THE OLD REPUBLIC

The Habitation of Justice

by Stephen B. Presser

Judge Roy Moore, chief justice of the Alabama Supreme Court, is in big trouble again. Judge Moore's first 15 minutes of fame happened when, as a lower-court judge, he refused to remove a plaque containing the Ten Commandments from the wall of his courtroom. The plaque, it was said, amounted to an impermissible establishment of religion and could not be tolerated in a public building. One court did order the judge to give up his Commandments, but he refused, arguing that, since our country's system of justice was, ultimately, based on the Ten Commandments, it was perfectly appropriate to recognize them in a courtroom. Judge Moore went on to capitalize on his notoriety by winning a seat on Alabama's highest court.

The latest flap concerning Moore comes as a result of a concurring opinion he published in a recent 9-0 decision affirming a trial court's denial to a lesbian of physical custody of her three children. At the time that her divorce was granted, the woman, a Californian, shared joint legal custody with the father and had primary physical custody of the kids, but she later petitioned the California courts to modify the custody arrangement in order to give physical custody to the father, who subsequently moved to Alabama. She desired this change, apparently, in order for her to pursue a same-sex relationship without the children getting in the way. The California courts granted the father physical custody, and the children moved to Alabama. Some years later, the mother changed her mind and, in a new quest for physical custody, argued, principally, that the father was too strict a disciplinarian. Her new petition for custody was filed with the California courts, but the father succeeded in getting the matter transferred to the Alabama court.

Some evidence suggested that the children preferred to move back to California to be with their mother and her same-sex lover, and the father may have administered corporal punishment to at least one of the children and kicked the boom box of another. Indeed, the trial court, concluding that the father should ease up in his discipline, ordered him to attend "parenting classes," but the court also found that the circumstances had not changed since the father was first awarded custody, and thus there was no legal reason to change the arrangement. An Alabama appellate court, however, reversed the trial court's order on the grounds that the father's strict discipline amounted to "abuse" of the children and that the mother's homosexuality was no impediment to custody.

In a short opinion for the unanimous Supreme Court, one of Judge Moore's colleagues pointed out that there is no clearer procedural rule of law than that the weighing of facts is a function of the trial court, not the appellate court. Thus, if the Alabama trial court, taking everything into consideration and having had the opportunity to observe the demeanor of the witnesses, had thought that custody still belonged with the father, no appellate court could reverse that factual determination. Judge Moore, in a concurring opinion, indicated his view that the law of Alabama deemed a homosexual couple presumptively unfit to be given custody of children. He referred extensively to prior Alabama decisions that had indicated the inappropriateness of homosexual relationships by quoting from a plethora of sources including the Bible and Blackstone, and he noted their observations that homosexuality was "an abomination," a "crime against nature," and so forth. Judge Moore did not present any of this as his own view, except possibly for one sentence where he wrote, without specific reference to Alabama law, that homosexual conduct "was an inherent evil, against which children must be protected." Still, the views the judge espoused were not really his but the prevailing holdings of prior judicial decisions in Alabama. Thus, he noted, the Alabama appellate court was wrong. The granting of physical custody to the father by the California courts had been appropriate, and so was the Alabama trial court's refusal to set that decision aside.

Nevertheless, Judge Moore's critics, who undoubtedly did not carefully examine the opinions in the case, went ballistic and called for his ouster. Lorri L. Jean, the executive director of the National Gay and Lesbian Task Force, bleated that

> It is appalling to see that blatant bigotry and unrepentant ignorance reign supreme in Alabama's highest court. Chief Justice Moore has decreed that his personal religious beliefs will now be the law of the land in Alabama. This violates the constitutional mandate of separation of church and state, and it renders him unfit to serve as a judge.

Moore had done nothing like that, though it is true that the current constitutional status of sexual preference is somewhat murky. The U.S. Supreme Court, our ultimate expositor of these matters, has ruled that state sodomy statutes that condemn and punish homosexual relationships do not violate the Constitution. It has also ruled, however, that a state constitution cannot be amended in a manner that prohibits municipalities from forbidding discrimination based on sexual preference.

The prevailing view in the legal academy and, of course, in the media is that your choice of sexual preference or practice ought not count against you in any forum, but Judge Moore chose puckishly to remind us that politically correct doctrine is something different from law. Indeed, Justice Moore's judicial philosophy is that the Constitution and laws must be interpreted according to their understanding *when they were adopted*. Thus, since the common law and the Constitution were promulgated in a nation committed to Judeo-Christian notions of morality, it is appropriate that some legal and judicial deference be afforded to traditional views, some incorrect decisions of the federal courts notwithstanding.

