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Natural Law, Natural Rights, and Same Sex Marriage

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Natural Law, Natural Rights, and Same Sex Marriage: Do Same Sex Couples have a Natural Right to be Married?

In contemporary liberal societies, when one wants to enact new legislation that will result in coercing one’s fellow citizens to act or refrain from certain actions, it is understood that those enacting such legislation have a burden to justify their laws. Legislation that creates same-sex marriages (SSM) is no different than any other law. This is especially true in that there is a strong coercive element that accompanies the legalization of same-sex civil marriages. That is, the government’s endorsement of SSM entails the enforcement of this legislation. In this case, SSM advocates can use the government as a tool to make those who would not otherwise do so believe or act as though SSM is the same thing as traditional marriage. At this point in history, it is clear that many do not want to accept SSM as an authentic marriage or as an acceptable lifestyle. It is my claim that the SSM advocates have a heavy burden to prove that SSM is actually marriage. If SSM is not actually a natural marriage, then there can be no natural right to SSM. It is the SSM advocate’s task to prove that there is an underlying principle with the moral force to justify the government’s enforcement of the recognition of SSM, thus commanding a change in legislation in order to protect this right. I argue, in this order, that only the natural moral law (NML) can grant this natural right. Therefore, there should be legislation to secure the right of SSM only if there is a natural right to SSM. Further, there can be a natural right to SSM only if there is actually such a thing as SSM that has an ontological status of existing naturally. If SSM advocates claim, as many of them do, that they have the right to marry, then they cannot mean that they have a posited right since only a few states actually have the legal right written into the
books. Thus, the claim that there is a right to same-sex marriage must mean that there is a naturally existing right that society ought to recognize and defend. Is this true?

Only Natural Moral Law Creates Natural Rights

The American Founders believed in natural law. They justified going to war on the grounds of the natural moral law.\(^1\) They further justified abandoning the original American constitution the Articles of Confederation\(^2\) by appealing to the natural law “in order to form a more perfect union.”\(^3\) The Founders wrote the Ninth Amendment in order to defend the existence of unwritten natural rights.\(^4\) Thomas Jefferson wrote about the “Laws of Nature and of Nature's God” and of mankind being “endowed by their creator with certain inalienable rights.”\(^5\) This is not the argument that SSM advocates use. So what is this natural law of which I speak?

The natural law is part of reality that man discovers. That is, man does not create the laws of nature. Man may deny the laws of nature or ignore them, but he does so at his own peril. Gravity is part of the laws of nature. Mankind did not posit this law into existence, but instead lives according to it. Natural laws of this sort do not stir much debate. Natural moral laws, however, are quite controversial. Natural moral laws (NML) follow the same basic principle as that of the law of gravity. That is, the NML is part of reality, discoverable by mankind, and is

\(^1\) See the Declaration of Independence, http://www.archives.gov/exhibits/charters/declaration_transcript.html


\(^3\) See the Constitution of the United States http://www.archives.gov/exhibits/charters/constitution.html

\(^4\) See Ninth Amendment, United States Constitution which reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

\(^5\) Declaration of Independence
either lived within or denied at one’s peril. Randy Barnett argues that these laws of nature are no less real than the laws of nature that govern engineering and architecture. Barnett writes:

Americans at the founding of the United States well-accepted the idea that the world, including worldly governments, is governed by laws or principles that dictate how society ought to be structured, in the very same way that such natural laws dictate how buildings ought to be built or how crops ought to be planted. This concept of law needs to be briefly compared to legal positivism.

Natural law is distinct from legal positivism or positive law (PL). In brief, legal positivism is the view that law is socially constructed. Positive law recognizes laws and rights based on pedigree. John Austin argued that what made a legitimate legal system was the presence of a habitually obeyed sovereign who has the power to back his will up with sanctions. Austin’s view has been the subject of criticism in light of democracies lack of a sovereign. H.L.A. Hart describes the pedigree of a complete legal system by describing three types of second-order rules that govern primary rules of government. The first is the rule of recognition that “specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.” Second is the rule of

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7 Ibid.


