PLESSY V. LOCHNER: THE *BEREA COLLEGE* CASE

ABSTRACT:

Because *Plessy v. Ferguson* and *Lochner v. New York* were decided within a decade of each other, and are two of the most maligned Supreme Court opinions of all time, legal scholars and historians have naturally been inclined to try to find commonalities between the two opinions. The history of the *Berea College v. Kentucky* case shows that this anachronistic approach is misguided. *Plessy* and *Lochner* were not cut from the same cloth; in the late 19th and early 20th centuries, the statism and racism of *Plessy* went hand in hand, while the skepticism of state power reflected in *Lochner* was a weapon in the battle against state-sponsored segregation. In 1908, just three years after the Court decided *Lochner*, the battle between the ideologies reflected in *Plessy* and *Lochner* reached the Supreme Court in *Berea College*. The Court chose to evade the conflict. Compared to *Plessy's* blunt endorsement of racism and state-sponsored segregation, that evasion, while hardly courageous, reflected a change in attitude toward the constitutionality of state-enforced segregation in the private sector that would come to full fruition less than a decade later in *Buchanan v. Warley*, in which the Supreme Court invalidated a residential segregation law.

Plessy v. Lochner: The *Berea College* Case

by David E. Bernstein[1]

Legal scholars and historians have often claimed to find intellectual affinities between the United States Supreme Court's notorious opinions in *Plessy v. Ferguson*[2] and *Lochner v. New York.*[3] In *Plessy*, the Supreme Court upheld a law requiring private railroads to enforce segregation, while in *Lochner* the Court invalidated a maximum hours law for bakers.

Bruce Ackerman asserts that *Plessy* had its intellectual roots "in the laissez-faire theories expressed one decade later in cases like *Lochner*."[4] In support of his thesis, Ackerman relies on the *Plessy* Court's statement that if the two races are to mingle, it must be "the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."[5] Brook Thomas also blames the *Plessy* ruling on laissez-faire ideology. He argues that laissez-faire theory led the Court to seek to encourage the "natural" forces of segregation.[6]

Owen Fiss, meanwhile, contends that the Supreme Court upheld the segregation statute at issue in *Plessy* because it "codified and strengthened existing social practices." The Court objected to the statute at issue in *Lochner,* meanwhile, because that law "tried to reverse social practices that were driven by market competition."[7] Cass Sunstein makes the similar argument

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[2] 163 U.S. 537 (1896).

[3] 198 U.S. 45 (1905).

[4] BRUCE ACKERMAN, WE THE PEOPLE 147 n. * (1992).

[5] *Id.,* quoting *Plessy,* 163 U.S. at 551.

[6] Brook Thomas, *Introduction: The Legal Background* in Plessy v. Ferguson: A BRIEF HISTORY WITH DOCUMENTS 1, 34 (Brooks Thomas ed. 1997).

[7] OWEN FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 362 (1993).

that *Lochner* and *Plessy* are consistent in that both "relied on a conception of neutrality taking existing distributions as the starting point for analysis."[8] Derrick Bell finds that the decisions are congruous because they both "protected existing property and political arrangements, while ignoring the disadvantages to the powerless caught in those relationships: the exploited whites (in *Lochner*) and the segregated blacks (in *Plessy*)."[9]

Recently, several commentators have persuasively challenged the purported affinities between *Plessy* and *Lochner*. Michael Klarman, for example, asserts that "[t]he outcome in *Plessy* is mainly attributable to the virulent racism of the Gilded Age, not to the era's skepticism of activist government."[10]

Richard Epstein, meanwhile, makes the bolder revisionist argument that the holdings and reasoning of *Plessy* and *Lochner* are at odds. According to Epstein, "[t]he statute sustained in *Plessy* was flatly inconsistent with laissez-faire principles. . . . By no stretch do *Plessy* and *Lochner* represent different applications of a common jurisprudence. *Plessy* represented the expansionist view of the police power that *Lochner* repudiated."[11] Mark Tushnet also argues that *Plessy* and *Lochner* were jurisprudentially at odds, because *Plessy* was a statist opinion while *Lochner* reflected a far more libertarian viewpoint.[12]

Finally, I have argued that *Lochner* represented a triumph of "traditional" jurisprudence. This jurisprudence required courts to enforce the limitations on government power enshrined by

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[8] CASS SUNSTEIN, THE PARTIAL CONSTITUTION 48 (1993).

[9] Derrick Bell, *Does Discrimination Make Economic Sense?: For Some it Did—and Still Does*, HUMAN RIGHTS, Fall 1988, at 38, 41.

[10] Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 787 (1992).

[11] Richard A. Epstein, *Lest We Forget:* Buchanan v. Warley *and Constitutional Jurisprudence of the "Progressive Era,"* 51 VAND. L. REV. 787, 790 (1998).

[12] Mark Tushnet, Plessy v. Ferguson *in Libertarian Perspective*, 16 LAW & PHIL. 245 (1997).

the Constitution's Framer's and ratifiers, regardless of public opinion, short-lived enthusiasms, and social science evidence.[13] By contrast, *Plessy* relied, at least in part, on racist social science, public opinion favoring segregation, and a negation of the Fourteenth Amendment's clear distinction between state and private action. Consistent with Epstein and Tushnet's observations, I also noted that *Plessy* reflected a view that the results of unregulated market processes are somehow unnatural and should therefore be corrected by state action, a view not reflected in *Lochner*.[14]

Just three years after it decided *Lochner*, the Supreme Court confronted the conflict between libertarian and traditionalist Lochnerism and statist and sociological Plessyism in *Berea College v. Kentucky*.[15] *Berea College* involved a private, integrated college's constitutional challenge to a Kentucky law requiring segregation in private schools.

If *Lochner* and *Plessy* were intellectually entwined, one would expect that the state would have relied on both opinions to support the constitutionality of the segregation law, while the college would try to assert that neither opinion applied. Instead, Berea College challenged the law on constitutional grounds, relying on *Lochner* and allied doctrines in arguing that the law violated the rights of liberty and property guaranteed by the 14th Amendment. Kentucky, meanwhile, relied on *Plessy* and the purported public interest in preventing miscegenation—supported by contemporary social science evidence—in defending the law's constitutionality. Ultimately, the Supreme Court dodged the conflict between *Lochner* and *Plessy* and upheld the law on non-constitutional grounds, over a Lochnerian dissent by Justice Harlan.

