

# Conservative Bench Press

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President Bush has promised the country that he will nominate only judges who believe in judicial restraint, judges who do not "make social policy" from the bench. Simultaneously, however, his first batch of judicial nominees includes people like Ohio's Jeffrey Sutton, nominated for the federal appellate court that covers Michigan, Ohio, Kentucky, and Tennessee. Sutton, unfortunately, is one of the nation's leading proponents of judicial activism that is advancing a conservative policy agenda from the federal bench.

At oral argument before the U.S. Supreme Court in 1996, for example, Sutton cajoled the Court to "respect the Jeffersonian vision for this country" and "let the States be the principal bulwark when it comes to protecting civil liberties." This may seem like a quaint call for respect for words and intent of our Constitution's framers until you consider that the case in question was interpreting the Fourteenth Amendment, a post-Civil War amendment ratified to rectify a blind spot in Mr. Jefferson's vision: slavery. In this context, Sutton's call for interpretation of the Amendment in light of the "Jeffersonian vision" not only violates historical and textual interpretation of the Constitution, it is downright subversive of lessons this country has learned about protecting civil liberties since our Constitution was drafted over 200 years ago.

Equally disturbing to those who care about environmental protection is Mr. Sutton's argument to the Supreme Court last year that the federal government lacks authority to prevent destruction of waters and wetlands that serve as critical habitat for migrating birds. Yet as early as 1920, Justice Oliver Wendell Holmes declared for the Supreme Court that the protection of migratory birds is a "national interest of very nearly the first magnitude" and that "it is not sufficient to rely upon the states" to protect these species. In light of the historical inability of states to prevent serious environmental degradation, Sutton's characterization of the destruction of wetlands and preservation of migratory bird habitat as "local matters" of no proper concern of the national government is startling.

While the Supreme Court has not yet adopted the most outlandish of Mr. Sutton's arguments, the Court has, in a series of 5-4 rulings split along ideological lines, created a new "federalism" jurisprudence that has already frustrated enforcement of a long line of federal statutes including the Violence Against Women Act, the American's with Disabilities Act and the Religious Freedom Restoration Act.

Taken as a whole, these rulings by conservative judges are just as activist and depart just as far from the text and original meaning of the Constitution as any issued by the "activist Warren court" that conservatives love to vilify. In the words of one judge appointed to the bench by President Reagan, we are in the midst of a "third wave of

judicial activism." Another Reagan appointee, has condemned "unwarranted conservative judicial activism" as "perhaps a lesser known evil than, but every bit as menacing as, its first cousin liberal judicial activism."

This goes a long way toward explaining the lavish attention being paid right now to judicial confirmation. Some conservatives, cognizant of the political constraints imposed by a divided Congress, see judicial appointments as a promising and stealthy vehicle for advancing their more extreme objectives. Many progressives, convinced the presidential election was stolen by the Supreme Court, revolt at the notion of confirming judges who appear likely to use the bench to advance a conservative policy agenda.

All of which will make the Sutton nomination fascinating to follow. Sutton has a resume that any lawyer would envy: Supreme Court clerk (Justice Scalia), Solicitor General of Ohio, frequent Supreme Court advocate. He also has a well-earned reputation as one of the nation's most effective and extreme advocates of conservative judicial activism. His confirmation thus will hinge on a stark question of ideology: Will the Senate confirm a judge who, by all indications, will take the bench hell-bent on undermining congressional power and striking down federal protections for civil rights and the environment?

The Senate's rejection of a nominee such as Jeffrey Sutton would send a strong signal to President Bush that he will be held to his promise of nominating judges who believe in judicial restraint. Jeffrey Sutton is a skilled advocate, but he is not the type of judge President Bush has promised this country.