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The Great Debate: Justice William J. Brennan, Jr. - October 12, 1985

Speech by Justice William J. Brennan, Jr. at Georgetown University on October 12, 1985

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I am deeply grateful for the invitation to participate in the "Text and Teaching" symposium. This rare opportunity to explore classic texts with participants of such wisdom, acumen and insight as those who have preceded and will follow me to this podium is indeed exhilarating. But it is also humbling. Even to approximate the standards of excellence of these vigorous and graceful intellects is a daunting task. I am honored that you have afforded me this opportunity to try.

It will perhaps not surprise you that the text I have chosen for exploration is the amended Constitution of the United States, which, of course, entrenches the Bill of Rights and the Civil War amendments, and draws sustenance from the bedrock principles of another great text, the Magna Carta. So fashioned, the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. The Declaration of Independence, the Constitution and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority. In all candor we must concede that part of this egalitarianism in America has been more pretension than realized fact. But we are an aspiring people, a people with faith in progress. Our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls forth interpretation, the interaction of reader and text. The encounter with the constitutional text has been, in many senses, my life's work.

My approach to this text may differ from the approach of other participants in

this symposium to their texts. Yet such differences may themselves stimulate reflection about what it is we do when we "interpret" a text. Thus I will attempt to elucidate my approach to the text as well as my substantive interpretation.

Perhaps the foremost difference is the fact that my encounters with the constitutional text are not purely or even primarily introspective; the Constitution cannot be for me simply a contemplative haven for private moral reflection. My relation to this great text is inescapably public. That is not to say that my reading of the text is not a personal reading, only that the personal reading perforce occurs in a public context, and is open to critical scrutiny from all quarters.

The Constitution is fundamentally a public text-the monumental charter of a government and a people-and a Justice of the Supreme Court must apply it to resolve public controversies. For, from our beginnings, a most important consequence of the constitutionally created separation of powers has been the American habit, extraordinary to other democracies, of casting social, economic, philosophical and political questions in the form of law suits, in an attempt to secure ultimate resolution by the Supreme Court. In this way, important aspects of the most fundamental issues confronting our democracy may finally arrive in the Supreme Court for judicial determination. Not infrequently, these are the issues upon which contemporary society is most deeply divided. They arouse our deepest emotions. The main burden of my twenty-nine terms on the Supreme Court has thus been to wrestle with the Constitution in this heightened public context, to draw meaning from the text in order to resolve public controversies.

Two other aspects of my relation to this text warrant mention. First, constitutional interpretation for a federal judge is, for the most part, obligatory. When litigants approach the bar of court to adjudicate a constitutional dispute, they may justifiably demand an answer. Judges cannot avoid a definitive interpretation because they feel unable to, or would prefer not to, penetrate to the full meaning of the Constitution's provisions. Unlike literary critics, judges cannot merely savor the tensions or revel in the ambiguities inhering in the text-judges must resolve them.

Second, consequences flow from a justice's interpretation in a direct and immediate way. A judicial decision respecting the incompatibility of Jim Crow with a constitutional guarantee of equality is not simply a contemplative exercise in defining the shape of a just society. It is an order-supported by the

full coercive power of the State-that the present society change in a fundamental aspect. Under such circumstances the process of deciding can be a lonely, troubling experience for fallible human beings conscious that their best may not be adequate to the challenge. We Justices are certainly aware that we are not final because we are infallible; we know that we are infallible only because we final. One does not forget how much may depend on the decision. More than the litigants may be affected. The course of vital social, economic and political currents may be directed.

These three defining characteristics of my relation to the constitutional text-its public nature, obligatory character, and consequentialist aspect-cannot help but influence the way I read that text. When Justices interpret the Constitution they speak for their community, not for themselves alone. The act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought. Justices are not platonic guardians appointed to wield authority according to their personal moral predilections. Precisely because coercive force must attend any judicial decision to countermand the will of a contemporary majority, the Justices must render constitutional interpretations that are received as legitimate. The source of legitimacy is, of course, a wellspring of controversy in legal and political circles. At the core of the debate is what the late Yale Law School professor Alexander Bickel labeled "the counter-majoritarian difficulty." Our commitment to self-governance in a representative democracy must be reconciled with vesting in electorally unaccountable Justices the power to invalidate the expressed desires of representative bodies on the ground of inconsistency with higher law. Because judicial power resides in the authority to give meaning to the Constitution, the debate is really a debate about how to read the text, about constraints on what is legitimate interpretation.