I. Background: The History of Berea College

Reverend John G. Fee, an abolitionist, founded Berea College in 1855. From the very

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13 David E. Bernstein, *Philip Sober Restraining Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 799 (1998).

14 *Id*.

15 211 U.S. 45 (1908).

beginning, the college admitted African-Americans. The second bylaw of its constitution stated that the college "shall be under an influence strictly Christian, and as such opposed to sectarianism, slaveholding, caste, and every other wrong institution or practice."[16] Berea's founders saw its mission as serving white and African-American students on equal terms, a vision they were able to realize after the Civil War. From 1866 to 1893, African-Americans usually constituted a slight majority of Berea's students. Thanks to the religious commitments of its founders, presidents, and supporters, Berea College was an unique example interracial harmony in the postwar South.[17]

In what turned out to be a fateful failing, the college never secured a charter from the legislature endorsing, or at least explicitly tolerating, its integrationist practices. Instead, the college incorporated itself under a general act. The act merely required the signatures of ten Kentucky citizens and the filing of papers with a county clerk.[18] While "[c]o-education of the races was the clear intent" of the college's incorporators, 'it was nowhere expressly stated."[19] In 1870, the trustees voted to take steps to secure a special charter from the legislature. Eventually, the trustees determined that the legislature was not prepared to grant such a charter because of the college's controversial racial policies.[20]

By the late 1880s, the egalitarian sentiment that motivated the founders of Berea College had diminished substantially, especially in the former abolitionist stronghold of New England.

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16 Scott Blakeman, *Night Comes to Berea College: The Day Law and the African-American Reaction*, 70 FILSON CLUB HIST. Q. 3, 4 (1996).

17 Jacqueline G. Burnside, *Suspicion Versus Faith: Negro Criticisms of Berea College in the Nineteenth Century*, 83 REG. KY. HIST. SOC'Y. 237, 239-40 (1985).

18 Lee Edward Krehbiel, From Race to Region: Shifting Priorities at Berea College Under President William Goodell Frost, 1892-1912, at 133 (Ph.D. Diss. 1997).

19 *Id*.

20 Summary of Treasurer's Statement to the Board of Trustees of Berea College for Year Ending June 1, 1896.

As a result, contributions to the college waned. William Goodell Frost assumed the college presidency in 1892. Lacking his predecessor's commitment to racial equality, and facing a financial crisis, Frost decided to shift Berea's primary mission from integrated education to educating poor Appalachian whites and reconciling the North and the South. Indeed, one scholar credits Frost and his fund-raising campaigns with "inventing" Appalachia as a familiar concept.[21] Fund-raising revenue increased markedly, as did the number of white students. While African-American enrollment at Berea remained stable, white enrollment more than quadrupled by 1903. For the first time, the vast majority of students at Berea College were white.

As the ratio of black students at Berea declined, Frost forbad interracial dating, discouraged social interaction between black and white students, segregated the school's dorms, dining halls and extracurricular clubs, and fired Berea's only black faculty member.[22] These actions appear to have been motivated by a combination of personal prejudice,[23] a desire to avoid tempting the state to regulate the college, and the perceived need to assign African-Americans to an inferior role at the college in order to attract white students and donors. Nevertheless, Frost fully intended to continue interracial education at Berea College, albeit at a ratio of seven white students for every black, instead of the approximate one to one ratio that had existed before he became president.[24]

As segregation laws spread throughout the South in the 1890s, Berea's trustees became concerned about the legal security of the college. The college treasurer's June 1896 report to the trustees concluded that the college should "enlarge its charted privileges." Until it does, he

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[21] Blakeman, *supra* note _, at 6-7.

[22] *Id*. at 9.

[23] Frost engaged in several gratuitous acts of discrimination, such as barring African-Americans from the Church of Christ, Union, which was affiliated with the college. Paul David Nelson, *Experiment in Interracial Education at Berea College*, 59 J. NEGRO HIST. 13, 26 (1974).

[24] Blakeman, *supra* note _, at 8.

added, "we are holding property with no assurance of protection."[25] Apparently, however, no one followed up on this suggestion.[26]

II. The Day Law

In 1902, a Kentucky legislator proposed a bill to ban interracial education in Kentucky. Opponents, led by Frost, who threatened to move the college out of Kentucky if the bill passed, managed to derail the measure.

The college's victory proved ephemeral. In 1904, Kentucky State Representative Carl Day introduced a bill into the legislature that prohibited African-American and white students from attending the same institution, public or private. The bill was clearly aimed at Berea, the only institution of higher learning in Kentucky that accepted African-Americans other than the Negroes-only Kentucky State Industrial College.[27]

The Day bill was a politically entrepreneurial venture by Representative Day, few if any of whose constituents in rural Breathitt County had any contact with distant Berea College. The bill was nevertheless very smart politics, as opposition to any hint of "social equality" between the races had become a popular political platform throughout the South. Dominant white opinion in Kentucky was reflected in the *Louisville Courier-Journal*, which criticized Berea for allowing "white and colored girls and boys associate together in class-rooms, dining halls, in dormitories and on playgrounds, as well as in social entertainment."[28] According to one source, Day decided to introduce the bill after President Theodore Roosevelt shocked and appalled

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[25] Treasurer's Statement, *supra* note _,.

[26] *Id.*

[27] Jennifer Roback, *Rules v. Discretion:* Berea College v. Kentucky, 20 INT'L J. GROUP TENSIONS 47, 51 (1990). Tennessee had recently passed a similar law forcing Maryville College to end its policy of integration. Blakeman, *supra* note _, at 26 n. 45.

[28] *Quoted in* Richard A. Heckman & Betty J. Hall, *Berea College and the Day Law*, 66 REGISTER KY. HIST. SOC'Y 35, 42 (1968).

