to adduce evidence that these syndromes are much more common among Jews than among others.

There are also errors of omission and commission that undermine the book's credibility. In the very first chapter on Brandeis, Burt asserts that "Brandeis is the founding father of the Jewish presence in American law," a startling claim to anyone familiar with the career of Louis Marshall, who not only was self-consciously Jewish, but whose prominence as a lawyer equalled or surpassed that of Brandeis.[14] And in the first paragraph dealing with Frankfurter, Burt asserts that "for Brandeis their friendship was apparently the most intimate male relationship in his adult life." This ignores the lengthy and extremely close ties between Brandeis and his brother Alfred, to whom Brandeis wrote nearly every day of his life.[15]

THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS. By William Lasser.[1] Chapel Hill: The University of North Carolina Press. 1988. Pp x, 354. $32.95 cloth, $9.95 paper.

Herbert Hovenkamp[2]

Professor William Lasser takes issue with one of the most respectable maxims of constitutional theory: the idea that controversial Supreme Court decisions expend part of the Court's stock of political "capital,"[3] thereby reducing its authority. The premise of this maxim is that the Court is a fragile institution. If it wishes to preserve its authority and guarantee maximum compliance with its orders, the power of judicial review must be exercised very sparingly. For Alexander Bickel and even more so for Jesse Choper, this thesis was a central part of an elaborate argument for judicial restraint. "[I]n some principled fashion," Choper concluded, the

14. *See* M. ROSENSTOCK, LOUIS MARSHALL: DEFENDER OF JEWISH RIGHTS (1965); LOUIS MARSHALL: CHAMPION OF LIBERTY (2 vols. C. Rezinkoff ed. 1957).

15. LETTERS OF LOUIS D. BRANDEIS *passim* (5 vols. M.I. Urofsky & D.W. Levy eds. 1971-1978).

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2. Professor of Law, University of Iowa.

3. A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 23 (1962); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 156 (1980); R.G. MCCLOSKEY, THE AMERICAN SUPREME COURT 229-31 (1960). *See also* J. ELY, DEMOCRACY AND DISTRUST (1980); W. MURPHY, CONGRESS AND THE COURT 2-3 (1962).

Court "must ration its power of invalidation."[4]

Professor Lasser tries to disprove this theory, largely by pointing out that congressional rhetoric denouncing the Court has almost never led to practical results, such as curbs on its appellate jurisdiction. Lasser argues that "[h]istorical analyses of the Court have traditionally underestimated the Supreme Court's power and overestimated the Court's vulnerability to damage from the political branches." In fact, the "Supreme Court has always been largely invulnerable to political assault," unpopular decisions notwithstanding.

Lasser supports his point by examining several stormy periods in constitutional history: the immediate pre-Civil War slavery debate and the Dred Scott case; the Court's controversial decisions involving military power and civil rights during Reconstruction; the New Deal Court and the Court-packing crisis; and the radical reformulation of individual rights during the Warren and post-Warren (principally *Roe v. Wade*) eras. From these case studies, he concludes that the Court has consistently been able to make controversial decisions without doing itself damage. Today "a sort of low-level, permanent crisis has become routine," and unpopular decisions have become an accepted and "unremarkable part of the American political landscape." This state of "crisis as usual," however, "does not seem to have hurt the Court's standing among the American people."

Lasser is right to call for reconsideration of the "fragile institution" theory. That alone makes this book a valuable contribution to constitutional studies. But its thesis is unconvincing, primarily because Lasser permits Bickel and Choper to formulate the question for him.

The unstated premise of Bickel's and Choper's work was that legislation generally has popular support and that the Court, in striking it down, is therefore acting contrary to public opinion. A more realistic view is that politicians and Justices operate in different markets, with different politically optimal outcomes. If legislation reflects, not the wish of the voting "majority," but rather that of effective interest groups, then judicial review may not consume the Court's "capital" at all. For example, July 1989 polls reported by the *New York Times* suggest that a majority of Americans basically favor a woman's right to have an abortion, and that the *Webster* decision limiting that right is unpopular.[5] In other words, the Court can use up some of its "capital" by *upholding* a statute, as in

4. CHOPER, *supra* note 3, at 156.
5. Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989).

Webster. Conversely, the Court may increase its capital when it strikes down a statute that most people regard as offensive. Controversial decisions increase the Court's support in some quarters while diminishing it in others; the net effect varies from case to case.

Any general thesis that the Supreme Court uses up capital when it exercises judicial review is probably not subject to verification, at least in any strict sense. Cause and effect are too difficult to discern in such complex political matters. Perhaps the best case for the Court's bowing to political pressure is the Roosevelt "Court-packing" controversy. But even here the evidence is purely circumstantial and points in both directions. The Nine Old Men struck down New Deal legislation, often by a one-vote margin. We know that one Justice, Roberts, changed his mind; but he may have done that before the Court-packing plan was even announced. Dean Choper cites widespread noncompliance with *Brown*, *Brown II* and the school prayer and Bible-reading decisions as evidence that the Supreme Court depletes its capital when it issues controversial decisions.[6] But ultimately the Court won these battles. None of the decisions has been overruled, nor has the Constitution been amended. Is the Court a weaker or a stronger institution for having made these decisions? The evidence is consistent with either proposition.