11 Ibid. 92.
change that allows citizens to add to, take away from, or change rules of society. And third is the rule of adjudication, which is the means by which society determines whether or not rules have been broken.¹²

Many PL theorists believe that there is no necessary connection between law and morality. Thus, there is a real distinction between positive laws and rights and morality. This distinction implies that law and morality can exist independently of one another.¹³ Hart writes that the separability thesis is the “simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.”¹⁴ According to PL, a just law is one that is created according to certain legal standards, not moral standards.¹⁵ Further it has been stated that “no legal positivist argues that the systemic validity of law establishes its moral validity.”¹⁶ This is important in that posited laws cannot ground the statement that society ought to recognize same-sex marriage. This “ought” must come before the law and not as a result of it. Positive law can enforce natural law, it can be used to protect natural rights, it can grant allowances, but it cannot create natural rights.

According to NL, a just law must not violate the NL. This is not to say that all laws must correspond to the NL. Many argue that laws specifying speed limits are not bound up by the NL. It can be argued, however, that there is an underlying principle of safety based on the NML,

¹² Himma, “Legal Positivism.”

¹³ The claim that law and morality can exist independently of one another is not the claim that there is never a connection, nor that there ought not be a connection.


¹⁵ Himma, “Legal Positivism.”

which states that the intrinsic value of human life grounds the instrumental value of traffic laws. Positive laws, one the other hand, that violate the NL cannot be just even if they are legally formed in accordance with accepted legal standards. If a society posited a law that all of its citizens had the right to step off the tops of buildings, the natural law of gravity would not acquiesce. It is my claim that natural moral laws have the same force, given that they are rooted in reality just as much as the law of gravity. With this in mind, laws that required black citizens to sit in the back of the bus were formed according to the accepted legal practices of the day, but they were unjust because they violated the natural rights of black citizens. To make sure that bad laws are not merely bad because they violate citizens’ legal rights, the case is strengthened in that both the American Revolution and Civil War were justified on the grounds that the laws, which had the proper legal pedigree, violated natural rights with which God endowed men. Just as the law of gravity, the rights that justified the two previous wars and the civil rights movement existed apart from the positive law.

Yet, how does one determine what the natural moral law is? Aristotle argued that:

Every art and every inquiry, and similarly every action and pursuit, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim. But a certain difference is found among ends; some are activities, others are products apart from the activities that produce them. Where there are ends apart from the actions, it is the nature of the products to be better than the activities.\(^\text{17}\)

The ends are that for which any object, action, etc... is designed. Aristotle argues that the activity of generalship is for victory, and that the activity of medicine is for health.\(^\text{18}\) Natural law theorists assert that we discover the natural moral law from the natural ends towards which an act is directed. That which fulfills the natural teleology is good, and that which deviates from the


\(^{18}\) Ibid.
natural teleology is bad. For example, the end of the eye is to see. Thus, to use the eye in a manner that deviates from, and is perhaps destructive to, this end is bad.

**Natural Rights and Unnatural Acts**

If it is the case that only those acts or things that conform to the natural law possess natural rights, then that which is unnatural does not possess natural rights. According to the NML, this is not something upon which society decides. Society would not find it rational to take a vote on whether or not it is permissible to ignore the laws of physics. If homosexuality is unnatural, then suggesting that same-sex couples have the natural right to marry is just as irrational as positing the right to ignore gravity or legislate square circles. NL presupposes that all things aim at some good. Does homosexuality aim at some good?

According to NML, homosexuality is unnatural. By unnatural, I mean the claim that the acts performed by same-sex partners do not fulfill the purpose for which the body parts are intended. Moreover, not only are the body parts in question not used for their designated purpose, homosexual acts are often injurious to the body. Though discussing this aspect of the homosexual union is often avoided, there is literature that supports this claim. Jeffery Satinover writes:

…homosexual men are disproportionately vulnerable to a host of serious and sometimes fatal infection caused by the entry of feces into the bloodstream. These include hepatitis B and the cluster of otherwise rare conditions, such as shigelosis and Giardia lamblia infection, which together have been known as the “Gay Bowel Syndrome.”