Southern whites by dining with Booker T. Washington at the White House.[29] Another source states that Day witnessed a light-skinned African-American female Berea student give a friendly kiss to another African-American female student, and became incensed at what appeared to him to be intimate contact between African-Americans and whites.[30]

Commitment to interracial education at Berea College lingered. Frost lobbied the legislature against the bill, bringing with him a petition supporting the college signed by 80% of the registered white voters of the college's county.[31] Even white students who had not been friendly to black students opposed the Day bill.[32]

However, the Day bill was unstoppable in the election year of 1904. The *New York Evening Post* stated that "any man who voted in opposition would have the 'nigger question' brought up against him in all his future career."[33] Even legislators personally opposed to the law felt obligated by political considerations to vote for it.[34] Some legislators expressed concern that the law violated Berea's property rights, but political expediency overcame those concerns.[35] As one legislator told Frost:

> We understand that this proposed law is an outrage. The state has never contributed the support of Berea College and it has no right to interfere in its affairs. I want you to understand that I have no sympathy with this law; but the facts are these: the law is going to pass. Now for me to oppose it would make it

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29 *Id*. at 38.

30 JOHN A. HARDIN, FIFTY YEARS OF SEGREGATION: BLACK HIGHER EDUCATION IN KENTUCKY, 1904-1954, at 12 (19__).

31 Roback, *supra* note _, at 53 .

32 Hardin, *supra* note _, at 16.

33 Heckman & Hall, *supra* note _, at 37.

34 *Id*.

35 *Id*. at 40.

> necessary for me to discuss the Nigger question in every political speech as long as I live. It would wreck my political future and so I shall be obliged to stay away when the matter comes up, or vote for the bill.[36]

Only five state senators and an equal number of representatives voted against the bill.[37]

Section 1 of the Day Law prohibited any person, corporation, or association of person to maintain or operate any "school, college or institution where persons of the white and negro races are both received as pupils for instruction." Section 2 prohibited individuals from teaching in any such school. Section 3 made it illegal "for any white person to attend any school or institution where negroes are received as pupils or receive instruction," and vice versa. Section 4 prohibited private schools from maintaining separate branches for white and negro students unless those branches were at least twenty-five miles apart.

III. Litigation Before the Kentucky Courts

Berea College hired three eminent attorneys to challenge the law–John G. Carlisle, former speaker of the United States House of Representatives, Curtis F. Burnham, a former Kentucky state senator, and Guy F. Mallon, a prominent Cincinnati attorney. The attorneys set up a test case. On September 13, 1904, A. Brock, a teacher at the college, was presented with two students, one African-American, and one white, and was told to teach them in violation of the Day Law. Berea College was indicted under section 1 of the law. A jury in the Circuit Court of Madison County convicted the college, and the judge issued a fine of $1,000, as required by the Day Law.

The college then asked the judge to set aside the verdict. The college argued that the law violated the constitutional rights of the trustees of the college to establish and maintain a private college for worthy purposes; of teachers to earn their living in pursuit of a lawful calling; of

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[36] *Quoted in* Blakeman, *supra* note _, at 10; *see also Voice of the Negro,* April 1905, at 224 ("To Damn the Negro in any way is a certain passport to fame in the South." The legislators who opposed the bill "did not have the moral courage to speak and vote as they thought.").

[37] Hardin, *supra* note _, at 12.

students to prepare themselves to earn a living by seeking an education; of anyone who wished to come to Berea College and engage in the right to associate with an interracial group; and of the college, by rendering its donations conditioned on interracial education subject to forfeiture.[38] These rights, Berea argued, were protected by the Kentucky Constitution, and the Fourteenth Amendment's Privileges and Immunities, Due Process, and/or Equal Protection clauses.[39]

The court rejected all of these arguments. As long as African-Americans and whites were not taught together, the court observed, teachers could still teach, students could still go to school, and trustees could still maintain schools. In *Plessy v. Ferguson*, the court noted, the Supreme Court held that segregation laws are constitutional so long as they are "reasonable" and "not for the annoyance or oppression of a particular class." The only question, then, was the reasonableness of the legislature's belief that allowing African-Americans and whites to associate intimately would be inimical and detrimental to the public peace and morals.[40] If this belief was reasonable, the statute came within the police power.

Kentucky required segregation in public schools and in public transportation, and prohibited interracial marriage. All of these regulations, according to the court, were unquestionably reasonable and proper and within the scope of the police power. And if the state could forbid race-mixing in all of those contexts, the court continued, why could it not prohibit its citizens from violating state policy at a private college?[41]

The court stated that Berea's strongest argument was that while many courts had held that prohibiting enforced separation of the races is inimical to the general welfare and can be banned consistent with the state's police power, no court had ever upheld a law that punished the voluntary association of the two races in a purely private enterprise. The court rejected that

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38 Commonwealth v. Berea College, No. 6009 (Madison Cty. Cir. Ct. Feb. 7, 1905).

39 *Id.*

40 *Id*., *Buchanan v. Warley* Record at 6.

41 *Id.*

argument, however, arguing that "[n]o well informed person in any section of the country would deny" that segregation in all areas of social life "is sound" and a "laudable desideratum." In fact, Thomas Jefferson, one of the earliest advocates of emancipation, "unreservedly expressed his disbelief that the two races could mingle in harmony under co-equal conditions of freedom."[42]

The court concluded by expressing the judge's "personal opinion" that if its opinion was upheld, segregation would prove to be "a blessing to Berea College, and to the colored as well as to the white youth of Kentucky."[43] White youth would continue to be educated there, and be free of the prejudice faced by Berea College graduates because of its racially-tolerant policies. Meanwhile, the trustees of the college could open a new campus for African-American students, which Kentuckians would generously support because integration would no longer be an issue. Thus, the legislature was really doing Kentucky's African-American students a favor, "prompted by . . . the purest and best motives."[44]

Berea College appealed to the state's highest court, the Kentucky Court of Appeals. The college argued that the Day Law violated the state Bill of Rights because it

> destroys the rights of the teachers and pupils of Berea College to enjoy their liberties and the right of seeking and pursuing their safety and happiness. It denies the right to worship God according to the dictates of their own consciences by attending and participating in non-sectarian religious exercises in a school or institution of their own choice. It denies to the trustees, the teachers and all others connected with the institution the right to freely communicate their thoughts and opinions, and it denies to the institution itself and to its assistants and employees of every grade the right of acquiring and protecting property and the right to

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42 Commonwealth v. Berea College, No. 6009 (Madison Cty. Cir. Ct. Feb. 7, 1905).

