RRR
ROTHBARD-ROCKWELL REPORT
AUGUST 1991 VOLUME II, NUMBER 8

Marshall, Civil Rights, and the Court

by Murray N. Rothbard

In a memorable line in *Cat on a Hot Tin Roof*, Big Daddy announces, "Mendacity, ah smell mendacity." Mendacity, thy name is Washington, D.C., but even for the nation's capital the stench of mendacity and baloney pervaded the air at the end of June when Mr. Justice Thurgood Marshall announced his retirement. The encomiums, the blown-up hokum were truly loathsome. "The greatest jurist of the twentieth century"; the "hero"; the "great dissenter"; the man of "quick wit"; the "conscience of the Court." What garbage! Mr. Justice Marshall was and is a fool and a cretin, his "dissents" and opinions mere leftist gabble thinly disguised as law; his "quick wit" the sputterings of a cantankerous simpleton. Marshall contributed nothing to the Court except a warm leftist body, and in that way added his mite to the destruction of our rights and our liberties at the hands of a malignant left-liberalism.

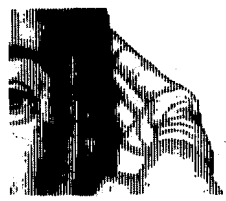
It is the mark of the degeneration of modern conservatism that many leading conservatives added their own orgy of praise to the expected twaddle of left-liberals. On *Crossfire*, Congressman Henry Hyde of Illinois, a leading voice of conservatism, gushed about how much he admired Justice Marshall and how wonderful was the *Brown v. Board of Education* decision that he had helped bring about as a counselor. All about us, we were spared nothing.

Before turning to the legal legacy of Mr. Justice Marshall, let us examine for a bit his wit and wisdom. Let loose of his law clerks, Marshall was really something. Last year, when Judge Souter was nominated for the Court, Marshall, asked what he thought in a TV interview, sputtered his rage: "If you can't say something good about a dead person, don't say it." The startled interviewer responded: "But President Bush isn't dead." "No, he dead," Marshall replied. An example of his "quick wit"?

Mr. Justice Marshall was and is a fool and a cretin, his "dissents" and opinions mere leftist gabble thinly disguised as law.

An admiring *New York Times* reporter wrote upon Marshall's retirement: "He is the least stultified of any recent member of the Court," whatever that is supposed to mean. Trying to explain how Marshall is not "stultified," the *Times* man explained that Marshall once greeted Chief Justice Warren Burger as follows: "What's shakin', Chiefie baby?" Well! Mr. Justice Burger's reply is not recorded, but I like to think it went

(Cont. page 3, col. 3)



THE EAR

by Sarah Barton
America's Only Libertarian Gossip Columnist

Definition of *Chutzpah*: A prominent Modal, engaged in a contract dispute with another libertarian, wrote to Murray, claiming that according to Rothbardian contract theory, the other guy owed the Modal money. Murray replied, pointing out that the Modal is wrong and that this was not in his view an enforceable contract. At which point Modal (anyway, one of those annoying types who *always* has to get in the last word) wrote Murray a long letter, claiming that he was right and Murray was wrong in applying Murray's own theory. Now, is that major league *chutzpah*, or what?

* * * * * *

Earthquake in the Kochtopus! Boss Charles Koch is furious at the Institute for Humane Studies, claiming that its "productivity is zero." Charles, who is now inter-

(Cont. next page,col. 1)

even using that handy description.

Charles Koch is the sort of billionaire who pays PR people to keep him *out* of print, and since E.J. got his information from Ed Crane, Charles is fuming. Richie Fink, never shy about using any lever in his efforts to oust Ed, reminds Charles about the book every chance he gets.

* * * * * *

An English professor at Smith College says he was interested in libertarianism in the early 1970s...until he was invited to a joint Massachusetts Libertarian Party - North American Man-Boy Love Association conference.

