

# RESTRAINING JUDICIAL POLICYMAKING

JOSEPH D. KEARNEY

The question is provocative—“Has conservatism run out of gas?”—and undoubtedly will generate contextual responses. This is generally as it should be. At least in specific terms, the issues of the day, whether arising in economics, education, health care, immigration, or even taxes, likely will vary from those of yesterday (assuming yesterday to be long enough ago). So, too, then will vary the appropriate policy responses, even if there is an attempt to limit oneself to responses that might be reasonably characterized as part of “conservatism.”

Not so, it seems to me, with respect to law and the essential matter of judicial policymaking. Conservatism, or at least one form of it, remains an important and constant force with respect to curbing excessive policymaking by the judiciary. This is not, to be sure, some statement that the courts are always constrained or that their constraint now is greater than it has ever been. Whether or not those cases could be made, important advances have occurred, even if they have been accompanied by a number of setbacks along the way.

Simply stated, the tendency of those seeking social change to look to the federal courts

*In the legal sphere, one brand of conservatism—the restraint on judicial policymaking to the detriment of the democratic process—has plenty of gas remaining.*

for creative and expansive interpretations of the United States Constitution or other sources of law has been sharply limited in recent decades, and there is no reason to think that this will change any time soon. Indeed, at the risk of being incautious, there is reason to hope that a Supreme Court in which Chief Justice John Roberts succeeded Chief Justice William

Rehnquist and (probably more significantly) Justice Samuel Alito succeeded Justice Sandra Day O’Connor will not generally be inclined towards expansive interpretations of the Constitution, with their concomitant reduction of the sphere of the democratic process.

But make no mistake: To the extent that matters in fact unfold consistently with that hope, it will at times disappoint some *political* conservatives. Consider, for example, the United States Supreme Court’s decision in 1997, reaffirming the *Miranda* rule and written by Chief Justice Rehnquist.<sup>1</sup> That was a conservative decision in the important sense that it conserved a long-standing judicial precedent, although it is also true that the opposite deci-

---

*Joseph D. Kearney is Dean and Professor of Law, Marquette University.*

sion would have comported with other important precepts of conservatism such as maintaining legislative and executive control over law enforcement.

The example is scarcely anomalous. From the reaction of many conservatives to the Supreme Court's decision in *Kelo v. City of New London*,<sup>2</sup> one without knowledge of the case might not have appreciated that the Court in *Kelo* actually rejected a novel interpretation of the Takings Clause of the Fifth Amendment to the Constitution.<sup>3</sup> In this sense, the *Kelo* decision is consistent with the important precept of judicial conservatism that "[t]he sphere of self-government reserved to the people of the Republic [should not be] progressively narrowed."<sup>4</sup>

And, so, my contextual answer is this: In the legal sphere, one brand of conservatism—the restraint on judicial policymaking to the detriment of the democratic process—has plenty of gas remaining. This aspect of conservatism will, at times, generate significant debate and disagreement concerning the pursuit of other, sometimes consistent but sometimes inconsistent, aspects of "conservatism." But this, too, is as it should be.

## Notes

1. *Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming rule announced in *Miranda v. Arizona*, 384 U.S. 436 [1966], concerning police warnings to those in custody).
2. 545 U.S. 469 (2005).
3. For some further sense of this, see the testimony of Thomas W. Merrill, Charles Keller Beekman Professor, Columbia Law School, before the United States Senate Committee on the Judiciary, Sept. 20, 2005 (available at [http://judiciary.senate.gov/testimony.cfm?id=1612&wit\\_id=4661](http://judiciary.senate.gov/testimony.cfm?id=1612&wit_id=4661)). Professor Merrill generally defends the Court's decision in *Kelo* and advocates for an approach that would "assur[e] a more 'just' measure of compensation [but] would leave the ultimate decision about when to exercise th[e] power [of eminent domain] in the hands of local elected officials, where it has long been lodged, and where it belongs."
4. *United States v. Virginia*, 518 U.S. 515, 601 (1996) (Scalia, J., dissenting from decision holding state operation of single-sex Virginia Military Institute to be unconstitutional).