43 *Id*. at 18-19.

44 *Id*. at 19.

follow their usual and innocent occupations.[45]

The College once attempted to distinguish other cases that had upheld segregation laws, such as *Plessy v. Ferguson*, on the ground that those laws prohibited what amounted to *involuntary* association in public places, such as trains, while the Day Law prohibited purely voluntary integration.

The Kentucky Court of Appeals, however, upheld the Day Law, with only one judge dissenting. The court stated that all of the rights invoked by the college are subject to the police power. The question, then, was whether "it is a fair exercise of the power to restrain the two races from voluntarily associating together in a private school."[46]

The court first reasoned that the law was a valid exercise of the state's well-established power to prohibit miscegenation. No one questions the validity of anti-miscegenation laws, the court explained, because the result of interracial marriage is "to destroy the purity of blood and identity of each [race]." Even if prejudice motivated the law, that would still not make it invalid because prejudice is "nature's guard to prevent the amalgamation of the races."[47] "In a less civilized society," the court continued, "the stronger race would probably annihilate the weaker race." In civilized America, however, "nature's edict as to the preservation of raced identity" is fulfilled by regulating "their necessary intercourse as to preserve each in its integrity." The court also found that the Day Law was valid because it prevented the violence that would inevitably result from integration of the races because of natural race antipathy.[48]

The court rejected Berea College's attempt to distinguish its case from those involving involuntary association. The court found that the rights of private property and private association could not overcome the state's right to exercise its police power to enforce

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45 Quoted in Berea College v. Commonwealth, 94 S.W. 623 (1906).

46 Berea College v. Commonwealth, 94 S.W. 623 (1906).

47 *Id*. at 626.

48 *Id*.

segregation. True to the Progressive spirit of the times, the court gave short shrift to autonomy claims by private institutions against the force of the state:

> We cannot agree that the ground of distinction noted [i.e., voluntary association] could form a proper demarkation [sic] between the point where the [police] power could form a proper demarcation between the point where the power might be exercised, and the one where it might not be. . . . All this legislation was aimed at something deeper and more important than the matter of choice. Indeed, if the mere choice of the person to be affected were the only object of the statutes, it might well be doubted whether that was at all a permissible subject for the exercise of the police power.[49]

The court also rebuffed Berea's claim that the Day Law violated the due process and equal protection clauses of the U.S. Constitution. The law did not deprive African-Americans of equal protection because the law "applies equally to all races." Meanwhile, the right to teach white and black children together in a private school "is not a property right," and therefore the law did not offend the due process clause. Moreover, because Berea is a corporation created by the state "[i]ts rights to teach is such as the State sees fit to give it."[50]

The court did invalidate Section 4 of the Day Law, which banned a school from teaching whites and African-Americans separately in branches located less than twenty-five miles apart. The court held that this provision was unreasonable, given that the state itself teaches both races in separate schools within very short distances of each other. The court held that "if the same school taught the different races at different time, though at the same place or at different places at the same time, it would not be unlawful."[51]

IV. Litigation Before the U.S. Supreme Court

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49 *Id*.

50 *Id*. at 629.

51 *Id*. at 628.

At this point, Berea College president Frost—who had already started raising funds for a new, segregated black college—was ready to give up. Even if the U.S. Supreme Court ultimately invalidated the Day Law, he believed that Kentucky politicians would find a way to prevent Berea from returning to integrated education. Frost's pessimism was strengthened by the general poor racial climate in the rest of the United States. In well-publicized remarks, the president of Harvard urged Frost to follow his instincts and yield to the Day Law:

> Perhaps if there were as many Negroes here as there, we might think it better for them to be in separate schools. At present Harvard has about five thousand white students and about thirty of the colored race. The latter are hidden in the great mass and are not noticeable. If they were equal in numbers or in a majority, we might deem a separation necessary.[52]

Frost stepped up his efforts to establish a separate college in Kentucky for African-Americans.

Nevertheless, the college's trustees ultimately decided to appeal to the U.S. Supreme Court. In its brief, Berea focused on the argument that the statute was not within the state's police power. "The Constitution makes no distinction between the different races or different classes of the people" Berea argued, and any such distinction "must be done by the legislature in the exercise of the police power."[53]

In order for the Court to sustain the statute, Berea contended, "the court must know judicially, outside of the statute and outside of the indictment, that the operation and maintenance of such a school are detrimental to the public peace, health, or safety, or it must conceded that the legislative judgment upon that subject in conclusive."[54] Berea argued that "[t]he legislature is not the final judge of the extent of its own power; for if it were, constitutional limitations would be useless," and that given Kentucky's efforts to educate African-American children, the

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52 THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 285-286 (1963).

53 Brief of Plaintiff in Error at 9, Berea College v. Kentucky, 211 U.S. 45 (1908).

54 *Id.* at 8.

Court could not judicially know that Berea was a harmful institution.[55]

Berea conceded that courts had uniformly upheld segregation statutes applying to public buildings and common carriers. Berea emphasized, however, that the regulated entities in those cases, as public or quasi-public institutions, had no general right to be free of regulation by the government. However, "[t]he right of the citizen to choose and follow an innocent occupation is both a personal and a property right," and as a private school Berea "stands upon exactly the same footing as any other private business."[56] The college asked rhetorically whether the legislature could "impose a penalty upon a merchant, or a farmer, or a manufacturer for employing persons of the white and colored races to work together in the same room or field," an idea Berea deemed "absurd."[57]

To support the college's claimed right to be free from interference by the state in pursuing its business, the brief cited and quoted from what many today would consider a rogue's gallery of cases limiting the government's ability to regulate private businesses, including *Allgeyer v. Louisiana*, *Lochner v. New York*, *Ritchie v. People*, and *In re Jacobs*.[58] The brief included an especially lengthy quote from *Lochner*.[59]

Having established its general right to be free from regulation, Berea argued that the Day Law could not be upheld as a reasonable exercise of the police power. Berea acknowledged that certain segregation laws had been held constitutional. But, as in its lower court brief, the college distinguished *Plessy* and other segregation cases on the ground that the laws in question in those cases had the purpose of preventing whites from involuntarily associating with African-Americans in trains and other public places which one could hardly avoid. No white student,

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55 *Id*. at 9.