There are those who find legitimacy in fidelity to what they call "the intentions of the Framers." In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned

is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality. Indeed, it is far from clear whose intention is relevant-that of the drafters, the congressional disputants, or the ratifiers in the states?-or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states. And apart from the problematic nature of the sources, our distance of two centuries cannot but work as a prism refracting all we perceive. One cannot help but speculate that the chorus of lamentations calling for interpretation faithful to "original intention"-and proposing nullification of interpretations that fail this quick litmus test-must inevitably come from persons who have no familiarity with the historical record.

Perhaps most importantly, while proponents of this facile historicism justify it as a depoliticization of the judiciary, the political underpinnings of such a choice should not escape notice. A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. It is far from clear what justifies such a presumption against claims of right. Nothing intrinsic in the nature of interpretation-if there is such a thing as the "nature" of interpretation- commands such a passive approach to ambiguity. This is a choice no less political than any other; it expresses antipathy to claims of the minority rights against the majority. Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.

Another, perhaps more sophisticated, response to the potential power of judicial interpretation stresses democratic theory: because ours is a government of the people's elected representatives, substantive value choices should by and large be left to them. This view emphasizes not the transcendent historical authority of the framers but the predominant contemporary authority of the elected branches of government. Yet it has similar consequences for the nature of proper judicial interpretation. Faith in the majoritarian process counsels restraint. Even under more expansive formulations of this approach, judicial review is appropriate only to the extent of ensuring that our democratic process functions smoothly. Thus, for example, we would protect freedom of speech merely to ensure that the people are heard by their representatives, rather than as a separate, substantive value. When, by contrast, society tosses up to the Supreme Court a dispute that would require

invalidation of a legislature's substantive policy choice, the Court generally would stay its hand because the Constitution was meant as a plan of government and not as an embodiment of fundamental substantive values.

The view that all matters of substantive policy should be resolved through the majoritarian process has appeal under some circumstances, but I think it ultimately will not do. Unabashed enshrinement of majority will would permit the imposition of a social caste system or wholesale confiscation of property so long as a majority of the authorized legislative body, fairly elected, approved. Our Constitution could not abide such a situation. It is the very purpose of a Constitution-and particularly of the Bill of Rights-to declare certain values transcendent, beyond the reach of temporary political majorities. The majoritarian process cannot be expected to rectify claims of minority right that arise as a response to the outcomes of that very majoritarian process. As James Madison put it:

> The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority. (I Annals 437).

Faith in democracy is one thing, blind faith quite another. Those who drafted our Constitution understood the difference. One cannot read the text without admitting that it embodies substantive value choices; it places certain values beyond the power of any legislature. Obvious are the separation of powers; the privilege of the Writ of Habeas Corpus; prohibition of Bills of Attainder and *ex post facto* laws; prohibition of cruel and unusual punishments; the requirement of just compensation for official taking of property; the prohibition of laws tending to establish religion or enjoining the free exercise of religion; and, since the Civil War, the banishment of slavery and official race discrimination. With respect to at least such principles, we simply have not constituted ourselves as strict utilitarians. While the Constitution may be amended, such amendments require an immense effort by the People as a whole.

To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances. The Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle

shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours. Successive generations of Americans have continued to respect these fundamental choices and adopt them as their own guide to evaluating quite different historical practices. Each generation has the choice to overrule or add to the fundamental principles enunciated by the Framers; the Constitution can be amended or it can be ignored. Yet with respect to its fundamental principles, the text has suffered neither fate. Thus, if I may borrow the words of an esteemed predecessor, Justice Robert Jackson, the burden of judicial interpretation is to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century." *Board of Education v. Barnette,* [319 U.S. 624, 639 (1943),].

