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Marriage, the church and the Supreme Court

by Michael Sean Winters

Distinctly Catholic

The Supreme Court's twin decisions in the battle over same-sex marriage on Wednesday were momentous, to be sure. But Wednesday was not "tragic," as the statement from the USCCB stated. Nor were the court's decisions victories in what Harvey Milk's nephew unfortunately termed the "defining civil right issue of our time," a claim that was downright offensive coming within 24 hours of the Supreme Court's far more objectionable decision to gut the Voting Rights Act. Turns out, old-style civil rights remains the defining civil rights issue of our time.

In his majority opinion, Justice Anthony Kennedy wrote, "The state's power in defining marriage is of central relevance to this case." Indeed. And there is the rub for me. I do not understand why some people, including some bishops, are all worked up about same-sex marriage when the fact that the state, not the church, has the power to define civil marriage is well-established in American legal culture, and it was so long before anyone ever talked about gay marriage.

A couple gets married in a Catholic church. The couple is heterosexual and they pledge themselves to each other forever. Both parts of the equation -- the complementarity of the genders and the indissolubility of the marriage bond -- are central to the sacrament. But as we all know, for many years now, even before no-fault divorce made it easy, Catholics married in the church were free to pursue civil divorce and throw the "'til death do us part" pledge overboard. Heterosexual opponents of homosexual marriage would be more convincing if they had not made such a hash of traditional marriage in the first place.

On the other hand, there was Edith Windsor, the plaintiff in the case against the Defense of Marriage Act. She is 83. A few years back, her lifelong partner, Thea Spyer*, died, and Windsor, who married Spyer in a civil ceremony, got saddled with a huge tax bill. Windsor and Spyer were not married in a Catholic

church, and they certainly did not meet the church's requirement about the complementarity of genders essential to our Catholic understanding of marriage. But they apparently nailed the " 'til death do us part" half of the equation. Why is their difference from the ideal so much worse than a divorce? In America, the culture has long entertained a different understanding of marriage from that of the church, an understanding rooted in contractual terms, not sacramental terms.

That difference was on full display Wednesday. I watched the coverage, and almost everyone in favor of same-sex marriage who was interviewed spoke about the "rights" and "benefits" the decision conferred. That language is not the language of the church. For us, marriage is a sacrament, and sacraments are about gift and grace. Of course, our Protestant brethren do not view marriage as a sacrament -- that was one of the points of contention during the Reformation, yes? As a matter of principle, Protestantism has always permitted divorce even though the culture shunned it until the mid-20th century. (Think Wallis Simpson.) What was "lost" Wednesday at the Supreme Court was something fundamentally different from what Catholics mean when we use the word "marriage." That was not before the court.

Language and law shape the culture. It is high time that both sides in this fight adopt different ways of speaking about this issue. They can start by acknowledging the good faith of the other side. You do not have to be an anti-gay bigot to be concerned about the state of traditional marriage in our culture and to worry about anything that might continue to eat away at this foundation of culture. "There are moments in intellectual history when a small change in quantity induces a change in quality, when the addition of a new shade to a seemingly continuous spectrum produces a new color," wrote Peter Gay in his authoritative history of the Enlightenment. I do not believe Wednesday's decision is such a moment, but I can recognize the good faith of those who fear it might be such a moment.

Similarly, as I have repeatedly said, it is time for the leaders of the Catholic church to recognize the good faith of those who support same-sex marriage. They do not see themselves as mounting an assault on traditional marriage. Imitation is the highest form of flattery, no? It costs us nothing to admit that we think gay couples should have the rights that attach to marriage: We do support the extension of health care benefits, the ability of people in all sorts of relationships to find stability and a nurturing environment for themselves, etc. This was always the beauty of the "Levada" solution to the issue of same-sex partner benefits in San Francisco back in the 1990s. Then-Archbishop William Levada took something problematic, the recognition of same-sex unions by contracting and employing Catholic institutions, and extended the concept, removing the problem and achieving a yet better solution: Why should only gay or straight married couples be able to share their employment benefits with each other? Why not an unemployed cousin who may be living with you, or a retired aunt, or a nephew whose parents have asked you to take their son for a bit? The argument for civil unions always appealed to me, but as a matter of politics, and now of law, that train has left the station.

There was a big loser Wednesday: natural law. Better to say, the big loser was the way natural law theory has been deployed in this and other debates by a set of Catholic conservatives. They hold up natural law as something accessible by means of reason to all men and women, irrespective of their religious beliefs. But if that is the case, introducing a natural law argument certainly should also require a disposition on the part of the person asserting it to enter into dialogue with those who, motivated by reason, reach different conclusions. Instead, natural law is usually put forward as a conversation-ender, not a conversation-starter, a trump card that wins the game even though very few non-Catholics learn natural law reasoning in their philosophy classes anymore, and even then-Cardinal Joseph Ratzinger admitted it has become a "dull instrument" for dialogue.

"Don't mess around with Mother Nature" was the tagline of a famous commercial when I was growing up. That was an ad for margarine. The strongest part of the argument against same-sex marriage has been that

gender is a given and should be experienced as a gift, and that anything that obfuscates gender differentiation can be problematic. The weakest part of the church's teaching on homosexuality at this moment in time is its inability to grapple successfully with the fact that most gay people also experience their sexual orientation as a given. Besides, we Americans mess with nature all the time. Think Hoover Dam.

The leaders of the church would do well to consider this. It has long been obvious that the church's teachings on homosexuality and other issues of pelvic theology are not persuasive in today's culture. Standing on their own, those ethical teachings can no longer carry the day in this or any Western culture. But, they were never meant to stand on their own. Only because Catholics have accepted the modern and Protestant view of the role of religion in our culture, reducing it to ethics and turning the church into a kind of ethical authority, have we gotten to this point. We must be able to approach the culture as a church, not an ethical authority. We must make clear that the church's teachings on these contentious issues are rooted in the self-revelation of Jesus Christ, not merely in the natural law. We must not expect our teachings to stand on their own but must root them in the empty tomb of Jesus Christ. Doing so will, I suspect, invite a different, less combative way of discussing them at the very least.

I repeat my call for the bishops of the United States -- and now extend it to the bishop of Rome -- to adopt a different strategy. We should draw a bright line between civil marriage and the sacrament of matrimony. We should start by announcing that the church's ministers will no longer participate in the conferral of civil marriage in any way. If you want that, go to city hall and get the forms signed there. If you want the sacrament, come to us. As long as the ministers of the church participate in a legal contract that the state defines, it is only a matter of time before someone seeks to compel the ministers of the church to perform a same-sex ceremony with a lawsuit.

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I worry deeply about the future of the family in this culture. Next week, I will have a review of a book by Mary Eberstadt that treats the relationship of the family to secularization. The issue is important for anyone who cares about the future of our society and our culture. I do not begrudge those who celebrated Wednesday's rulings their joy, nor do I begrudge Ms. Windsor the money she will now get back from the federal government. I fear that if the primary face of the church in these battles is a begrudging face, we will not only continue to fail to make our case to the culture, we will do a disservice to the love of Jesus Christ, which knows no bounds and which falls beyond the jurisdiction of the Supreme Court. Let's focus on helping couples stay married. Let's focus on teaching our people about the sacramental beauty that can be theirs. Let's get our own people to the altar! There is plenty of work to do, and none of it requires begrudging Edith Windsor her day or her victory in court.

**An earlier version of this blog incorrectly spelled Thea Spyer's name.*

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