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ADHERENCE TO THE ORIGINAL INTENTIONS IN CONSTITUTIONAL ADJUDICATION: THREE OBJECTIONS AND RESPONSES

Richard S. Kay*

I. INTRODUCTION

In a 1968 television interview, Justice Black was asked about certain unpopular constitutional decisions of the Supreme Court. "Well," he replied, "the Court didn't do it The Constitution did it."¹ His response nicely captures the conventional view of constitutional adjudication. According to this view, when a court finds unconstitutional the otherwise lawful action of some agency of government, it merely acts as the executor of a conclusive determination already embedded in the Constitution.² This understanding is the standard fare of school civics books.³ It is the implicit assumption underlying the boast

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¹ Justice Black and The Bill of Rights (CBS television broadcast, Dec. 3, 1968). As another point in his answer to the same question, Justice Black said, "the Constitution-makers did it." *Id.* (emphasis supplied). This formulation is closer to the nature of original intentions adjudication discussed in this essay than is the quotation in text. See *infra* text accompanying notes 16-49.

² This is the rationale upon which the power of judicial review was originally asserted. *Marbury v. Madison*, 5 U.S. (1 Cranch) 135, 176 (1803).

³ See, e.g., *Following our Constitution*, Harcourt Course, Sept. 16, 1997. In this special section aimed at school children, the writers say that the Supreme Court has "the difficult job of deciding just what the Framers meant when they wrote the Constitution." The court's work is to say whether laws agree with the Constitution." *Id.* at 13. This outlook is so elementary that school books rarely do more than note that the Court has the power to invalidate a law or action that "violates some part of the Constitution." A. DAVIS, *FAMOUS SUPREME COURT CASES 6* (1979) (9th grade text); see also H. PETERSON, *THE SUPREME COURT OF AMERICA'S STORY 19* (1975) ("The Court strikes down a law when the justices rule it violates or is against the Constitution.") (elementary school text). The official inauguration and Nonviolence Service text on government for prospective citizens says that the Supreme Court's function includes the duty "to decide whether laws passed by Congress agree with the Constitution." U.S. DEPT. OF JUSTICE, *U.S.A., OUR GOVERNMENT 82* (1973).

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