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time. This realization is not, I assure you, a novel one of my own creation. Permit me to quote from one of the opinions of our Court, *Weems v. United States,* [217 U.S. 349,] written nearly a century ago:

> Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice John Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision or events of good and bad tendencies of which no prophesy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.

Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized. Thus, for example, when we interpret the Civil War Amendments to the charter-abolishing slavery, guaranteeing blacks equality under law, and guaranteeing blacks the right to vote-we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world, to eliminate all vestige of slave caste.

Having discussed at some length how I, as a Supreme Court Justice, interact with this text, I think it time to turn to the fruits of this discourse. For the Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law. Some reflection is perhaps required before this can be seen.

The Constitution on its face is, in large measure, a structuring text, a blueprint for government. And when the text is not prescribing the form of government it is limiting the powers of that government. The original document, before addition of any of the amendments, does not speak primarily of the rights of man, but of the abilities and disabilities of government. When one reflects upon the text's preoccupation with the scope of government as well as its shape, however, one comes to understand that what this text is about is the relationship of the individual and the state. The text marks the metes and bounds of official authority and individual autonomy. When one studies the boundary that the text marks out, one gets a sense of the vision of the individual embodied in the Constitution.

As augmented by the Bill of Rights and the Civil War Amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual. This vision is reflected in the very choice of democratic self-governance: the supreme value of a democracy is the presumed worth of each individual. And this vision manifests itself most dramatically in the specific prohibitions of the Bill of Rights, a term which I henceforth will apply to describe not only the original first eight amendments, but the Civil War amendments as well. It is a vision that has guided us as a people throughout our history, although the precise rules by which we have protected fundamental human dignity have been transformed over time in response to both transformations of social condition and evolution of our concepts of human dignity.

Until the end of the nineteenth century, freedom and dignity in our country

found meaningful protection in the institution of real property. In a society still largely agricultural, a piece of land provided men not just with sustenance but with the means of economic independence, a necessary precondition of political independence and expression. Not surprisingly, property relationships formed the heart of litigation and of legal practice, and lawyers and judges tended to think stable property relationships the highest aim of the law.

But the days when common law property relationships dominated litigation and legal practice are past. To a growing extent economic existence now depends on less certain relationships with government-licenses, employment, contracts, subsidies, unemployment benefits, tax exemptions, welfare and the like. Government participation in the economic existence of individuals is pervasive and deep. Administrative matters and other dealings with government are at the epicenter of the exploding law. We turn to government and to the law for controls which would never have been expected or tolerated before this century, when a man's answer to economic oppression or difficulty was to move two hundred miles west. Now hundreds of thousands of Americans live entire lives without any real prospect of the dignity and autonomy that ownership of real property could confer. Protection of the human dignity of such citizens requires a much modified view of the proper relationship of individual and state.

In general, problems of the relationship of the citizen with government have multiplied and thus have engendered some of the most important constitutional issues of the day. As government acts ever more deeply upon those areas of our lives once marked "private," there is an even greater need to see that individual rights are not curtailed or cheapened in the interest of what may temporarily appear to be the "public good." And as government continues in its role of provider for so many of our disadvantaged citizens, there is an even greater need to ensure that government act with integrity and consistency in its dealings with these citizens. To put this another way, the possibilities for collision between government activity and individual rights will increase as the power and authority of government itself expands, and this growth, in turn, heightens the need for constant vigilance at the collision points. If our free society is to endure, those who govern must recognize human dignity and accept the enforcement of constitutional limitations on their power conceived by the Framers to be necessary to preserve that dignity and the air of freedom which is our proudest heritage. Such recognition will not come from a technical understanding of the organs of government, or the new forms of wealth they

administer. It requires something different, something deeper-a personal confrontation with the well-springs of our society. Solutions of constitutional questions from that perspective have become the great challenge of the modern era. All the talk in the last half-decade about shrinking the government does not alter this reality or the challenge it imposes. The modern activist state is a concomitant of the complexity of modern society; it is inevitably with us. We must meet the challenge rather than wish it were not before us.

