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FRAGMENTATION OF THE SUPREME COURT: AN INQUIRY INTO CAUSES

*Louis Lusky**

It is time to dispel a small cloud that shadows the memory of a great man. I have hesitated to speak out, for fear of lending significance to a relatively minor criticism by superficial observers. Harlan Fiske Stone was a towering judicial figure, a courageous pillar of the law at a time of troubles—and, considering the difficulties that beset him and his Court, a Chief Justice of unsurpassed effectiveness. His place is secure, and needs no explanation or defense. Yet I am impelled to speak because, as Judge Charles Wyzanski, Jr. reminded lawyers and law teachers in his 1975 Sulzbacher Lecture,¹ today's students suffer from a desperate shortage of the sustaining encouragement that comes only from learning what can be accomplished in a short lifetime. Wyzanski rightly observed that available role models are few and far between in this era of disillusionment. The reason I speak to attack a misconception of long standing is that this rare and precious model ought not be blurred, however slightly, by even a single unjustified blemish.²

The misconception is that Stone's administration of the Court as Chief Justice was deficient on the score of leadership, and that the increasing fragmentation of views during his tenure³—symptomized by a significant increase in the number of concurring and dissenting opinions—resulted from his inability to induce his colleagues to waive small differences and act in concert. Chief Justice Taft once

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1. See Address by Hon. Charles Wyzanski, Jr., *The Third Sulzbacher Memorial Lecture*, 7 COLUM. HUMAN RIGHTS L. REV. 405, 408-09 (Fall-Winter 1975-76) (delivered at Columbia Law School, November 12, 1975).

2. What brought this matter to mind after so many years was my review of the Stone Court's performance for an article I submitted this spring for publication in a legal encyclopedia.

3. He was sworn in as Chief Justice on July 3, 1941, and served until April 22, 1946, the day he died.

called this process "massing the Court," as descriptive a short phrase as any.⁴

Fragmentation did indeed occur. Here are pertinent statistics for two terms of court during the middle part of the tenure of Stone's predecessor, Chief Justice Charles Evans Hughes; for Hughes's last term; for Stone's last term; and (for a reason that will presently appear) for the 1979-80 Term.⁵

TABLE I⁶
Annual Terms of Court

	1936-37	1937-38	1940-41	1945-46	1979-80
(a) Majority Opinions ("Opinions of the Court")	149	152	165	136	149
(b) Concurring Opinions	1	10	5	42	79
(c) Dissenting Opinions	17	25	42	69	156
(d) Total Opinions	167	187	212	247	384

The figures show that the Justices were expressing their individual views with ever greater freedom as the years passed. The numerical increase in dissenting opinions is striking enough, but the increase in concurring opinions is even more significant.

Alfred McCormack, who was Stone's law clerk at the 1925 Term, wrote later: "In those days there was no premium on dissents. Even Holmes and Brandeis, the great dissenters, sometimes refrained from noting disagreement in cases where their individual

4. See *infra* text accompanying note 15.

5. See *infra* text following Table II at note 30.

6. The figures for the 1936-37, 1937-38 and 1979-80 Terms are taken from articles published regularly in the *Harvard Law Review*. *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 HARV. L. REV. 579, 596-98 (1940) (indicating the figures for the 1936-37 and 1937-38 terms); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 1, 289 (1980) (indicating the figures for the 1979-80 term). These statistical reports lapsed during World War II. The figures for the 1940-41 Term have been determined by direct examination of Volumes 311-13 of the U.S. Reports. For the 1945-46 Term, the figures are taken partly from the *Annual Report of the Director of the Administrative Office of the United States Courts*, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 73 (1946) [hereinafter cited as *Annual Report*]. That source, however, does not provide the detailed figures with regard to dissents and concurrences; they have been taken from *Review of Supreme Court's Work*, 14 U.S.L.W. 3443 (1946). The same sources are used for Table II, *infra*, text accompanying note 30.

votes had been adverse. . . .”⁷ It will be recalled that a number of extensively researched and documented Brandeis dissents were drafted and circulated to the Justices but never saw daylight until after his death, when Alexander Bickel (once his law clerk) compiled them under the title, *The Unpublished Opinions of Mr. Justice Brandeis*.⁸ Even when the Court divided, the published report often showed only the naked fact that a particular Justice dissented—or, occasionally, that he remained *dubitante*. It was indeed a rare event for a Justice to dissent from (or explain his concurrence in) a decision on the preliminary application for review.⁹ All that, of course, has now changed.

