



ON “A TICKET GOOD FOR ONE DAY ONLY”

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ALMOST EVERY LAWYER HAS HEARD the commonplace that one legal decision or another is “a ticket good for one day only.” This metaphor captures the idea that a decision lacks precedential value: it is here today, but gone before tomorrow’s train. The metaphor is powerful because the idea of a one-day-only precedent is almost always viewed with derision. A legal principle, if sound, is expected to survive the day it was decided and to last far into the future – perhaps even forever. The “one-day ticket” metaphor has itself passed that test, persisting in American legal culture for nearly 80 years. Over its long career, the expression has been put to a variety of uses by jurists of every ideological bent, and each usage has its own lessons and ironies.

USAGE 1: TO CRITICIZE INFIDELITY TO PRECEDENT

In February 1936, then-Justice Harlan Fiske Stone wrote a letter to then-Harvard Law School Professor Felix Frankfurter. Stone penned his missive near the height of the historic conflict between the Supreme Court and President Franklin D. Roosevelt over the scope of federal authority to implement the New Deal. Neither correspondent had much love for the recent string of decisions invali-

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dating the President's signature legislation, but Stone focused his ire on the incoherence he had detected in the Court's treatment of precedent. "I can hardly see the use of writing judicial opinions," Stone wrote, "unless they are to embody methods of analysis and of exposition which will serve the profession as a guide to the decision of future cases. If they are not better than an excursion ticket, good for this day and trip only, they do not serve even as protective coloration of the writer of the opinions and would much better be left unsaid."¹ Stone was condemning his own Court (particularly his Chief) for casting aside old lines of reasoning so as to more easily obtain newly desired results.²

The "one-day ticket" metaphor first appeared in the *United States Reports* nearly a decade later in a dissenting opinion by Justice Owen Roberts. Writing only for himself in the 1944 case *Smith v. Allwright*, Roberts explained that "[t]he reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."³ Just as a season pass is only as good as its expiration date, Roberts was saying, judicial precedents become worthless if too often or quickly overruled. To this day, Roberts's use of the "one-day ticket" metaphor is regularly quoted by jurists and legal commentators of all ideological stripes.⁴ In that sense, Roberts's solo dissent – unlike Stone's earlier,

¹ Letter from Justice Stone to Felix Frankfurter (Feb. 25, 1936) (Stone Papers, Library of Congress). A number of widely read histories quote Stone's letter. See ARTHUR M. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL* 483 (2003) (first published 1960); ALPHEUS MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 105-06 (1958)).

² Cf. Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1951 n.300 (1994) ("[Chief Justice Charles Evans] Hughes had a well-known tendency to distinguish cases on very thin grounds, rather than overrule them.").

³ *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

⁴ In addition to the examples in the main text and other notes, see, for example, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 n.1 (1987) (quoting Justice Roberts's maxim); Edward H. Levi, *The Sovereignty of the Courts*, 50 U. CHI. L. REV. 679, 694 (1983) (arguing that, without stare decisis, "judicial opin-

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unpublished usage of the metaphor – has achieved canonical status.

From one standpoint, the success of Roberts's opinion is easy to explain, for it is full of fine rhetoric, even apart from its crisp statement of the "one-day ticket" metaphor. For example, Roberts complained about a rash of recent overrulings – three in the "present term" alone⁵ – in forceful terms familiar to twenty-first-century readers of Supreme Court decisions. "I have no assurance," Roberts wrote, "that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject."⁶ And, in a peroration that calls to mind the much later defense of *stare decisis* in *Planned Parenthood of Southeastern Pa. v. Casey*,⁷ Roberts said it was "regrettable" that a Court obligated to exhibit "consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions."⁸ Liberty, one might say, finds no greater refuge in a one-day ticket than in "a jurisprudence of doubt."⁹

ions would be, as Justice Roberts complained (and almost every United States Supreme Court Justice who sits long enough has sometimes complained) a 'restricted railroad ticket, good for this day and train only'" (citation omitted)); see also Hon. Richard S. Arnold, *Mr. Justice Blackmun: A Tribute*, 28 CREIGHTON L. REV. 589, 589 (1995) ("Once your judicial mind is made up, you should stay hitched. Precedents should not be like railroad tickets, good for one day and one train only." (citation omitted)).

⁵ *Smith*, 321 U.S. at 669 (Roberts, J., dissenting).

