Dickinson College
Constitution Day Speech
9/17/85

It is a pleasure for me to be here today to deliver my first address relating to the Bicentennial of our Constitution. It is hard to think of a better day than Constitution Day; and it is hard to think of a place more appropriate for the thoughts I wish to share with you today than the Center for the Study of the Constitution. For both the town of Carlisle and Dickinson College are intimately involved in the history of our political quest to secure equality under the Constitution.

Carlisle, after all, was the home of James Wilson, one of the most celebrated of our Founding Fathers. As you know, Wilson was one of only a few men to sign both the Declaration of Independence and the Constitution. Second only to James Madison in influence at the Federal Convention in 1787, James Wilson's contribution to the American Founding was remarkable. Later, as a professor of law and as a Justice of the Supreme Court of the United States, Wilson continued to exert an important and lasting influence on the foundations of American legal institutions. His lectures in law remain a valuable contribution to the study of American constitutionalism.

Carlisle was also a center of Anti-Federalist resistance to the ratification of the Constitution. In fact, there was something of a major riot in the town square where Judge Wilson was hanged in effigy. Our Founding Fathers, it seems, did not always show one another the same great deference we show them now.

And we should not forget the great man for whom this campus is named, John Dickinson. His defense of the Constitution he offered under the pen name "Fabius," is a classic articulation of the political principles of the document. In fact, Mr. Dickinson provided one of the best descriptions of President Reagan's public philosophy I have ever encountered. In his 8th letter from "Fabius," Dickinson wrote:

> Delightful are the prospects that will open to the view of United America — her sons well prepared to defend their own happiness, and ready to relieve the misery of others — her fleets formidable, but only to the unjust — her revenue sufficient, yet unoppressive; her commerce affluent, but not debasing — peace and plenty within her borders — and the glory that arises from a proper use of power, encircling them.

I think we can all agree that the Constitution has fulfilled John Dickinson's great expectations.

As most of you also know, Dickinson College was the alma mater of Chief Justice Roger Taney and Justice Robert Grier of the United States Supreme Court, and also of President James Buchanan. Together these men were destined to grapple with the vexatious political and constitutional issues of slavery in the infamous case of *Dred Scott* v. *Sandford (1857).* In that case, and especially in Chief Justice Taney's opinion, we see clearly the moral dilemma posed to that generation by the evil presence of human slavery in a Nation that Abraham Lincoln celebrated as being "conceived in liberty and dedicated to the proposition that all men are created equal."

That unfortunate judicial attempt to resolve the dilemma only proved Thomas Jefferson was right when he likened the presence of slavery to having a "wolf by the ears". "We can neither safely hold him," Jefferson wrote, "nor safely let him go."

The Civil War proved how accurate Jefferson's description actually was. That war was far worse than the usual bloody and tragic conflicts between different nations; it was nothing less than a war between brothers for the very soul of the American Constitution — the principle of human equality. It was a war, as President Lincoln remarked just down the road from here at Gettysburg, that tested whether any nation so conceived in liberty and so dedicated to the idea of equality could long endure. But we have endured; and we have endured precisely because through that bitter conflict our politics were forced to conform to our most ennobling principles.

What, precisely, are those principles?

It is, I think, worth recalling Jefferson's famous formulation in the Declaration of Independence. "We hold these truths," he said, "to be self evident,"

> That all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men deriving their just powers from the consent of the governed.

These rights were neither a matter of legal privilege nor the benevolence of some ruling class. They were rights that existed in nature before governments and laws were ever formed. As the physical world is governed by natural laws such as gravity, so the political world is governed by other natural laws in the form of natural rights. These rights, like the laws of gravity, antedated even mankind's recognition of them.

But because these natural rights were left unsecured by nature, as Jefferson said, governments are instituted among men. Thus there exists in the nature of things a natural standard for judging whether governments are legitimate or not. That standard is whether or not the government rests upon the consent of the governed. Any political powers not derived from the consent of the governed are, by the laws of nature, illegitimate and hence unjust. Only by such a standard can arbitrary power be checked.

