



INSIDE THE MARBLE PALACE

THE DOMESTICATION OF THE SUPREME COURT

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Reviewing

CHRISTOPHER BUCKLEY, *SUPREME COURTSHIP*
(Twelve 2008)

CHRISTOPHER BUCKLEY'S recent comic novel, *Supreme Courtship*, joins a small but revealing class of fictions that consider the question of what qualifies someone to sit on the Supreme Court. These fictions have little interest in the usual criteria – legal credentials, professional experience, ideology – that dominate discussions about selecting the right Justice. Instead, they focus on the human element, asking a more intriguing question: What sort of person deserves to be a Justice? Buckley's novel answers that question by stripping away the Court's legal trappings to identify its mission as simply doing justice by grounding its decisions in the morality of everyday life. In the world of his novel, the law is often the problem, not the solution, and the right sort of Justice turns out to be the one who views the law not through the narrow lens of doctrinal precedent but through the more generous lens of human experience and common sense.

Buckley's image of a humanized Court is not one that the Court itself has tended to embrace, at least until very recently. For much

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of the twentieth century, the Supreme Court – unlike the two other branches of government – preserved its aura of dignity and remoteness. It was assisted in that effort by the opening of its first permanent home, a classical courthouse so majestic that Chief Justice Stone confessed that he felt like “a beetle entering the Temple of Karnak” when the Court took occupancy in 1935.¹ Justices, even those who came directly to the Court from political careers, generally kept low public profiles, with the notable exception of Justice William O. Douglas, whose public and private adventures, including multiple divorces and remarriages, disturbed even his closest ally on the bench.² The Court’s remoteness from national life was reflected in its absence from the popular culture of the day. Only another exceptional Justice, Oliver Wendell Holmes, broke the mold when he became the subject of a popular 1946 biographical play.³ Otherwise, novelists, playwrights, and filmmakers found little of use in the figure of the Supreme Court Justice.

That changed in the wake of *Brown v. Board of Education*,⁴ the Court’s 1954 landmark school desegregation decision that made clear the potent role the Court’s decisions played in the daily lives of millions of Americans. And writers took notice. In the 1950s and 1960s, several novelists, beginning with Allen Drury in *Advise and Consent*,⁵ introduced Supreme Court Justices as characters in their fictions. Justices started appearing in other cultural venues as well: in *New Yorker* cartoons,⁶ in detective fiction, on Broadway, in Hollywood, and on television.⁷ Although a number of these fictional

¹ WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 31 (1987).

² BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 297-99, 373-74, 396-98 (2003).

³ EMMET LAVERY, *THE MAGNIFICENT YANKEE* (1946).

⁴ 347 U.S. 483 (1954).

⁵ ALLEN DRURY, *ADVISE AND CONSENT* (1959).

⁶ For an examination of *New Yorker* cartoons about the Court, see Laura Krugman Ray, *Laughter at the Court: The Supreme Court as a Source of Humor*, 79 S. CAL. L. REV. 1397 (2006).

⁷ Laura Krugman Ray, *Judicial Fictions: Images of Supreme Court Justices in the Novel*,

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Justices were presented as down-to-earth characters with emotional as well as professional lives, their creators tended to avoid commingling the personal and the judicial strands.

Two Hollywood movies illustrate the lingering reluctance to humanize the Court by their refusal to allow romance to enter the marble palace. The films, one released more than a decade before *Brown* in 1942 and the other almost forty years later, nonetheless share a sense that even the Justices' private lives belong to the Court rather than to the world of romantic engagement. The first of these films, *The Talk of the Town*,⁸ co-authored by the novelist Irwin Shaw and the screenwriter Sidney Buchman, creates a romantic triangle in which the heroine must ultimately choose between the chilly, professorial Michael Lightcap, a Supreme Court nominee who views the law as a rational construct distinct from what he dismisses as the "small emotions" of ordinary life, and Leopold Dilg, a vibrant, iconoclastic activist who believes that Lightcap must be "thawed" before he can be trusted to join the Court. After his emotional education in the human dimension of the law is complete, Lightcap joins the Court but loses the girl, who flees the Supreme Court building with Dilg after seeing her admired but rejected suitor take his seat on the bench for the first time.