Homosexual men are at risk for these pathologies even if they are in a monogamous relationship. Females are not without risks health risks. Lesbianism includes higher risks of several different

types of infections including but not limited to: bacterial vaginosis, chlamydia, trichomoniasis, and the human papillomavirus (HPV).\textsuperscript{20} If following the NL creates conditions for individuals to flourish both mentally and physically, it follows that that which diminishes the chances of one’s flourishing is not part of the NL.

Beyond the physical risks of homosexual behavior, the acts do not result in the ends for which any of the body parts used are designed. To make this clear, the end or purpose of genitals is procreation. Further, the end or purpose of the lower digestive tract is for the expulsion of waste. The use of these two body parts together not only does not result in the purpose for each, but often is destructive of their purposes.

The question is whether or not the homosexual is using his body in accordance with its function. Describing the natural law, Timothy Hsiao writes:

…something is good by functioning as it should. A firefighter is good by fighting fires, since that is what firefighters are supposed to do. A vehicle is good by transporting people and goods well, since that is how vehicles are supposed to function. An orange tree is good by producing fruit, since that is how orange trees are supposed to develop… …Good firefighters, good cars, and good orange trees are all good in the sense that they are fulfilling their respective ends. The standard of goodness for any being consists in what perfects it according to the kind of thing it is.\textsuperscript{21}

Hsiao further writes:

Now our actions are executed by engaging bodily faculties. When we breathe, we use our lungs. When we see, we use our eyes. When we engage in sexual activities, we use our sexual organs. These faculties have natural purposes that direct up to the achievement of


their end. Lungs are for breathing, eyes are for seeing, and sex, as I will argue, is for procreation.\textsuperscript{22}

Hsaio argues that badness is “a type of privation.”\textsuperscript{23} That is, it is a lack of fulfillment of the act or object’s purpose. Examples of this include medicine that does not produce health, cars that do not transport people or goods, or sex that is not sufficient to procreate.\textsuperscript{24} Given all of this, it appears that homosexual acts are insufficient at best and often destructive to the ends of the individual, and thus, they are unnatural. Further, if the act is not natural, then there is no natural right that requires the state to endorse it.

What if, apart from the sexual act, there is a natural right to SSM because of the nature of marriage itself? If there is a natural right to SSM, then there is an implicit ought that is placed upon citizens to accept such unions as legitimate. If, however, there is no natural right to SSM, then there is no obligation for citizens to treat SSM as truly marriage. It is to this question that I now turn.

**Is Same-Sex Marriage the Same as Conjugal Marriage?**

Presupposing the equality of all marriages, SMM advocates make the claim that legislation “should” or “ought” to be passed that legalizes same-sex marriages. The claim that there “should” or “ought” to be legislation is the moral grounding upon which the SSM laws will be made. The question is whether or not the SSM advocate is on firm ground. As written above, there should be a positive right to SSM only if there is a natural right to SSM. This is to say that

\textsuperscript{22} Ibid. 2.

\textsuperscript{23} Ibid.

\textsuperscript{24} It is often the case that heterosexual couples engage in sexual activity but they cannot conceive. This does not indicate that their sexual acts are morally wrong. Though they are engaging in the natural sexual act, there is a malfunction of one or both of the spouses’ organs. The hetero-sexual act by nature produces offspring, whereas, the homosexual act does not.
there needs to be a non-arbitrary reason for creating such culture changing legislation. Without giving a full blown course on how specifically each and every other moral theory is inadequate, it should suffice to say that Natural Moral Law (NML) offers a universal, non-subjective account of the Good that transcends time and location. That means that if homosexual behavior is moral according to NML, then it has always been moral in all places, and it will continue to be moral in all places even if it is not popular. However, if homosexual behavior is not moral according to NML, then it has not been moral ever, nor will it ever be moral. This is true even if homosexuality becomes a sociological norm. Further, even if homosexuality could be determined to be morally acceptable according to NML, it does not follow that there is a natural right to marriage. For there to be a natural right to SSM, the SSM advocate must first show that there is an essential feature of marriage that is not heterosexual. Second, she must then show that the essence of marriage includes same-sex couples.

