Judicial Review is the Sugar-Coated Way to Say Judicial Supremacy

To the Editor:

With reference to representations made about *Marbury v Madison* (1803) in your May 2012 issue (book review of *A Brave Man Stands Firm: The Historic Battles Between Chief Justice John Marshall and President Thomas Jefferson*), the only reason we attorneys believe what popular opinion says about *Marbury* is because we were taught the overbroad interpretation by law professors back in the 1950s and 1960s before they taught us about *dicta*. If we had known about *dicta* before we were taught about *Marbury,* we would have scoffed at the overblown claims for *Marbury*.

Marbury was not the first case in which the United States Supreme Court asserted a right to question legislative actions. There were at least two cases before *Marbury* in 1796—one involving a decision that a carriage tax was constitutional and another deciding that the Treaty of Paris superseded an otherwise constitutional state law.

The notion of *dicta,* of course, is that not everything that falls out of a justice's mouth and lands on paper is law or necessarily about the United States Constitution. No matter the bombast by Justice Marshall, his entire ruling in *Marbury* may be honestly summarized by saying that he found congressional action to add persons or staff to the judiciary a contravention of the Constitution. But this was how the Constitution was understood in those brassy days of 1803, namely that each department of government was the judge of the constitutionality of what might affect the grant of constitutional power given to it. The legislative branch clearly thought so, and so did the executive branch right through Andrew Jackson and Abraham Lincoln. Somehow, careless researchers have worked to make *Marbury* say things the actual ruling did not say, and have enthroned idle chatter (*dicta*) in the text.

If researchers want to identify the Mother of all Judicial Supremacy, they need to examine *Dred Scott v Sandford* (1857), which overturned federal statutes that sought a compromise to save the union and led directly to the Civil War. Too arcane? Try *Citizens United v Federal Election Commission* (2010) or a real horror, *Kelo v City of New London* (2005), to see the crawling monster of judicial supremacy creeping across the land.

I suspect law professors in the 1950s and 1960s felt that civil rights were more important than chaining down the United States Supreme Court, and thus overlooked *Dred Scott* to set *Marbury über alles* in the hopes that a judicial-centric approach would undo wrongs. Unfortunately, as is true for so many liberal cures, judicial supremacy has infiltrated American society so thoroughly that it easily establishes new wrongs.

Dale Warner
San Jose, California

Traveling Violation?

To the Editor:

It is curious that the State Bar Criminal Law Section selected Cuba as a place to learn about another country's criminal law system (Up Front, June 2012 *Michigan Bar Journal*). There are so many other places they could have learned from: North Korea, Zimbabwe, and even China. And a visit to Cuba to learn about justice would not have been complete without visiting some political prisoners and trying to cheer them up. I did not see any mention of this in the *Bar Journal* piece.

Bruce A. Miller
Detroit

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