The second film, *First Monday in October*,⁹ goes a step further and teases the audience with a possible romance between Supreme Court Justices before pulling back from the personal to the professional. Based on a 1978 play by Jerome Lawrence and Robert E. Lee, the film adaptation of *First Monday* appeared, fortuitously, in 1981, just as Sandra Day O'Connor became the first woman named to the Court. As its protagonists, the conservative new appointee Ruth Loomis and the venerable liberal lion Dan Snow, spar over the law, they appear to be sliding toward a romantic relationship in the manner of conventional Hollywood comedies in which the leads meet, battle, and ultimately embrace. Although *First Monday* seems

Drama, and Film, 39 ARIZ. L. REV. 151 (1997).

⁸ THE TALK OF THE TOWN (Columbia Pictures 1942).

⁹ FIRST MONDAY IN OCTOBER (Paramount Pictures 1981).

to be headed in that direction, it chooses instead to have Ruth and Dan discover that their jurisprudential disagreements are a vital source of judicial strength rather than a prelude to romance. When Ruth decides to resign after discovering her late husband's unethical conduct, Dan insists that she remain because, as Ruth remarks, "[y]ou and I make each other possible." The film's ending reverses *The Talk of the Town*: Ruth and Dan are last seen climbing the steps of the Court building together while discussing the fights that lie ahead over the new cases on the Court's docket.

Creators of fictional Justices have not been alone in resisting the ideal of a humanized Court. On the contrary, non-fictional critiques of the Court aimed at a popular audience have tended to target the Justices, rather than the law, as the problem. In 1936, in the midst of the battle over President Roosevelt's New Deal agenda, Washington journalists Drew Pearson and Robert S. Allen published *The Nine Old Men*,¹⁰ a fierce attack on the conservative Justices who struck down Roosevelt's initiatives. The book, which became a national bestseller, insisted that the source of the Court's misguided decisions was the approach of those Justices whose votes were shaped by their individual identities and preferences rather than by the impersonal dictates of the law.¹¹ Each of the nine Justices was profiled in a separate chapter, carefully labeled to signal whether or not he was on the side of the angels. Thus, while Roosevelt supporters Justices Brandeis and Cardozo were, respectively, "The Crusader" and "The Hermit Philosopher," the Justices opposing the New Deal didn't fare as well. Justices Van Devanter and Butler, both former railroad attorneys, were dubbed "The Dummy Director" and "The Bruiser," and the notoriously unpleasant Justice McReynolds was "Scrooge." In a broad caricature of legal realism, *The Nine Old Men* expressly linked the Justices' jurisprudence to their biographies; the villains failed the Court and the country by drawing on their pre-Court identities rather than following the law.

¹⁰ DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* (1936).

¹¹ Laura Krugman Ray, *America Meets the Justices: Explaining the Supreme Court to the General Reader*, 72 TENN. L. REV. 573, 579 (2005).

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Forty-three years later, when two other journalists, Bob Woodward and Scott Armstrong, published *The Brethren*,¹² the first insider account of the Court, their focus was less on the substance of the law than on the decisionmaking process that created it. Where Pearson and Allen were clear partisans, Woodward and Armstrong presented themselves as detached journalists interested only in mining their sources, who included both sitting Justices and their law clerks, for the inside story of the Court. That story turned out to be about the personal interactions of the Justices, with its own villain – Chief Justice Burger – skewered by those sources as both an inept leader and a petty man whose machinations at times distorted the doctrinal resolution of cases. *The Brethren* provided no elaborate biographical back stories of the Justices, limiting itself instead to their behavior as they dealt with one another through negotiation, alliance, intimidation, and even conspiracy. Like *The Nine Old Men*, it was a popular success, remaining at number one on the *New York Times* bestseller list for nine weeks and fascinating readers with its accounts of behind-the-scenes maneuvers to create or impede a majority. Although the book offered some vivid portraits, favorable and not, of the Justices, it also presented them as able to separate their professional disagreements from their personal relationships; in one scene, Justices Black and Harlan leave a conference where they have fought over the law and “walk[] out arm and arm, gently arguing as they headed down the hall to their chambers.”¹³ According to *The Brethren*, the Court was simply an elevated version of the ordinary workplace, where the Justices’ personalities could either hinder or smooth the operation of the institution. To function effectively the Court required no humanizing of the law; it required only a different Chief Justice.

