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Yes: It is a fundamental right under the U.S. Constitution.

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In the debate over gay marriage there are two related but distinct questions.

One question is whether people believe, for religious or other reasons, that people of the same sex should not fall in love and marry each other; many people have strong and sincere beliefs on each side of this question.

The second question is whether state laws prohibiting persons of the same sex from marrying each other violate the equal-protection and due-process clauses of the U.S. Constitution; this is the question that former Solicitor General Ted Olson and I are now litigating in our case to overturn California's Proposition 8, which prohibits gay marriage in that state.

People's personal views of the appropriateness of same-sex relationships naturally influence their views of our lawsuit. However, it is important to remember that the legal question does not, and under our Constitution cannot, depend on people's personal preferences.

The constitutional issue is quite simple. The Supreme Court repeatedly has held that the right to marry the person of your choice is a fundamental human right guaranteed by the equal-protection and due-process clauses of the Constitution:

In 1967, in *Loving v. Virginia*, a unanimous court overturned the laws of more than 20 states that at the time prohibited interracial marriage.

In 1978, the Supreme Court, in *Zablocki v. Redhail*, vacated as unconstitutional (by an 8-1 vote) a Wisconsin law preventing child-support scofflaws from getting married. The court emphasized, "Decisions of this court confirm that the right to marry is of fundamental importance for all individuals."

In 1987, in *Turner v. Safley*, the court, in a unanimous opinion written by Justice Sandra Day O'Connor, struck down as unconstitutional a Missouri law preventing imprisoned felons from marrying, holding that marriages were "expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship."

In 2003, *Lawrence v. Texas* held that states could not constitutionally outlaw consensual homosexual activity. In his dissenting opinion, Justice Antonin Scalia noted that the court's ruling undermined the rationale for any state limitations on gay marriage.

There are five basic arguments that are made to support state prohibitions. First, it is argued that the prohibitions are the result of the democratic process. This is true but irrelevant to the constitutional question. The purpose of constitutional guarantees of equal protection and due process is to limit the power of the majority to restrict minority rights.

Second, it is argued tautologically that marriage by definition is between a man and a woman. That is the question, and a circular answer does not advance the analysis. In fact, marriage is not, and has not been,

limited to persons of different sexes. Not only are there historical examples, but there are a number of states in this country (including Connecticut, Iowa, Maine, Massachusetts, New Hampshire, Vermont, and California before the passage of Proposition 8) and a number of foreign nations (including countries as Catholic as Spain, as different as Sweden and South Africa, and as near as Canada) that have embraced gay and lesbian marriage.

Third, it is argued that same-sex marriages are inconsistent with religious teachings. As a Christian, I would disagree. (See Matthew 22:35-40.) As a lawyer, it is irrelevant. The First Amendment guarantees the right of religious opponents of gay marriage to express their personal disapproval of such unions and the right of churches that forbid same-sex marriages not to perform them. But the same First Amendment, as well as the due-process and equal-protection clauses, precludes anyone from using state law to enforce his or her religious beliefs on others.

Fourth, it is sometimes argued that permitting gays and lesbians to marry will somehow undermine heterosexual marriage. There is no evidence that this is so, and contrary evidence from places where same-sex marriage is permitted. Moreover, it is difficult to the point of impossibility to envision two heterosexuals in love deciding not to marry, or to get a divorce depending on whether their gay neighbors are permitted to marry.

Fifth, it is argued that it has "always" been true that gays and lesbians have been prohibited from marrying. As already noted, this has not been, and is not, true. Moreover, as Justice Anthony M. Kennedy elegantly wrote in *Lawrence v. Texas*, rejecting the notion that a history of discrimination might trump constitutional rights:

"Times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."