accommodations on segregated railway cars were equal. Even if the segragation of school children was constitutional -- and Edmunds did not challenge it directly in his brief -- the opportunities offered students of each race had to be substantially the same, if the Court followed the "equal, but separate" rule of Plessy. Abolishing Ware was, Edmunds charged, an "arbitrary denial of the equal protection of the laws," not an action which the 14th Amendment left to the discretion of the School Board.[53]

While Edmunds did not examine state and federal district court opinions on school discrimination, the vast majority of previous decisions in both Southern and Northern courts favored his views, and his failure to discuss them was probably a mistake. The leading federal cases were U.S. v. Buntin and Claybrook v. Owensboro. In Buntin, an Ohio judge instructed a federal jury that it did not have

to grant the petition of a black child who wished to enter a white school as long as the segregated school provided by the states offered "substantially the same facilities and educational advantages that were offered in the school established for the white children." In Claybrook, Judge John W. Barr, a friend of Justice Harlan, declared unconstitutional a Kentucky statute which set up a racially segragated local taxation and expenditure system for schools in Owensboro, Kentucky. The Equal Protection Clause, Barr asserted, "can only mean that the laws of the state must be equal in their benefits, as well as in their burdens," and while absolute equality was "impracticable," the distribution had to be made "upon some fair and equal classification or basis."[54] State court decisions from Arkansas, California, Kentucky, New York, and North Carolina all upheld the view that the Equal Protection Clause guaranteed "equal benefits" or "equal advantages."[55] Summarizing state and federal cases on the subject in the 1898 edition his General Principles of Constitutional Law, Judge Thomas M. Cooley, the leading legal commentator of the day, declared school segregation constitutional only if "the schools are equal in advantages, and the same measure of privilege and opportunity is afforded in each."[56] To rule against the black appellants in Cumming, therefore, the Supreme Court would have to set its face against a line of precedent firmly established in the lower courts.

Yet in a deeper, less strictly logical sense, the trend of Supreme Court decisions was unfavorable to the blacks' cause. The overwhelming fact was that the Court had rarely been willing to act or even to allow Congress to act to protect blacks against the assaults

of the states or individuals. The Slaughter House Cases had narrowed the scope of the privileges and immunities of U.S. citizens so much that that clause of the 14th Amendment became mearly meaningless; Reese, Cruikshank, Harris, and Williams had undermined federal protection of voting rights; The Civil Rights Case had outlawed federal power to prohibit racial discrimination in most commercial transactions by a very strict definition of "state action;" Plessy had ruled segregation constitutional.[57] Moreover, at the same time that it stripped Negro rights of the 14th Amendment's protections, the Court had increasingly employed it to restrict Congressional and state legislative efforts to control the economy. Committed to the difficult and controversial task of judicial oversight of the regulation of businesses, the Court must have hesitated to get involved in reviewing decisions of school boards, too. Suppose the Supreme Court granted the injunction and the School Board complied by erecting a new building in which to house the black high school. Then, Ganahl suggested in his brief, could the Negroes not demand that the local court insure that the black and white schools were entirely equal in facilities brick by brick, in staff salary by salary, and in other respects? Would such a situation not inextricably intertwine the courts in matters better left to "political" bodies whose actions could be reviewed directly by the voters, such as the School Board? Should the courts intervene in a case where it was doubtful whether a high school for 60 pupils better served the interests of blacks than elementary classes for 200? Even granting all these points, Miller and Ganahl continued, wasn't it

necessary for the appellants to show bad faith on the part of the Board to be able to claim a remedy at equity? Since "no evil eye or combination is averred or shown against the Board of Education," should the courts step in to reverse what was at most "an error of judgment," not an act directed at the blacks "on account of" their race?[58]

The indifference to Negro rights of most of the Justices who faced these questions on the United States Supreme Court is too well known to require comment. But what of John Marshall Harlan, whose bitter, lonely dissents in Civil Rights, Plessy, and other cases have led prominent scholars to describe him as a man with "a messianic commitment to Negro rights," who gave "undeviating support to Negro civil rights" on the bench?[59] A Kentucky slaveholder who, as a Whig candidate for Congress in 1859 contended that Congress had a moral duty to protect slavery in the territories, Harlan was a nationalist who became a colonel in the Union army but condemned the Emancipation Proclamation and denounced the Thirteenth Amendment as "a flagrant invasion of the right of self-government." Failing in his effort to promote a "Union party" which would unite all men "opposed to the admission of the Negro to the ballot-box," Harlan in 1868 joined the Republicans and, as his new party's candidate for Governor in 1871 and 1875, strongly denounced Ku Klux violence and just as strongly upheld the rights of blacks under the same Reconstruction Amendments whose passage he had previously decried. A leader in the campaign to gain the Republican Presidential nomination for his law partner, Benjamin H. Bristow, in 1876, Harlan threw his support to

Rutherford B. Hayes at a crucial time in the GOP convention. A thankful President proposed Harlan's name as a Supreme Court Justice to the Senate, which, after forty-five-day delay while Judiciary Committee Chairman George F. Edmunds made sure that Harlan's newfound commitment to the enforcement of black rights was less transient than his former support of slavery, endorsed Hayes's nominee.[60]

That a former slaveholder and anti-Negro demagogue should become a more faithful defender of black rights than any of his Northern colleagues on the Court has lent a certain air of romance to his career and intrigued historians attracted by paradoxes and Pauline ideological conversions.[61] And in addition to his generally pro-Negro judicial stance, Harlan had a special reason to look favorably on the appellants' case in Cumming. In 1866, white Kentuckians had reacted to the black desire for education by grafting onto the white school system a separate one for Negroes, supported only by the taxes which the poverty-stricken freedmen could pay. By 1869, black leaders were organizing to demand the merging of the two systems into a single state scheme which would pool all taxes and distribute them to the (segregated) schools on a racially equal basis. In 1875, the blacks, who comprised about a sixth of the Kentucky electorate and probably a majority of the Republican faithful, convinced the party of Lincoln to endorse their plan in the state platform. During the gubernatorial campaign, candidate Harlan, who had made equal education for all whites a main theme of his 1871 race, traversed the state announcing his belief in equalizing state school expenditures for blacks and whites. "The education of the colored children of the Commonwealth is a matter of

the profoundest concern to every right-hearted, liberal-minded citizen," candidate Harlan announced in a debate with his 1875 Democratic opponent. "There is no question of graver moment presented for our consideration." Approvingly, he quoted the Republican platform's statement on the issue. "[A]s a measure of justice, no less than wise statesmanship, we hold that the provision now made for the education of colored children shall be increased until they are afforded, in their separate schools, facilities for obtaining instruction in every respect equal to those provided for white children."[62] Thus, the issues raised by Cumming were hardly new to Harlan. Fully aware of the importance of public education for poor whites and blacks, Harlan had twenty-four years earlier committed himself wholeheartedly to equal expenditure regardless of race or the amount of taxes paid.

Yet in his opinion for the Court, Harlan almost casually accepted the arguments and statements of fact of Miller and Ganahl. Citing no previous cases from either state or federal courts, the Justic circumvented the question of whether Plessy required equal privileges by simply not discussing it. Predicting ingenuously that the School Board would respond to an injunction by closing the white high schools, instead of by reopening Ware, Harlan concluded that the proposed injunctive remedy would damage white children without assisting blacks.[6] Ignoring the fact that mandamus had rarely been held to control discretionary acts and seemingly unaware of the existence of the Blodgett case, Harlan suggested that if the blacks had sought an order compelling the Board to reopen Ware, "different questions might have arisen in the state court."[64] But Harlan went beyond all previous

cases in acceding to the Board lawyers' argument that the blacks, to sustain an equal protection claim, had to demonstrate that "the Board proceeded in bad faith," that the allegedly discriminatory action was motivated by "hostility to the colored population because of their race." And he qualified his acknowledgement that "all admit that the benefits and burdens of taxation must be shared by citizens without discrimination against any class" by adding the words "on account of their race," which implicitly transferred the burden of proof on the question of motivation from the Board to the blacks. Under this test, it was not sufficient to show that whites got a disproportionate share of public benefits. Instead, states could blatantly deny blacks equal protection so long as there was no direct evidence that they did so because of racism. Yet what other rationale could have underlain the Board's decisions, detailed in Edmunds's brief, to provide sufficient elementary schools for whites, but not blacks, to pay substantially higher salaries to white than black teachers, to close Ware while continuing two white high schools? If, as Harlan's statement implied, a public body could evade the Fourteenth Amendment's requirements by dissimulating about its reasons for acting, by demonstrating to a Southern state court that there was some other rational basis for its behavior, and if to overcome this defense the blacks had to show positively that it was race and race alone which led to the public body's move, then the promise of equal protection became redeemable only in Confederate money.[65]