The next insider study of the Court, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*,¹⁴ writ-

¹² BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979).

¹³ *Id.* at 91.

¹⁴ EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998).

ten in 1998 by former Blackmun law clerk Edward Lazarus, made no claims to authorial detachment. As its subtitle proclaimed, this book merited attention because of its rare and authoritative perspective. Lazarus's book also had a clearly articulated thesis: that the problem with the Court on which he clerked was precisely the failure of the Justices at both ends of the ideological spectrum to respect legal doctrine, instead distorting it to reach their preferred outcomes. His model of decisionmaking assumed that the law itself can be separated from the people who engage it, and thus the personalities and interactions of the Justices become irrelevant, or even damaging, aspects of the process. When Lazarus describes the individual behavior of the Justices, his focus is on the ways in which they, assisted by their clerks, contrive to manipulate the law and their colleagues to reach a partisan goal. That behavior, he finds, interferes with what he calls "a decency of process,"¹⁵ which requires precisely the suppression of the human element.

Although *Closed Chambers* never reached the bestseller list, the most recent study of the Court written for a popular audience did. Jeffrey Toobin's *The Nine: Inside the Secret World of the Supreme Court*¹⁶ is a much more ambitious work than its three predecessors. Toobin's claim to insider status is based on what he describes as "my interviews with the justices and more than seventy-five of their law clerks" conducted "on a not-for-attribution basis,"¹⁷ thus leaving the reader to guess which Justices and clerks consented to speak with the author on what subjects. The book tracked the Court's rightward evolution from the appointment of Clarence Thomas in 1991 to the close of the Roberts Court's second term in June 2007. Toobin's narrative combines accounts of the resolution of major cases with brief profiles of the Justices, including their personal interactions during the decisionmaking process. For Toobin, personality and ideology are complementary elements of that process, and the

¹⁵ *Id.* at 9.

¹⁶ JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007).

¹⁷ *Id.* at 342.

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direction of the Court can best be explicated through an acquaintance with its members as well as their opinions. As he observes in conclusion, “when it comes to the incendiary political issues that end up in the Supreme Court, what matters is not the quality of the argument but the identity of the justices,”¹⁸ the blend of ideology and personal history that shapes their jurisprudence.

To some observers of earlier Courts, Toobin’s approach might have seemed impertinent in both senses: a cheeky intrusion into the Justices’ sanctum and an irrelevant overlay to their jurisprudence. In recent years, however, the Justices themselves have suggested that their dignified seclusion is no longer necessary to their work, encouraging both legal scholars and observers of the Court to look for links between the individual’s life and jurisprudence. While those few nineteenth century Justices who wrote their memoirs tended to do so for limited audiences – family members or editors seeking biographical information – their successors have cast a broader net.¹⁹ Justice Douglas authored three volumes of memoirs, two while on the bench, that deliberately created a mythic persona, the incorruptible individualist whose close ties to the natural world shaped his independent jurisprudence.²⁰ In 2002, Justice O’Connor published a childhood memoir whose narrative of a rugged life on an isolated Arizona ranch celebrating the values of hard work and community inevitably tempted readers to see links to her pragmatic jurisprudence.²¹ And Justice Thomas’s 2007 memoir, *My Grandfather’s Son*, recounting his life as a series of victimizations for his independent views on race, provided a personal context for his opinions on affirmative action and related issues.²²

Several Justices have stepped beyond their memoirs to engage a popular audience directly. Both Justice O’Connor and Justice Tho-

¹⁸ *Id.* at 339.

¹⁹ Laura Krugman Ray, *Lives of the Justices: Supreme Court Autobiographies*, 37 CONN. L. REV. 233, 236 (2004).

²⁰ *Id.* at 304-16.

²¹ SANDRA DAY O’CONNOR & H. ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* 316-19 (2002).