Fairness demands that things that are the same be treated the same way. That is equals should be treated equal, and those that are not equal should be treated as unequal. With that said, proponents of SSM demand equal treatment of SSM as though it is the same thing as the traditional understanding of marriage. This is a statement of knowledge that needs to be shown and not merely asserted.

The claim that there is an essential feature to marriage is bold indeed. However, the SSM advocate is placed in an awkward position. She has the choice to affirm one of two propositions: First, SSM fulfills NML, and thus, there is a natural right to marriage; or second, there is no essence to marriage, therefore there is no reason to include or exclude same-sex couples into this class of citizens. The former is a metaphysical claim that there is an essential feature to what a marriage is that excludes all other types of relationships that do not share it. Thus, to call a same-
sex union a marriage if it did not share this essential feature would be akin to calling a circle a square. They are both shapes, but they are not the same type of shape.

There are several types of definitions. With that in mind, there are also different types of definitions concerning the debate over same-sex marriage. For example, there are definitions that describe merely the use of a term. In this case when defining marriage, one would be discussing the use of the word "marriage" rather than the object to which that word tags. In the debate over same-sex marriage, this type of definition asks how society should extend or retract the word. Should the word “marriage” be used to tag relationships that include same-sex partners, or should the word “marriage” be used only to tag relationships that include (among other things) only opposite sex partners? I could say that I am married to an idea, I am married to job, and I am (or at least will be) married to my fiancé. In these cases I am using the word “marriage” to describe my relation to many different things. The problem with this is that I have equivocated. That is, the term is not consistent in its meaning. Though I use the same term, marriage to an idea is not the same thing as marriage to a spouse. The question then is whether or not the marriage of two same sex partners is the same thing as the marriage of two opposite partners. If we insist that marriage is merely a word that can be applied to whatever we desire, then I truly can be married to objects such as work and ideas. However, I do not believe that such an arbitrary definition is what anybody desires marriage to be.

Determining whether or not same-sex marriage is an identical type of relationship as traditional marriage requires an essential definition. An essential definition of marriage asks what has to be present for a thing to be a marriage. Furthermore, if the essential thing (whatever

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25 See Peter Kreeft, *Socratic Logic: A Logic Text Using Socratic Method, Platonic Questions, and Aristotelian Principles*, (South Bend, St. Augustine’s Press, 2010).
it is) is missing, then so too is that object we call marriage. In this case, the word “marriage” is merely a word that tags an essential object or relation that fulfills the necessary criteria. If same-sex marriage possesses all the same “essential properties” of marriage that opposite-sex marriages possess, then they are essentially the same. However, if any essential properties are missing from either one of the two relationships, then they are not identical types, and to use the same term serves only to confuse the subject.

To understand what is essential to marriage one must know what is non-essential. Non-essential properties are called accidents; they are often associated with a things identity, but they are not essential to a things identity. For example, I can be described as the professor who is 5’10”, 195 pounds, and has brown hair; however, none of these descriptors is essential to who I am. I can shrink with age, gain or lose weight, and lose my hair; yet, I would still be identical to who I am. Just like myself, there are several accidents that describe marriage. First, the concept of love in the form of passion is non-essential to marriage. Many people are married who rarely if ever feel passion for their spouse. Passion is not even sufficient for marriage to obtain since there are many people who are passionate for one another that are not married. Second, marriage licenses seem to be accidents of marriage also. History indicates that marriage existed long before the issuance of licenses by the state. If licenses are essential to marriage, then marriage did not exist until governments started issuing these arbitrary pieces of paper. Moreover, this

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26 This statement is true if marriage is not merely identical to a contractual agreement with the state that requires a license.

would mean that nineteenth century marriages between slaves were not real marriages. This is because the slave states did not issue marriage licenses to enslaved people. If the slaves were truly married, then the marriage license is non-essential to what a marriage really is.