What accounts for Harlan's opinion? Though his voluminous papers at the Library of Congress make no reference to the case and

provide little insight into his attitude toward Negro rights, scholars have offered several explanations for his decision in Cumming. Some, focusing on his unwillingness to rule on the segregation question, merely note his strict construction of the judicial practice of refusing to decide matters which have not been fully argued and ignore or minimize the overall inconsistency of Cumming with Harlan's opinions in other cases on black equality.[66] Concentrating too narrowly on segregation, which is merely one form of racial discrimination, they appear to underestimate how much difference it might have made in the lives of black people in America if the Court had enforced equal benefits even if the services were segregated. A second group has tried to explain the inconsistency by suggesting, without bothering to examine the full record of the case, that the lawyers for the blacks had not placed sufficient emphasis on the equal protection clause or "clumsily presented" the issues.[67] While Edmunds did make the tactical mistakes of not appealing Blodgett and not discussing lower court decisions, it seems very unlikely that these errors determined the result, for his brief presented the essential inequity and unconstitutionality of the situation clearly and in sufficient detail for the Court, acting within the relatively loose constraints of equity principles, to have decided in his clients' favor had it so desired. A third attempt to explain Harlan's stance suggests that the Justice was moved by the facts that clsoing Ware allowed the Board to increase the opportunities for black elementary students and that former Ware students could attend private high schools with no increase in tuition. But as Edmunds' brief pointed out, the Board could have met the demand for more places in the black

elementary schools by the constitutionally preferable means of raising the tax rate or diverting funds from the comparatively affluent white schools. The presence of private high schools, as Edmunds also noted, was irrelevant to the constitutional question of equality in public services.[68] A fourth view is that in Cumming, Harlan was "probably continuing a subtle war against segregation legislation," undermining the "separate but equal" standard by denying the Court's right to look into most exercises of state "police power," thereby showing that the Court can never guarantee equality in racially separate institutions and implying that the only way to fulfill the goal of the Equal Protection Clause was to end segregation. This overrefined apologetic, based on no evidence whatsoever, ignores Harlan's stout defense of segregated schools in Kentucky during the 1870s and his indubitable knowledge of the massive opposition of Southern turn-of-the-century whites to school integration, as well as his denial in the 1908 Berea College case that he favored forcing integration on the public schools.[69]

A fifth line of argument would simply downplay the importance of the case. Perhaps Harlan just did not spend very much time thinking about it, did not realize how much more important it was to the vast majority of Negroes that they have adequate educational opportunities than that they ride in a "first-class" car on a railroad. Perhaps he was ignorant of the rapidly growing gulf between expenditures for black and white schools in the South. But Harlan had certainly long been aware of the problem of racial discrimination in education and believed in the centrality of equalizing educational opportunities during his gubernatorial campaigns of 1871 and 1875. And, as chief

judge on the Sixth Circuit Court, after February, 1896, he must have known of the continuing efforts by his home state to deny blacks equal schools.[70] Even if he had forgotten what he had said two decades earlier and failed to observe widely-known facts, why would he have bothered to erect such a high barrier to further challenges to discrimination if he merely thought this a minor case, rather than a crucial precedent in a key area of the law?

Nor will an explanation drawing on Harlan's judicial habits or general philosophy shed much light on Cumming. Customarily straightforward in logic, he was impatient with legal casuistry, accusing the majority in the Civil Rights Cases, for instance, of undermining the Fourteenth Amendment through "a subtle and ingenious verbal criticism." Yet his assumption that the Board would close the white schools rather than reopen Ware was casuistical in the extreme, and his "racial hostility" test for equal protection was just the sort of outright judicial amending of the Constitution for which Harlan often berated his colleagues on the Bench.[71] An ardent nationalist who generally opposed state economic regulation as well as state infringements on noneconomic rights, Harlan in this case exalted states' rights at the expense of enforcement by the federal courts of constitutional guarantees.[72] Unconstrained by such sophisticated theories as legal realism, which might have led him to defer to legislatures or cautioned him against projecting his own policy predilections into the Constitution, Harlan loosely followed a model of judging which, in G. Edward White's words, "was primarily designed to implement his individual convictions. It placed a premium on

arriving at desirable results, not on theoretical consistency.[73] But these observations merely complicate the Cumming puzzle, for if "intuition" was Harlan's chief guide, and satisfaction of his policy-ends his only thread of consistency, we are left with the view that Harlan simply desired the result in Cumming, that in spite of his famous dissents in other cases, he opposed federal action to protect Negroes from the most obvious discrimination in public services.

If Harlan's motives for decision remain obscure, the results of Cumming were very clear. The case gave the Southern and other states a green light to heighten discrimination in publicly-funded activities, and discouraged black litigants from seeking redress in the federal courts. After all, if the Court would not overturn a system which flatly denied to blacks a service which it offered to whites, it surely would not intervene to adjust mere discrepancies in teachers' salaries, school and other facilities, etc. In addition, the burgeoning disfranchisement movement and the refusal of the courts to block that practical nullification of the Fifteenth Amendment, meant that blacks would be unable to employ the ballot box to pressure white officials for equal treatment.

The consequences of Cumming were nowhere more apparent than in Augusta, where to accommodate a continuing stream of students cheaply, the black elementary schools were put on double sessions in 1898, despite which 1000 black children were still unable to obtain seats in schools as late as 1910; and where the "temporary" suspension of the public high school for blacks was continued until 1937.[74] Augusta also witnessed a dramatic collapse of the limited political

power blacks had enjoyed since Reconstruction: A white primary eliminated blacks from municipal politics in 1899; a murder and lynching led to the absolute segregation of streetcars in 1900. The blacks' optimism was gone. As one previously hopeful black spokesman, Silas X. Floyd, commented, "Many say that the relations between the two races, hitherto so pleasant in Augusta, are now strained forever and that the breech can never be healed."[75] Their rights no longer protected, the three light-skinned Negroes who had initiated the case responded variously. James Harper remained in Augusta, continuing his business and religious activities, and apparently refrained from more active protest, but one of his sons moved to Chicago where he later became a militant editor of the influential black newspaper, the Defender. John Ladeveze, who according to family tradition was despondent over the outcome of the case, moved to Los Angeles in 1900, passed over the racial barrier, and became a well-to-do real estate and insurance broker. Joseph W. Cumming stayed in Augusta until 1913 or 1914, when he migrated to Philadelphia, passed for white, and also sold real estate.[76] When even Justice Harlan reneged on the Reconstruction Amendments' promise of federal guarantees of black rights, the only way to obtain those rights was to cease to be a Southern Negro.

FOOTNOTES

1. 175 U.S. 528, 552. On Harlan's reputation and the reasons for changes in it, see G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges (New York: Oxford University Press, 1976), p. 129.

2. According to Raymond P. Stone, Plessy v. Ferguson, 163 U.S. 537 (1896) "went virtually unnoticed" in newspapers and legal journals at the time, attracting less attention in most of the newspapers which regularly covered the Court's decisions than an obscure civil case decided the same day. The New York Times briefly summarized Plessy in a column headlined "Railway News," and the Washington Post, noting that carpetbagger-lawyer novelist Albion Tourgée had represented Plessy, curtly dismissed the case as "another fool's errand," a reference to Tourgée's most famous novel. Stone, "'Separate But Equal:' The Evolution and Demise of a Constitutional Doctrine" (unpublished Ph.D. dissertation, Princeton University, 1963), pp. 263-64. There are brief newspaper reports on Cumming in Washington Post, Dec. 19, 1899, p. 5; Cleveland Gazette Dec. 30, 1899; Philadelphia Public Ledger, December 19, 1899, p. 12; and of course longer treatments in the Georgia newspapers. The best of the numberless treatments of Plessy are C. Vann Woodward, American Counterpoint (Boston: Little, Brown, and Company, 1971), pp. 212-33; and Otto H. Olsen, ed., The Thin Disguise (New York: Humanities Press, 1967). See pp. 25-27, 123-130 of Olsen's book for another treatment of the response to Plessy.