²² CLARENCE THOMAS, *MY GRANDFATHER’S SON: A MEMOIR* (2007).

mas gave television interviews to promote their books. Justice Kennedy masterminded and participated in “The Trial of Hamlet” at the Kennedy Center in Washington as part of a Shakespeare celebration. And Justice Breyer appeared on the National Public Radio news quiz program, “Wait Wait . . . Don’t Tell Me!,” where he good-humoredly missed all his questions on the lifestyles of rock and roll musicians.²³ If the Justices are not yet readily recognizable media figures, they are no longer remote presences who speak only through their opinions. And their increasing visibility encourages the notion that those opinions are the products of distinctly human authors rather than the pronouncements of faceless legal automata.

In this context, Buckley’s domestication of the Court seems like the inevitable next step from the remote Justices of the past to the more accessible – and human – Justices of the present. His protagonist, the folksy television judge Pepper Cartwright, not only joins the Supreme Court but also marries its unhappy Chief Justice, Declan Hardwether, giving the novel the traditional comedic ending of marriage. Although Buckley’s satiric territory is considerably broader than the Court – it includes as well the other two branches of government – his message is tied most closely to the judiciary. That message, carried by Cartwright, is the need for the law to reach beyond the narrow confines of doctrine and precedent to embrace as well the commonsensical morality of ordinary life. Buckley is scarcely the first writer to make that point (Shakespeare in *The Merchant of Venice* and the screenwriters of *Talk of the Town* come immediately to mind), but he is the first to do so by penetrating the Court’s cloistered chambers to find that its decisionmaking is really only a more specialized variety of the challenge to do the right thing. As the novel opens, a vacancy on the Supreme Court has created a stalemate between the executive and legislative branches. President Vanderdamp, a paragon of decency and fiscal responsibility, has antagonized Congress by vetoing every spending bill it

²³ www.npr.org/templates/rundowns/rundown.php?prgId=35&prgDate=03-24-2007&view=storyview.

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passes. In retaliation, Dexter Mitchell, the chair of the Senate Judiciary Committee, has contrived to sabotage both of Vanderdamp's sterling nominees. Faced with this impasse, Vanderdamp opts for a bold stroke. He nominates the alluring Cartwright, a former trial court judge who now presides over a hit television series, *Courtroom Six*, in which she dispenses with the conventional judicial formalities as she resolves her cases. At her confirmation hearing, she summarizes her approach to the law: "Basically, do your best to keep an orderly courtroom. Make sure everyone abides by the rules. Punish the wicked and acquit the innocent. That's about it."²⁴ Cartwright's Texas charm, media savvy, and total candor render the senators literally speechless. After she cheerfully offers to share with them "the suggested answers" provided to her by presidential aides, "[n]ineteen senators stared mutely at the nominee."²⁵ Cartwright is then confirmed by an impressive Senate vote of 91 to 7 and takes her seat on the high court.

Having placed his heroine on the Court, Buckley moves quickly to illustrate the novel's thematic dilemma, which first arrives in the case of Jimmy James Swayle, a would-be bank robber whose defective gun foils his attempt to shoot a sheriff's deputy. Convicted of attempted armed robbery and attempted murder, Swayle has filed suit against the gun manufacturer, claiming that the defective weapon "caus[ed] him not only loss of income but also significant psychic and physical distress."²⁶ The oral argument becomes a showcase for citation of precedents by attorneys and Justices, with a healthy smattering of Latin phrases, both real and invented; as one Justice observes, "So absent *mens rea*, you'd have *concommittant diminuendo* of *ballistico ad hominem*."²⁷ Cartwright provides the counterpoint to the hypertechnical argument as she asks herself "*What in the hell are these people talking about?*"²⁸ and compares the

²⁴ CHRISTOHER BUCKLEY, SUPREME COURTSHIP 111 (2008).

²⁵ *Id.* at 112.

²⁶ *Id.* at 139.

²⁷ *Id.* at 144-45.

²⁸ *Id.* at 142.

