

**CONSTITUTIONAL LAW I:  
JUDICIAL REVIEW AND CONSTITUTIONAL INTERPRETATION  
POLITICAL SCIENCE 307  
SPRING 2024  
MICRO-ESSAY #3**

Write a 750-900 word essay on the following topic. Your essay is due in the Google folder by 4 PM on FRIDAY March 8. Be sure to use direct quotations from *Democracy and Distrust* and the Chemerinsky readings to bolster your claims. Also, cite page numbers in parentheses after the quotation, add a title that captures your argument, and include at least one claim-objection-rejoinder sequence.

**Write an essay that assesses whether Hart Ely's theory of procedural judicial review is tenable. Use the modes of constitutional interpretation to support your position.**

Chemerinsky would argue that it is not tenable for both empirical and normative reasons. In the empirical claim, Hart Ely's theory is problematic because the Supreme Court has so often turned its back on minorities by following conservative social movements, such as the pro-slavery movement that rose up in the South beginning in the 1820s and then the anti-Black movement beginning in the 1870s. He documents the shameful legacy of *Prigg*, *Dred Scott*, and *Plessy* and the Court's narrow reading of the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments for one hundred years after the Civil War (*The Case*, 24-38). More recently, the Court has once again picked up the themes of a conservative social movement in its decisions in *Heller*, *Hobby Lobby*, and *Dobbs*.

In the normative claim, Chemerinsky attacks the very ground of Hart Ely's theory. He finds it untenable because it rests on a simplistic and incomplete theory of democracy defined as "rule by the majority" ("Interpreting," 3). James Madison, the premier framer of the Constitution, famously distrusted majorities and added protection of minorities as a key goal of the representative democracy the Constitution sanctioned (7). He also argues that Hart Ely's theory is untenable because it is part of a mistaken reaction against the doctrine of "substantive due process" embodied in the *Lochner* case (121). Chemerinsky argues that the contrary is closer to the truth: the fear of "judicial tyranny" has been overblown and the effort to eliminate judicial discretion is worse than its abuses (127).

Hart Ely would respond that the theory is indeed tenable because it empowers justices to interpret the Constitution in a way that avoids "value imposition" (73) by unelected judges. Furthermore, it can claim to be: true to key constitutional clauses like "due process;" consistent with the original public meaning of "representative democracy;" tied to the structuralism of Justice John Marshall (85-6); rooted in doctrine since *Carolene Products* (75-7); validated by good consequences in supporting Congress and American societies' fairer treatment of "racial minorities ... aliens, "illegitimates," and poor people" (74) during the Warren Court (e.g., *Brown*, *Katzenbach*, *Miranda*, and *Gideon*), and ethically warranted under the principle of limited government.

Who has the better argument?