3. The NAACP and the Court majority tiptoed around Cumming, much to the dissenters' disguist, in Missouri ex. rel. Gaines v. Canada, 305 U.S. 337, 340, 353, (1938), and lawyers for both sides in Brown handled the by then doddering Cumming precedent gingerly. See Leon Friedman, ed., Argument (New York: Chelsea House Publishers, 1969), pp. 42n., 57, 231: Brown v. Board of Education, 347 U.S. 483, 491 (1954). Most of the treatments of the case devote only one or two paragraphs to it. For specific citations, see below, notes X-XX.

4. For a variety of attempts to escape the coils of narrow constitutional doctrine as the exclusive focus of legal history, see Wythe Holt, Essays in 19th Century American Legal History (Westport, Conn.: Greenwood Press, 1976), and Richard Kluger, Simple Justice (New York: Random House, 1975).

5. John Michael Matthews, "Studies in Race Relations in Georgia, 1890-1930," (unpublished Ph.D. dissertation, Duke University, 1970), p. 9. The 1829 law making it illegal to teach any black to read or write seems to have been widely ignored. See Edward Forrest Sweat, "The Free Negro in Ante-Bellum Georgia" (unpublished Ph.D. dissertation, University of Indiana, 1957), pp. 205-07.

6. Augusta Chronicle, July 1, 1866. The Augusta Daily Press, May 3, June 21, 1866, favored setting up schools for blacks by Southern whites to preempt Northerners from control. Quoted in Alan Conway, The Reconstruction of Georgia (Minneapolis: University of Minnesota Press, 1966), p. 86.

7. On the Bureau schools, see Conway, Reconstruction, pp. 84-96. The local school board did partially subsidize the salaries of Bureau teachers in Augusta. See Jacqueline Jones, "The 'Great Opportunity': Northern Teachers and the Georgia Freedman, 1865-1873" (unpublished Ph.D. dissertation, University of Wisconsin, 1976), p. 403.

8. The fact that it was composed locally implies that the law reflected the opinion of the Augusta white elite, at least, and not simply that of a legislative committee. On the writing of the bill,

see Augusta Chronicle, May 21, 24, 1872. For the act, see Ga. Acts, 1872, public law 456.

9. See section 5, paragraph 1 of the 1877 Constitution. The board was allowed, if it wished, to charge tuition in high schools by section 10, public law 347, of 1877.

10. Augusta Chronicle, April 13, 1873. For White's Freedmen's Bureau employment, see Register of Officers and Agents, Civil, Military, and Naval, in the Service of the United States, 1867 (Washington, D.C.: Government Printing Office, 1868).

11. Augusta Chronicle, July 21, 22, 1973.

12. John Avery Dittmer, "The Black Man and White Supremacy in Georgia During the Progressive Era" (unpublished Ph.D. dissertation, University of Indiana, 1971), p. 183; Atlanta Age, quoted in Savannah Tribune, April 30, 1898; Mrs. Mary Blocker (daughter of William J. White), to Laura Harper, April 8, 1962, in Harper Family Papers; Torrence, John Hope, p. 122; Willard Range, The Rise and Progress of Negro Colleges in Georgia (Athens, Ga.: University of Georgia Press), pp. 8, 16, 24-26, 53, 108. "Atlanta Baptist" eventually became Morehouse College, part of the Atlanta University Center.

13. The mix of public and private funding and the charging of tuition in "public" high schools was quite typical of the pragmatic, unbureaucratized school systems of the South during this period. Thus the building for the public girls' high school was paid for from a private legacy; the public high school for both sexes in suburban Summerville had been formed by a secession from the Academy of Richmond County and had a private endowment; the Houghton Institute, which covered primary to high school grades, received a subsidy from the Augusta City Council, but not the School Board; and the Board paid the salaries of teachers at one elementary Catholic

parochial school. While moves to establish a public boys' high school aroused strenuous protests from the prestigious alumni of the Academy of Richmond County, which had educated Augusta's elite since 1784, the Board's offer to pay teachers' salaries there for a few years after 1875, and from 1909 on met no such resistance. John L. Maxwell, Pleasant A. Stovall, and T. R. Gibson, The Handbook of Augusta (Augusta: Chronicle and Constitutionalist, 1878), pp. 63-66; Augusta Chronicle, June 18-21, Sept. 18-20, 1895, Feb. 12, 1900, Charles G. Cordle, "The Academy of Richmond County," Richmond County History, 4 (1972), pp. 25-34.

14. Augusta Chronicle, July 11, 1880. Fleming was a Southern Puritan and intellectual whose teetotalling, taciturn Presbyterianism set him somewhat apart in freewheeling Augusta. Reportedly a member of the American Protective Association in the 1890s, he gave an anti-Catholic peroration as defense attorney for Tom Watson in Watson's 1915 and 1916 trials for sending "obscene" (i.e. anti-Catholic) literature through the mails. Yet Fleming did not follow Watson into racial demagoguery, even after being race-baited out of his congressional seat in 1902 by sometime Watson ally Thomas Hardwick. In the midst of the floridly racist Hoke Smith - Clark Howell campaign for Government in 1906, Fleming gave an address to the University of Georgia alumni endorsing the Reconstruction Amendments and denouncing the movement to disfranchise blacks, which, issued as a pamphlet and reported widely in the newspapers, attracted as much praise from such Northern and Southern moderates as President Theodore Roosevelt and Federal Judge Emory Speer as it did abuse from Southern racists. See Edward L. Cashin, "Thomas E. Watson and the Catholic Laymen's Association of Georgia" (unpublished Ph.D. dissertation, Fordham University, 1962), pp. 13, 59-61, 91-92; Augusta Chronicle May 13, June 5, 6, 1902, June 20, 22, 1906; Fleming, Slavery and the Race Problem in the South (Boston: Dana Estes and Company, n.d.).

15. Augusta Chronicle, July 11, 28, Oct. 10, 1880; Minutes of the Richmond County School Board, 1876-91, pp. 126-27, in School Board offices, Augusta, hereafter referred to as Minutes. Belcher, who was so light in color that the 1868 state legislature hesitated to expel him along with other blacks because his race was "questionable," led a movement in 1880 to increase black power in the Republican party. At the GOP state convention, Belcher moved successfully to give the Negroes a three-to-one edge in national convention delegates, and the convention also applied the same ratio to the state central committee and elected its first black state chairman. Edward B. Young, "The Negro in Georgia Politics, 1867-1877" (unpublished M.A. thesis, Emory University, 1955), p. 35; Shadgett, Republican Party, pp. 78-9. In Augusta, the Republicans for the fist time in some years nominated a black candidate, Judson Lyons, for the state legislature. See Augusta Chronicle, July 21, Sept. 24, Oct. 8, Nov. 4, 1880.

16. Augusta Chronicle, Sept. 2, 10, Oct. 2, 1880. Supported by other state black leaders, Colquitt carried the black vote in Augusta, 780 to 133. Augusta Chronicle, Oct. 7, 1880. Though the Chronicle, Aug. 17, 1880 stated vaguely that "The colored people of Georgia know that Gov. Colquitt will be just to them in all things," it is unclear exactly what the Colquitt leaders promised the Negroes. It should be noted, however, that the Democrats included two black jurors on the 1880 panel of the Augusta Circuit of the Superior Court. This was apparently the first time since Reconstruction that blacks had been called. On black participation in Augusta politics during this period, see William B. Hamilton, "Political Control in A Southern City: Augusta, Georgia in the 1890s" (unpublished A. B. thesis, Harvard University, 1972), pp. 34-54; Richard Henry Lee German, "The Queen City of the Savannah: Augusta, Georgia, During the Urban Progressive Era, 1890-1917" (unpublished Ph.D. dissertation, University of Florida, 1971), pp. 46, 152. Until about 1900, black votes bought lenient enforcement of the law for Augusta Negroes,

according to A. G. Coombs and L. D. Davis, "Crime in Augusta," in W.E.B. DuBois, Some Notes on Negro Crime, Particularly in Georgia (Atlanta, Ga.: The Atlanta University Press, 1904), pp. 52-53.