* * * * * *

Richard Kostelanetz, senior editor of *Liberty* magazine, regularly denounces the National Endowment for the Arts. Not as an immoral, tax-funded boondoggle, but for not giving enough money to avant-garde artists like...him! Richard, a Modal Libertarian, once placed a collect call to a real magazine about an "emergency." After hearing him out (Richard was upset that his article wasn't published), the editor asked, "Since when do New York operators have such thick accents?" "I'm calling from Munich," said Richard. "So long" said the editor, who later received—and refused—a collect Richard call from Latin America.

* * * * * *

A young libertarian answered Bill Bradford's ad in *Liberty* for an editorial assistant, and they agreed to $1,000 a month. But when the young man trekked to Port Townsend, Bradford explained that, of course, he could not pay that much to start: "Perhaps in six months or so, when you have proven yourself..."

* * * * * *

John Hix, the convention maven of California Republicanism (and occasionally Libertariansm), writes about "the world-famous *Rothbard-Rockwell Report*. Beyond the meat and potatoes from you two, I find the libertarian gossip by Sarah Barton delightful." But then, John has *always* had good taste. In his last LP venture, he managed Ron Paul's Operation Wounded Knee against Russell Means.

* * * * * *

Dick Boddie's campaign for the LP presidential nomination is picking up steam, and money and delegates. Could he actually beat Andre Marrou? The race is wide open, especially since Boddie campaign manager Chuck Geschlider is set to expose some Marrou shenanigans.

* * * * * *

I wouldn't want to say that R. Emmett Tyrell, Jr., editor of the *American Spectator*, has a high-pitched voice, but when he speaks, dogs bark for miles around.

A few years ago they were barking at the Philadelphia Society, when in a disjointed squeech, Bob announced, several times, that he was proud to be a neocon. The leading neocons there, including Mike Joyce of the Bradley Foundation, were furious, and since then, Bob's funding has slowly dried up. Bob, not one of the higher-level trusties, gets no respect. It's why Ben Wildavsky writes for *AS*, but not Aaron; John Podhoretz, but not Norman. Bob now whines that after all he's done for them, the neocons are letting his magazine go down the drain. •

(MARSHALL, cont. from P.1)

something like this: "You, Thoroughgood [Marshall's original first name], you shuckin' and jivin' mutha."

Thurgood Marshall first achieved acclaim by winning cases before the Court as chief counsel of the NAACP Legal Defense Fund. It is well known, however, that these accomplishments, such as they are, were not really his own. Marshall was the needed colored front man for the smart white lawyers, notably Jack Greenberg, who actually ran this successful separate legal arm of the NAACP. Setting aside *Brown* for a moment, these cases spearheaded the disastrous "civil rights" revolution against property rights in this country—for example, the outlawing of racial covenants in the renting and sale of residential real estate. On the Court, Marshall helped in the catastrophic imposition of forced school busing, a policy that drove whites out of the big inner cities and made those cities a burned-out wasteland. Marshall's contention that the death penalty is unconstitutional as "cruel and unusual punishment" can only be considered idiotic, countered by the well-known fact that the death penalty has been around from time immemorial, and was certainly "usual" at the time of the passage of the Constitution. It was only *made* unusual in recent years because of the temporarily nutty attitude of the Court, including Mr. Justice Marshall.

The "Civil Rights" Trap

On the entire question of legally and judicially imposed "civil rights," we have been subjected

to a trap, to a shell game in which "both sides" adopt the same pernicious axiom and simply quarrel about interpretation within the same framework. On the one side, left-liberalism, which in the name of equality and civil rights, wants to outlaw "discrimination" everywhere, has pushed the process to the point of virtually mandating representational quotas for allegedly oppressed groups everywhere in the society, be it jobs and promotions, entry into private golf clubs, or in legislatures and among the judiciary. But the Official Conservative opposition, which includes not only neo-cons but also regular conservatives, conservative legal foundations, and Left-libertarians, adopts the self-same axiom of civil rights and equality. In the name of the alleged "original" civil rights vision of Martin Luther King, conservatives also want to outlaw discrimination in jobs and housing, and to allow federal courts to mandate gerrymandering of electoral districts. But while Official Conservatives fully endorse outlawing racial and other discrimination, they want to stop there, and claim that going beyond that to mandating affirmative action measures and quotas is perverting the noble original civil rights ideal.

