

can have on the judicial branch of the federal government.

President Barack Obama inherited 54 vacancies when he took office. Unlike the Bush and Clinton administrations before him, the Obama administration did not place a high priority on filling these vacancies his first year in office. Nonetheless, President Obama nominated a total of 329 Article III judgeships during his eight-year tenure.

At the district court level, Congress confirmed 268 Obama nominees or nearly 40 percent of authorized district court judgeships. President Obama also successfully appointed 55 judges to the U.S. Court of Appeals, which constitutes approximately 30 percent of federal circuit court judges.

Additionally, the Obama administration successfully placed three judges on the Federal Circuit Court of Appeals in Washington, D.C. Seven out of the eleven active judges on that court were appointed by liberal administrations.

In only eight years, President Obama's judicial nominations significantly shifted the make-up of the

entire judicial branch. At the close of the Bush administration, judges considered to be "progressive" in ideology controlled only one of the thirteen circuit courts. As a result of President Obama's appointments, progressive judges now control nine of the thirteen circuit courts.

The Fourth Circuit, for example, was once considered a bastion of judicial conservatism and was previously populated with famous textualists such as Judge John Michael Luttig. Over the course of past administrations, presidents favoring progressive judges appointed nine of the fifteen judges on this court. As reported in the pages of *The Washington Post*,

"The U.S. Court of Appeals for the 4th Circuit, a Richmond-based venue the administration might once have found reliably hospitable, now has a higher proportion of judges tapped by Democrats than most of the nation's 13 circuit courts. That includes the pan-Western 9th Circuit with its long-standing reputation among conservatives as the "nutty 9th."

Left unchecked, these lifetime appointments will influence American jurisprudence away from originalism. These courts have already had a detrimental impact to longstanding religious liberty rights just in the last few years.

Reshaping the Judicial Branch for Freedom

The Trump administration has much work to do: there are 133 judgeships to fill, more than twice as many judicial vacancies than President Obama had when he came into office in 2009. Since the Republican-controlled Senate is eager to fill these vacancies, President Trump has an opportunity to swing the pendulum of our judiciary back into balance for a generation and shift the courts so that they protect the vital rights of Americans.

As with the first Supreme Court nomination of the Trump administration, First Liberty Institute attorneys will keep a watchful eye on these influential positions. It is vital to ensure that those nominated to serve as judges are dedicated to the principle of religious freedom in the First Amendment, the foundation of all other rights we hold so dear. 

OBERGEFELL: SILENCING RELIGIOUS DISSENTERS

By Keisha T. Russell, a 2017 graduate of Emory University School of Law

In one of the most politically polarizing decisions since *Roe v. Wade*, the Supreme Court in *Obergefell v. Hodges* decided that the Fourteenth Amendment requires states to license and recognize same-sex marriage. When the case was decided, I was finishing my first year at Emory University School of Law. I was also working in a policy internship to reform education in Atlanta. At my workplace, there were very few Bible-believing Christians — which is increasingly the norm in civil rights work. The leader of the

group praised the *Obergefell* decision and said that we were witnessing a historic moment. Although I was generally unconcerned about the practical consequences of the case, I was concerned about how the decision would heighten the hostility towards Christians who are as vocal as I am about their faith.

In 2012, Dan Cathy, the CEO of Atlanta-based Chick-fil-A, the family-owned fast-food chain known for operating according to Christian principles, made statements regarding the biblical view of marriage. Cathy be-

came the target of a relentless media onslaught with severe repercussions:

(1) colleges expelled Chick-fil-A food from campus; (2) Alderman Joe Moreno threatened to block the construction of a second Chicago store; (3) city council members tried to block a proposed franchise at Denver International Airport. Most strikingly, the outspokenly Christian CEO was being punished for simply stating



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aloud what Christians have believed for 2,000 years. The message was clear for Christian leaders: you can have your beliefs but do not dare to express them in public — and if you intend to live by them, then prepare to face dire consequences.

Cathy later expressed regret for getting involved in the debate on same-sex marriage. He agreed to disengage from politics and instead focus on serving clients. But does this policy of corporate détente apply to CEOs who *support* same-sex marriage? Of course not.

At the time *Obergefell* was decided, I believed that supporters of same-sex marriage see the Supreme Court decision as a stamp of approval, thereby invalidating any viewpoints to the contrary. Regardless of the weighty dissents in the case, my fear was that the decision would intensify the movement against faith-based business and political leaders by labeling their words “hate speech” and bullying them into silence.

In his dissenting opinion, Justice Samuel Alito lamented the majority opinion as an insult to the Free Exercise Clause of the First Amendment and a threat to Evangelicals, Protestants, Catholics, Jews, Muslims, and Mormons who continue to adhere to a millennia-old definition of marriage:

“I assume that those who cling to

old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”¹

In my post-graduate religious liberty work, I have had a front row seat watching Justice Alito’s dire prediction realized in real cases involving real people.

In a recent case, a Christian student was being baited by his classmates and repeatedly asked to defend his religious beliefs about marriage and sexuality. The student was physically attacked when he refused to retract his statements. While admitting that there was no excuse for *physical* violence, the school said that the Christian student’s words were akin to “hate speech” and therefore worthy of censure.

As with this 14-year-old student, I anticipate *Obergefell* will be thrown in my face as an affront to my Christianity. This bigotry against Christians has already happened in recent confirmation hearings for Trump appointees. **Think about it: the words I write now will be used against me if I decide to run for office or am selected by a future president to serve the country.**

Perhaps the most alarming trend in the wake of *Obergefell* lies in equating millennia-old religious beliefs about marriage with *racism*. While this argument works as a bully tactic, it does not work as a matter of history, logic, or scriptural interpretation.

History reflects that the Christian rite of marriage was race-neutral in all denominations for *centuries* until 18th Century slaveholders wrapped their racism in the language

of religion. These outlier racists were eventually defeated by a coalition of black, white, and brown civil rights activists led by a Baptist preacher who fought under the banner of the Southern Christian Leadership Conference. His reading of the Bible prevailed because it was historically correct, scripturally literate, and logical: since Genesis, man and woman have



united in marriage to create children — whatever their race or ethnicity.

Obergefell does not displace this ancient truth. Nonetheless, *Obergefell* has become a weapon wielded by those attempting to sever Christians from positions of power and influence and slice the Bible from public discourse. As Americans, can we profess to support a healthy marketplace of ideas when we silence the voices of the religious or the voices of anyone with whom we disagree? If history has taught us anything it is, those who seek to silence their opposition do so to prop up ideas which would crumble under intellectual or moral scrutiny.

I have embraced my duty as a lawyer to obey and defend the Constitution of the United States. As a Christian, I feel deeply the spirit of liberty, which is at the heart of the Constitution. For me, there is no greater liberty than the choice to obey God. Not everyone will make the same choice, but I will continue to defend our sacred rights. 

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200 W. Third St., Ste. 502

Alton, IL 62002 (618) 433-8990

Eagle@EagleForum.org

EagleForum.org

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642-43 (2015).