⁶ *Id.* at 669 (Roberts, J., dissenting); cf. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 942 (2010) (Stevens, J., dissenting) (arguing that because the "only relevant thing that has changed since *Austin* and *McConnell* [the two cases the Court was overruling] is the composition of this Court," "[t]oday's ruling . . . strikes at the vitals of *stare decisis*"); Linda Greenhouse, *Justices, Voting 5-4, Limit the Use of Race in Integration Plans*, N.Y. TIMES, June 29, 2007, at A1 (quoting Justice Breyer as saying during an oral dissent: "It is not often in the law that so few have so quickly changed so much.").

⁷ 505 U.S. 833, 869 (1992) (plurality opinion).

⁸ *Smith*, 321 U.S. at 670 (Roberts, J., dissenting).

⁹ *Casey*, 505 U.S. at 844.

When viewed in context, however, it is quite surprising that Roberts's *Smith* dissent still enjoys a place in the legal canon. The question in *Smith* was whether Texas's obviously racist "white primary" election system was constitutional, and the eight-justice majority for the Court ruled that it was not. In so holding, the majority had to overrule a prior decision, *Grovey v. Townsend*, that had been written by none other than – Justice Roberts himself.¹⁰ The good Justice thus deployed the "one-day ticket" metaphor to defend his own debunked opinion and to attack one of the era's major rulings in favor of racial justice at the voting booth. Indeed, Thurgood Marshall called *Smith* his most important victory as an advocate before the Supreme Court, even surpassing *Brown v. Board of Education* in importance.¹¹ So, whatever kind of "ticket" it might be, *Smith* offered a trip that any twenty-first-century reader would recognize as well worth the price. Yet Roberts's misguided dissent continues to collect citations, from the Court and beyond.¹²

The "one-day ticket" metaphor also sits uncomfortably within Roberts's larger jurisprudential legacy. As thousands of law students are still taught every year, Roberts was the pivotal Justice who made possible the Court's so-called "switch in time to save nine" in the face of President Roosevelt's court-packing plan.¹³ That famous change of heart helped bring about the abandonment of many pre-New Deal decisions limiting federal power. *Smith* itself can even be viewed as a product of the pro-federal-government legal revolution that Roberts had helped usher in. But Roberts later came to regret the full ramifications of what he had set in motion and so appears in

¹⁰ *Grovey v. Townsend*, 295 U.S. 45 (1935).

¹¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 199 (2009).

¹² See, e.g., text accompanying *infra* note 38.

¹³ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). The reason why Justice Roberts cast his vote the way he did has been the subject of perennial debate. See, e.g., Daniel E. Ho & Kevin M. Quinn, *Did A Switch In Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010) ("In *West Coast Hotel v. Parrish*, Justice Roberts (arguably) reversed course from an earlier case . . .").

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Smith as a stalwart defender of both precedent and state prerogatives. In trumpeting the "one-day ticket" metaphor, Roberts may even have been trying to prove, his alleged "switch in time" notwithstanding, that he really did care about precedent, after all.

Stone, too, experienced a role reversal in *Smith*. As noted earlier, Stone had used the "one-day ticket" metaphor at a time when he was an Associate Justice bitterly dissenting from decisions that were, in his view, unfaithful to precedent. By the time *Smith* came down, however, Stone had become the Chief, and he led a Court remade by a spate of Roosevelt appointments. Now it was Stone's turn to set unwanted precedent aside, including in *Smith* itself. By invoking the "one-day ticket" metaphor that Stone himself had previously used, Roberts may have sought to draw attention to Stone's apparent change of perspective.

USAGE 2: TO INSIST ON EXTENDING PRECEDENT

The enduring popularity of the "one-day ticket" metaphor becomes easier to explain when one considers its next incarnation. Just a year after *Smith*, the Court narrowly decided *Screws v. United States*.¹⁴ This case, too, involved racial oppression in the South: Georgia police, having beaten a black man to death, raised a constitutional challenge to their subsequent federal criminal convictions. As in *Smith*, Justice Roberts wrote a dissenting opinion in favor of state authority – and against vigorous federal enforcement of civil rights.¹⁵

Smith and *Screws* had something else in common: in both cases, one of the key precedents was *United States v. Classic*,¹⁶ which had recently recognized Congress's authority to regulate primary contests for federal elections. In *Smith*, the Court cited *Classic* in support of its decision to outlaw white primaries and overturn Roberts's con-

¹⁴ 325 U.S. 91 (1945).

¹⁵ Even at this late point in his career, Justice Roberts defied easy categorization. *E.g.*, *Korematsu v. United States*, 323 U.S. 214, 225 (1944) (Roberts, J., dissenting) (finding "a clear violation of Constitutional rights").