A typical expression of this view is the *Wall Street Journal's* editorial on Marshall's resignation. After hailing Marshall and the other "heroes'" achievements, including *Brown*, and the original civil rights ideal mandating "fundamental fairness in the nation's civic life," the *Journal* laments that Marshall and the rest of the civil rights movement have tragically gone beyond that doctrine and come "precariously close to approving quotas." The *Journal* also hastens to assure left-liberals and everyone else that Marshall's "achievement" of coerced equality for blacks is "not in danger" but a "permanent legacy." [*WSJ*, June 18]

The *Journal* is right about one thing. It inadvertently gives the lie to the media nonsense, trumpeted everywhere, about the "move of the pendulum" back to conservatism on the Court as against the old left-liberal position, as well as all the wailing about the heroic and rugged wait for the next left-liberal turn. There *is* no pendulum, precisely because the civil rights revolution is perfectly safe from the modern conservatives on the Court. The Marshall "legacy" may not be "permanent," but it has certainly nothing to fear from *this* group of turkeys or from anyone else whom President Bush is likely to nominate.

Anti-discrimination laws are evil because they run roughshod over the *only* fundamental natural right: property.

The original sin of "civil rights," which would have been perfectly understood by such "old conservatives" as the much maligned Nine Old Men who tried to block the measures of the New Deal, is that anti-discrimination laws or edicts of any sort are evil because they run roughshod over the *only* fundamental natural right: the right of everyone over his own property.

Every property owner should have the absolute right to sell, hire, or lease his money or other property to anyone whom he chooses, which means he has the absolute right to "discriminate" all he damn pleases. If I have a plant and want to hire only six-foot albinos, and I can find willing employees, I should have the right to do so, even though I might well lose my shirt doing so. (Of course I should *not* have the right to force the taxpayers to bail me out after losing my shirt.) If I own an apartment complex and want to rent only to Swedes without children, I should have the right to do so. Etc. Outlawing such discrimination, and restrictive covenants upholding it, was the original sin from which all other problems have flowed. Once admit that principle, and everything else follows as the night the day. Once concede that it is right to make it illegal for me to refuse to hire blacks (or substitute any other group, ethnic or gender or whatever that you wish), then left-liberalism is far more logical than official conservatism. For if it is right and proper to outlaw my discriminating against blacks, then it is just as right and proper for the government to figure out if I am discriminating or not, and in that case, it is perfectly legitimate for them to employ quotas to test the proposition.

Current conservatives say it is OK to outlaw discrimination if such a result is *intended* by employers or landlords, but that it is monstrous and illegitimate for the government to use statistics and other objective measures to figure out whether discrimination exists. Hence the spectre of quotas. But how can we figure out anyone else's subjective intent anyway? Given the premise of outlawing discrimination, then mandatory quotas, despite the undoubted horrors they bring in their wake, make perfect sense. It is not "going too far" that causes the trouble. The problem is not the *abuse* of the anti-discrimination axiom; the problem is the axiom itself. Nothing will help except challenging the basic axiom and reversing the "civil rights" revolution. Libertarians and conservatives who have any spunk left must drop their blinders and call not for "the original King equality" or the original civil rights ideal, but for throwing over the entire structure and restoring the absolute right of private property. "Freedom" must mean the freedom to discriminate.

The *Brown* decision was rotten law because it was not law at all, but the supposed "science" of sociology.

