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It takes four Supreme Court justices to take a case. It takes five to decide it.

So sometimes the court takes a case only to discover that there is no resolution five members can agree on.



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That appears to be the problem with the California Proposition 8 case that the court heard arguments on last month.

The case invites the justices to decide whether gays and lesbians have a constitutional right to marry.

The justices just don't want to go there.

The four liberal justices would probably commit to a right for gays and lesbians to marry. But Justice Anthony Kennedy, the most likely fifth vote, is not ready to walk down the aisle.

He does seem willing to strike down the Defense of Marriage Act provision denying federal benefits to same-sex couples.

But this would likely be on only a narrow "federalism" ground: that DOMA impinges on states' rights because states, not the federal government, have traditionally regulated marriage.

On the big picture Prop. 8 issue of whether gays and lesbians have a right to marry, Kennedy wants out.

During oral argument, he openly wondered "if the case was properly granted" and asked an attorney "why you think we should take and decide this case." Other justices, perhaps fearful of how the case might be decided, want out too.

Of course, if the majority wants to dodge the issue, it can. It could meekly concede that the decision to accept the case was improvidently granted or find that the parties challenging Proposition 8 lack the standing to do so.

But even if the case disappears, it's worth recognizing that gays and lesbians have a powerful argument for the right to marry.

Their claim goes to the heart of core American values about equality and liberty.

Take equality. The Supreme Court has never said that the government must always treat people equally. Indeed, the government treats people unequally all the time (only some applicants get into a state's premier public university; only veterans receive veterans' benefits).

But the court ratchets up its scrutiny when people are treated differently

because of a characteristic they're born with or can't fairly be expected to change. Classic examples are race, ethnicity and gender.

The justices recognize the inherent unfairness of discriminating against people based on a trait they can't control and that bears no relation to their ability to contribute to society.

They are particularly concerned when the group has suffered from societal discrimination and, because of its minority status, cannot adequately protect itself through the political process.

The high court similarly does not protect all liberty interests.

Like it or not, the Constitution does not prevent the government from forcing employers to pay minimum wages or requiring individuals to wear seat belts.

The court instead focuses on liberties involving "the most intimate and personal choices a person may make in a lifetime."

The court has said that these choices – which it has identified as decisions about marriage, procreation, contraception and child rearing – are so "central to personal dignity and autonomy" that they warrant constitutional protection.

This precedent casts the strength of the case for same-sex marriage in sharp relief.

After all, discrimination against gays and lesbians is exactly the type of discrimination the Supreme Court forbids.

Being gay is not relevant to a person's ability to contribute to society. It is a defining characteristic that one cannot be expected to change.

There is a long history of discrimination against gays, and gays, as a minority, cannot rely on the political process to protect their rights. (They might be successful in Maine but not Oklahoma.)

Similarly, the decision of gays and lesbians about whom to marry is precisely the type of intimate and personal choice that the Supreme Court has said is constitutionally protected.

So don't be misled. The fact that there are not five justices currently willing to give gays and lesbians a constitutional right to marry does not negate the justness of their cause.

Indeed, there could be no better use of the Constitution than to ensure that individuals are not denied the most important decision of their lives simply because of who they are.

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