¹⁶ 313 U.S. 299 (1941).

trary opinion in *Grovey*. In *Screws*, the controlling plurality opinion cited *Classic* to defend the constitutionality of the 1870 federal criminal statute then being used to prosecute murders by racist police.

Writing the lead opinion in *Screws*, Justice William O. Douglas redirected Roberts's rhetorical flourish from the previous term. In *Smith*, Roberts had argued that *Classic* should not be read so broadly as to cast doubt on the limitations on federal power established by other precedents; but now Roberts's new dissent in *Screws* was arguing that *Classic* simply should not be read broadly, full stop. This new position suggested that what really drove Roberts's opinion – in both cases – was that *Classic* was just not of great precedential import. Seeing a rhetorical opportunity, Douglas pressed the advantage in his concluding paragraph: “The rule adopted in [*Classic*] was formulated after mature consideration. It should be good for more than one day only.”¹⁷ Writing those words made them true: *Classic* was thenceforth secure in its status as a foundational decision on federal power.

Douglas's opinion pointed the “one-day ticket” metaphor in a new direction. Whereas Roberts had used the metaphor to oppose *overruling* precedents, Douglas argued that precedents had to be *extended* over time. On this view, any precedent not expanded through common-law decisionmaking might as well be good for one day only. *Classic* thus turned out to be a ticket for a much longer jurisprudential journey than the Court had initially planned. This situation might be compared with *Ring v. Arizona*,¹⁸ where Justice Stephen Breyer agreed with the Court's result, but not its reliance on an earlier precedent, *Apprendi v. New Jersey*.¹⁹ Justice Antonin Scalia responded that Breyer was “on the wrong flight,” and urged him to “either get off before the doors close, or buy a ticket to *Apprendi*-land.”²⁰ Confronted with a similar choice, Roberts had plainly

¹⁷ *Screws*, 325 U.S. at 112 (plurality opinion); see also *id.* at 121-22 (Rutledge, J., concurring in the judgment).

¹⁸ 536 U.S. 584 (2002).

¹⁹ 530 U.S. 466 (2000).

²⁰ *Ring*, 536 U.S. at 613 (Scalia, J., concurring).

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decided not to "buy a ticket" to "Classic-land" and, as a result, was increasingly being left behind by history. Interestingly, Douglas didn't cite Roberts's recent *Smith* dissent – perhaps because, to its intended audience, the connection was obvious.

Having thus turned Roberts's best rhetoric against him, Douglas later consolidated his appropriation of the "one-day ticket" metaphor. In the important 1961 decision *Monroe v. Pape*, which helped breathe life into what are now known as "Section 1983" lawsuits, Douglas wrote the opinion for the Court and addressed the legal meaning of the term of art "under color of state law."²¹ Douglas block-quoted his own earlier discussion from *Screws*, including its treatment of *Classic* and its related deployment of the "one-day ticket" metaphor.²² That move guaranteed that the "one-day ticket" expression would have a large readership throughout the remainder of the twentieth century – and that it would be associated with a vibrant area of law.

USAGE 3: TO CRITICIZE FACTBOUND PRECEDENTS

Today, the "one-day ticket" metaphor is most frequently used in a way perhaps best exemplified by the writings of Chief Justice William Rehnquist. Whereas Justice Roberts had used the metaphor to insist on adherence to established precedents, Rehnquist used it to complain about new decisions that were made artificially narrow in order to achieve attractive results, without establishing prospectively binding rules.²³ These decisions find application just once before pass-

²¹ *Monroe v. Pape*, 365 U.S. 167 (1961).

²² See *id.* at 184-85.

²³ See Ward Farnsworth, "To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness, 86 MINN. L. REV. 227, 235-36 n.32 (2010) ("Justice Roberts was using the expression to describe his fear that the Court's practice of overruling its own precedents would come to make its decisions seem only temporary; the train ticket metaphor, however, has since become a general way to refer to decisions that, when they are made, are not meant to have precedential significance."); e.g., Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 236 (1985) ("[A]ny ad hoc norm elaboration is, in theory, like a ticket good for a specific trip only.").

ing quietly into desuetude, even if they are never actually overruled.