"Consent of the governed" is a political concept that is the reciprocal of the idea of equality. Because all men are created equal, nature does not single out who is to govern and who is to be governed. There is no divine right of kings, for example. Consent is the means whereby equality is made politically operable.

This theory of government, this philosophy of natural rights, is what made the institution of slavery intolerable. For there is nothing that one can imagine that denies the idea of natural equality as severely, as completely, as slavery.

It is a common view that the Framers of the Constitution made concessions to slavery, concessions that rendered the document nothing more than a "covenant with death and an agreement with hell," as the abolitionist William Lloyd Garrison put it. But that rather common view is, in fact, a common mistake. The Constitution did not make fundamental concessions to slavery at the level of principle. No where in the Constitution do the words "slavery" or

"slave" appear. Indeed the Framers of the Constitution, while forced by political realities to *tolerate* slavery for a while *in practice,* never *accepted* that "peculiar institution" *in principle.*

The former slave and great abolitionist leader Frederick Douglass understood this perfectly. In 1863 he wrote:

> I hold that the Federal Government was never, in its essence, anything but an anti-slavery government. Abolish slavery tomorrow, and not a sentence or syllable of the Constitution need be altered. It was purposely so framed as to give no claim, no sanction to the claim, of property in man. If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed.

Interpreted as it ought to be interpreted, Douglass believed the Constitution was nothing less than "a Glorious Liberty Document"; it was a charter that clearly contained "principles and purposes entirely hostile to the existence of slavery."

Indeed, the Constitution made explicit provision for a time in the not-so-distant future when Congress could seek to restrict not only the slave trade but the spread of the institution itself. That, we should remember, was why the Civil War came to be fought.

The issue in *Dred Scott* was not whether slavery was right or wrong but only whether Congress had the legitimate power to keep it out of the new territories. Congress and Lincoln and Dred Scott said Congress did have that power. The Supreme Court said it did not. By declaring the Missouri Compromise unconstitutional, the Court, in the view of some, made war inevitable. And when the artillery was finally stilled and the smoke cleared from the blood-drenched fields of Gettysburg and Shiloh and Antietam, it was the view of Lincoln and not that of Taney that prevailed. It was the original view of equality — the view stated in Jefferson's Declaration — that prevailed. To secure by law the principles won on the fields of battle, Congress proposed and the nation ratified the Civil War Amendments, the 13th, 14th, and 15th amendments to the Constitution. No longer would slavery be tolerated; no longer could persons legitimately be deprived of the rights of equal citizenship by the states; no longer could the right to vote constitutionally be denied to those now freed from the shackles of slavery. There was now to be no doubt that Congress had the power to secure the civil rights of all citizens, of all persons. *Dred Scott* was officially abandoned; the principled basis of the Constitution was fulfilled.

In a sense the passage of the Civil War Amendments signaled the true completion of the founding of the American republic. With the abolition of slavery those original principles of the Declaration that had informed the creation of the Constitution could now be given full political effect. No longer would there be the inconsistency of slavery in a land dedicated to political liberty.

With the ratification of the 13th, 14th and 15th amendments, it would no longer be acceptable for the rights of any individuals or minorities to be abridged by what James Madison had called in The Federalist "an interested and overbearing majority". The Constitution was now officially "color-blind."

Or so it seemed.

But not long after those amendments became part of the Constitution the Supreme Court set out to nullify their original purpose. By the 1880s, those amendments had been all but neutered by the Court. But it was not until 1896 that it became clear just how completely neutered they had become.

In 1894 a man was told that because he was black (he had one eighth so called "African blood", as defined by Louisiana law) he could not sit where he chose in a railway car. Refusing to move from the "Whites Only" section to the "Colored Only" section, Homer Adolph Plessy was arrested for being in clear violation of Louisiana's Jim Crow Car Act of 1890. That law, gently entitled "An Act to Promote the Comfort of Passengers," required railroads to "provide equal but separate accommodations for the white and colored races"; no person, the act stipulated, would "be permitted to occupy seats in coaches other than the ones assigned to his race."