56 *Id*. at 10.

57 *Id*. at 10.

58 *Id*. at 11-23.

59 *Id*. at 19-21.

however, need come in contact with African-Americans at Berea College, as they could easily attend another college that was not integrated.[60]

Once the Court recognized that any association between whites and African-Americans at Berea College was voluntary, Berea's argument continued, the Day Law could not be justified under the police power:

> [N]or can the voluntary association of persons of different races, or persons of the same race, be constitutionally prohibited by legislation unless it is shown to be immoral, disorderly, or for some other reason so palpably injurious to the public welfare as to justify a direct interference with the personal liberty of the citizen; and even in such a case the restriction should go no further than is absolutely necessary.[61]

Berea noted that Justice Harlan warned in dissent in *Plessy* that the decision could lead to extreme results, such as allowing state-enforced segregation in public spaces such as courtrooms, streetcars, and public assemblages. But even when presenting his parade of horribles, Harlan never imagined that legislatures would attempt to interfere with purely voluntary association between the races on purely private property.[62]

The statute could not be justified on anti-miscegenation grounds, the college added. No one claimed that the school preached social equality between the races, or that "social equality or amalgamation has in fact resulted in the locality where the college is located, or at any other place in the State."[63]

Berea's brief initially seems to end on page 29, where the attorneys for the college request relief, and their signatures appear. But for unknown reasons, a page 30 was added, to

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60 *Id*. at 25.

61 *Id*.

62 *Id*. at 27.

63 *Id*. at 14.

deal with the following language in the Kentucky Court of Appeals' opinion:

> Besides, appellant, as a corporation created by this state, has no natural right to teach at all. Its right to teach is such as the state sees fit to give to it. The state may withhold it altogether, or qualify it. Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. We do not think the act is in conflict with the federal Constitution

Berea stated that the "court below appeared to think the validity of this act might be sustained upon the ground that it was an amendment or repeal of the charter of the college."[64] The college noted that "the trustees did not acquire the right to maintain the school by any grant from the State." The right received from the charter was merely the right to "be a corporate body and to conduct its business as such." Even if the state had sought to repeal the charter, the only effect "would have been to dissolve the corporation, leaving the trustees and those associated with them entirely free to maintain and operate the school as it had been conducted for nearly half a century."[65]

Kentucky's brief focused almost entirely on the argument that the Day Law was within the police power because it was part of a broader scheme of laws enacted to prevent undue social interaction between African-Americans and whites, and thereby prevent miscegenation. The brief contained a combination of Progressive, statist sentiment and racist pseudo-science. The statism of the brief is readily apparent. "The welfare of the State and community is paramount to any right or privilege of the individual citizen," Kentucky argued. "The rights of the citizen are guaranteed, subject to the welfare of the State."[66]

The state also pointed out that no one was being denied an education by the statute, nor was anyone prevented from donating money for the education of whites, African-Americans, or

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64 *Id*. at 30.

65 *Id*.

66 *Id*. at 2.

both races. All that is prohibited is the co-education of the races. Thus, "[u]nless white pupils are guaranteed the right to voluntary associate [sic] with the pupils of the colored race, and vice versa, the act is not in conflict with, nor repugnant to the 14th Amendment."[67]

Kentucky, relying on racist assumptions, expressly disputed Berea's contention that the voluntariness or involuntariness of interracial interaction was relevant. "The fallacy in this argument," Kentucky contended, "lies in the assumption that the whole of the white race has an antipathy toward the colored race, and vice versa."[68] In fact, Kentucky acknowledged, there are members of each race that "had mutual desire to associate with the other race in such public school sand on the common carriers" yet they were "forced to separate" by legislation.[69] Thus, the state continued, "[w]e must look deeper for the philosophy and reason upon which the courts" had sustained segregation legislation.[70]

According to Kentucky, the reason these laws came within the police power was "in order to maintain the purity of blood and avoid an amalgamation. This is also the object of the Statute in question."[71] Kentucky relied on racist evolutionary theory to support its case:

> If accepted science teaches anything at all, it teaches that the heights of being in civilized man have ben reached along one path and one only--the path of selection, of the preservation of favored individuals and of favored races.... It is idle to talk of education and civilization and the like, as corrective or compensatory agencies. All are weak and beggarly as over against the mightiness of heredity; the omnipotence of the transmitted germ plasma.

The state argued that "color carries with it natural race peculiarities which furnish he reason for

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67 *Id*. at 36; *see also id.* at 38.

68 *Id*. at 23.

69 *Id*.

70 *Id*.

71 *Id*. at 24.

the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated."[72]

According to the state, if social equality is established in a school, by allowing white and black children to sit, eat, recite, study, and sleep together, "mutual attachment will follow as surely as the day does the night." First the weaker members of each race will succumb, and finally all will "resulting in the destruction or blotting out of the individuality and indentity [sic] of each race." The state passed the Day Law "[t]o guard the rights of the generations yet to be; to preserve the identity of the races, and to maintain the purity of blood."[73]

Kentucky spent significant effort attempting to persuade the Court to take judicial notice that African-Americans are mentally inferior to whites, and mulattoes even less intelligent. "This is not the result of education," argued Kentucky, "but is innate and God-given; and therein lies the supremacy of the Anglo-Saxon-Caucasian race."[74] To bolster its case, the state cited two studies that purported to show that African-Americans have smaller brains than whites, and that African-Americans with some white lineage have even smaller brains, thus showing the dangers of miscegenation.[75]

V. The Supreme Court Opinion

Given the college's and the states arguments, the Court was faced with a stark choice between the libertarian principles of *Lochner* and the statism and sociological jurisprudence of *Plessy*. In the end, the Court chose to evade the dilemma by upholding the law as an amendment to Berea's corporate charter, even though the law was not phrased like an amendment, because its effect was to amend the charter.[76] By relying on this non-constitutional rationale, the Court

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72 *Id*.

73 *Id*. at 39.

74 *Id*. at 40.

75 *Id*.