17. Elizabeth Ross Haynes, The Black Boy of Atlanta (Boston: The House of Edinboro, published, 1952) is a biography of Wright; on his "color complex," see Haynes, pp. 99-101, 120, and Bacote, "Negro in Georgia Politics," p. 236; on his political activity, see Bacote, pp. 52-53, Shadgett, Republican Party, p. 85; on his reputation among Augusta whites and early political radicalism, see Augusta Chronicle, April 16, 1881, June 9, July 2, 8, 1897. The fact that James S. Harper, a classmate of Wright at Atlanta, solicited subscriptions for Wright's newspaper indicates Wright's initial acceptance by Augustans of all shades of brown.

18. On E. A. Ware, see National Cyclopedia of American Biography (New York: James T. White and Company, 1907), vol. 5, p. 380. The Georgia legislature attacked Atlanta's forthright integrationism and its library's possession of "incendiary books" throughout the 1880s, withdrew its federal land-grant college subsidy (which was administered by the state), and established a new college for Negroes in Savannah, of which, ironically, Wright was named the first President. See Range, Rise and Progress of Negro Colleges, pp. 60-63.

19. Minutes, 1876-91, p. 153; Torrence, John Hope, pp. 54-55, 59-60; 13th Annual Report of the Public Schools of Richmond County, 1885 (Augusta: The Chronicle, 1886), pp. 15-16. German, "Queen City," pp. 36-37; Matthews, "Race Relations in Georgia," p. 300. Annual Report of the Secretary of the Interior, 1881 (Washington: Government Printing Office, 1883), vol. 4, pp. 4-307 gives statistics of secondary schools.

20. Matthews, "Race Relations in Georgia," pp. 297-98; George Esmond Clary, Jr., "The Founding of Paine College -- A Unique

Venture in Interracial Cooperation in the New South (1882-1903)" (unpublished Ed. D. dissertation, University of Georgia, 1965), p. 24; Augusta Chronicle, June 9, 1897.

21. Augusta Chronicle, July 22, Aug. 31, Sept. 24, 1880; June 24, July 17, Aug. 5, Dec. 31, 1984; March 3, 12, Aug. 18, 1895; Aug. 25, Oct. 14, 22, 1897; Sept. 29, 1898; Jan. 11, 13, Nov. 16, 29, Dec. 24, 1899; Feb. 11, 18, March 7, 1900. Washington Bee, April 30, 1898; Savannah Tribune, April 23, 1898; Augusta Union, Jan. 27, 1900; Haynes, Black Boy of Atlanta, pp. 99-112; J. L. Nichols and William H. Crogman, Progress of a Race, or the Remarkable Advancement of the American Negro (Napierville, Ill.: J. L. Nichols and Company, 1920), p. 373; German, "Queen City," pp. 135-37.

22. Augusta Chronicle, July 2, 1880; June 10, Sept. 16, 1894; April 13, 14, June 14, 1895; Minutes, 1876-91, pp. 309-11. Compare Evans's report for 1897 in the Minutes, p. 403.

23. Atlanta People's Party Paper, Nov. 2, 1894; for a similar appeal by Black in 1895, see Augusta Chronicle, Sept. 26, 1895. Naturally, Black also sought Negro votes on the more conventional grounds of patronage and putting Negroes on juries.

24. Ware High in 1895 was taught in a building described by the Chronicle of June 9 as "a relic of past days." See also Helen Chapman, "The Contributions to Education of Lawton B. Evans" (unpublished M.A. thesis, University of Georgia, 1949), p. 20; Augusta Chronicle, June 17, Sept. 15, 18, Oct. 14, 1894, Jan. 20, Sept. 22, 1895; Evans, Annual Reports of School Board of Richmond County: 1882 (p. 16), 1887 (p. 13), 1897 (in Minutes, p. 384); Minutes, 1876-91, pp. 235-36; Minutes, 1900, pp. 53-57.

25. The statistics for teachers' salaries for 1897 are incomplete, since the totals for salaries in the printed state report do not match those computed by adding up the average salaries

multiplied by the number of teachers of each "grade" by race. Apparently the salaries of principals (who also taught) were left out of the average salary figures, for their salaries were high enough to have raised the averages above the stated 1897 figures. Since the racial differential in the principals' salaries was higher than that for other teachers, exclusion of them reduces the measured racial disparity for 1897. It also understates the level of support per student for white schools in 1897 by perhaps $1 to $1.50.

26. The reports on the cost of building the white schools come from the State School Reports, 1907, p. 382, and 1908, p. 482; other statistics from the printed annual reports of the Richmond County Board of Education, as well as the State School Reports for the appropriate years.

27. To show how the figures for Column 1, table 2, were calculated, let us use 1895 as an example. The state appropriation to Richmond County in that year was $31, 880. This derived from indirect taxes, the lease on the state-owned railroad, and property taxes amounting to $356,834.15, $210,006 and $600.000, respecitvely, at the state level. I assumed that blacks were "due" income from the lease and indirect taxes in proportion to the percentage of black adult males to all adult males (proxies for households) in the state. Black comprised about 44.7 percent of the adult males. Thus, the blacks in Richmond County were "due" 44.7 percent of that part of the state appropriation which was made up of indirect taxes (37.3 percent), or $5,318.44 from indirect taxes.

Blacks owned 3.5 percent of the taxable property in Richmond County in 1895. Thus, they were "due" 3.5 percent of that part of the state appropriation which came from property taxes (62.7 percent) or $695.12.

Poll taxes all went to schools in the county where they were collected. Richmond County blacks paid $4,121 in poll taxes in 1895. After the institution of the white primary in 1898-99, the number of blacks who paid their poll taxes dropped off drastically, which accounts for the decline in the percentages in

column one from 1897 to 1900 and 1901.

Finally, blacks paid about 3.5 percent of the $45,000 local property tax for schools, or $1,564.73.

Thus, the total estimated taxes paid by blacks for schools was $11,699.29, or 15.2 percent of the $31,880 state and $45,000 local taxes.

Black schools in 1895 actually received in salaries $12,955.18, which would make the subsidy $1,255.89, but, under the assumption that the expenses for building and maintenance were distributed proportionately to salaries -- an assumption which no doubt overestimates the white subsidy -- the total subsidy from whites amounted to $3,415.32. The relatively small funds which the school board received from private sources and tuition have been disregarded in these calculations because of insufficient evidence about their origins.

28. Augusta Chronicle, June 17, 1897; Minutes, 1891-99, pp. 370-72.

29. Augusta Chronicle, July 11, 31, Aug. 26, 29, Sept. 23, 1897; Minutes, 1891-99, pp. 379-81. Since the legislature had increased its general school appropriation, Richmond County would receive 41 percent more from the state in 1898 than in 1897. Thus, the projected total 1898 budget for Richmond County's schools would rise by $13,000 or approximately 23 percent over the 1897 level.

30. German, "Queen City," p. 92; Augusta Chronicle, July 27, 1894, May 14, 1895, July 16, 1897, Feb. 19, 1900.

31. Wealth figures are from the Report of the Georgia Comptroller-General for 1897, table 16, pp. 171-175. For the quotations, see Torrence, Story of John Hope, p. 59; Augusta Chronicle, June 21, 24, 1894. For Walsh's endorsement of reopening Ware, see Chronicle, November 27, 1897, and for other appeals to

blacks by Walsh and his chief opponent see Chronicle, Sept. 13, 29, Oct. 2, 7, 8, 12, 15, 22, Nov. 27-28, 30, 1897. There were 4050 whites and 3972 blacks registered to vote in the city of Augusta in 1897, and since they placed their ballots in separate boxes, the turnout of those registered in each race in the mayor's contest can be measured directly. 88.5 percent of the white registrants and 87.8 percent of the black voted, and 55.8 percent of winning candidate Walsh's votes came from blacks. For the registration and turnout figures, see Chronicle, Dec. 1, 2, 1897. For the successful streetcar boycott, see Chronicle, Oct. 24, 1898, May 15, 1900; Savannah Tribune, Sept. 17, Nov. 26, 1898; August Meier and Elliott Rudwick, "The Boycott Movement Against Jim Crow Streetcars in the South, 1900-1906," Journal of American History 68 (1972), p. 758.