Left-Libertarians and the Brown Decision

Much of this will be endorsed by Left-libertarians, at least in theory, as opposed to political practice. (When have you heard LP candidates actually sounding the call for the abolition of anti-discrimination laws?) Most libertarians will, in theory, concede that employers and landlords should have the right to discriminate for or against any given group. The problem for libertarian theory is public property, government operations. Left-libertarians believe that government, as an owner of any sort of enterprise, has no right to treat it as an enterprise. Hence, the Gingell position endorsing the ACLU view that public libraries, being governmental institutions, have no right to kick smelly bums out of the library. And hence the view that the government has no right to kick bums who are smelling up the streets and harassing peaceful citizens off those streets. On that basis, Left-libertarians endorse the *Brown* decision, which mandated that public schools in the South, which had used racial segregation for over half a century, were violating the U.S. Constitution because "separate" could not be "equal." Libertarians don't care one way or another about the Constitution; they have endorsed *Brown* because of their view that somehow it is a matter of high principle that everyone must have some sort of "equal access" to government facilities; whether race in public schools or smelly bums in public libraries.

But why? All of libertarian political thought follows from the non-aggression principle: that no one, including the government, can aggress against someone else's person or property. Since, according to libertarian theory, there *should be no* government property, since it is all derived from coercion, how does *any* principle whatever of government property use follow from libertarian theory? The answer is, it doesn't. On the question of what to do about government property, libertarians, apart from calling for privatization, are set adrift without a rudder. They are set adrift, in short, with nothing but their common sense and their attunement to the real world, of which libertarians have always been in notoriously short supply.

The fundamental basis of the *Brown* decision was rotten law because it was not law at all, but the supposed "science" of sociology. The crucial grounding of *Brown* was the alleged finding of the revered socialist Dr. Kenneth Clark that black schools in the South were not *really* equal to white because black students in segregated schools don't do as well as blacks in integrated schools. That was the basis, and from that came all the horrors of compulsory integration, forced busing, and white depopulation and decay of the inner cities. And what has been the result? It is universally acknowledged that the education of black students in current integrated schools is much worse than what they received in the segregated schools; and indeed, the old segregated black schools are now being looked upon as a veritable Golden

Age. Indeed, the latest trend among blacks is to try to reestablish all-black grade schools and high schools.

Very well. But from that, several things must follow. One is that since the sociology of the *Brown* decision is all wet, and *Brown* was based upon lousy sociology, that *Brown* should be reversed. It has also been ruefully acknowledged by integrationists that black and white students always tend to segregate themselves voluntarily—socialize among themselves, eat by themselves in the school cafeteria, etc. Much as Jacobin integrationists deplore this phenomenon and try to discourage it, we have to recognize that the process is voluntary and natural, and that there is nothing wrong with it. In my view, by the way, the truly great leader of black Americans in the 20th century was not the socialistic and compulsory integrationists like Martin Luther King and Thurgood Marshall, but the brilliant and charismatic Malcolm X, who would have taken blacks down a very different path. Malcolm always stressed, not only black separation, but also the importance of such "middle-class" values as hard work, temperance, and thrift. In the short time that he had after leaving the Black Muslims and before he was gunned down by a still unexplained conspiracy (*not* by a lone nut), Malcolm was in the process of beginning to hammer out a coherent vision and strategy for blacks in America. It's too bad that he was never given the chance.

The truly great leader of black Americans in the 20th century was the brilliant and charismatic Malcolm X.

In general, the instinct of the black masses was always toward separatism; the siren-song of compulsory integration was sold to them by an alliance of white leftists and a small minority of very light-skinned middle-class "black" leaders, the very ones to benefit—as contrasted to the black masses—by anti-discrimination laws and affirmative action.

