

**National Council for History Education 2015 Conference - Encounters in History**

*Constitutional Connections: How Individuals, Ideas, and Institutions Shape Our Constitutional Understanding - Madison Fellow Lesson, D. Clayton Lucas, Paul English*

## **Judge Harlan's Dissent**

**Recommended Grade/Ability Level:** This lesson is most appropriate for grade levels 11/12 for use in U.S. History and/or Government Classes.

**Recommended Lesson Length:** For use in a U.S. History class as a supplement to a study of the Gilded Age and Supreme Court ruling of the period, two classes are recommended. As a specific study of Plessy Ferguson in a Government class, one class (block schedule) period would be appropriate.

**Essential Questions:**

The objective of teaching any topic is to engage the intellectual inquisitiveness of students in an effort to promote critical thinking and individual growth. Thus, a study of Judge Harlan's memorable dissent in Plessy v. Ferguson remains a relevant and provocative. His ideas continue to shape our Constitutional understanding today.

*How do Harlan's ideas express both the spirit and the intent of the Declaration of Independence as well as the 14th Amendment?*

*How can dissent define the scope of the application of constitutional principles?*

**Overview:** In a 7-1 decision, the Supreme Court held that the state of Louisiana did not violate the Fourteenth Amendment by establishing and enforcing a policy of racial segregation in its railway system in what would become a landmark case, Plessy v. Ferguson, (1896). Justice John Marshall Harlan wrote a dissenting opinion to that decision. In subsequent school segregation decisions as well as affirmative action cases, Harlan's dissent remains pivotal in our understanding and interpretation of the Constitution.

**Materials:** Primary source documents; Declaration of Independence (Preamble), Fourteenth Amendment, text of Harlan's dissent.

**Objectives:** Use of primary source documents teach and reinforce important historical thinking skills including, but not confined to:

1. Prompt students to ask questions.
2. Encourage students to acknowledge various points of view.

3. Help students establish context for historical events.

4. Helps students understand continuity and change over time.

**Standards:** National Curriculum Standards for Social Studies (<http://www.socialstudies.org/standards>)

- **2: Time, Continuity, and Change:** Knowledge and understanding of the past enable us to analyze the causes and consequences of events and developments, and to place these in the context of the institutions, values, and beliefs of the periods in which they took place
- **6: Power, Authority, and Governance:** Through study of the dynamic relationships between individual rights and responsibilities, the needs of social groups, and concepts of a just society, learners become more effective problem-solvers and decision-makers when addressing the persistent issues and social problems encountered in public life.
- **10: Civil Ideals and Practices:** Learning how to apply civic ideals as part of citizen action is essential to the exercise of democratic freedoms and the pursuit of the common good.

**Background Information/Homework/Pre-learning:**

Students need to have a working knowledge of the period during which Plessy v. Ferguson was decided. Further, students should recognize how this case relates to later cases such as Brown v. Board of Education as well as the intent of the Fourteenth Amendment. A pre-reading and discussion of the amendment is essential.

Anticipatory Activity: Distribute a copy of the Fourteenth Amendment to students and ask them what places, names, concepts and issues are contained in the document, along with what questions they prompt. Write these on a large sheet of paper to be posted in the room for the duration of the lesson.

**Conducting the lesson:**

Encourage the students to visualize another place or time as they consider the main issue/problem the Supreme Court dealt with as they decided Plessy v. Ferguson. Have the students collaborate as they analyze the concept of "separate but equal" as it pertains to this specific situation. Each group should write their response to what this means to them.

Using Harlan's Dissent, have students discuss then write a response to the question: Why and how did Harlan contend that the law was "hostile to both the spirit and the letter of the Constitution"?

What is Past is Prologue? Use ideas in Harlan's Dissent to begin a discussion about an issue or

event currently in the news.

**Wrap-Up:** Lead discussion about other key Supreme Court dissention that lead to fundamental institutional change later on. Including *Olmstead v. United States* (1942) ([http://www.oyez.org/cases/1901-1939/1927/1927\\_493](http://www.oyez.org/cases/1901-1939/1927/1927_493)) and *Betts v. Brady* (1942) ([http://www.oyez.org/cases/1940-1949/1941/1941\\_837](http://www.oyez.org/cases/1940-1949/1941/1941_837)). In each case, key dissent lead to a later clarificaiton of constituional issues. In *Olmstead* it lead to an overturn in *Katz v. United States* (1967) ([http://www.oyez.org/cases/1960-1969/1967/1967\\_35](http://www.oyez.org/cases/1960-1969/1967/1967_35)) and *Betts* was overturned in *Gideon v. Wainwright* (1963) ([http://www.oyez.org/cases/1960-1969/1962/1962\\_155](http://www.oyez.org/cases/1960-1969/1962/1962_155)). Have students read an article on the lone dissent in *Snyder v. Phelps* (2010) ([http://www.oyez.org/cases/2010-2019/2010/2010\\_09\\_751](http://www.oyez.org/cases/2010-2019/2010/2010_09_751)) in which Justice Alito finds cause to challenge the majority opinion that defends the Westboro Baptist Churches 1<sup>st</sup> amendment right to protest military funerals. (Article: <http://www.politicsdaily.com/2011/03/03/supreme-courts-8-1-westboro-ruling-and-alitos-passionate-di/>)

**Assessment:** Have students respond to the following writing prompt:

“Margaret A. Blanchard, a journalism educator from the University of North Carolina, is quoted as saying, ‘Dissenters have been responsible for ending British control of the United States, for stopping slavery, for ending segregation, and for stopping and unwise war in Southeast Asia. In such situations, their opponents might well have said that the protesters hated America when really they despised flawed national policies.’ Discuss how a careful consideration of dissenting opinion from justices in the Supreme Court mght be an indicator of the dynamic examination of constitutional principles in America. Pick any case discussed in class or through individual research and describe it’s impact on individual freedoms or institutional policy.”

**Additional Resources:** *Our Documents - National Initiative on American History (National History Day Teacher Sourcebook, Volume III)*

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