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I recall seeing a column, not long ago, which referred to the Supreme Court as increasingly "a right-wing playground."[1] Liberal groups may be able to raise funds off this impression, but if conservatives rely on it, they are in for a rude awakening when the gavel falls.

Remember that when conservatives first took on the liberal Warren Court as a political target back in the late sixties, what they specifically targeted was "judicial activism," and the remedy was said to be "strict constructionism." Now, with William Rehnquist as Chief Justice, Antonin Scalia as house legal philosopher, and David Souter and Clarence Thomas replacing the two most consistent liberals, conservatives now have, in some sense, a "conservative" Court. But will this mean that the Court will strike down liberal legislation by the bushel, the way the Warren Court did with so many statutes that reflected the pre-sixties received wisdom of our culture? Probably not.

The battle-cries of judicial conservatives all throughout the eighties were: Down with the unelected super-legislature! Let the people make their own laws! Taking our cue from Alexander Bickel's seminal book *The Least Dangerous Branch*,[2] and from Judge Robert Bork's article *Neutral Principles and Some First Amendment Problems*,[3] we argued that judicial review is inherently undemocratic, and therefore inherently suspect. It should be confined to the few cases in which the Constitutional text is clear.

There's an old saying: "Be careful what you wish for; you might get it." There are certain old cases that are plainly "activist" by

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1. *NAACP Delegates Cheer Jackson's Anti-Bork Stance*, WASH. POST, July 9, 1987, at A4.

2. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

3. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

strict Borkian standards, yet are dear to conservatives, especially *Pierce v. Society of Sisters*,[4] which protects the rights of parents to direct the education of their children. While *Pierce* itself is protected by decades of precedents relying on the case, it is very unclear how it would come out if the Court considered it de novo today. Whatever else is meant by the Peyote Case, *Employment Division v. Smith*,[5] it clearly means that the Court expects people to look more to their legislatures and less to the courts for redress of grievances.

Or consider abortion: it is highly likely that the ultimate activist opinion, *Roe v. Wade*,[6] will be overruled; yet this result, while obviously welcome to pro-lifers, is nonetheless unsatisfying. Our whole argument is that the unborn human being is a person, and the Fourteenth Amendment protects the lives of persons.[7] How, from our point of view, can the states be allowed to exclude an entire category of persons from the equal protection of the laws? Yet because language specifically relating to the unborn is not to be found in the text of the Fourteenth Amendment, the "conservative" Court will probably not go further than the "states' rights" position.

I think the Court is trying to teach us to see law as a neutral means of mediating conflicts, rather than as a technique for high-stakes political battles. The new conservative majority would like to wean us from an era in which the most important political battles were fought in the arena of constitutional litigation, precisely because they were important. They certainly have a point — but they also have their work cut out for them. The impulse to turn our deepest beliefs into claims about "natural law" dies hard in the American people.

4. 268 U.S. 510 (1925).
5. 494 U.S. 872 (1990).
6. 410 U.S. 113 (1973).
7. U.S. CONST. amend. XIV, § 1.