So what is essential to being married? Is it even essential that one have a partner? Can I be married to myself? It seems to me that a relationship is essential to marriage. Relationships require more than one object. Thus, it seems to me that for me to be married, I must be wedded to something other than myself. Though marriage requires at least two relata (things that are related), not all things that are related are marriages. I am related to my sisters, my parents, my friends, and my students; yet, I am married to none of them. What has to be present in a relationship that makes it a marriage? As asked before, can I actually be married to my job instead of a wife? One’s wife can accuse her spouse of being married to his job, but that does not make him a bigamist. To suggest such a thing is clearly absurd, or is it? As we will find, the argument over the definition of marriage takes place in the theater of the absurd. We can and should ask whether or not that which we marry even has to be human. Recently, a woman, Linda Ducharme “married” a Ferris wheel. Shortly before this, in France, a woman was granted a marriage license to “marry” her dead boyfriend. In 2006 a woman “married” a dolphin. The list goes on: In Germany a man “married” his cat, in China a man “married” himself, and in

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28 This question is not my own. My good friend Luke Mather asked this of his students.


32 “Man Marries Cat,” http://metro.co.uk/2010/05/04/man-marries-cat-281021/(2010)
South Korea a man “married” his pillow. All of those in the “marriages” boast a romantic attraction. Yet, as I pointed out earlier, romantic attraction is not essential to marriage. On top of that, the romance is only one-sided. Ferris wheels and pillows cannot reciprocate romantic love. This is also true for dead bodies and even other species. With that said, those who claim to be married to these objects may feel romantic attachments to particular objects, but they do not possess that which is necessary for a true marriage.

One might argue that commitment is essential for true marriage to obtain. I can agree with this. However, commitment covers too much ground. That is, though commitment may be necessary for a marriage, it is also sufficient for other types of relationships to obtain. It is not unique to marriage. I am committed to my work, but I am not married to it in the way I will be to my fiancé. I am committed to being a good father to my son, but I am neither his husband nor his wife. Commitment is necessary (perhaps) for marriage, but it is not sufficient. We need to ask what it is that is essential and unique that makes some relationships marriages while excluding others. Otherwise, if we can apply the term marriage to any and every type of relationship, then all relationships are marriages. And, if every relationship is a marriage, then nothing is really married. This is much like the saying, “if everyone is special, then nobody is special.”

There are many relationships that possess both passion and commitment, but these are not marriages. Many cohabitate with one another under such circumstances, and there is almost universal agreement that the couples are not married. Why is this? One obvious reason is that there has not been a marriage ceremony to declare that the couple has transitioned from being

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non-married into the bonds of matrimony. This ceremony centers on the stating of vows and declarations. But, what does the stating of vows do that makes a relationship a marriage? For most theists, including Jews, Christians, and Muslims the marriage ceremony establishes a covenant with God. For the Jewish, the term “marriage” is the same Hebrew word *kiddushin*, which is translated as sanctification. George Robinson writes, “Marriage is viewed by Judaism as a *sacred* act, also an imperative one.”\(^{35}\) George goes on to say:

Marriage as an institution is as much the creation of God as anything in the Torah. “It is not good for man to be alone;” the Creator says of Adam in Genesis 2:18 before creating Eve as his companion. By investing marriage with a Divine origin, Judaism gives it even greater weight and sanctity.\(^{36}\)

The Catholic Church teaches that:

The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament.\(^{37}\)

This above definition is known as the “conjugal” view of marriage.\(^{38}\) This is in contrast to what many same-sex couples refer to “Civil Marriage.” Civil Marriage is defined as:

…a unique legal status conferred by and recognized by governments all over the world. It brings with it a host of reciprocal obligations, rights and protections. It is also a cultural institution. No other word has that power and no other status can provide that protection.\(^{39}\)

Currently Civil Marriages come with the following legal rights:


\(^{36}\) Ibid.