Mr. Plessy thought such a law violated the 14th Amendment guarantee that no state could deprive him of the "equal protection of the laws." He sought to vindicate his right before the Supreme Court of the United States. But the Court was unpersuaded. Separate but equal treatment based on race did not violate the constitutional command that all persons in all states be accorded equal treatment, the Court said. If Mr. Plessy thought the law tended to "stamp the colored race with a badge of inferiority," said the Court in *Plessy* v. *Ferguson (1896),* it was "not by anything found in the act, but solely because the colored race chooses to put that construction on it."

In that decision (with 7 of 8 justices agreeing) the Supreme Court established the noxious principle that the 14th Amendment permitted "Separate but Equal" treatment for blacks and whites. That principle was to stand as ruling, controlling law until it was finally rejected in 1954 in *Brown* v. *Board of Education.*

I speak to you today thirty years after the second *Brown* case was concluded in 1955 wherein the proper meaning of Equal Protection of the Laws was finally restored to the 14th Amendment. Over the past three decades administrations of both parties, government at all levels, and the American people as a whole, have made tremendous progress in implementing and enforcing the equality of law and civil rights promised by the Constitution. Nevertheless, we must acknowledge the reality that there are still individual Americans who are denied these rights.

Accordingly, it is the mission of this Administration and this Department of Justice to bring the full weight of the law to bear against those who discriminate in violation of the law, and to enable the victims of discrimination to vindicate their rights.

Still, at the same time we reaffirm this commitment to equality, we must also understand that a metamorphosis has taken place again in the way some would have us understand the legal and constitutional demands of Equal Protection. Once again there are those who argue that equal protection permits the different races to be treated separately. For all intents and purposes, a new version of the Separate but Equal doctrine is being pushed upon us.

I speak, of course, of the debate over Affirmative Action. On the one hand there are those who argue that Affirmative Action must mean race-conscious, preferential treatment. We in the Reagan Administration reject that notion unequivocally. We stand where we have stood for

over four years: firmly on the principle that any policy of Affirmative Action to be constitutionally and legally acceptable must be a policy that is nondiscriminatory.

In recent weeks as in recent years there have been loud accusations that because we advocate a policy of nondiscrimination this Administration is against Affirmative Action. Nothing — I repeat, nothing — could be farther from the truth.

Our dedication to the principle of nondiscrimination does not mean we are against Affirmative Action; it only means that we are against certain sorts of Affirmative Action policies that violate the principle of nondiscrimination. At the bottom of the current debate is the question of whether Affirmative Action can be reconciled with the principle of nondiscrimination. The answer of this Administration is an emphatic "yes".

Our position is neither new nor radical. It is the original understanding of Affirmative Action; it is the understanding fought for by Hubert Humphrey, Roy Wilkins, and Thurgood Marshall throughout the 1950s and early 1960s. This understanding is consistent with the idea that the Constitution demands that public law and public policy be racially neutral. It reflects the belief that discrimination — racism, to be precise — cannot be used to do away with discrimination. The idea that you can use discrimination in the form of racially preferential quotas, goals, and set-asides to remedy the lingering social effects of past discrimination, makes no sense in principle; in practice, it is nothing short of a legal, moral and constitutional tragedy.

The fact that discrimination occurred in the past provides no justification for engaging today in discriminatory conduct, even if the stated reason is to "undo" the past wrongs. The only way to overcome discrimination and its lingering effects is to refuse to tolerate it in any form, at any time, for any reason. Then, and only then, can we honestly say that we have removed discrimination, both in policy and practice, "root and branch."

There are those who will tell you that racially preferential policies are the only true policies of Affirmative Action. They will tell you that whatever discriminatory features such policies employ, that discrimination is benign; it is benevolent. They will tell you that such policies are good not only for the recipient but for society. But you should not forget that an earlier generation of Americans heard from some that slavery was good not only for the slaves but for society. It was natural, they argued; it was a kind of benevolence. The people of America rejected that argument; and the vast majority of Americans today reject the idea that preferring some people for certain jobs because of their race or gender is right. There is no other way to say it: Discrimination is wrong.

Many of those who might receive the fruits of such discriminatory policies of Affirmative Action agree. Just a month ago in Miami there was a public protest over the fire department's affirmative action policies. The protesters were not just white males. Four hispanic firemen actually turned down promotions noting that they did not score as high as some of their colleagues on the test and did not wish to be promoted "out of turn". One of the hispanic men on the picket line put it bluntly: "I've been singled out as a minority. It has put me in a bad position."