Court's approach with that of her own television program: "*Here we got an idiot bank robber suing the maker of his gun. What I could do with this on Courtroom Six.*"²⁹ At conference, the Court divides four to four, leaving the most junior Justice to break the tie. And although "[e]very atom in every fiber of Pepper Cartwright screamed at her to vote against Jimmy James Swayle,"³⁰ she feels constrained by precedent to vote in favor of his appeal. When a sympathetic Justice suggests that Cartwright's vote is at war with her instincts, the new Justice locates the source of her discomfort: "It's not about instincts, is it?" Pepper said. "It's about the law. Right?"³¹

Buckley transposes Cartwright's dilemma, the conflict of instinct and law, from the legal to the personal sphere when she finds the Chief Justice preparing to hang himself from the light fixture in the Justices' conference room. Hardwether's distress has been apparent from his increasingly "minty" breath, which signals the private drinking that has followed the break-up of his marriage.³² Faced with his evident despair, Cartwright manages to identify the conflict that eluded her at conference and to resolve it. Initially, she and Hardwether debate her situation with lawyerly caution after he asks her to leave the room:

"Thing is, if I were to leave, I'd be guilty of aiding and abetting a felony. Suicide's a crime in DC. . . ."

"No," the Chief Justice replied. "You're perfectly in the clear. You've committed no act in support of the sui . . . of the deed. Absent said support, you would be guilty only if there were a relational obligation. Absent relational obligation — there being none here — you're quite blameless. I would remind you that there is no 'duty to rescue.'"

"There's a moral duty, surely," Pepper said.

"We're not talking about moral duty, Justice. We're talking about law."

²⁹ *Id* at 144.

³⁰ *Id.* at 154.

³¹ *Id.* at 156.

³² *Id.* at 68.

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“Right,” Pepper said. “Sorry.”³³

This time, Pepper lets the law serve her instincts, offering to help Hardwether tie the knot for his noose and then arguing that she has consequently made herself an accessory to his suicide. Her solution appears to be grounded in the cold logic of the law as she coaxes him down from the table: “We’ll go over to the library, rustle us up a couple of real sharp clerks, see if maybe we can’t find a loophole. If there is, then off you go and we’re done.”³⁴ When Hardwether stumbles as he turns to answer her, the knot turns out to be a deliberate slipknot, what Cartwright calls an “[e]scape clause,” that would have prevented the suicide.³⁵ And she completes her rescue by accompanying Hardwether home, providing the support that no one else at the Court has offered.

Buckley provides a third iteration of Cartwright’s dilemma in the novel’s final case, reminiscent of *Bush v. Gore*,³⁶ in which the Court is asked to resolve a presidential election. The candidates are a reluctant President Vanderdamp, who does not want a second term but feels compelled on principle to run in the face of a hastily passed constitutional amendment that sets a limit of a single presidential term. That amendment has been masterminded by Dexter Mitchell, the former chair of the Senate Judiciary Committee who has gone on to play the president of the United States in a popular *West Wing*-like series and now schemes to win the real office. When Vanderdamp wins, Mitchell sues, claiming that the amendment became effective prior to the election and thus the Court should bar Vanderdamp from taking office. At oral argument, Cartwright raises a precedent for rejecting that claim, a case holding that the effectiveness of a ratification is a political question outside judicial authority (though she cautions herself against using any legal Latin in making her point). The Court once again divides four to four, leaving Cartwright to break the tie and write the majority opinion.

³³ *Id.* at 189-90.

³⁴ *Id.* at 192.

³⁵ *Id.* at 193.

³⁶ 531 U.S. 98 (2000).

And she bases her opinion rejecting Mitchell's argument on "the principle of popular sovereignty that lies at the heart of our *real* founding document," the Declaration of Independence.³⁷ Cartwright has rejected the proffered legal technicality in favor of the broad principle of popular sovereignty, that the people rather than the courts choose the president.

