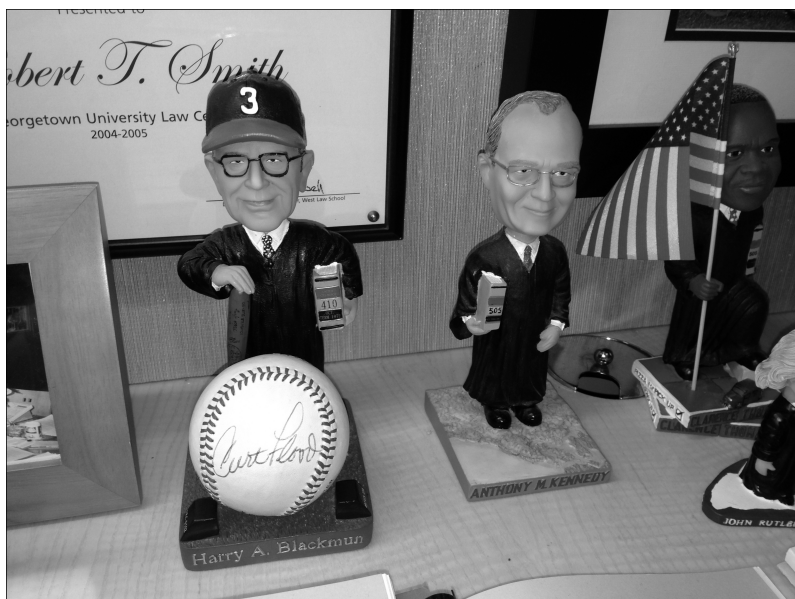


To the Bag

To the *Bag*:

Thank you for extending your Bobblehead Justice Blackmun to non-Fantasy Law experts. As a legal geek and baseball aficionado, I was hoping to get my hands on the bobble-likeness of the author of *Flood v. Kuhn*, 407 U.S. 258 (1972). And, as you can see, my autographed Curt Flood baseball finally has a fitting home (see picture attached). (Incidentally, my Justice Blackmun sits next to the other member of the “old number three” club – Justice Kennedy.)

Robert T. Smith
Washington, DC



INTELLECTUAL COMPLACENCY AND INTOLERANCE

To the *Bag*:

I am certain, or at least hopeful, that I am not the only one of your readers to be astounded by the propositions put forward in your Summer issue by Suzanna Sherry and her academic admirers.

To the Bag

The danger of judicial review on the American pattern, a fine British historian and lawyer, Peter Calvocoressi observed fifty years ago, is that it can become a vehicle for “making the law so much more inflexible as to deflect it from the service of society to the service of a class.” Calvocoressi was no blind reactionary, insensible of the lessons law can teach. He was the principal compiler of the documentary record at Nuremberg and a founder of Amnesty International and the Africa Bureau. On any fair view, his prophecy has come to pass. The Bag’s essays are permeated with intellectual complacency and intolerance. The class whose interests they vindicate is Milovan Djilas’ New Class, dwellers in the welfare states sponsored by academic and bureaucratic institutions, and increasingly divorced from the economic, social, moral and religious concerns of the citizenry at large. It is this sensibility that has given us school busing, the trampling of local political institutions worked by the reapportionment decisions and the revised voting rights act, and the abortion and ‘gay rights’ wars and their consequences in national politics, including the 1980 congressional elections and the presidential election of 2004. A view of the judiciary that regards its functions as limited to corrective rather than distributive justice is not in vogue; Book 3 of Aristotle’s *Ethics* has been thrown in the ash can.

One consequence of this has been public loss of confidence in the disinterestedness of courts, and public unwillingness to lend them necessary support in the exercise of the functions, preeminently the prevention of arbitrary imprisonment and the maintenance of predictability in private relations, that are committed to their care. To see this, one need only contrast the timidity of the American courts and the fearlessness of the British ones in cases involving the rights of accused terrorists.

The most immediately available antidote to this tendency are the writings of Judge Learned Hand, particularly his magnificently chosen and edited letters, which have not been noticed in *The Green Bag* (or, for that matter, in the *Harvard Law Review*). Hand, unlike Professor Epstein, regarded “Fearless Franklin” as a good psychologist if not a good economist, a view shared by Conrad Black in his worthy biography of Roosevelt. (Black, also a competent biographer of

To the Bag

Nixon and Maurice Duplessis, suffers from Nixon's Disease: a capacity for being intelligent about everything but oneself.). The history of America, or of the world, would not have been happier without the New Deal, and the relief of public pressures it afforded. Hand is surely right in his observation that "people do not take sides so much because of their economic interests as because of some wounding of their self-esteem." Although theory has its uses, it would be nice if the education of young lawyers were taken from the hands of game theorists, micro-economists, public choice theorists and moral philosophers and returned to those with an interest in history, literature, and 'the crooked timber of humanity,': the way human beings have behaved in fact., and in empirical and not rationalistic approaches to the law, including a belief in government by consent of the governed.

George W. Liebmann
Baltimore, MD

GB