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REAGAN, BUSH AND THE SUPREME COURT

*Arthur J. Kropp**

What may be the most significant achievement of the Reagan-Bush years is one we have only begun to appreciate: the radical revolution in the federal courts. After nearly three terms of conservative presidents bent on remaking the federal judiciary, the courts have been transformed. They are far more conservative, and, despite Administration rhetoric to the contrary, decidedly more activist.

Nowhere has the ideological transformation been more apparent than the Supreme Court, where the steady stream of arch-conservative appointments has plainly taken its toll on the Court's traditional mission. Time was when the High Court was the last bulwark of individual liberty, defending Americans' fundamental freedoms against the encroachments of majoritarian rule. But with the ascension of William Rehnquist to Chief Justice; the additions to the Court of Justices Scalia, O'Connor, Kennedy, Souter, and Thomas; and the retirement of such leading defenders of individual liberties as Justices Brennan and Marshall — the Court has turned its back on its traditional role.

The retrenchment has come not just on the marquee issues of civil rights and abortion rights, although certainly the damage in these two areas has been severe. It has also come at the expense of freedom of speech and religious liberty. The Court's 1991 decision in *Rust v. Sullivan*,¹ upholding a regulation barring federally funded family planning clinics from so much as mentioning abortion to their patients, has been commonly accepted as an anti-choice decision. Indeed it is. But it is also a significant and dangerous slap at the freedom of speech, allowing the government to invade the necessarily intimate discussions between doctor and patient. Already the Administration has begun using the *Rust* decision as rationale for content restrictions on federally funded

* President, People For the American Way (a 300,000-member nonpartisan constitutional liberties organization).

1. 111 S. Ct. 1759 (1991).

art, and similar arguments can be expected in other First Amendment areas.

Similarly, the Court's 1990 ruling in *Employment Division v. Smith*² struck a blow at the heart of the First Amendment's protection of religious liberty. In a case dealing with use of controlled substances in religious rituals, the Court gave states broad discretion to regulate religious conduct, the free exercise clause of the First Amendment notwithstanding.

Much of this Court's handiwork can only be described as the product of conservative activism. In *Smith*, for example, the Court's ruling went far beyond the scope of the case at bar. In a range of other cases, the Court has reached out to bend constitutional principle to comply with what can only be regarded as a political agenda.

The sea of change that marked the 1980's will no doubt shape American jurisprudence well into the next century. The unfortunate result of the Court's sharp turn to the right is that fundamental rights and liberties once beyond the reach of legislative and executive tinkering are now subject to political demagoguery and partisan horse-trading. The conservatives describe the resulting din as democracy in action, but they're wrong: it is really the sound of the Bill of Rights being dismantled, one liberty at a time.

2. 494 U.S. 872 (1990).