To return to the fallacies of Left-Libertarianism: apart from the question of what to do with government facilities, Left-libertarians are being grossly unrealistic by saying that anti-discrimination laws should only apply to strictly government operations, while private operations must be totally free. The problem is that, particularly in our State-ridden society, the line between "public" and "private" has grown increasingly fuzzy, and it is precisely because of that fuzziness that left-liberalism has been able to expand very easily, and with virtually no opposition, the original application of civil rights from public to all sorts of private facilities. Everywhere, for example, and in front of or next to every private property, there are public streets and roads. Virtually every private business sells some service or product to some government agency; every private business sells across state lines and is therefore subject to the "commerce clause" of the Constitution; every private school or cultural institution receives, directly or indirectly, government funds; restaurants are somehow invested with a "public" nature because they have doors open to the public; social clubs are not really "private" because once in a while they may discuss business or employment, and on and on. The results is that there is nothing "private" left, and Left-libertarians, as usual content with correctness in high theory, are left totally irrelevant to the current social scene.

So what is the remedy for all this? Certainly *not* to take the standard libertarian path: to endorse civil rights for public operations and then, if they are interested at all in the real world, to try to sort out precisely what is private and what is public nowadays. What has to be done is to repudiate "civil rights" and anti-discrimination laws totally, and in the meanwhile, on a separate but parallel track, try to privatize as much and as fully as we can.

The Role of the Judiciary

There is another crucial problem involved in the battle over the judiciary, in the shell game between leftists and modern conservatives, and in problems with Left-libertarianism. And that is the proper role of the federal judiciary and the Supreme Court. What is it? So far there have been three positions:

(1) Left-liberalism, with judges

frankly creating new propositions in the Constitution so as to justify and even mandate left-liberal despotism by the federal government over everyone in the United States.

(2) Modern conservatives, exemplified by the revered Judge Bork, who believe that judges should only passively interpret and enforce the statutes. In short, that the role of the federal judiciary is to put an imprimatur of constitutionality on every action of the President and the Congress. Oddly, this so-called "conservative" stance used to be precisely the position of New Deal leftists such as Felix Frankfurter and his disciple Robert H. Jackson. This Old Left position was precisely the one that scuttled the Old Right, Nine Old Men position that magnificently outlawed as unconstitutional a host of invasions of property rights and freedom of contract. The embrace of this Old Left position by the current Right is in fact a testament to the degeneration of modern conservatism. Indeed, Bork himself embodies this shift. As a young jurist, Bork was a Chicago-School libertarian; then, while teaching at Yale Law School, he was converted by colleague Alexander Bickel, a disciple of the evil Frankfurter, to the Frankfurter-Jackson position.

It should be clear that, from the libertarian perspective, the Borkian conservative position is far worse, far more statist, than the Left-liberal one. At least, with Left-liberalism, we would accidentally gain libertarian judicial decisions because they sometimes happened to coincide with the Left-liberal agenda. But with Old Left/New Right conservatism in the judicial saddle, there would be no hope whatsoever in the Court of a libertarian check on executive or legislative despotism.

(3) The third camp is a return to the Nine Old Men, using the Federal judiciary as a frankly activist bulwark of the rights of private property as against the executive or legislative branch. This is now the Official libertarian position, held most notably by Richard Epstein of the University of Chicago Law School, by Randy Barnett of IIT-Kent Law School, and by the Cato Institute. It is certainly a position infinitely preferable to the other two, and one which I myself have ardently espoused in the past.

Absolute power must never be entrusted to a small oligarchy of men, especially Supreme Court judges.

But I have come to think that there are serious deficiencies in this Official Libertarian position, one that should lead us to rethink the entire problem of the role of the judiciary. There is of course the problem of naive adventurism, the idea that all we need do is somehow to sneak in a few Good Guys on the Supreme Court and all would be well. But more profoundly, for the sake of such a quick fix, of getting Good Guys like Epstein or Bernard Siegan (already rejected by the Senate) or Judge Alex Kozinski on the High Court, we fail to ask ourselves a deeper question, *e.g.*: should there be a Supreme Court, with absolute power, in the first place? The Old Jeffersonian position, for example, was radically different: that absolute power must never be entrusted to a small oligarchy of men, especially Supreme Court judges, who are an unchecked oligarchy appointed for life. Before Federalist John Marshall began to amass all power in the Supreme Court, no one ever believed, even with the existence of such a court, that it has the last word on constitutionality. In his great anti-New Deal novel, *The Grand Design*, John Dos Passos wrote:

We learned. There were things we learned to do but we have not learned, in spite of the Constitution and the Declaration of Independence and the great debates at Richmond and Philadelphia, how to put power over the lives of men into the hands of one man and to make him use it wisely.