As for the growing frequency of concurring opinions, the numerical increase is less pronounced than in the case of dissents, but the contrast with earlier practice is still more striking. During the 1937 term, when I served as Justice Stone’s law clerk, a simple concurrence in the result—without explanatory opinion or some self-evident and plausible alternative cause—was considered insulting; the implication was that the defects in the main opinion were too obvious or too pervasive to justify the time and effort needed for a special opinion. Scuttlebutt had it that Justice John H. Clarke’s resignation in 1922 at the age of 65, after only six years on the Court (he lived until 1945), was at least partly due to harassment by Justice McReynolds; and, it was said, one of McReynolds’ tactics was to refuse as a matter of course to go along with Clarke’s opinions for the Court—instead, concurring in the result without opinion. Another bit of gossip was that Justice Butler, unwilling to concede the legitimacy of law journal citations as documentation, withheld his approval from any opinion that relied on such authority, and—to register his protest—likewise concurred in the result without opinion. The relevance of these ancient oddities (and of the more usual situation, where opinionless concurrence was and is resorted to for some such

7. McCormack, *A Law Clerk’s Recollections*, 46 COLUM. L. REV. 710, 712 (1946). In 1938, when I was Justice Stone’s law clerk, he told me he regretted not having publicized his dissenting vote in *Gitlow v. New York*, 268 U.S. 652 (1925). He said he had refrained because he had just come on the Court and was feeling his way cautiously. Nor did he publicize his vote against dismissing, for want of a substantial federal question, the first two Jehovah’s Witness Flag Salute cases, *Leoles v. Landers*, 302 U.S. 656 (1937) and *Hering v. State Board of Education*, 303 U.S. 624 (1938).

8. A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* (1957).

9. For a rare exception, see *Herndon v. Georgia*, 295 U.S. 441, 446 (1935) (Cardozo, J., dissenting). It is safe to assume that the majority opinion would not have been written, but for Justice Cardozo’s determination to publish his powerful dissent.

conventional reason as expediting the announcement of decision) is, of course, that in none of these situations has a concurring *opinion* been written. Therefore, the above statistics on concurring opinions do not reflect such concurrences.

Beyond this: There was a time when a very great deal of time and effort went into the crafting of opinions that could and would be joined by as many Justices as possible. In this connection, an understanding of the mechanics is essential. The Court's practice is to vote on the *decision* in a conference held at the end of the week in which oral argument has been heard. The task of writing the Court's opinion is then assigned to one of the Justices who has voted for the prevailing result. That Justice knows fairly well, from views expressed at the conference, what points he must handle with particular care to win the assent of colleagues who have voted with him. He also knows what points have troubled the dissenters (if any) and can sometimes draft the opinion in such a way as to avoid or even satisfy the objections that trouble them.

But the task is not finished. The embryonic opinion of the Court, rapidly set up in page proof, is carried by messenger to all the Justices. They in turn examine it as a matter of priority and react quickly by advising that they assent, that they cannot assent and will write separately, or that they disagree—*usually saying why*. At the 1937-38 Term I observed that specification of the particulars of disagreement led almost always to the redrafting and recirculation of the opinion in an effort to avoid or satisfy the stated objection.¹⁰ Not infrequently, such alterations gave rise to new objections, and a further redraft and recirculation followed. Plainly, the process took a lot of the Justices' time; but in an era when the Court's caseload was less than a fourth as large as it is today,¹¹ the Court could spare the time and still keep current on its work.¹²

The earlier statistics unequivocally reflect the result of these labors. Despite the seismic convulsions that shook the Court in the

10. For example, the *Carolene Products* Footnote (*United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)) was redrafted to accommodate a point raised by Chief Justice Hughes. See L. LUSKY, *BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* 110 (1975) (*supplemented by id.*, *Author's Foreword to Second Printing* (1978)) [hereinafter cited as LUSKY, *BY WHAT RIGHT?*]; Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

11. *Compare Annual Report*, *supra* note 6, with the corresponding report for the 1979-80 Term, at 353.