The challenge is essentially, of course, one to the capacity of our constitutional structure to foster and protect the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure. During the time of my public service this challenge has largely taken shape within the confines of the interpretive question whether the specific guarantees of the Bill of Rights operate as restraints on the power of State government. We recognize the Bill of Rights as the primary source of express information as to what is meant by constitutional liberty. The safeguards enshrined in it are deeply etched in the foundation of America's freedoms. Each is a protection with centuries of history behind it, often dearly bought with the blood and lives of people determined to prevent oppression by their rulers. The first eight Amendments, however, were added to the Constitution to operate solely against federal power. It was not until the Thirteenth and Fourteenth Amendments were added, in 1865 and 1868, in response to a demand for national protection against abuses of state power, that the Constitution could be interpreted to require application of the first eight amendments to the states.

It was in particular the Fourteenth Amendment's guarantee that no person be deprived of life, liberty or property without process of law that led us to apply many of the specific guarantees of the Bill of Rights to the States. In my judgment, Justice Cardozo best captured the reasoning that brought us to such decisions when he described what the Court has done as a process by which the guarantees "have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption . . . [that] has had its source in the belief that neither liberty nor justice would exist if [those guarantees] . . . were sacrificed." *Palko v. Connecticut,* [302 U.S. 319, 326 (1937),]. But this process of absorption was neither swift nor steady. As late as 1922 only the Fifth Amendment guarantee of just compensation for official taking of property had been given force against the states. Between then and 1956 only the First Amendment guarantees of speech

and conscience and the Fourth Amendment ban of unreasonable searches and seizures had been incorporated-the latter, however, without the exclusionary rule to give it force. As late as 1961, I could stand before a distinguished assemblage of the bar at New York University's James Madison Lecture and list the following as guarantees that had not been thought to be sufficiently fundamental to the protection of human dignity so as to be enforced against the states: the prohibition of cruel and unusual punishments, the right against self-incrimination, the right to assistance of counsel in a criminal trial, the right to confront witnesses, the right to compulsory process, the right not to be placed in jeopardy of life or limb more than once upon accusation of a crime, the right not to have illegally obtained evidence introduced at a criminal trial, and the right to a jury of one's peers.

The history of the quarter century following that Madison Lecture need not be told in great detail. Suffice it to say that each of the guarantees listed above has been recognized as a fundamental aspect of ordered liberty. Of course, the above catalogue encompasses only the rights of the criminally accused, those caught, rightly or wrongly, in the maw of the criminal justice system. But it has been well said that there is no better test of a society than how it treats those accused of transgressing against it. Indeed, it is because we recognize that incarceration strips a man of his dignity that we demand strict adherence to fair procedure and proof of guilt beyond a reasonable doubt before taking such a drastic step. These requirements are, as Justice Harlan once said, "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In *re Winship,* [397 U.S. 358, 372 (1970),] (concurring opinion). There is no worse injustice than wrongly to strip a man of his dignity. And our adherence to the constitutional vision of human dignity is so strict that even after convicting a person according to these stringent standards, we demand that his dignity be infringed only to the extent appropriate to the crime and never by means of wanton infliction of pain or deprivation. I interpret the Constitution plainly to embody these fundamental values.

Of course the constitutional vision of human dignity has, in this past quarter century, infused far more than our decisions about the criminal process. Recognition of the principle of "one person, one vote" as a constitutional one redeems the promise of self-governance by affirming the essential dignity of every citizen in the right to equal participation in the democratic process. Recognition of so-called "new property" rights in those receiving government entitlements affirms the essential dignity of the least fortunate among us by

demanding that government treat with decency, integrity and consistency those dependent on its benefits for their very survival. After all, a legislative majority initially decides to create governmental entitlements; the Constitution's Due Process Clause merely provides protection for entitlements thought necessary by society as a whole. Such due process rights prohibit government from imposing the devil's bargain of bartering away human dignity in exchange for human sustenance. Likewise, recognition of full equality for women-equal protection of the laws-ensures that gender has no bearing on claims to human dignity.