76 *Id*.

did not need to confront the conflict between *Lochner* and *Plessy*.[77] Because the corporate charter rationale was rather weak, it seems logical to conclude that the Court's evasion was intentional.[78]

Berea was vulnerable to the charter argument because, as noted previously, Berea's "charter" was just articles of incorporation. To be incorporated, the relevant statute required only that Berea file papers with a county clerk and obtain the signatures of ten Kentucky citizens. The articles of incorporation obtained by Berea in the late 1860s were thus different from more specific charters that institutions such as colleges sometimes obtained directly from the government. If the college had been given a specific right to operate an interracial institution, it could have argued that this right became a vested property right and could not be changed.[79] In fact, however, the college had received no such specific grant.

Nor could the college argue that because the state had failed to explicitly prohibit interracial education in the charter, it had implicitly tolerated the practice. In addressing the corporate charter issue, the Supreme Court asserted that when a state creates a corporations, it may withhold powers which it could not be deny to an individual.[80] Given that the state segregated whites and African-Americans in the public schools system, the Court stated, "It is not at all unreasonable to believe that the legislature, although advised beforehand of the constitutional question, might have prohibited all organizations and corporations under its control from teaching white and colored children together, and thus made at least uniform

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77 Benno Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 452 (1982).

78 "This case was loaded with political dynamite, and it probably would not be far amiss to say that the court was glad it could find a way to sidetrade the main issue of the validity of the statute." CHARLES MAGNUM, JR., THE LEGAL STATUS OF THE NEGRO 103 (1940).

79 *See, e.g.*, *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819).

80 *Berea College*, 211 U.S. at 54.

official action."[81]

Moreover, Kentucky, like most states, had reserved in its constitution the right to amend all corporate charters.[82] As substantial prior Supreme Court precedent had held,[83] because Berea College was established under state charter, the state could regulate it in any way it chose as long as it did not violate the original wording of the charter—'the education of all persons who may attend.'[84] Justice Brewer, writing for the Court, pointed out that the college could still educate all persons, if African-Americans and whites were separated.[85] Thus, the Day Law did not "defeat or substantially impair the object of the [charter] grant."[86]

The Court's reasoning seems a bit disingenuous, because the first two sections of the Day Law--prohibiting individuals and from engaging in interracial coeducation--had nothing to do with corporations. Moreover, the college argued at oral argument that the state legislature had obviously not considered the law to be a charter amendment, because the fourth section of the

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[81] *Id*. at 55.

[82] Kriehbel, *supra* note _, at 133.

[83] In *Tomlinson v. Jessup*, 82 U.S. (15 Wall.) 454 (1872), the Court explained that "[t]he reservation [of power to alter or repeal corporate charters] affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State." *Id.* at 459. In *Holyoke Co. v. Lyman*, 82 U.S. (15 Wall.) 500, 522 (1872), the Court added that vested rights "cannot be destroyed or impaired" under such reserved power. However, "it may safely be affirmed that it reserves to the legislature the authority to make any alteration or amendment in a charter granted, subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, which the legislature may deem necessary to secure either the object of the grant or any other public right not expressly granted away by the charter." *Id*. at 519, 522. The Court endorsed the *Holyoke Co.* language in 1907, 1900, and 1882. Polk v. Mutual Reserve Fund Life Association of New York, 207 U.S. 310, 325 (1907); Looker v. Maynard, 179 U.S. 46, 52 (1900); Close v. Glenwood Cemetery, 107 U.S. 466, 476 (1882).

[84] *Berea*, 211 U.S. at 56. The Court hinted that the law might have been unconstitutional had it been applied to an individual rather than a corporation, but the Court did not consider that question. *Id*. at 54. Despite Berea's direct challenge, the Court did not mention *Lochner* at all.

[85] *Id*. at 57.

[86] *Id*.

law prohibited a school from educating the two races in the same institution, even in different branches, if the branches were not at least 25 miles apart. Section 4 was not an amendment but a clear violation of the charter, since it prevented the college from educating "all persons who may attend." The Court responded that this provision had been invalidated by the Court of Appeals, and that the court need only concern itself "with the inquiry whether the first section can be upheld as coming within the power of a State over its own corporate creatures."[87] The Court then held that the Act was separable, without explaining why.

In dissent, Justice Harlan[88] first disputed the notion that the section of the Day Law dealing with corporations was separable from the rest of the statute. Harlan contended that the majority necessarily must have assumed that the Kentucky legislature differentiated between the effects of integrated educational institutions run by private associations and integrated educational institutions run by corporations. In fact, Harlan argued the "manifest purpose" of the Day Law "was to prevent the association of white and colored persons in the same school," regardless of whether the school was organized as a corporation. Indeed, the title of the Day Law was an act "to prohibit white and colored persons from attending the same school." Thus, Harlan argued, the various provisions of the law were inseparable, and the court could not "properly forebear to consider the validity of the provisions that refer to teachers who do not represent corporations."

Moreover, it was clear to Harlan that the Kentucky Court of Appeals did not uphold the the Day Law provisions dealing with corporations as an amendment to Berea College's charter. After all, Harlan noted, the Court of Appeals invalidated Section 4, the provision that prohibited Berea from educating black and white students within 25 miles of each other, as unreasonable and oppressive. Yet, if the court had regarding the state's authority over its corporations as being sufficient to sustain the statute, there was no reason for the court to have invalidated section 4,

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87 *Id*. at 58.

88 Justice Day also dissented, but did not write an opinion or join Justice Harlan's dissent.

nor was there any reason for the court to discuss "the general power of the state to forbid the teaching of the two races at the same time." Harlan added that the Day Law on its face does not "purport to amend the charter of any particular corporation," but applies to all individuals, association or corporations that educate African-Americans and whites together.[89] Thus, any mention of the power of the state over corporations in the Court of Appeals' opinion was mere dictum.

Harlan added that once the charter issue was put aside, the statute as a whole was "an arbitrary invasion of the rights of liberty and property guaranteed by the 14th Amendment against hostile state action." The right to impart instruction, according to Harlan, is both a property right and a liberty right under the 14th Amendment that could not be infringed with if the instruction was not by nature harmful to public morals or a threat to public safety. Harlan, citing *Allgeyer v. Louisiana* and the Lochnerian opinion he authored earlier in 1908 in *Adair v. United States*[90] (another case typically found in the modern rogue's gallery of *Lochner* era cases), noted that the Supreme Court "has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.'"[91] Besides the rights of the teachers, Harlan argued the students themselves had a right to voluntarily sit together in a private institution to receive "instruction which is not in its nature harmful or dangerous to the public."