12. See Letter from Chief Justice Hughes to Senator Burton K. Wheeler (March 21, 1937), *reprinted in* S. REP. NO. 711, 75th Cong., 1st Sess. 38 (1937).

middle 1930s, when it suffered complete polarization in passing judgment on the economic and social innovations of the Roosevelt New Deal, the Justices managed to preserve unimpaired the tradition of articulating the prevailing position (as well as its supporting rationale) with a single voice. And it was unusual for dissenters to fail to join in a single minority opinion. All that, too, has now changed.¹³

Table I tells the tale. It quantifies the dramatic numerical increase in concurring and dissenting opinions over the years.

The "Court-watchers" who attributed the increasing fragmentation of views during Stone's Chiefship to his lack of leadership did not have to base their criticism on the statistical record alone. They could adduce as corroboration an appraisal of Stone made by an expert witness possessing virtually unique qualifications: Chief Justice William Howard Taft. Moreover, Taft had pronounced his appraisal in circumstances that encouraged reliance upon it. The year was 1929. After a strenuous career the worn septuagenarian's iron constitution was beginning to fail, his 300-pound frame starting to dwindle to the mere shadow it eventually became. He was fully aware that he would soon be leaving the Court, and he showed himself to be actively interested in the choice of a worthy successor. Views made known at such a time, by such a personage, are not to be dismissed as casual chatter; their context guarantees their deadly seriousness. Uttered *sub specie aeternitatis*, they command as much respect as a deathbed testament.

As the state of Taft's health became common knowledge, public speculation grew as to who would succeed him; and Justice Stone soon emerged as the most likely choice. Alpheus T. Mason, in his Stone biography, provides a graphic description:

On September 10 Justice Butler passed along to the Chief Justice a very disturbing rumor. "My Secretary," Butler wrote, "heard Sater, the Associated Press man, tell a group in the Clerk's office that the President has told the newspapermen that he intends to make Stone Chief Justice. Sater was not present on the occasion referred to. It seems to be unbelievable that Hoover would do that. There is no vacancy and he has no right to assume that there will be one during the present term of Presidency. We all hope and believe that there will be none. Moreover, there would be no reason for making the announcement now even if it is the present purpose

13. See, e.g., Lusky, *Public Trial and Public Right: The Missing Bottom Line*, 8 HOFSTRA L. REV. 273 *passim* (1980).

to nominate Stone if and when there is opportunity.

"However," Butler continued, "there has been enough of publicity in reference to Stone's elevation—when taken in connection with the President's known desire to have him for Attorney General, Secretary of State, and head of the Law Enforcement Commission, to indicate that there is an understanding between them and a purpose—even with indecent haste—to reorganize the Court for the accomplishment of some purpose."

The Chief Justice replied laconically September 14: "What you say with reference to Stone's promotion to succeed me, I have no doubt has a good deal of truth in it, and it can hardly be called news."¹⁴

There is no doubt that Hoover and Stone had been cordial friends ever since they served together in the Coolidge cabinet. Even after Stone was appointed to the Court in 1925, the personal relationship continued; I remember, for example, the white medicine ball that always occupied a corner of Stone's great desk—a memento of his membership in Hoover's "medicine ball cabinet"—flaunting the autographs of the select group of statesmen who took their exercise on the White House lawn in the early mornings. At the age of 57, with five years experience on the Court and a distinguished career as law school dean, legal scholar, practicing lawyer, and Attorney General, he seemed to possess all the qualifications.

Taft, however, had doubts. According to Mason, Taft believed that Hoover would be making a great mistake in appointing Stone, "for the reason that Stone is not a leader and would have a good deal of difficulty in massing the Court."¹⁵ Given the depth of Taft's concern and his known readiness to go outside the Court in preserving its well-being as he conceived it, one may safely assume that he made his views known to Hoover. In any event, they were known to the "Court-watchers" who—along with everyone else—very soon observed also that when Taft resigned, on February 3, 1930, it was not Stone, but the 68-year-old Charles Evans Hughes whom Hoover selected to take his place.