The novel's resolution intertwines the judicial and personal strands of Cartwright's dilemma. As Hardwether, who has become her lover after his aborted suicide attempt, puts it, "I think in some ways, Pep, it's your own declaration of independence."³⁸ The commonsensical television judge who trusted her instincts has now learned to approach the weightiest cases on the Court's docket with a similar tempering of the law. Buckley allows another member of the Court, Crispus Galavanter, to nail down the point. He tells her

that with these hyper-legalistic rulings you're handing down, you've been trying to *act* like a Supreme Court Justice, instead of just rendering your own best judgment. You used to be a pretty good judge, back when you stood astride the vast wasteland like a giant. At least in *Courtroom Six* your rulings had some heart.³⁹

It is appropriate that Galavanter makes his final appearance in the novel when, on its last page, he marries Cartwright and Hardwether.

In Buckley's fictional universe, the Supreme Court Justice is in danger of becoming an artificial construct – a dehumanized creature that speaks legal Latin and views the world exclusively through a legal lens. Some of Cartwright's colleagues illustrate the largely unpalatable forms that creature can take. Silvio Santamaria, a thinly veiled version of Antonin Scalia, is the Court's "diva" who has turned the law into a not-so-blunt weapon:

He was brilliant, with a wit as caustic as drain cleaner; good company if you were in his camp and look out if you

³⁷ Buckley, *supra* note 24, at 283.

³⁸ *Id.* at 284.

³⁹ *Id.* at 209.

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weren't. Silvio Santamaria didn't take yes for an answer. He didn't disagree – he violently opposed. Didn't demur – he went for your throat. Didn't nitpick – disemboweled you and flossed his teeth with your intestines.⁴⁰

Ishiguro Haro, the first Japanese-American on the Court, “was, like many of advanced intelligence, impatient with those of more modest brilliance”;⁴¹ he too uses the law as a weapon, leaking the result of the Court's vote in the Swayle case to the press. Ruth “Ruthless” Richter, one of the two other female Justices, “wasn't outright hostile, but her vibes were of the what-are-you-doing-here kind,”⁴² and she, like Santamaria, welcomes Cartwright to the Court with a “cool” handshake.⁴³ Even Hardwether, whose name reflects the rough sailing he finds in his personal and professional lives, finds more comfort in drink than in the support of his colleagues until Cartwright arrives. The more benign Justices – Morris Gotbaum, the motorcycle-riding liberal; Galavanter, the irreverent African American Justice; Paige Plympton, the kindly Mayflower descendent; and Barry Jacoby, the “ardent foe of gun manufacturers”⁴⁴ – seem largely stymied by their opposites. When she breaks its four-four ties, Cartwright is also freeing the Court from its legalistic limbo by bringing her human perspective to bear on the task of doing justice.

Buckley's satiric target is an institution that has somehow severed justice from the ordinary virtues of communal life. Its Justices wield the law as a weapon rather than an instrument of fairness, keep their distance from one another even when confronted with clear signs of personal distress, and suppress their human instincts in the service of legal constructs. Pepper Cartwright, the judicial ingenue, brings to the Court precisely those instincts that have been excluded: common sense, compassion, a willingness to reach out to

⁴⁰ *Id.* at 71.

⁴¹ *Id.* at 135.

⁴² *Id.* at 134.

⁴³ *Id.*

⁴⁴ *Id.* at 140.

an unhappy colleague. The irony, of course, is that those are the qualities that she honed on *Courtroom Six*, where she was free to do justice without jurisprudential constraints. Once unleashed within the Court, those instincts lead her to friendship, romance, and marriage, and lead the institution to a just resolution of *Mitchell v. Vanderdamp*, one that endorses the democratic will of the people over narrow legalism.

And so *Supreme Courtship* takes Supreme Court Justices where no fiction has taken them before, into bed and then into marriage. *The Talk of the Town* humanized Lightcap to prepare him for his judicial role but concluded that the solemnity of his job was incompatible with the joy of romance. *First Monday* celebrated the friendship of Ruth and Dan as a source of nourishment for their judicial labors, but it too stopped short of making them partners in life as well as on the bench. It remained for Buckley to domesticate the Court by insisting that in law, as in life, the simple virtues produce the most humane and appropriate results. The marriage of Pepper Cartwright and Declan Hardwether is his solution to a Court that has lost its way, a romance that personalizes jurisprudence and demystifies the Court as one more setting for the traditional narrative of conflict that finds its resolution in the most human of happy endings.