32. On Harper, see Ridgely Torrence, The Story of John Hope reprint ed., (New York: Arno Press, 1969), p. 57. Harper's wealth as listed in the U.S. Census manuscripts for 1850 was $1000, and for 1860, $2000. According to an analysis of these manuscripts for the whole state by Sweat, "Free Negro," pp. 157-61, Harper's wealth put him among the twenty-one wealthiest free persons of color in 1850 and among the thirty-three richest in 1860. A great deal of information about Harper is available in family papers held by Mrs. Mary Harper Ingram, Atlanta, Georgia, hereafter referred to as "Harper family papers."

33. On White's ancestry, see Caroline Bond Day, A Study of Some Negro-White Families in the U.S. (Cambridge, Mass.: Peabody Museum of Harvard University, 1932), p. 30. Fanny Butts, the mother of John Hope, first "black" President of Atlanta University (he had blond hair and blue eyes), was a bridesmaid in the antebellum wedding of the Whites. The fact that Fanny lived as the de facto wife of a socially prominent white medical doctor before the war and after his death had the same relationship with the white organizer of the city's largest textile plant indicates how loose interracial

social relations were in Augusta. See Torrence, John Hope, pp. 54-5, 60 and passim. To demonstrate again the close connections within the black elite in Augusta, the aunt of Robert Harper and Charles Ladeveze donated the land on which White's Harmony Baptist Church was built. And to underline once more the openness of interracial contacts in Augusta, this aunt, Mary Bouyer, had received the land in a legacy left her by her antebellum white consort, John Carrie, with whom she lived openly. The legacy was supervised by Henry Harford Cumming, an antebellum entrepreneur, mayor, and member of one of Augusta's most prominent families. See Gaspard Carrie v. Henry H. Cumming, 26 Ga., 690 (1858); John Carrie file, #1076, in 19th century records, Probate Court, Richmond County Courthouse Augusta, Georgia; Bryan M. Halterman, "From Father to Son: Henry H. Cumming and Joseph B. Cumming," (unpublished senior thesis, Yale University, 1975), pp. 5-34. Racial intermarriage, prohibited in Georgia after 1749, was allowed in South Carolina, and family tradition has it that John Carrie and Mary Bouyer had crossed the Savannah River to marry. On the prohibition, see Ruth Scarborough, The Opposition to Slavery in Georgia Prior to 1860 (Nashville, Tenn.: George Peabody College for Teachers, 1933), p. 55. Antebellum white Augusta's reputation for leniency in its treatment of free persons of color led one state senator to tag the city the "Connecticut Reserve of Georgia," referring to the liberal racial attitudes in northern Ohio. Florence Fleming Corley, Confederate City: Augusta, Georgia, 1860-1865 (Columbia, S.C.: University of South Carolina Press, 1960), pp. 14-16.

34. William J. Simmons, Men of Mark: Eminent, Progressive, and Rising, reprint ed. (New York: Arno Press, 1968), pp. 1095-96; Augusta Herald, Sept. 22, 1940; I. Garland Penn, The Afro-American Press and Its Editors (Springfield, Mass.: Willey and Company, 1891), pp. 216-222; William H. Heard, From Slavery to the Bishopric in the A.M.E. Church, reprint (New York: Arno Press, 1969), pp. 89-90; Atlanta People's Party Paper, June 22, Oct. 19, Dec. 21, 1894; Augusta Chronicle, Sept. 17, 1872, Aug. 31, Sept.

2, 1880, Feb. 11, March 10, 1900; Olive Hall Shadgett, The Republican Party in Georgia, From Reconstruction Through 1900) (Athens, Ga.: University of Georgia Press), pp. 82-85, 164-73. Herbert Aptheker, A Documentary History of the Negro People in the United States (New York: Citadel Press, 1969), pp. 697-98, 857; Clarence A. Bacote, "The Negro in Georgia Politics, 1880-1908" (unpublished Ph.D. dissertation, University of Chicago, 1955), pp. 81-2, 114, 124; Atlanta Voice of the Negro (February, 1904), p. 91, (March, 1906), pp. 163-65; Matthews, "Race Relations in Georgia," pp. 235, 284. White's portrait in the Harmony Baptist Church, Augusta, confirm memories of survivors of his era that he had few if any Negroid physical traits.

35. Much of the biographical material on the Harper, Ladeveze, Cumming, and White families comes from the previously cited collection of Harper family papers. Wealth information is from the Tax Digest of Richmond County for 1897, in the Georgia Department of Archives and History, Atlanta, hereafter referred to as "Tax Digest, 1897." Other information comes from the U.S. census manuscripts for 1830-1900; the scattered surviving Augusta City Directories for the period from 1841 through 1915, most of which I consulted in the Augusta College Library at Augusta; the probate court and marriage license records at the Richmond County Courthouse, Augusta; the signature list of the Freedmen's Savings and Trust Co., Augusta Branch, R G 101, microfilm 816, location 10-53-2, roll 7, accounts # 2544, 4742, 5929, 6400 in the National Archives, Washington, D.C.; the Board of Education Minutes, 1876-91, pp. 61, 66, 217. For James Harper's position at Paine College, see Clary, "Founding of Paine College," pp. 24, 44-45, 157; and Graham, "Patterns in Intergroup Relations," p. 197. Information on the civil service status of Railway Mail Service employees comes from Leonard D. White, The Republican Era, A Study in Administrative History, 1869-1901 (New York: The Macmillan Company, 1958), p. 268. There is some material on James Harper in Bacote, "Negro in Georgia Politics," p. 55; and on Union Church in Torrence, Story of John Hope,

pp. 68-69. Scattered biographical information on these men or their families may be found in the Augusta Chronicle, July 3, 28, Aug. 31, Sept. 24, 1880; Oct. 7, 11, 26, 27, Nov. 9, 1894; March 21, 1895; Jan. 30, 1898; June 10, 1900; Feb. 12, 1920; and in Ruth Blair, Some Early Tax Digests of Georgia (Atlanta: Department of Archives and History, 1926), pp. 125-27. Middle-class Negro activists in the South are pictured in Lawrence J. Friedman, The White Savage, (Englewood Cliffs, N.J.: Prentice-Hall, 1970), pp. 128-31, 143-47. On the white Cumming family, see Lucian Lamar Knight, Georgia's Bi-Centennial Memoirs and Memories (n.p., n.p., 1931), pp. 104-06. Joseph W. Cumming's death certificate, which gives his race as white, in the Pennsylvania Department of Vital Statistics, dated Jan. 17, 1931, lists his father as Thomas Cumming. There was a member of the white Cumming family of that name and of the correct age to have fathered Joseph. Further, Joseph named his son "Harford," a distinctive name which had long graced the white Cumming family.

36. It has often been noted that light-skinned Negroes have played important roles in racial protests. See, for instance, Kruger, Simple Justice, pp. 113, 123, 165, 177, 183. But the question of their motives and psychology has been virtually taboo among serious scholars -- among Negro scholars perhaps because of the need for unity in the struggle against white racism, among whites, perhaps because of a desire not to patronize and simple ignorance of what has gone on inside the heads of such people. (Neither group has been so reticent about examining the psychic make-up of black slaves.) While I do not claim to have any special insights into the mind-set of these racially marginal men and women, I suggest that the topic is too important to be ignored or left to popularizers; that the status of Americans of African descent is now secure enough for their history to withstand the most exacting scrutiny; that, besides, an observer with a modicum of objectivity will find much to admire and sympathize with in the lives of such men as Harper and Ladeveze; and that to treat the topic with sneer at the "black

bourgeoisie" or disdainful references to hair straightening or skin bleaching products is a s dehumanizing to the observer as to his prey.

37. The last names and initials of the petition signers were recorded in the School Board Minutes, 1891-99, pp. 379-81, sometimes barely legibly and sometimes manifestly incorrectly. Comparisons with the incomplete city directories and the sometimes indecipherable tax digest therefore probably produced some errors and made it impossible to find individuals who were actually listed. This was particularly a problem with women, who were seldom listed separately from their husbands. In addition, some people probably died or moved between July, 1897 and the dates at which the directories and tax rolls were compiled. I followed a conservative course in identifying people, assigning doubtful cases to the unlisted or unidentifiable categories.