Recognition of broad and deep rights of expression and of con" science reaffirm the vision of human dignity in many ways. They too redeem the promise of self-governance by facilitating-indeed demanding-robust, uninhibited and wide-open debate on issues of public importance. Such public debate is of course vital to the development and dissemination of political ideas. As importantly, robust public discussion is the crucible in which personal political convictions are forged. In our democracy, such discussion is a political duty, it is the essence of self government. The constitutional vision of human dignity rejects the possibility of political orthodoxy imposed from above; it respects the right of each individual to form and to express political judgments, however far they may deviate from the mainstream and however unsettling they might be to the powerful or the elite. Recognition of these rights of expression and conscience also frees up the private space for both intellectual and spiritual development free of government dominance, either blatant or subtle. Justice Brandeis put it so well sixty years ago when he wrote: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means." *Whitney v. California* [274 U.S. 357, 375 (1927),] (concurring opinion).

I do not mean to suggest that we have in the last quarter century achieved a comprehensive definition of the constitutional ideal of human dignity. We are still striving toward that goal, and doubtless it will be an eternal quest. For if the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve.

Indeed, I cannot in good conscience refrain from mention of one grave and crucial respect in which we continue, in my judgment, to fall short of the

constitutional vision of human dignity. It is in our continued tolerance of State-administered execution as a form of punishment. I make it a practice not to comment on the constitutional issues that come before the Court, but my position on this issue, of course, has been for some time fixed and immutable. I think I can venture some thoughts on this particular subject without transgressing my usual guideline too severely.

As I interpret the Constitution, capital punishment is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. This is a position of which I imagine you are not unaware. Much discussion of the merits of capital punishment has in recent years focused on the potential arbitrariness that attends its administration, and I have no doubt that such arbitrariness is a grave wrong. But for me, the wrong of capital punishment transcends such procedural issues. As I have said in my opinions, I view the Eighth Amendment's prohibition of cruel and unusual punishments as embodying to a unique degree moral principles that substantively restrain the punishments our civilized society may impose on those persons who transgress its laws. Foremost among the moral principles recognized in our cases and inherent in the prohibition is the primary principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. Death for whatever crime and under all circumstances is a truly awesome punishment. The calculated killing of a human being by the State involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the State from constitutional restraints on the destruction of human dignity. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. It is, indeed, "cruel and unusual." It is thus inconsistent with the fundamental premise of the Clause that even the most base criminal remains a human being possessed of some potential, at least, for common human dignity.

This is an interpretation to which a majority of my fellow Justices-not to mention, it would seem, a majority of my fellow countrymen-does not subscribe. Perhaps you find my adherence to it, and my recurrent publication of it, simply contrary, tiresome, or quixotic. Or perhaps you see in it a refusal to abide by the judicial principle of *stare decisis,* obedience to precedent. In my judgment, however, the unique interpretive role of the Supreme Court with

respect to the Constitution demands some flexibility with respect to the call of *stare decisis*. Because we are the last word on the meaning of the Constitution, our views must be subject to revision over time, or the Constitution falls captive, again, to the anachronistic views of long-gone generations. I mentioned earlier the judge's role in seeking out the community's interpretation of the Constitutional text. Yet, again in my judgment, when a Justice perceives an interpretation of the text to have departed so far from its essential meaning, that Justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path. On this issue, the death penalty, I hope to embody a community striving for human dignity for all, although perhaps not yet arrived.

You have doubtless observed that this description of my personal encounter with the constitutional text has in large portion been a discussion of public developments in constitutional doctrine over the last century. That, as I suggested at the outset, is inevitable because my interpretive career has demanded a public reading of the text. This public encounter with the text, however, has been a profound source of personal inspiration. The vision of human dignity embodied there is deeply moving. It is timeless. It has inspired Americans for two centuries and it will continue to inspire as it continues to evolve. That evolutionary process is inevitable and indeed, it is the true interpretive genius of the text.

If we are to be as a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity. For the political and legal ideals that form the foundation of much that is best in American institutions-ideals jealously preserved and guarded throughout our history-still form the vital force in creative political thought and activity within the nation today. As we adapt our institutions to the ever- changing conditions of national and international life, those ideals of human dignity-liberty and justice for all individuals-will continue to inspire and guide u because they are entrenched in our Constitution. The Constitution with its Bill of Rights thus has a bright f as well as a glorious past, for its spirit is inherent in the aspirations of ople.

William J. Brennan