Eleven years later, when Stone in turn succeeded Hughes on the center throne, those professional observers doubtless waited with interest to learn whether Taft's prophecy would prove accurate. When the above-tabulated statistics shaped up as they did down through

14. A.T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 274-75 (1956) (footnote omitted).

15. *Id.* at 275 (quoting Taft's letter of March 12, 1929 to his kinsman, Charles P. Taft).

the 1945-46 Term,¹⁶ those worthies saw no escaping the conclusion that lack of leadership had led to the fragmentation that the figures reflected.

In my opinion, however, they were deceived. A more careful analysis of the data and an examination of other evidence not yet mentioned afford strong reason to believe that the fragmentation resulted mainly, if not entirely, from two pervasive and persistent centrifugal influences that *no* Chief Justice could have countered (and, indeed, no later Chief Justice has in fact been able to resist to the extent that Stone did). One was an ill-starred innovation that Justice Frankfurter took upon himself to introduce in 1939.¹⁷ The other was the whole Court's steadily accelerating movement toward formulation of new constitutional rules not fairly derivable by interpretation from the text of the Constitution or its formally ratified amendments.¹⁸ Now for the particulars.

*Graves v. New York ex rel. O'Keefe*¹⁹ came on for decision in the spring of 1939. The issue was whether employees of the Home Owner Loan Corporation, a federal agency, were constitutionally immune from New York state income taxation. Only two years before, in an almost precisely comparable case, the Court had upheld an immunity claim.²⁰ Since then, however, Stone's great opinion for the Court in *Helvering v. Gerhardt*²¹ had established a beachhead for a new and less mechanical and conceptualistic approach to the inter-governmental immunity doctrine; and in the *O'Keefe* case Stone circulated to the Justices an opinion greatly enlarging that beachhead—overruling not only the 1937 precedent²² that had led the lower court to uphold O'Keefe's immunity claim, but also *Collector v. Day*,²³ the venerable precedent from which the doctrine of derivative immunity²⁴ had sprung.

At that time the Court had only eight members, Justice Brandeis having retired in February. At conference McReynolds and Butler had made it clear that they favored affirmance of the judgment below and would dissent. The Chief Justice voted for reversal but it

16. See *supra* Table I accompanying note 6.

17. See *infra* text accompanying notes 19-29.

18. See *infra* text accompanying notes 33-38.

19. 306 U.S. 466 (1939).

20. *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937).

21. 304 U.S. 405 (1938).

22. *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937).

23. 78 U.S. (11 Wall.) 113 (1870).

24. *I.e.*, immunity derived from some type of relationship with an immune government.

was uncertain that he would join a bold effort by Stone to conform the law still more closely to the economic realities. That left Stone, Roberts, Reed, Black, and Frankfurter—a bare majority of the sitting Justices, but enough to render an opinion of the Court even if the Chief did not join.

Frankfurter, however, who had come to the Court from the Harvard Law School faculty only a short while before, had grown accustomed to the professorial independence he had enjoyed for decades in Cambridge. More than any other Justice he must have felt cramped by the Court's tradition of striving toward unanimity.²⁵ He very soon determined to declare his continued independence, and chose the *O'Keefe* case as the occasion. His concurring opinion, mistakenly attributing the existing tradition of laboring for a single opinion of the Court to nothing more than the modern Court's heavy caseload, begins with this fateful pronouncement:

I join in the Court's opinion but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early [pre-1800] healthy practice whereby the Justices gave expression to individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court.²⁶

On the merits of the case, Frankfurter said Stone should have gone further and overruled an additional precedent, *Dobbins v. Erie County*,²⁷ which Stone had left unmentioned because he thought it was arguably distinguishable from the other two discards.²⁸ Mason, quoting a letter Stone wrote to Frankfurter on March 23, 1939, upon circulation of the concurrence to the Justices, tells us:

The *Dobbins* case . . . had invalidated a state tax laid directly on a federal office, though measured by the salary of the incumbent. As Stone understood immunity, such a tax might still be unconstitutional. In any case, innate caution led him to think judges should "hear argument in a specific case before expressing an opinion." He had purposely written the *O'Keefe* case as "narrowly" as he could. "I think it of importance," he told Frankfurter, "that we proceed to effect as widely extended a reform as the present one in

25. See *supra* text accompanying note 10.

26. 306 U.S. at 487 (Frankfurter, J., concurring) (footnote omitted).