In *County of Washington v. Gunther*, for example, then-Justice Rehnquist wrote the dissent in a closely divided Title VII case.²⁴ “The Court correctly emphasizes that its decision is narrow,” Rehnquist explained, “and indeed one searches the Court’s opinion in vain for a hint as to what pleadings or proof other than that adduced in this particular case, would be sufficient.”²⁵ Having thus set the stage, Rehnquist delivered the punch line: “One has the sense that the decision today will be treated like a restricted railroad ticket, ‘good for this day and train only.’”²⁶ This cited use of Roberts’s forceful rhetoric attracted considerable attention, and a number of commentators subsequently debated whether and to what extent Rehnquist’s “one-day ticket” assessment was accurate.²⁷

Another, more recent example appeared in *Elk Grove Unified School District v. Newdow*, which involved an Establishment Clause challenge to the pledge of allegiance.²⁸ A slim majority of the Court ducked this hot-button issue by finding that, because the plaintiff lacked legal custody over his school-age daughter, he also lacked prudential standing to raise a claim on her behalf. Rehnquist, by then Chief Justice, was among the minority who believed that the Court’s prudential standing holding was little more than an opportunistic evasion of the merits. Rehnquist accordingly punctuated his separate writing with the following observation: “Although the Court may have succeeded in confining this novel principle almost narrowly enough to be, like the proverbial excursion ticket – good

²⁴ 452 U.S. 161 (1981).

²⁵ *Id.* at 183 (Rehnquist, J., dissenting).

²⁶ *Id.* (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)).

²⁷ See, e.g., Cotton M. Lindsay & Charles A. Shanor, *County of Washington v. Gunther: Economic and Legal Considerations for Resolving Sex-Based Wage Discrimination Cases*, 1 SUP. CT. ECON. REV. 185, 186 (1982) (“The dissent voiced a legitimate uncertainty over whether the decision would be carefully restricted to its facts and thus create ‘a restricted railroad ticket “good for this day and train only,”’ or would have broader ramifications.”).

²⁸ 542 U.S. 1 (2004).

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for this day only – our doctrine of prudential standing should be governed by general principles, rather than ad hoc improvisations.”²⁹ Interestingly, this formulation of the metaphor, particularly its reference to an “excursion ticket,” more closely tracks Stone’s version than Roberts’s.³⁰

Given his role in popularizing the “one-day ticket” metaphor as a way of criticizing artificially narrowed decisions, it is a little ironic that Rehnquist himself joined the modern opinion most closely associated with that trope. The decision in question is *Bush v. Gore*, where a 5-4 majority of the Court resolved an intensely disputed presidential election while relying on an equal protection rationale often viewed as anomalous. The Court also noted, almost in passing, that “[o]ur consideration is limited to the present circumstances.”³¹ This remark echoed prior decisions involving contested issues of presidential politics.³² Under the circumstances, however, many readers felt that the Court’s disclaimer amounted to the announcement of an imminent expiration date.³³ Here today, gone tomorrow.

²⁹ *Id.* at 25 (Rehnquist, C.J., concurring in the judgment).

³⁰ See also *Stone v. Guerrero*, 970 F.2d 626, 638 (9th Cir. 1992) (explaining that General MacArthur “did not issue an excursion ticket that was good for one day only”).

³¹ 531 U.S. 98, 109 (2000).

³² See, e.g., *United States v. Nixon*, 418 U.S. 683, 697 (1974) (reaching its holding “[i]n light of the uniqueness of the setting in which the conflict arises”).

³³ See, e.g., Adam Liptak, *Caperton After Citizens United*, 52 ARIZ. L. REV. 203, 203 (2010) (noting “the suggestion in *Bush v. Gore* that some decisions are tickets good for one ride only”); Pamela Karlan, *Exit Strategies in Constitutional Law: Lessons For Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 695 (2002) (“And so, in words ironically written by a Justice in another voting-rights case nearly sixty years earlier, ‘the instant decision . . . tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only.’”); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001) (asserting that *Bush v. Gore* is “the classic ‘good for this train, and this train only’ offer”); *The Prime Time Election, from Courtroom to Newsroom: The Media and the Legal Resolution of the 2000 Presidential Election*, 13 CARDOZO STUD. L. & LIT. 1, 95 (2001) (Sanford Levinson: “[O]ne of the most offensive features of *Bush v. Gore* for a lot of us is what has come to be known as the ‘this ticket good for one trip only’ aspect of the case.”).