Married couples have 1,138 federal rights, protections and responsibilities such as:

- Social Security benefits upon death, disability or retirement of spouse, as well as benefits for minor children.
- Family and Medical Leave protections to care for a new child or a sick or injured family member
- Workers' Compensation protections for the family of a worker injured on the job
- Access to COBRA insurance benefits so the family doesn't lose health insurance when one spouse is laid off
- ERISA (Employee Retirement Income Security Act) protections such as the ability to leave a pension, other than Social Security, to your spouse
- Exemptions from penalties on IRA and pension rollovers
- Exemptions from estate taxes when a spouse dies
- Exemptions from federal income taxes on spouse's health insurance
- The right to visit a sick or injured loved one, have a say in life and death matters during hospitalization.\(^{40}\)

By contrasting these two uses of the term “marriage,” one can see the obvious differences. The theistic understanding of marriage centers on two things, a covenant with God and the type of relationship that can potentially create offspring. On the other hand, the civil marriage, for which same-sex couples fight, centers on a legal status that brings legal rights and benefits.\(^ {41}\) At least for Catholics and many Protestants, the essential element for a true marriage to obtain is a covenantal relationship with God.\(^ {42}\) Having government granted legal status and a set of privileges before the law is merely a collection of accidental properties that can be given or taken away. If, for instance, the United States government decides to take away the legal rights

\(^{40}\) Ibid.

\(^ {41}\) It can be argued that these benefits are given to encourage and strengthen marriage. SSM advocates tend to assume that these benefits are the marriages.

\(^ {42}\) Another question one might ask is whether or not same-sex couples can enter into a marital covenant with God. This is a theological question. Thus, this puts the state in the position to determine the validity and truth of theological claims.
contained in a civil marriage from those in a covenantal agreement with God, the wedded do not cease to be married. However, if one takes marriage to be merely these governmental rights, protections, and responsibilities, then the loss of these entails the loss of the marriage. Keep in mind that the American slaves entered into covenantal marriages with each other in absence of the aforementioned non-essential elements of civil marriages. Though they were not legally able to wed, according to the conjugal view of marriage they were in fact married. Governments can neither deny, nor unwed a conjugally married couple. The same cannot be said of civil marriages.

If same-sex couples accept the above as true, then should they instead seek to enter into a conjugal marriage? Are conjugal marriages possible for same-sex couples? As said above, the conjugal view of marriage necessitates the type of relationship that by nature results in the procreation of children. This means that those who enter into the union of a conjugal marriage create the type of relationship that by nature produces offspring. This is not a biased claim; it is merely the observation that same-sex couples do not possess the essential type of relationship that is required for a “conjugal” marriage. This is not something that one can argue for or against in court, it is part of reality. Just as the relationship of the woman who “married” a Ferris wheel can perhaps get the civil rights of a legal marriage but she is not in the type that naturally procreates, so too are those in same-sex relationships. They may obtain licenses and legal rights that grant privileges, but they can never be married in the conjugal sense of the word. This is because it is not part of mankind’s nature to conjugally marry the same sex, just as it is not part of our nature to conjugally marry Ferris wheels. Society may start calling same-sex relationships

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43 It is important to note that the conjugal view of marriage necessitates only the type of relationship that creates offspring. The actual creation of offspring is not necessary for marriage on this view.
marriages just as one can start referring to squares as circles, but merely using the same term does not make two things identical.

**Conclusion**

In this paper I suggested that the same sex marriage advocate has a strong burden to prove that there is a natural right to same-sex marriage. Furthermore, in order for there to be a natural right to same-sex marriage the union must adhere to the natural law. I then argued that same-sex marriage fails to fulfill the natural law for many reasons. First, homosexuality fails to fulfill the natural ends for the body parts that are used in this union. Second, homosexuality is often deleterious to the health of those who participate in it. From there I argued that for there to be a natural right to same-sex marriage, then same-sex unions must actually be marriage by nature. Natural rights require natures. If constructivist accounts of marriage are correct in saying that there are no such things as natures, then there also is no natural right to same-sex marriage. Thus, to say one has the right to same-sex marriage in the same way the American Founding Fathers used the term, requires one to embrace natural law. Yet, in appealing to the natural law, the same-sex marriage advocate is also able to be judged by it. On the one hand, by getting rid of the natural law to avoid this judgment, the same-sex marriage advocate has thrown out the ability to appeal to an objective principle upon which one can justify the written law. Thus, the same-sex advocate cannot appeal to natural rights for the endorsement of same-sex marriage laws. On the other hand, by demanding that one has a natural right to same-sex marriage, the union is judged against the law and found wanting.