27. 41 U.S. (16 Pet.) 435 (1842).

28. *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870).

just this way, step by step, if possible." He very much wanted his opinion that of the Court. "As the matter now stands," he reminded the concurring Justice, "unless the Chief Justice comes in, it will require agreement by all those who voted to reverse in order to get an opinion of the Court. . . . If that cannot be accomplished," he exclaimed somewhat petulantly, "it would perhaps be as well to settle the matter by announcing our vote, without opinion, as the Court did in the Prohibition cases."²⁹

Stone's remonstrance evidently did have one effect, albeit a relatively limited one. One can assume from his letter that, as initially circulated, Frankfurter's concurrence lacked the opening words quoted above ("I join in the Court's opinion but . . ."); that phrase must have been inserted later to give Stone the fourth assent he needed to be sure his opinion would appear in the Court's name. Hughes, presumably then realizing that nothing was to be gained by withholding his own assent, finally granted it. Aside from this slight concession (if, indeed, concession it was), Frankfurter would not be diverted.

It was a disastrous move. Despite his long and distinguished career as a constitutional law scholar and teacher, Frankfurter was a novice as a judge. He failed to appreciate how directly both the substance and the appearance of the rule of law, as well as the Court's own prestige, depended on its practice of speaking with a single voice—if, and to the extent that, it was at all able to do so. Moreover, he underestimated the eagerness with which his colleagues—and, even more readily, future Justices—would follow his lead. Every one of them had been an outspoken public man until he became a judge, and had accepted the monkish self-restraint of judicial office only under constraint of tradition and peer pressure. Now Frankfurter had announced that the ventilation of individual views, at least when new doctrine was being formulated by new Justices (an increasingly common event; and anyway, why in that situation only?), far from being blameworthy, was downright praiseworthy. The novice had lifted the lid of Pandora's box.

It would be an overstatement to attribute the increasing fragmentation in the years since 1939 to this cause alone. There was in fact a second contributing factor, at least as significant, without which the Frankfurter deviation would have been less consequential. Before examining it, however, let us analyze more carefully the sta-

29. A.T. MASON, *supra* note 14, at 510 (footnote omitted).

tistics contained in Table I and reflect upon their meaning. Table II contains one additional datum—the number of dissenting votes in each term (as distinguished from the number of dissenting opinions) and two sets of ratios (one set expressed as percentages) that are sufficiently described in the Table.

TABLE II³⁰

		Annual Terms of Court				
		1936-37	1937-38	1940-41	1945-46	1979-80
(e)	Dissenting votes	78	91	N.A.	139	362
(f)	Concurring opinions per majority opinion $\left(\frac{b}{a}\right)$ (See Table I for lines (a) and (b)).	0.7%	6.6%	3.0%	30.9%	53.0%
(g)	Dissenting votes per dissenting opinion $\left(\frac{e}{c}\right)$ (See Table I for line (c)).	4.6*	3.6	N.A.	2.0	2.3

N.A. = Not available

* Inclusion of dissents without opinion makes it possible for this number to exceed 4.

Table II brings into focus two trends material to the present discussion. When I have examined them and reviewed their implications, I shall rest my case.

First: Fragmentation of the prevailing position (not infrequently, nowadays, so extreme a scattering that there is *no* opinion of the Court) is quantified in line (f). It began to grow in 1937 or thereabouts, and had become still more pronounced by the time Stone died, in harness, in April of the 1945-46 Term. Even so, the propensity for self-expression was far less general than it was to become; by the 1979-80 Term it had reached 53.0%, *i.e.*, a concurring opinion was written in approximately every second case. The reasonable inference is that the trend has been powered by some influence or influences that originated before Stone became Chief Justice and still remain operative.

