

# PANEL IV: JUDICIAL INTERPRETATION OF THE BILL OF RIGHTS

## INTERPRETING THE BILL OF RIGHTS: A DICHOTOMY OF JURISPRUDENTIAL APPROACHES

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I scarcely can imagine a more controversial topic in the area of jurisprudence than that of the judiciary's interpretation of the Bill of Rights. Whether the judiciary has acted magnificently or abysmally during the past thirty years depends largely upon your view of the proper role of the federal courts. During this period, we have witnessed either the long-overdue recognition of inherent rights that naturally and appropriately stem from the principles established by the Constitution, or the creation of a vast number of otherwise non-existent rights that have been fabricated out of whole cloth by liberal policy mavens robed in black.

The juxtaposition of these two jurisprudential extremes is perhaps best embodied by recently retired Justice William Brennan, and by Supreme Court nominee Robert Bork. In describing his own judicial philosophy, Justice Brennan has written that the opinions of the Court's justices

must be subject to revision over time, or the Constitution falls captive to the anachronistic views of long-gone generations . . . . [W]hen 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.<sup>1</sup>

In his confirmation hearings before the Senate Judiciary Committee, Judge Bork set forth the essence of originalist doctrine:

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1. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986).

The judge's authority derives entirely from the fact that he is applying the law and not his personal values . . . .

. . . . How should a judge go about finding the law? The only legitimate way, in my opinion, is by attempting to discern what those who made the law intended. . . .

. . . .

. . . My philosophy of judging . . . is simply a philosophy of judging which gives the Constitution a full and fair interpretation but, where the Constitution is silent, leaves the policy struggles to the Congress, the President, the legislatures and executives of the 50 States, and to the American people.<sup>2</sup>

Should the federal courts continually strive to articulate an ever-evolving "essential meaning" of the Bill of Rights in the context of the great issues of the present day, or should judges limit their inquiry to the plain language and the original intent of our Founding Fathers, regardless of the social mores and priorities of the Twentieth Century? This distinguished panel of law professors will try to answer these questions.

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2. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Committee on the Judiciary, 100th Cong., 1st Sess. 103, 105 (1987).*