USAGE 4:
TO CRITICIZE UNBOUNDED HOLDINGS

One of the most recent examples of the “one-day ticket” metaphor appeared in Justice Breyer’s four-justice dissenting opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.³⁴ The case primarily raised the question whether executive branch officers could be insulated from presidential removal by not one, but two layers of for-cause tenure protection. The Court answered in the negative, and so held that members of the Public Company Accounting Oversight Board (PCAOB) could not be removable only for cause by the Securities and Exchange Commission, whose members (the Court assumed) were likewise removable only for cause. The Court emphasized that its narrow holding, though prospectively important, would have little immediate impact beyond the PCAOB.³⁵

Justice Breyer was not so sure. As Judge Henry Friendly famously observed, dissenting opinions often exaggerate the implications of controversial majority decisions,³⁶ and Breyer’s *PCAOB* dissent arguably succumbed to that temptation. Contending that the Court’s rule could have sweeping implications for a wide range of imperiled federal agencies – he listed no fewer than 48 in an impressive appendix, along with a comparable number of doubly tenure-protected federal officers – Breyer insisted that the Court’s “mechanical rule cannot be cabined simply by saying that, *perhaps*, the rule does not apply to instances that, at least at first blush, seem highly similar.”³⁷ Breyer then quoted from Justice Roberts’s *Smith* dissent: “A judicial holding by its very nature is not ‘a restricted rail-

³⁴ 130 S. Ct. 3138 (2010).

³⁵ *Id.* at 3160-61 (noting that “the very size and variety of the Federal Government . . . discourage general pronouncements on matters neither briefed nor argued here”).

³⁶ *United States v. Travers*, 514 F.2d 1171, 1174 (2d Cir. 1974) (“Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority’s ruling . . .”).

³⁷ *PCAOB*, 130 S. Ct. at 3178 (Breyer, J., dissenting).

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road ticket, good for' one 'day and train only.'"³⁸ Whereas Chief Justice Rehnquist had used the "one-day ticket" metaphor to condemn opinions that had been narrowed artificially, Breyer appeared to be saying that the Court *couldn't* narrow the scope of its holding to the facts before it, even if it wanted to. Because every judicial decision is precedential "by its very nature,"³⁹ the Court's ruling in *PCAOB* threatened unforeseeable future applications that could not simply be wished away.

Remarkably, the "one-day ticket" metaphor appeared on both sides of the debate in *PCAOB*. In the Court of Appeals, Judge Brett M. Kavanaugh's *PCAOB* dissent pointed out that while the government defended the constitutionality of the PCAOB, "the superb counsel from DOJ refused to say that the structure of the PCAOB would be permissible in *any* analogous situation, strongly implying that the Executive Branch's position is a ticket good for this train and this day only."⁴⁰ The Supreme Court continued that general theme, pointing out that the noncommittal government "was unwilling to concede that even *five* layers between the President and the Board would be too many."⁴¹ This line of reasoning suggests that Breyer's insistence on a sharply limited holding was a two-edged sword. Perhaps the Court's holding would eventually have to be cabined, as Breyer alleged. But the same appeared to be true of the government's position, which Breyer accepted. So the choice wasn't really between a one-day ticket and a timeless opinion. Rather, both options before the Court seemed to invite and even require reassessment over time.



Could Justice Breyer and the other judges who use the "one-day ticket" metaphor actually have it backwards? Since cases never determine their own longevity, whether a precedential journey lasts

³⁸ *Id.* (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)).

³⁹ *Id.*

⁴⁰ 537 F.3d 667, 713 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

⁴¹ 130 S. Ct. at 3154.

a day or a century always depends on later rulings yet to be decided. In that sense, every judicial principle is, “by its very nature,” a “restricted ticket”⁴² – presumptively destined to expire, if not tomorrow, then at some point in the indefinite future. While some cases echo through the ages, most do not; and, in practice, even fair-minded judicial principles can have expiration dates.⁴³ That at least appears to be the moral of *PCAOB*, where the Court was faced with two options, neither of which offered permanent analytical clarity. And it also seems to be the lesson of Justice Roberts’s lamentable dissent in *Smith*, which enlisted the now-venerable “one-day ticket” metaphor in the service of an obviously misbegotten precedent that could not have been abandoned quickly enough. Ditto for Justice Douglas, who used old tickets to reach unexpected destinations, and for Chief Justice Rehnquist, who provoked debates about the scope of ambiguously confined rulings. All these cases involved precedents of uncertain duration, thereby raising the ever-present question whether a past decision, though once esteemed, has finally run its course. Justice Benjamin N. Cardozo made a similar point in aphorizing that courts must always guard against the “tendency of a principle to expand itself to the limit of its logic,” and beyond.⁴⁴ One might say that there is a point on every train trip when it comes time to disembark. The trick is catching the right stop.



⁴² *PCAOB*, 130 S. Ct. at 3178 (Breyer, J., dissenting).

⁴³ *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

⁴⁴ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921).