(Dos Passos, *The Grand Design*, Boston, 1949, pp.416-18.)

This warning applies not just to one man, the President, but also to an absolute oligarchy of Nine Men or Women. And so what we have to do is to rediscover the Jeffersonian anti-judicial oligarchy position, not so much of Jefferson himself, who was largely all talk and no action, but of such Jeffersonian ultras as John Taylor of Caroline and John Randolph of

Roanoke. In other words, we have to rediscover not only the forgotten individualist Ninth Amendment, but also the radically decentralist Tenth Amendment, and the legal tradition and principles from which it stemmed. Dismantling the Leviathan State, a task embraced by all libertarians, must also involve dismantling the nationalizing, centralizing, absolute oligarchy that constitutes the Supreme Court of the United States. Here we have a truly noble, new and exciting task awaiting us: to hammer out a fourth, radically Jeffersonian as well as libertarian position on the federal judiciary and the Supreme Court. In sum, we need a *paleo* position. ●

Color Bind

by Joseph Sobran

As I write, George "President" Bush has just nominated Clarence Thomas to the Supreme Court to fill the vacancy created by the retirement of Thurgood Marshall. Actually, Marshall *was* a vacancy during his quarter-century on the High Court. When a reporter asked him what he was going to do in his retirement, he replied, "Sit on my behind." I thought he hadn't heard the question. It was what are you *going* to do, not what have you *been* doing all these years. But the pundits marveled at what a witty answer he'd given. I guess they haven't been exposed to much Oscar Wilde.

Thomas's nomination enabled the press to change the subject from what a great justice Marshall had been, and not a moment too soon. Talk about lying to the American people. The encomiums the old dolt has been receiving have broken all records for collective mendacity. I've lost count of how many times Marshall has been called a "giant" during the past few days. The only giant he remotely resembles is one drawn by Don Martin in *Mad* magazine many years ago.

The encomiums the old dolt has been receiving have broken all records for collective mendacity.

Marshall's retirement caused Haynes Johnson of the *Washington Post* to get all leaky-eyed about the good old days of Lyndon Johnson (no kin, I suppose) when the Supreme Court was on the cutting edge of social change. Haynes is one of the few liberals in town who can still mention his namesake without embarrassment. The Great Society is still the good old days to him, and he has lately written a much-touted book deploring the Reagan years—*Sleepwalking Through History*, I think it's called. Anyway, LBJ appointed Marshall because it was the Historic thing to do—putting a blackfella on the Court, you know. Johnson also appointed his crooked crony Abe Fortas, who at least had something between his ears. Unlike Marshall, though, Fortas didn't last long. His shady business connections were exposed just as he was about to succeed Earl Warren as Chief Justice, and he had to resign, and he died a few years later.

The irony of it! Fortas was in his grave, while Marshall lived on to continue the struggle for social change, if dozing in front of the color television in your chambers can be called continuing the struggle for social change. Marshall once confided to a colleague that you can learn a lot about life from the soap operas. Possibly his views on abortion were shaped by *As the World Turns*, but since he says he has no plans to write his memoirs, we may never know. If someone writes a biography of him, though, it should be called *Thurgood Marshall: The Sleeping Giant.*

What's remarkable about Marshall is that in all his years on the Court he never said anything memorable. Even his admirers were hard-pressed to find any useful quotes. About the only interesting things he ever said were those remarks notable for their indecorum, as when he pronounced Bush "already dead" and called the Founding Fathers racists. Lately he has gotten into the habit of attacking his colleagues because the Court isn't voting his way any more. His concern is purely with results. Legal reasoning doesn't interest him, and he's no good at it anyway.

What I'm trying to say is what all his encomiasts are trying