NATIONAL REVIEW

The Constitution Is Silent on Same-Sex Marriage

By The Editors — April 28, 2015

If the Supreme Court rules that all state governments must recognize same-sex unions as marriages, it will not just be saying that the view that marriage should be defined in law as the union of a man and a woman is wrong—and saying that without any clear constitutional warrant. It will be officially declaring that this view is irrational, in opposition to the country's fundamental principles, and, quite possibly, bigoted. The Court should refrain from taking that reckless step.

An older view of marriage has steadily been losing ground to a newer one, and that process began long before the debate over same-sex couples. On the older understanding, society and, to a lesser extent, the government needed to shape sexual behavior—specifically, the type of sexual behavior that often gives rise to children—to promote the well-being of those children. On the newer understanding, marriage is primarily an emotional union of adults with an incidental connection to procreation and children.

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We think the older view is not only unbigoted, but rationally superior to the newer one. Supporters of the older view have often said that it offers a sure ground for resisting polygamy while the newer one does not. But perhaps the more telling point is that the newer view does not offer any strong rationale for having a social institution of marriage in the first place, let alone a government-backed one.

What ought to matter for the Court, though, is that the Constitution neither commands states to adopt one of these understandings nor forbids them to do it. No legislators

who ratified the Fourteenth Amendment understood themselves to be settling policy on this question or to be handing over the authority to settle policy on it to federal judges. (In this respect same-sex marriage is very different from interracial marriage, bans on which were introduced into the law precisely to enforce the racial hierarchies the Reconstruction Amendments assaulted.)

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When the Court ruled in 2013 that the federal government could not define marriage as the union of a man and a woman for the purposes of its own programs, Justice Kennedy's opinion was full of references to the prerogatives of the states. If the Court now rules that states do not have the authority to define marriage as the union of a man and a woman, either, it will be clear that those references were for show, and that the Constitution is the plaything of a willful Court.