No matter what Judge Moore personally believes about homosexuals, and no matter how politically incorrect he is, he is certainly right about the law—about the need to draw distinctions between popular opinion and politics, on the one hand, and the dictates of precedent, on the other. (In his concurring opinion,

Judge Moore stated that "Judges should not make decisions based on the latest psychological or sociological study or statistical poll," indicating his belief that prior law should govern). He does not deserve the scorn and the contempt that his critics and their sympathizers in the national media love to lavish upon him. He is a man of honor committed to the rule of law. God bless him.

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THE NEW REPUBLIC

A "Containment Policy" for the New Cold War

by Donald W. Livingston

Americans regularly accept expropriations—legal, moral, and economic—from the central government that would have driven our 18th- and 19th-century ancestors to arms. The Constitution reserves to the states and local communities all powers necessary to provide legal protection for valuable ways of life. These rights have been usurped by the central government, especially by the Supreme Court, which has—absurdly—become the most important social policy-making body in the Union. As a result, the states are no longer genuine *political societies* but mere administrative units of the center. This concentration of power has been seized by a ruling class that is deeply hostile to traditional American society. Well into the 1960's, it was publicly acknowledged that America was a Christian society—that Christianity is the source of its fundamental law and its dominant culture. Religion was not expelled from the public square because states and local communities changed their constitutions and statutes to drive Christianity to the margin of society (as they had a constitutional right to do if they chose), but because the Supreme Court prohibited prayer in public schools. The Court did not ban prayers from the Oval Office, or from Congress, or from its own chambers—only from public schools financed by local tax dollars. The great majority of statutes declared unconstitutional by the Court are acts of states and municipalities. The Court rarely takes on the other branches of the central government, because the Court is a creature of that government.

Immigration and other policies of the central government, urged by our cultural elites, are making a minority of the European stock that built the fundamental institutions of America. Susan Sontag, a respected pundit among our ruling class, declares that the "white race is the cancer of human history." Crude racist declamations of this sort are heard regularly in the academy, and no one objects. President Clinton triumphantly predicted in a commencement speech at Portland State University that, by 2050, white Europeans would be a minority. Elsewhere, he admonished Americans on the need for a "great revolution . . . to prove that we literally can live without having a dominant European culture." Americans accept these insults and contemplate the disintegration of their culture with the resignation appropriate to acts of God. But this disintegration is the work of men in the central government, not of nature. In the 1960's, Congress radically altered our immigration laws to favor non-Europeans. In 1960, Americans of European ancestry accounted for 87 percent of the population. By 2050, they will be a minority. We were told in the 1960's that this change would not affect the character of our culture. Now we are told that a "revolution" in our consciousness is needed to reconcile us to our emerging status as a minority culture.

The universalist Enlightenment ideologies that created the modern unitary state, whether in their liberal or Marxist form, place no value on cultural inheritance. Usually, it is seen as an impediment to being a citizen of the world, or to advancing class struggle or human rights. Why have Americans offered no resistance to these assaults on their cultural inheritance? Part of the answer is simply that they no longer possess the *civic virtue* that resistance requires. Aristotle taught that virtue of any kind comes into being and is sustained only by practice and habit in a society of a certain kind. For a citizen to possess civic virtue, he must inhabit a society of human scale in which real issues concerning the human good can be decided through eloquent speech and persuasion. Such small societies, or federations of small societies, must have genuine sovereignty over their affairs. Enjoying such sovereignty and the habitual practice of it, people in communities of this kind are jealous of their corporate liberty and are no more likely to accept encroachments on it than they would on their families. Hobbes understood this and warned that a modern centralized state must eliminate or strictly control all independent social authorities, for they are a potent source of corporate resistance to central authority. He aptly called them "worms in the commonwealth."

The American colonies were made up of such "worms." They were composed of small Protestant communities, each retaining a high degree of sovereignty. When the British government embarked on a project of increased centralization, which required more resources from the colonies, they resisted. Such resistance was possible only because these were societies of human scale in which civic virtue could be exercised. The Constitution they formed provided legal protection for state and local sovereignty and, consequently, for continuance of the civic virtue that had secured their secession from Britain.

The Antifederalists warned that these protections were not sufficient and that the center would eventually consolidate the states and local communities into a unitary regime. The authors of the *Federalist* replied that this could never happen because the people had ample means to resist, by force if necessary. This held true for the first 70 years. Indeed, the central government was so contained that, from 1830 to 1860, it was virtually out of debt and imposed no inland taxes. It lived simply from a tariff on imports and land sales. State and local sovereignty flourished. Nobody ever saw a federal agent, except at the post office or customs house. When Southerners confronted the Northern industrial program of centralization—which demanded subsidies for Northern industry (paid by the South, which accounted for three fourths of federal revenue), a centralized currency (driving out state banks and subverting regional economies), and a high tariff that would destroy Southern exports—they voted in conventions of the people of their respective sovereign states, as their fathers a generation before had done, to secede and form a Union of their own. Article VII of the Constitution declares that the concurrence of nine states is sufficient to dissolve the Union under the Articles of Confederation and to form a Union of the nine states. If so,