38. On Haines, Walker, and other black private schools in Georgia, see Matthews, "Race Relations in Georgia," pp. 297-98, 303, 307-08. The enrollment at Paine jumped from 249 in 1897 to 308 in 1898, but dropped back to 266 in 1899. Part of the enrollment increase undoubtedly came from former Ware students, for a list of Paine graduates of 1900 in the Harper family papers contains several former Ware students. The enrollment statistics are taken from Clary, "Founding of Paine College," p. 153, and if similar figures were available from long-defunct Haines and Walker, they would no doubt parallel those from Paine. On the brown-skinned Laney, see Haynes, Black Boy of Atlanta, p. 37; Torrence, Story of John Hope; p. 47, and Edward Twichell Ware, The Good of It: How It Pays to Give Higher Education to Negroes — Being Some Account of What Graduates of Atlanta University Are Doing for the Uplifting of Their Race (n.p., n.p., 1902), pp. 8-11. There is both direct and circumstantial evidence for Lucy Laney's actions. In an undated note in the Harper family papers, Laura Harper, who was probably enrolled in Ware High in 1897, wrote that "The case was Lost,

because a few self-centered Negroes sneaked to Lawyer Ganahl Who represented the Board of Education by night and told them the Negroes had enough High Schools." [punctuation and capitalization, sic] Entirely independently of that note, Mrs. Mary Harper Ingram reported to me that during the 1930s, Channing H. Tobias told Mrs. Ingram's mother (who was Laura Harper's sister-in-law) that he had never forgiven Lucy Laney for going to the School Board and asking them to abolish Ware and give the money to primary schools. Born in 1882 in Augusta, Tobias had graduated from Paine in 1902, been named a Theology Professor there in 1904, and later became International YMCA Secretary and an officer in the NAACP, so he was both responsible and in a position to know. The circumstantial evidence comes from the fact that Laney, a leader in all black educational activities in the city, did not sign the petition, and from the deposition she gave on the side of the School Board in the case. For her activism, see e.g. Augusta Chronicle, June 20, 1894; Jan. 1, March 12, 1895; and for her deposition, which mentioned that several of the pupils from Ware were attending Haines in 1898 and in which she particularly protested that she was an unwilling witness for the Board (implying that rumors of collusion circulated at the time), see "Transcripts of Records, 1899," Case #164 (Cumming), vol. 12, p. 32, in U. S. Supreme Court Library, Washington, D.C.

39. One, Judson Lyons, Republican National Committeeman for the state, was in 1897 fully engaged in an attempt to become either Augusta postmaster or Register of the Treasury. He failed in both efforts initially, but won the post of Register after former U.S. Senator Blanche K. Bruce died in 1898. His law partner, Henry M. Porter, was no doubt too young and inexperienced to handle the case. For the fact that they were the only two black lawyers in Augusta, see Augusta City Directory, 1898 (the statistics for which were gathered in 1897), pp. 610, 815. On Lyons, a light-skinned man born in Burke County, Georgia, who taught school in Augusta during

the 1870s and who was respected as dignified and intelligent, though not a particularly good lawyer, by whites in Augusta, see Bacote, "Negro in Georgia Politics," pp. 81-82, 127-28, 249-54, 327, 372-373, 456-458; and Savannah Tribune, March 26, April 30, May 7, 1898: The Washington Bee, Feb. 25, 1899 called Lyons "The greatest factor in southern politics." For Lyons's position in Augusta, see Augusta Chronicle, March 25, 1898. For his color, origin, and occupation, see 1880 manuscript U.S. population census, and signature list, Augusta Branch, Freedman's Savings and Trust Co., accounts number 2467, 6516, in National Archives, Washington, D.C.

40. George F. Edmunds to James H. McKenney, Dec. 3, 1898, in Cummings case file, National Archives, Washington, D.C. identifies Dutcher as the principal local counsel; Salem Dutcher, Jr., Minority or Proportional Representation, Its Nature, Aims, History, Processes and Practical Operation (New York: U.S. Publishing Company, 1872), and his Expressions of Law and Fact Construed by the Courts of Georgia (Atlanta: The Franklin Printing and Publishing Company, 1899) testify to Dutcher's scholarship; for his social views and other biographical facts, see Edward J. Cashin, Jr., "The Banner of the South, A Journal of the Reconstruction Era," Richmond County History 6 (1974), pp. 13-22; Augusta Chronicle and Sentinel, Dec. 18, 1873; Augusta Chronicle, Oct. 19, 23, 29, Nov. 21, 1880; June 18, 19, 20, 22, July 3, Aug. 16, 22, Sept. 13, 20, 24, 25, Nov. 4, 1898; Jan. 10, 1899; Dec. 24, 1917; Ralph W. Donnelly, undated typescript on Dutcher in Augusta College Library, Augusta; "Tax Digest, 1897"; Probate Court File on Dutcher, Richmond County Courthouse, Augusta, Georgia. For the fact that Dutcher shared a two-story, two-tenant building with Ladeveze, see Augusta City Directory, 1891, pp. 156, and 1892-3, p. 321. Dutcher apparently did not attend college, but his father's apparent friendship at Union College with future Georgia Governor and prominent Augustan Charles J. Jenkins may have led Dutcher Jr. to settle in Augusta. See Catalogue of the Officers and Alumni of Union College,

Schenedktady, New York, from 1797 to 1844) (Albany, N.Y.: C. VanBenthuysen and Sons, 1884). Dutcher mounted an unsuccessful independent campaign for the state Senate in 1894 and served as counsel to the Populists in several legal matters at that time. During the bitter Black-Watson congressional contests of these years, in which every vote in overwhelmingly anti-Populist Richmond County counted (many more than once), to ally with the Watson men was to declare oneself an outcast. Further, since Dutcher was a Catholic, and many Populists in Augusta appear to have been members of the American Protective Association, Dutcher was not even accepted by all People's Party men! It is also interesting to note that one of Dutcher's wife's relatives was a witness to John Carrie's will, and that the connection between the Dutcher, Harper, and Ladeveze families may therefore have predated the War.

41. Ferdinand Phinizy Calhoun, The Phinizy Family in Augusta (Atlanta: Johnson-Dellis Company, 1925), 52, 83, 91-92, 136-38; Lucian Lamar Knight, A Standard History of Georgia and Georgians (Chicago and New York: The Lewis Publishing Company, 1917), vol. 5, pp. 2718-19, vol. 6, p. 2817; William J. Northen, Men of Mark in Georgia (n.p., n.p., 1911), vol. 3, pp. 271-74; Augusta Bicentennial Pageant Book, 1735-1935 (n.p., n.p., n.d.), p. p. 38; Augusta Chronicle, July 22, Aug. 16, 1894, April 11, 1895, Oct. 17, 26, 1897, Feb. 22, 27, Oct. 20, 1899; interview with Dr. Irvine Phinizy, Augusta, Nov. 10, 1976; "Tax Digests, 1897 and 1898," rate Phinizy's property in Augusta at $950, but he reportedly owned land elsewhere.

42. Letter from Mrs. Mary R. Powell (Reynolds's daughter) to author, Feb. 7, 1977; Augusta City Directories, 1886, p. 321, and 1888, p. 360; "Tax Digest, 1897;" Augusta Chronicle, June 15, July 4, 5, 1897; April 24, June 20, Sept. 27, Oct. 2, 6, Nov. 10, 1898; Nov. 17, Dec. 17, 1899; Feb. 17, 22, 23, March 22, May 13, 17, 20, 1900.

43. Transcript of Record #621, October Term, 1898, Appellate case File #17206, in National Archives, Washington, D.C.; Augusta Chronicle, Sept. 22, 1897. Since Blodgett was never considered an important a case by counsel, and since the plantiffs apparently took no part in raising money or propagandizing for the cases, I have devoted less attention to them. Blodgett, a mulatto who may have been the son of White Reconstructionist Foster Blodgett, Jr., was a grocer whose son married one of John Ladeveze's sisters. Griffin was a brown-skinned barber and president of one of the town's largest benevolent societies who son later married one of James Harper's daughters.

