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Preface

Dear Professors and Students,

This supplement is the teaser to the third edition of *Investigative Criminal Procedure*. The new edition will include the cases in this supplement.

Our emphasis remains on exposing the origins and evolution of doctrine. To that end, we excerpt every substantive opinion in the selected cases — whether majority, concurrence, or dissent — to show that law is not just a collection of holdings but a perpetual contest of ideas whose prevalence and influence ebbs and flows.

Feel free to pass along any comments or suggestions about coverage, sequencing, or anything else. We would be especially interested in knowing whether there are additional cases you would like included and whether there are cases that might be removed.

Regards,

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• **Democracy and Justice.** The power to interpret the Constitution arguably is the single most important power in American society. So, the Supreme Court’s exercise of the power of judicial review has been controversial since Chief Justice John Marshall asserted it on behalf of the Court in *Marbury v. Madison:* “Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.” Marshall justified this assertion of power by invoking a court’s need to afford justice against political or majoritarian excess: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”

Critics of Marshall’s claim maintained that entrusting ultimate power to interpret the Constitution to the one branch of government that is unelected, and therefore not directly accountable to the people, is intolerably antidemocratic. That was the position President Thomas Jefferson consistently took after *Marbury.* Even years later, when William Jarvis, who served as consul to Portugal under Jefferson, sent the former president a copy of *The Republican,* a collection of essays on federalism Jarvis authored, Jefferson responded:

> I thank you, Sir, for the copy of your Republican which you have been so kind as to send me … . I have not yet had time to read it seriously but in looking over it cursorily I see much in it to approve, and shall be glad if it shall lead our youth to the practice of thinking on such subjects & for themselves. That it will have this tendency may be expected, and for that reason I feel an urgency to note what I deem an error in it, the more requiring notice as your opinion is strengthened by that of many others. You seem in pages 84 & 148 to consider the judges as the ultimate arbiters of all constitutional questions: a very dangerous doctrine indeed and one which would place us under the despotism of an Oligarchy.

> Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privileges of their corps. Their maxim is ‘boni judicis est ampliare jurisdictionem,’ [the judicial duty is to extend justice] and their power the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal knowing that, to whatever hands confided, with the corruptions of time & party, its members would become despot. It has more wisely made all the departments co-equal and co-sovereign within themselves. … I know no depository of the ultimate powers of the society, but the people themselves: and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is, not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power.”

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1 5 U.S. (1 Cranch) 137, 178 (1803).
2 Id. at 163.
• **Politics and Law.** The Constitution is meant to foster both democracy and justice—the former through representative government that responds to the will of the people and the latter through a court system that is principled, rather than a mere extension of prevalent passions, prejudices, and politics. This implies that democracy does not always yield justice and that justice sometimes is necessarily antidemocratic. Hence, the world of democracy is politics—the competition among factions fighting for power, wealth, and status—while the world of justice is law—the adherence to neutral principles for resolving competing claims to power, wealth, and status. Under the Constitution, politics is no vice in the partisan world of democracy but is no virtue in the principled world of law. For there to be justice, law must effectively limit politics. This is the essence of the “rule of law” in a constitutional democracy.

Distinguishing law from politics therefore is critical to perceptions of judicial legitimacy in constitutional lawmaking—especially when courts use the judicial review power to trump the democratic process. Consequently, one of the worst things that can be said of a court ruling is that it amounts to “mere politics”—in other words, that it reflects only or chiefly the personal views and political values of the judge (and the judge’s factional affiliations), rather than a detached judgment arrived at through application of legitimate sources of law in conformance with basic canons of interpretation. If a court is viewed as commandeering the judicial review power for political purposes, the ruling will be deemed illegitimate. While rulings believed to be illegitimate may be obeyed as the law of the land, they will be derided and disparaged in intellectual and moral terms. This serves as something of a constraint on judges, who are, of course, concerned about how their peers and posterity assess their professionalism and competence. Judges know that other members of the legal profession will review their opinions and judge them under the standards and ideals of their office.

• **The Ideal: Principled Adjudication.** It is never legitimate for a judicial opinion to be founded on judges’ political views or personal values. So, it sometimes is said that courts should exercise “deference” and “judgment” rather than “will”—which entails making policy choices. This follows from the Constitution’s commitment to a “separation of powers” among three branches of government. “Judgment” is for the judicial branch and “will” is reserved for the political branches. Courts should respect the “will” of the people, as expressed through their popularly elected representatives, unless that will violates the Constitution, which itself was adopted and designated by the people as the supreme law of the land. This makes sense if the Constitution is understood to embody such basic and fundamental principles that a majority vote is insufficient to override them. Constitutional law questions always require courts to decide whether today’s democratic “will” violates the supreme law of the land.

• **The Means: Sources of Constitutional Law.** Over time, certain devices have emerged as means for principled adjudication, which in turn may help to ensure that judicial review is always legitimate. Generally, five sources of reasoning in constitutional law are deemed legitimate. They are: text; intent; precedent; history, tradition, or experience; and social or textual structure. Another source that is used but remains questionable is natural law.