Harlan contended that if Kentucky could criminalize interracial education in private schools, it could also forbid interracial church Sunday schools, or even integrated church services. He acknowledged that some would argue that religious education is different because "no government, in this county, can lay unholy hands on the religious faith of the people."[92] In

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89 *Berea College*, 211 U.S. at 66-67 (Harlan, J., dissenting).

90 Allgeyer v. Louisiana, 165 U.S. 578 (1897).

91 *Berea College*, 211 U.S. at 67-68 (quoting *Allgeyer*, 165 U.S. at 589).

92 *Id*. at 68.

fact, however, the right to impart and receive instruction is entitled to the same degree of constitutional protection under the 14th Amendment as the right to "enjoy one's religious belief."[93]

Harlan added a brief and impassioned equal protection argument: "Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races?"[94] Even Harlan, however, limited his equal protection observations to private institutions. The question "of regulations prescribed for public schools" was not presented, and Harlan declined to discuss his views on the matter, though he implied that he might look more favorably on the constitutionality of public school segregation.[95]

VI. The Reaction

The result in *Berea College* received unanimous support from law review authors who chose to comment on it. The law review commentary reflects the strong influences Progressivism and racism were exerting on the legal academy by this time.

The *Virginia Law Register* hailed the opinion for destroying "freak institution" where "negroes and whites were educated together without distinction of race."[96] A *Harvard Law Review* note stated that given that the government clearly has the right to prohibit miscegenation, "to prohibit joint education is not much more of a step."[97] An article in the *Central Law Journal* by Andrew Bruce argued that the Day Law appropriately defended "race purity and race

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93 *Id*.

94 *Id*. at 69.

95 *Id*.

96 Editorial, *The Berea College Case*, 13 VA. L. REG. 643 (1908).

97 Note, *Constitutionality of a Statute Compelling the Color Line in Private Schools*, 22 HARV. L. REV. 217, 218 (1909).

virility."[98] Bruce added that "the mingling of the races in the past on terms of social intimacy has invariably led to illicit intercourse and to intermarriage, and that the results have not been satisfactory to either race."[99]

According to Bruce, the Day Law "was essentially a police regulation, adopted for the purpose of protecting the morals and the general welfare of the people of the state," and therefore constitutional.[100] Bruce rejected the libertarian argument that "private donors and benefactors should be allowed to do with their money as they please. Even private benefaction cannot be made the means of subverting the public policy of a state." Bruce also denied that segregation laws intended to prevent "social intimacy" constituted class legislation, the bete noir of Lochnerian jurisprudence.[101] Miscegenation opponents, according to Bruce, are "equally afraid of the white seducer of the black" as of "the black rapist of the white."[102] The *Journal* got to the heart of why the South could not tolerate institutions like Berea College: "it is impossible to maintain a public policy of separation, if you allow it to be violated whenever private charity desires to change the rule."[103]

While clearly pleasing to racists, the *Berea College* opinion also delighted those who feared that *Lochner* would prevent state governments from regulating the economy. The *Virginia Law Register* editorialized that the *Berea College* opinion was a "shining star."[104] The *Register* stated that it applauded the decision "not so much for the set back it gives the

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98 Andrew Alexander Bruce, *The Berea College Decision and the Segregation of the Colored Races*, 68 CENTRAL L.J. 137, 142 (1909).

99 *Id*.

100 *Id*. at 141.

101 *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED (1993).

102 Alexander, *supra* note _, at 141.

103 *Id.*

104 Editorial, *supra* note _, at 644.

Negrophile, but for the salutary doctrine laid down as to the right of a State to control its creation, the corporations."[105] According to the *Register*, the opinion, if followed in the future, ensured that "the so-called dangers of corporate aggression will be easily met."[106] *Law Notes* also praised the *Berea College* Court for reining in "corporate aggression."[107]

A few years later, Charles Warren cited *Berea College* while defending the Court from its Progressive critics. Warren pointed out that the Court upheld most of the regulations that came before it, including "negro-segregation laws," by giving wide scope to the police power.[108] Warren called this judicial blind eye to various economic regulations "wise policy."[109] Years later, Warren criticized Harlan's attempt to expand the constitutional definition of "liberty" in his *Berea College* dissent.[110]

VII. *Berea* and Segregation Law

In the wake of *Berea College*, one treatise author approvingly noted in 1912 that "[t]here seems to be no limit to which a State may go in requiring the separation of the races."[111] In fact, however, while the opinion was interpreted as a blow to integrationists, it actually represented a step away from *Plessy*, which was both explicitly racist and seemed to hold that any "reasonable" segregation law passed constitutional muster. The *Berea College* Court did not endorse the racism of the Kentucky Court of Appeals opinion or of *Plessy*, and also did not find

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105 *Id*.

106 *Id*.

107 12 LAW NOTES 163, 163 (1908).

108 Charles Warren, *A Bulwark to the State Police Power--The United States Supreme Court*, 13 COLUM. L. REV. 667, 695 (1913).

109 *Id*.; *see also* Note, *Constitutionality of a Statute Compelling the Color Line in Private Schools*, 22 HARV. L. REV. 217 (1909).

110 CharlesWarren, *The New "Liberty" Under the Fourteenth Amendment,* 39 HARV. L. REV. 431, 451 (1926).

111 CHARLES W. COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES 72 (1912).

that the segregation statute came within the police power. Moreover, although the opinion upheld the segregation ordinance at issue, its holding only applied to corporations with no vested right to conduct an integrated school. The Court hinted that the segregation law would have been unconstitutional as beyond the police power had it been applied to an individual or to an unincorporated business.[112] The narrowness of the Court's holding perhaps explains why Justice Holmes, always eager to expand the scope of the police power, concurred in the judgment rather than joining the majority opinion.