44. On the development of equity law, see Owen M. Fiss, Injunctions (Mineola, New York: The Foundation Press, 1972), pp. 9-11, 75-76. The quotations are from Thomas Crisp Spelling, A Treatise on Injunctions and Other Extraordinary Remedies, 2nd ed. (Boston: Little, Brown, and Company, 1901), pp. 250, 1255. For similar treatments of mandamus, see Thomas M. Cooley, Constitutional Limitations, 6th Ed. (Boston: Little, Brown, and Company, 1890), pp. 136-37; and Forrest G. Ferris and Forrest G. Ferris, Jr., The Law of Extraordinary Remedies (St. Louis, Mo.: Thomas Law Book Company, 1926), sections 206 and 209. Only Dutcher signed the later brief appealing Blodgett to the Georgia Supreme Court. For the disagreement on strategy between counsel, see Augusta Chronicle, March 25, 1898.

45. Probably the best legal craftman in Augusta at this time was Joseph Lamar, who was later appointed to the United States Supreme Court. See Clarinda Pendleton Lamar, The Life of Joseph Rucker Lamar (New York: G. P. Putnam's Sons, 1926). Son of a Whig lawyer-politician who has served in the antebellum Georgia legislature for twenty years, Frank Miller was a wealthy lawyer with a large and varied practice by the 1890s. Less rhetorical than several of the better-know members of the Augusta bar, he seems to have gloried in legal technicalities, as evidenced in his

Cumming briefs. A graduate and long-time Trustee of Richmond Academy, Miller had an interest in education, but chiefly private rather than public education. His son William married Hamilton Phinizy's sister Martha. For biographical details on Miller, see William J. Northen, Men of Mark in Georgia (Spartanburg, S.C.: The Reprint Co., 1974), IV, pp. 33-38; Knight, Georgia and Georgians, V, pp. 2777-78. The ironic fact that all three lawyers for the blacks were Miller's pupils I learned from the 1886 Augusta City Directory, p. 311; Augusta Chronicle, Dec. 24, 1917; and a letter from Mary R. Powell, previously cited.

46. Augusta Chronicle, Dec. 23, 24, 1897 for the decisions, Nov. 11, 1894 for a capsule biography, and Nov. 3, 5, 15, 1898 for his actions with regard to the attempted lynching; Sept. 29, 1898, and Augusta Herald, Oct. 30, 1898, for Callaway's standing as a judge and the reasons for his retirement; Allen D. Candler and Clement A. Evans, Georgia (Atlanta: State Historical Commission, 1906), vol. 1, pp. 295-299 for more biographical details.

47. Southeastern Reporter 488 (1898). For biographical facts about Simmons, see Augusta Chronicle, Oct. 29, 1894. The briefs are part of the record of the case in the U. S. Supreme Court Library. Simmons's earlier dictum came in Reid v. Eatonton, 80 Ga. 755, 758 (1888). In an attempt to strengthen his case against allegations of racial discrimination by the Board, Simmons denied, contrary to facts stipulated by both sides, that the Board had ever supported a boys' high school for whites. To buttress his contention that section 10 was completely separate from the foregoing regulations of the free common schools, he patently misread the 1877 amendments as requiring tuition at high schools, instead of merely allowing the Board discretion on whether or not to charge tuition.

48. Augusta Chronicle, Jan. 28, March 25, 1898, Dec. 24, 1897.

49. For the fundraising, see Savannah Tribune, Nov. 5, 12, 1898; Ladeveze to Washington, June, 1898, Nov. 11, 17, 1898 in container 142, Booker T. Washington Papers, Library of Congress. Despite the appeal to Washington to help in the fundraising, the Augustans were forced to rely almost entirely on their own resources. For earlier fundraising activities, see Augusta Chronicle, Jan. 14, 1898. In contrast, the NAACP received a $100,000 grant from the liberal Garland Fund in 1929 to fight for equalization of school facilities, among other things. See Kruger, Simple Justice, pp. 132-33.

50. The fact that Edmunds burned all his papers before he died probably accounts for the lack of a published biography. Selig Adler's "The Senatorial Career of George Franklin Edmunds, 1866-1891" (unpublished Ph.D. dissertation, University of Illinois, 1934) provided most of the scanty biographical details. The quotations are from pp. 274-76. Other information derives from Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1886); Howard Jay Graham, Everyman's Constitution (Madison, Wis.: State Historical Society of Wisconsin, 1968), p. 88, n. 79; Westin, "Harlan and the Constitutional Rights of Negroes," p. 240, n. 68; and an undated note by Laura Harper in the Harper family papers. Another prominent Republican who worked on the same cases as Edmunds and shared his beliefs that the 14th Amendment protected both corporations and Negro rights was Roscoe Cankling, who called Harlan's Civil Rights Cases dissent "the noblest opinion in history." See Lewis Issac Maddocks, "Justice John Marshall Harlan: Defender of Individual Rights" (unpublished Ph.D. dissertation, Ohio State University, 1959), pp. 37-8. Edmunds's emotional involvement in Cumming is evidenced in the fervid language of his petition to advance the case on the Court's docket and his statement that he "was grieved to see in the newspapers that the Supreme Court had defected my poor colored clients" in a letter to Supreme Court Clerk James H. McKenney, Dec. 30, 1894, both of which are in the National Archives file on the case. It is interesting to compare the devotion of Edmunds and Conkling to

the rights of the downtrodden with the scorn shown by a leading 20th century corporation lawyer, such as John W. Davis, on whom see William H. Harbaugh's masterful Lawyer's Lawyer (New York: Oxford University Press, 1973).

51. The Attorney General or Soliciter General appeared for the blacks in U.S. v. Reese (92 U.S. 214), U.S. v. Cruikshank (92 U.S. 542), Strauder v. W. Virginia (100 U.S. 303), Ex parte Virginia (100 U.S. 339), Ex parte Siebold (100 U.S. 371), U.S. v. Harris (106 U.S. 629), Ex parte Yarbrough (110 U.S. 51), The Civil Rights Cases (109 U.S. 3), and James v. Bowman (1890 U.S. 127). In Plessy, the chief lawyer was the respected "Judge" Albion Tourgée; in the 1903 Alabama disfranchisement cases, Giles v. Harris (189 U.S. 475) and Giles v. Teasley (193 U.S. 146) black lawyer Wilford Smith filed competent briefs; and in the 1904 Virginia disfranchisement cases of Jones v. Montague (194 U.S. 147) and Selden v. Montague (194 U.S. 153), the blacks were represented by John S. Wise, an excellent lawyer who practiced on Wall Street as well as in Virgina. The exception referred to was Cornelius J. Jones, a blustering black Vicksburg attorney whose failure to present the disfranchisement case of Williams v. Mississippi (170 U.S. 213) correctly allowed the Court easily to sidestep the crucial precedent. For his bluster, see the file on Williams v. Mississippi in the National Archives.

52. Edmunds' confidence is reflected in his correspondence with the Supreme Court and in a letter from Ladeveze to Booker T. Washington, cited above, footnote 47.

53. Edmunds' printed brief, pp. 12-15, in United States Supreme Court Library file on Cumming, citing Chicago, Burlington and Quincy Railroad v. Chicago, (166 U.S. 226); Gulf, Colorado, and Santa Fe Railroad Company v. Ellis, (165 U.S. 154); Yick Wo v. Hopkins, (118 U.S. 356); Strauder v. West Virigina, (100 U.S. 303); and Plessy v. Ferguson, (163 U.S. 537). In his opinion in Cumming, Harlan implied that at the oral argument, Edmunds had challenged school segregation per se. The court, however, declined to rule on that question on the stated grounds that the legality of segregation had been conceded in the lower courts and in the briefs.

54. U.S. v. Buntin, 10 Fed. Cas. 730, 735 (1882); Claybrook v. Owensboro, 16 Fed. 297, 301 (1883).

55. Maddox v. Neal, 45 Ark. 121 (1885); Ward v. Flood, 48 Cal. 36 (1874); Dawson v. Lee, 83 Ky. 49 (1885); People ex. rel. King v. Gallagher, 93 N.Y. 438 (1883); Puitt v. Commissioners, 94 N.C. 709 (1885). For discussions of these and similar cases, see Gilbert Thomas Stephenson, Race Distinctions in American Law reprint ed., (New York: Negro Universities Press, 1969), pp. 196-199; Charles S. Mangum, The Legal Status of the Negro (Chapel Hill, N.C.: University of North Carolina Press, 1940), pp. 89-91, 126-131; Maurice London Risen, Legal Aspects of Separation of Races in the Public Schools (Philadelphia: Temple University, 1935), pp. 48-51, 70-84.