Lasser's evidence is as inconclusive as Bickel's and Choper's. One obvious example of Lasser's failure to isolate important variables is his study of congressional response to controversial Warren and post-Warren era decisions such as *Brown* and *Roe*. He notes that Republican presidents of this period such as Nixon and Reagan have repeatedly criticized the Court for its liberalism, yet Congress has never come close to curbing the Court's jurisdiction. But the Congresses during this era have been overwhelmingly Democratic. Neither Nixon nor Reagan had anything approaching Roosevelt's control of Congress in the early 1930s, when one could say that the legislative and executive branches were aligned against the Court. Lasser cites the failure of the Bork nomination as evidence of the Court's endurance in the face of criticism from the political branches. But given the almost straight party-line division on Bork, it seems clear that the result says little about the Court's ability to protect its unpopular decisions in the face of a politically hostile Congress.

The biggest shortcoming in Lasser's book is his uncritical acceptance of the premise that the political branches speak for the majority while the Court—at least when it invalidates statutes—

6. *See* CHOPER, *supra* note 3, at 150-55.

does not. Lasser's conclusion that the Court can strike down statutes without using up its prestige may well be correct—but not for the reasons he suggests. Notwithstanding its oligarchic character, the Court may sometimes be closer to the popular mood than a legislature.

Jesse Choper acknowledged the "anti-majoritarian element" in the legislative process—but he concluded that its principal effect was "to prevent the translation of popular wishes into governing rules rather than to produce laws that are contrary to majority sentiment."[7] Statutes are thus presumptively majoritarian. As a generalization, this may be true. It is hard to say.[8] But well-organized minorities led by skilled lobbyists are notoriously adept at obtaining legislation that is not in the public interest and would not necessarily be popular (or enacted) if widely discussed. When it invalidates such a statute, the Court, while "anti-majoritarian" in a formal sense, may nonetheless be expressing more broadly-based sentiments than the legislators did when they enacted it.

The McCarran-Ferguson Act[9] is probably a good example of this phenomenon. It permits insurance companies to engage in what amounts to price-fixing with no effective supervision by state regulatory agencies. A well-organized lobby somehow convinced Congress to give its clients such an exemption from the antitrust laws. Would the Court be "expending its political capital" if it invalidated this law?

The Bickel-Choper paradigm also fails to take account of the fact that in our federal system many state and local statutes and ordinances, even if locally popular, are contrary to the wishes of most Americans. A good example is the Texas death penalty statute, which permits a state to execute a mentally retarded convicted murderer if the defendant cannot pass the state's test for legal insanity, and without permitting the jury to consider retardation as a mitigating factor. The Supreme Court recently upheld such a statute.[10] Although the statute may not be "special interest" legislation within Texas, it represents the policy of only one state, and may be quite contrary to the wishes of most Americans. The Missouri abortion restrictions recently upheld in *Webster* may be another example.

The Bickel-Choper paradigm also needs to be reconsidered in

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7. *Id.* at 26.

8. But some appear to believe that much if not most legislation does more harm than good. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 495-507 (3d ed. 1986).

9. 15 U.S.C. §§ 1011-1013 (1986).

10. Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

another fundamental way. The paradigm suggests that politicians want to do what most citizens want, and that they as much as the citizenry feel injured when the Court strikes down controversial statutes, or at least that they are likely to retaliate against the Court for offending their constituents. An alternative hypothesis is that Congress wants a powerful Supreme Court, even if—perhaps sometimes especially if—the Court makes politically unpopular decisions. The Supreme Court is Congress's lightning rod. The real reason Congress is reluctant to whip the Supreme Court in the wake of controversial decisions is not that the Court has more power or prestige than Congress can control. Quite the contrary. The Court shields the members of both Congress and the state legislatures from the need to make politically unpopular decisions. *Roe v. Wade* makes it possible for a member of Congress to have it both ways on the abortion question. How many congressmen and how many state legislators publicly criticize *Roe* and perhaps in some cases even privately believe that it was wrong, but secretly hope that it is never overruled? *Roe* shields them from a great political danger; the Republican candidate for Governor of Virginia, among others, has cause to wish that *Webster* had not removed part of that shield.

On this hypothesis, one would not generally expect to see Congress reducing the jurisdiction of the Supreme Court in the wake of a controversial decision. Legislators need a Supreme Court that is making controversial decisions so that they themselves do not have to make them. In such situations, activism enhances the Court's safety even if it decreases its popularity. Whether one applauds or deplores this covert alliance between judges and politicians, it undoubtedly helps to explain the Court's ability to hand down unpopular decisions.

JERRY FALWELL v. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL. By Rodney A. Smolla.[1] New York: St. Martin's Press. 1989. Pp. xi, 336. $18.95.

L.A. Powe, Jr.[2]

Almost too good to be true: *Hustler Magazine* v. the Moral Majority; Larry Flynt v. Jerry Falwell—two men who offer proof that if you go far enough along a social and political spectrum, the

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