

Obergefell v. Hodges / Excerpts from the Dissenting Opinions—Answer Key

The following are excerpts of the dissenting opinions written by Chief Justice John Roberts and Justice Clarence Thomas:

In the dissent, Chief Justice Roberts and Justices Scalia, Thomas, and Alito made two basic constitutional arguments:

- First, the Court overstepped its bounds by creating a new right.
- Second, by allowing same-sex marriage, the majority decision infringes upon the religious liberty of those who oppose same-sex marriage on religious grounds.

“But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise ‘neither force nor will but merely judgment.’ (The Federalist No. 78, p. 465)

The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. The majority expressly disclaims judicial “caution” and omits even a pretense of humility, openly relying on its desire to remake society according to its own “new insight” into the “nature of injustice.”... As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?”

—*Chief Justice John Roberts*

“In our society, marriage is not simply a governmental institution; it is a religious institution as well. Today’s decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples. The majority appears unmoved by that inevitability.”

—*Justice Clarence Thomas*

Questions to Consider

1. Do you agree with Chief Justice Robert's assertion that the Court should not make policy? Why or why not?

Student answers will vary. Those arguing that the Court should not create policy may build their argument around the fact that justices are not elected but the state legislators who wrote the policies to allow or ban same-sex marriage are elected. Other students might argue that the Supreme Court makes policy every time it makes any ruling at all because its decisions are binding upon lower courts and referenced by elected legislators.

2. Would the First Amendment's Free Exercise Clause allow states to outlaw behaviors such as same-sex marriage on a religious basis?

Student answers will vary. Students who argue that the Free Exercise Clause would allow states to outlaw certain behaviors, like same-sex marriage, would argue that same-sex marriage might force some people like photographers or bakers to provide services to a wedding of a same-sex couple even though they oppose same-sex marriage on religious grounds. Those students who argue that the Free Exercise Clause would not allow states to outlaw behaviors like same-sex marriage might use the Establishment clause to support their arguments saying that states are not allowed to favor certain religious beliefs over others or even the absence of religious faith.