Any policy of Affirmative Action that prefers one person over another because of race, gender or national origin is unfair for two reasons. First, such special treatment and quotas reward those who personally have not been victimized by discrimination and penalizes others who have been personally wholly innocent of discrimination. But second, the problem cuts deeper; it undermines the spirit of the very group it is designed to reward. As Secretary of

Education William Bennett said when he was Chairman of the National Endowment of the Humanities, different or special treatment on the basis of race or gender or ethnicity "offends our best principles as a nation." The fundamental idea of America is an idea of equality that shuns both special privilege and patronizing benevolence.

Such a selection process — for hiring, admissions, promotions or whatever — encourages us to stereotype our fellow human beings. It encourages us to view their advancements not as hard-won achievements, but as conferred benefits. It invites us to look upon people as possessors of certain characteristics, not as the unique individuals they are.

The person preferentially selected by means of race or gender classifications suffers no less indignity than the person excluded because of those classifications. Such classifications are wrong when they were used by government to bestow advantages on whites and men; they have no greater claim of morality when the tables are turned. Discrimination in any form violates the principle of equality.

Numerical remedies also can result in ceilings on minorities. In one southern city, for example, a consent decree entered into prior to this Administration set a 50% quota in hiring practices while the applicant pool was often as large as 70%. Thus a "cap" was placed on the number of minorities that were hired by the terms of the decree. This we reject in favor of a policy of nondiscrimination.

Secretary of Labor William Brock recently spoke to what this Administration views as proper Affirmative Action policies. "Affirmative Action," Secretary Brock told the Urban League, "is a statement of national will, of intent, of integrity. Affirmative means positive. Action means the taking of concrete steps." But, he argued, Affirmative Action "does not mean heavy-handed government edicts on absolute numerical quotas that at their best can only represent the kind of paternalism which snuffs out the last vestige of human pride and respect."

Counting by race is a form of racism. And racism is never benign, never benevolent. It elevates a perverted notion of equality and denies the original understanding of equality that is our national birthright.

At the most fundamental level of this debate we are battling for the moral principle of equality that has guided our political thinking since we began as a nation.

The meaning of that idea of equality has been the belief that all people have an equal right to liberty. Certainly no one has ever seriously argued that people are equal in all respects; only that they are equal in the most important respect — the right to be free.

The basic premise of the equal claim to political liberty is that it is not fair or just to make legal classes among human beings on the basis of what James Madison called in *The Federalist* "frivolous and fanciful distinctions." Madison meant on the basis of such distinctions as race. The essence of political liberty, thus the essence of the principle of nondiscrimination, is that all citizens have a right to live their lives as they see fit without the pressures of legally imposed burdens based on race or gender or any other characteristic.

In practice this principle means that there must be a regard for *individual* rights; for by being created equal with all others, each person has dignity as an individual, each person has an equal claim to be free. This original understanding of liberty and equality is undermined by those who seek to claim group rights and to secure group remedies.

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would not permit such a distinction. That argument is the same that is at issue in *Wygant:* Our Constitution is in principle and must be made in practice color-blind.

We have also achieved great success in pursuing our strategy of make-whole relief in consent decrees we have negotiated in discrimination cases. In one case, 87 blacks and women who were denied police and fire fighter jobs in Lafayette, Louisiana will be paid a total of $235,000. In yet another case, the owners of two apartment complexes in a predominantly white suburb of Chicago have agreed to rent to black residents. The owners were also required to offer apartments to nine particular individuals whose applications were originally rejected because of race. We maintain that discrimination is a wrong against individuals, not groups, and must be remedied as such.

Our view is that the full force of the law must be brought to bear upon those who discriminate; and the full and equal protection of the laws be made to shield all Americans from discrimination and to restore the rights of those who have in fact suffered discrimination.

It is our position that our Constitution — its text and the original intention behind — demands nothing less. To argue otherwise is to risk (as Lincoln said) "blowing out the moral lights around us."

Thank you.