Second: Fragmentation of the dissenting position or positions,

30. See *supra* note 6.

quantified by the *diminution* of the figures contained in line (g), has increased by more than a third. That is, whereas dissenting opinions were once typically joined by three or more Justices, the average number now joining has dropped to about two—while the total number of dissenting *votes* has jumped from 139 to 362. The same sustained impetus toward individual expression that would account for fragmentation of the prevailing position would likewise account for this development.

One should bear in mind that the foregoing comparisons do not reflect *substantive* differences among the Justices. Such differences are ascribable to the second of the two centrifugal influences that are referred to above,³¹ which I shall identify more precisely in a moment. As will be seen, that influence was no more attributable to lack of leadership by Stone than was the *O'Keefe* concurrence (published despite his efforts to scotch it). In this connection it should not be forgotten that the 1936-37 and 1937-38 Terms, the two earliest for which figures are given in Tables I and II, witnessed intense pressure on the Court and great strain within it.³² Nevertheless, even while the Justices were dividing almost weekly and excoriating each other's views in the strongest terms, they did not allow their differences on the substantive side to unsettle their adherence to the single-voice tradition.

It remains to pinpoint the second of the two pervasive and persistent centrifugal influences which, in my opinion, account for the fragmentation that has so often been laid at Stone's door. Beginning no later than 1938, the Court began to emancipate itself from the written Constitutional text³³—*i.e.*, to extend judicial review beyond the limits implied by the rationale of *Marbury v. Madison*.³⁴ This expansion of the Court's range of action gradually accelerated, until in 1965 it explicitly acknowledged that a recently adopted constitutional rule had been arrived at not by reinterpretation of the sacred text but by its own action. "It was the judgment of this Court that changed the rule," declared the opinion of the Court.³⁵ Since that

31. See *supra* text accompanying notes 17 and 18.

32. For a readable account, see D. PEARSON & R.S. ALLEN, *THE NINE OLD MEN passim* (1937).

33. In one sense, the Court under John Marshall's leadership began its emancipation almost at birth. That, however, is hindsight; Marshall would have been scandalized at the idea. *Self-awareness* of the emancipation, on a general basis, began perhaps with the *Carolene Products* Footnote (*United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

34. 5 U.S. (1 Cranch) 137 (1803).

35. *Linkletter v. Walker*, 381 U.S. 618, 639 (1965). For analysis and discussion of this

time the proliferation of constitutional innovations has become a virtual explosion. A substantial literature on judicial activism has come into being, to which I have contributed a book-length commentary³⁶—published in 1975, it was one of the first, if not the first, of the contemporary studies in this area—as well as some law journal articles that have illustrated and somewhat broadened the thesis there advanced.³⁷

In those writings I have chronicled the development of which I now speak, and there is neither space to repeat here nor any need to do so. All that is essential for present purposes is the simple fact that the Justices, having cut themselves free from their common basis of agreement, the Constitutional text, have not yet—even now, in 1982—arrived at consensus on a set of postulates that can serve the same purpose. Unless and until they do—and the stated objective of my 1975 book *By What Right?* was to propose a basis for such a fresh consensus and urge its acceptance³⁸—each Justice's urge to explain his own vote may remain overwhelming. That is the second centrifugal influence to which I have referred.

* * * * *

To conclude: I submit that, in light of all the evidence, there is no basis for saying that the Court suffered from any lack of leadership on the part of Chief Justice Stone.

case, see L. LUSKY, *BY WHAT RIGHT?*, *supra* note 10, at 77-79.

36. L. LUSKY, *BY WHAT RIGHT?*, *supra* note 10.

37. *E.g.*, Lusky, *supra* note 13; Lusky, "Government by Judiciary": *What Price Legitimacy?*, 6 HASTINGS CONST. L. Q. 403 (1979).

38. L. LUSKY, *BY WHAT RIGHT?*, *supra* note 10, at 21, 24, 40-41, and 107.