The majority opinion, while disheartening to civil rights advocates in its result, encouraged legal attacks on state-enforcement of segregation against private parties.[113] Perhaps that was the intent of Justice Brewer, a strong proponent of laissez-faire, and, for his day, a liberal on racial issues.[114] Brewer, in fact, consistently wrote opinions in cases involving African-American rights that reaffirmed that African-Americans were entitled to constitutional protection, but that avoided ruling on the constitutional substance of the case before the Court, probably because he believed that his colleagues, and the country at large, were not prepared respect African-American rights at this time.[115]

Most important in hindsight, *Berea College* left room for an attack on residential segregation laws, which the Supreme Court invalidated on Lochnerian grounds less than a decade later in *Buchanan v. Warley*.[116] *Buchanan* prevented the United States, or at least the

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112 *Berea*, 211 U.S. at 54.

113 David Currie, *The Constitution in the Supreme Court: 1910-1921*, 1985 DUKE L.J. 1111, 1136.

114 *See* ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-21, at 736 (1985). Justice Brewer did not participate in *Plessy*, even though he was on the Court at that time, so it is hard to gage his views on the constitutionality of segregation.

115 *See* J. Gordon Hylton, *The Judge Who Abstained in* Plessy v. Ferguson: *Justice David Brewer and the Problem of Race*, 61 MISS. L.J. 315 (1991).

116 245 U.S. 60 (1917).

urban South, from sliding down the slippery slope toward South African-style apartheid.[117]

VIII. Who Lost Berea College?

While the Supreme Court can be justifiably criticized for ducking the main issue in *Berea College*–whether the constitutional protection of liberty of contract and property rights recognized in *Lochner* trumped the purported state interest in segregation–the ultimate loss of integrated education at the college was due less to the Court's opinion and more to Frost and the Berea Trustees' unwillingness to expend further resources to challenge the Day Law.

As discussed in its brief, Berea College could have unincorporated itself and financed a new challenge by teachers at the college to force the Court to confront the police power issue. The Day Law deprived the teachers of their right to earn a living as they saw fit. As the college pointed out in its brief, and Harlan pointed out in his dissent, the right to earn a living was both a liberty and a property right under Court precedent. The state's response would have been that the law was a reasonable exercise of the police power, because it tended to prevent miscegenation. The Court, however, rejected exactly that rationale for interfering with property rights in *Buchanan v. Warley*, and instead relied on Lochnerian reasoning.

Moreover, even if the trustees had not wanted to take the relatively drastic step of unincorporating the college, a golden opportunity to reassert its Lochnerian argument and reintegrate the college presented itself, but the trustees failed to act. In 1906, Frost began planning in earnest to build a new technical and vocational school for Negroes in Kentucky, but not in the town of Berea. He provided a grant of $400,000 to found the Lincoln Institute.[118]

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[117] For elaborations, see David E. Bernstein, *Philip Sober Restraining Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 799 (1998). William A. Fischel, *Why Judicial Reversal of Apartheid Made a Difference*, 51 VAND. L. REV. 977, 981-84 (1998); A. Leon Higginbotham, Jr., et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice,* 1990 U. ILL. L. REV. 763.

[118] Paul David Nelson, *Experiment in Interracial Education at Berea College*, 59 J. NEGRO HIST. 13, 25 (1974); George C. Wright, *The Founding of the Lincoln Institute*, 49 FILSON CLUB HISTORY Q. 57, 62-63 (1975).

The trustees eventually selected Shelby County as the home for the Institute. Local whites opposed this move, and their state legislator, John Holland, introduced a bill designed to prevent the trustees from building the Institute. The bill, which passed over the governor's veto, prohibited Lincoln Institute from locating in Shelby County unless it could muster 3/4 of the vote in a local referendum.[119] The trustees challenged the law, and emerged victorious at the trial level. The case was then appealed to the Kentucky Court of Appeals, which also ruled in favor of the trustees.[120]

The Court of Appeals rejected the notion that it could uphold the anti-Lincoln Institute bill as an amendment to the Institute's charter. In doing so, the Court of Appeals stated that the Day Law had not been upheld in its *Berea College* opinion because it was an amendment to the college's charter. The court acknowledged that the Supreme Court had affirmed the opinion for that reason. However, the Court of Appeals, added, "that doctrine was repudiated by our own court on another branch of the case [the 25 mile rule] which was decided in favor of the college, and therefore not appealed from. If that principle had prevailed in our court, then the Day act would have been upheld in both branches."[121] Thus, with the Supreme Court's rationale in *Berea College* rejected, the college could have filed a new challenge to the Day Law on Lochnerian grounds. Nothing happened.

Besides the State of Kentucky, then, the ultimate villain in the Berea College saga is not the Supreme Court, but the college's trustees, who were all too ready to give up on interracial education. Indeed, even under the Court's opinion, a corporate Berea could have founded a new campus near the old one, and kept educating African-Americans, albeit not in segregated classes. Instead, the College chose to raise money to found the Lincoln Institute hundreds of miles away. Perhaps the trustees felt they had to inevitably bow to public opinion; perhaps they had given up

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119 Wright, *supra* note _, at 63.

120 Columbia Trust Co. v. Lincoln Institute of Kentucky, 129 S.W. 113 (Ky. 1910).

121 *Id*. at 116-17.

the founding ideals of the college. Both factors seem to have been at work, but, either way, the trustees certainly did not live up to the proud legacy of the college's founders. The limits of even relatively liberal whites' willingness to fight for integration when it conflicted with other goals provides another example of why the founding of the NAACP (which successfully litigated the *Buchanan* case), was so important to the cause of civil rights.

Conclusion

Because *Plessy* and *Lochner* were decided within a decade of each other, and are two of the most maligned Supreme Court opinions of all time, legal scholars and historians have naturally been inclined to try to find commonalities between the two opinions. The history of the *Berea College* case shows that this anachronistic approach is misguided. *Plessy* and *Lochner* were not cut from the same cloth; in the late 19th and early 20th centuries, the statism and racism of *Plessy* went hand in hand, while the skepticism of state power reflected in *Lochner* was a weapon in the battle against state-sponsored segregation. In 1908, just three years after the Court decided *Lochner*, the battle between the ideologies reflected in *Plessy* and *Lochner* reached the Supreme Court in *Berea College*. The Court chose to evade the conflict. Compared to *Plessy's* blunt endorsement of racism and state-sponsored segregation, that evasion, while hardly courageous, reflected a change in attitude toward the constitutionality of state-enforced segregation in the private sector that would come to full fruition less than a decade later in *Buchanan v. Warley*.