56. Cooley, The General Principles of Constitutional Law in United States of America, 3rd ed., (Boston: Little, Brown, and Company, 1898), p. 255; and similarly, his A Treatise on the Law of Torts, or the Wrongs Which Arise Independent of Contract, 2nd ed. (Chicago: Callaghan and Company, 1888), pp. 338-39, which was still the current edition of this book in 1899.

57. The Slaughter-House Cases, 16 Wall. 36 (1873); U.S. v. Reese, 92 U.S. 214 (1876); U.S. v. Cruikshank, 92 U.S. 542 (1876); U.S. v. Harris, 106 U.S. 629 (1883); Williams v. Mississippi, 170 U.S. 213 (18980); Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896). There are good discussions of these cases (but a misleading treatment of Cumming) in Robert J. Harris, The Quest for Equality: The Constitution, Congress, and the Supreme Court (Baton Rouge, La." Louisiana State University Press, 1960), pp. 57-109.

58. Ganahl and Miller briefs in Cumming file, U.S. Supreme Court Library.

59. White, American Judicial Tradition, p. 133; Westin, "Harlan and the Constitutional Rights of Negroes," p. 697. Similarly, see Lewis Isaac Maddocks, "Justice John Marshall Harlan: Defender of Individual Rights" (unpublished Ph.D. dissertation, Ohio State University, 1959), p. 108; Westin, An Autobiography of the Supreme Court (New York: The Macmillan Company, 1963), p. 118; Florian Bartosic, "The Constitution, Civil Liberties, and John Marshall Harlan," Ky. Law Jl. 46 (1958), p. 446. For a more careful and qualified opinion, see Louis Filler, "John M. Harlan," in Leon Friedman and Fred L. Israel, The Justices of the United States Supreme Court, 1789-1969; Their Lives and Major Opinions (New York: Chelsea House Publishers, 1969), pp. 1281-1293.

60. Maddocks, "Harlan," pp. 1-47; David G. Farrelly, "Harlan's Formative Period: The Years Before the War," Ky. L.J., vol. 46 (1958), pp. 367-406; Ellwood W. Lewis, "Document: The Appointment of Mr. Justice Harlan," Ind. L. Rev. vol. 29 (1953), pp. 46-74; Westin, "Harlan and the Constitutional Rights of Negroes," pp. 658-69; Bruce Thompson, "The Bristow Presidential Boom of 1876," Mississippi Valley Historical Review, vol. 32 (1945), pp. 3-30. The only published biographies of Harlan, Floyd Brazilla Clark, The Constitutional Doctrines of Justice Harlan, reprint ed. (New York: Da Capo Press, 1969), and Frank B. Latham, The Great Dissenter: John Marshall Harlan, 1833-1911 (New York: Cowles, 1970), add no important details.

61. C. Vann Woodward, American Counterpoint (Boston: Little, Brown and Company, 1971), p. 224. Woodward notes the Cumming case but makes little of it. White, American Judicial Tradition, pp. 131-33, 138-43. Westin, "Harlan and the Constitutional Rights of Negroes," p. 698, makes much of Harlan's "conversion" on civil rights issues in 1868.

62. The Democratic platform was silent on the issue and gubernatorial candidate James B. McCreary opposed taxing whites to pay for black schools. For the speech, see Louisville Courier-Journal, July 5, 1875. Harlan seems to have made similar statements in all his joint debates across the state. See, e.g., ibid., June 19, 1875. Harlan did constantly condemn "mixed schools" and the public accommodations sections of the 1875 Civil Rights Act (which he later defended in his Civil Rights Cases dissent) during the campaign. For black activities in favor of the equalization of the Kentucky school fund, see "Kentucky State Colored Educational Convention Held at Benson's Theater, Louisville, Ky., July 14, 1869" (n.p., n.p., n.d., a pamphlet in the Library of Congress); Lexington American Citizen, Nov. 13, 1875.

63. Everyone appears to have assumed from the first that the Board, if enjoined, would reestablish Ware, and Ganahl's brief, pp. 15-16, conceded as much.

64. Although the printed record of Cumming, p. 46 did refer to "the mandamus case," Blodgett was nowhere stressed. If such considrations had occurred to Harlan early enough, of course, he might have satisfied them at the oral argument, but since no record of that argument survives, we cannot determine whether Harlan misstated the facts of the state court case -- the blacks had, indeed, asked for a mandamus -- deliberately or by mistake.

65. All quotations are from 175 U.S. 544-45; on the "racial hostility" test, see note, University of Pennsylvania Law Rev. vol. 82 (1933), p. 157.

66. Albert P. Blaustein and Clarence Clyde Ferguson, Jr., Desegregation and The Law: The Meaning and Effect of the School Segregation Cases 2nd ed. (New York: Vintage, 1962), p. 100; Loren Miller, The Petitioners (New York: Pantheon Books, 1966), p. 214; Westin, "Harlan and the Constitutional Rights of Negroes," p. 689.

67. Derrick A. Bell, Jr., Race, Racism and American Law (Boston: Little, Brown and Company, 1973), pp. 449-51; Clark Spurlock, Education and the Supreme Court (Urbana, Ill.: University of Illinois Press, 1955), p. 181; Monte Canfield, Jr., "Our Constitution is Color-Blind: Mr. Justice Harlan and the Modern Problem of Civil Rights," University of Missouri Kansas City Law Rev., vol. 32 (1964), pp. 311-12; Maddocks, "Harlan," p. 98; Kruger, Simple Justice, p. 121.

68. Loren P. Beth, "Justice Harlan and the Uses of Dissent," American Political Science Review, 49 (1955), 1091-92.

69. E. H. Hobbs, "Negro Education and the Equal Protection of the Laws," Journal of Politics, 14 (1952), pp. 495-97; Berea College v. Ky., 211 U.S. 45, (1908).

70. On the extensive litigation of such questions in Kentucky, see Stephenson, Race Distinctions, pp. 196-98; Mangum, Legal Status of the Negro, pp. 120-125. The 1896 case of Davenport v. Cloverport, 72 Fed. Reporter 690, decided by Harlan's friend Judge Barr, raised issues very similar to Cumming. In the 1898 case of Henderson Bridge Co. v. Henderson City, 173 U.S. 592, Harlan's opinion of the court cited an earlier state court case dealing with the same issues, Marshall v. Donovan, 73 Ky. 681 (1874).

71. Civil Rights Cases, 109 U.S. 3, 26 (1883); Henry J. Abraham, "John Marshall Harlan: The Justice and the Man," Ky. Law Journal, vol. 46 (1958), p. 450. For an example of Harlan's criticism of his colleagues' amendment of the Constitution by judicial decree, see his bitter dissent in Pollock v. Farmer's Loan and Trust Company, 158 U.S. 601 (1895).

72. For Harlan's nationalistic views on economic matters, see Mary Cornelia Porter, "John Marshall Harlan and the Laissez-Faire

Court (1877-1910)" unpublished Ph.D. dissertation, University of Chicago, 1970).

73. White, American Judicial Tradition, p. 130.

74. Minutes, 1891-99, p. 435; Minutes, 1900, p. 61; W.E.B. DuBois and Augustus Granville Dill, The Common School and the Negro American (Atlanta: The Atlanta University Press, 1911), p. 63; Range, Rise and Progress of Negro Colleges, p. 181. It was 1945 before a full four-year public high school, which was what Ware had been, was reestablished, according to the annual reports of the Georgia State Department of Education.

75. Augusta Chronicle, Nov. 13, 17, Dec. 7, 1899; May 15-17, 20-21, 25, 1900. The lynching was in stark contrast to a similar experience in 1895, when the local militia had been called out to maintain law and order and Joseph R. Lamar, appointed special counsel for the black accused of murder, had defended his penniless client with considerable vigor.

76. Harper family papers; correspondence between Mrs. Emile Veze of Arcadia, California and author; city directories of Los Angeles, 1900-30, and Philadelphia, 1915-30.