inSocialWork Podcast Series

Episode 130 - Michael Boucai: The Impact and Ramifications of the Recent Supreme Court Rulings Regarding Same-Sex Marriage

[00:00:08] Welcome to in social work a podcast series of the University of Buffalo School of Social Work at www.insocialwork.org. We're glad you could join us today. The purpose of social work is to engage practitioners and researchers and lifelong learning and to promote research to practice and practice to research. We're in social work. Frederick Law Olmsted called Buffalo the best planned city as to its streets public places and grounds in the United States if not the world. If you don't believe them we invite you to go over to youtube and search for Buffalo. America's best designed city. And then decide for yourself. I'm Peter Sobota. What are the real effects that conformity with the law produces at the level of people's everyday lives and social practices. In this episode our guest Michael Boucai discusses the recent United States Supreme Court decisions related to the Defense of Marriage Act the Voting Rights Act and finally California's Proposition 8 our guest begins by addressing the apparent incongruency with a court that rules in support of same sex marriage yet upholds aspects of the Voting Rights Act that too many erases advances in social justice and maintains a not so subtle discrimination in our country related to race. Professor Boucai then turns to the court ruling on section 3 of the Defense of Marriage Act and addresses what he believes are the accomplishments and the limitations of this decision in terms of the lives of affected citizens. He goes on to comment on the court's decision related to California's Proposition 8 including what it is and describing what it does.

[00:02:03] He concludes by responding and offering his opinion in terms of where he believes the country and the court are headed regarding the rights of same sex couples. Michael Boucai is associate professor at SUNY Buffalo Law School and teaches family law criminal law and law and sexuality here. His scholarship focuses on the regulation of sexuality in intimate relationships. His current research is largely historical including projects on the first same sex marriage cases of the early 1970s. Anita Bright's pivotal 1977 campaign against gay rights and the complicated legacy of Oscar Wilde and his trials Michael Boucai was interviewed by our own Dr. Diane Elze associate professor and director of the MSW program here at the Eubie School of Social Work. Their discussion was held in September of 2013. I'm Diane Elze associate professor and director of the MSW program at the University of Buffalo School of Social Work. I'll be talking today with Professor Michael Boucai associate professor at SUNY Buffalo Law School. We'll be talking about the content and ramifications of the recent Supreme Court decisions on same sex marriage. Michael thank you so much for your willingness to be interviewed on this very important topic. Certainly we have many reasons to celebrate the Supreme Court's decision on Windsor versus the United States and the Hollingsworth versus Perry challenge to California's Prop 8. And we'll talk about the details of those in a moment. But sadly these decisions came on the heels of the Courts gutting of the Voting Rights Act.

[00:03:50] So on the one hand the Court expands the rights for same sex couples at the same time that it makes it much more difficult for people of color to assert their voting rights in states with a history of setting up barriers to voting. How do you make sense of this. Well I'll begin by saying that I think you're right that the Supreme Court's decisions in Windsor and Perry are in different ways causes for celebration. The decision you're referring to regarding the Voting Rights Act is Shelby vs. Holder where the Supreme Court struck down Section 4 of the Voting Rights Act which required certain jurisdictions mainly in the south but including localities like Manhattan and Brooklyn and the Bronx. Basically jurisdictions with a clear history of racial discrimination in voting to obtain approval from the federal government and specifically the Department of Justice before instituting any changes to their election laws. That was called preclearance. So I understand your question to be asking how the Supreme Court can on one hand expand however incrementally

equality for gay people by which I mean LGB people people are affected by same sex marriage laws while striking down a law designed to advance the equality of racial minorities and particularly African-Americans. I think there are several ways of answering that question but one common thread through several of them would be that we have an altogether conservative Supreme Court and conservatives most importantly our swing vote Justice Kennedy have a highly formalised and I would say shallow understanding of legal quality. What this means I think is that Justice Kennedy is able to see invidious discrimination unconstitutional breaches of the Constitution's promise of equality where laws on their face make categorical distinctions between citizens and or manifest overt animus. To use one of Kennedy's favorite terms the federal Defense of Marriage Act is just such a law. Discrimination against same sex couples is as Kennedy puts it in Windsor.

[00:06:00] The very essence of the law when one doesn't have to look really beyond the statute itself to see that turning to the Voting Rights Act we might start by observing how rare it is nowadays to find laws that overtly discriminate against racial minorities in the same way that DOMA overtly discriminates against gay people or at least against same sex couples. And that's because the mechanisms of racial discrimination are much more subtle than in the days of Brown vs. Board of overt racial discrimination to the extent they exist at all are actually today exemplified not by Jim Crow laws and the like but to the contrary by affirmative action provisions. And of course we know that Justice Kennedy is no great fan of those either. Kennedy embraces the idea that benign racial classifications like affirmative action schemes are not so benign at all and should be held to the same exacting scrutiny as invidious classifications such as laws mandating segregated schools. I'm not sure Kennedy would subscribe to that idea if he didn't believe as a practical matter that our society has made such great progress with regard to racial discrimination that our laws like our culture can be post race. And I think that last point is particularly relevant to Shelby the Voting Rights Act case where the five conservative justices on the court basically said that the jurisdictions covered by the law again primarily southern states have made tremendous progress with regard to race and that their election laws no longer deserve to be singled out for special treatment.

[00:07:35] So in short I think we can reconcile Windsor and Shelby by simply observing that LGBT people unlike racial minorities and particularly African-Americans have not achieved even the formal bare minimum version of equality that for the conservatives and especially Justice Kennedy is the only real kind of equality our Constitution demands. I think another way to think Windsor and Shelby and this again refers primarily to Justice Kennedy is there a concern for federalism in Windsor. The court spent several pages discussing how DOMA intrudes on what is traditionally been a matter of state prerogative right. Family definition and shelbie the court struck down Section 5 of the VRA because in singling out certain states for special treatment it undermined what Justice Roberts opinion in that case called the equal sovereignty of the states. And those are both federalism concepts. The first refers to what's called vertical federalism. The relationship between the federal government and the state governments and the other horizontal federalism which refers to the relationship between equally sovereign states. Finally had observed that in the conservative justices view this special treatment requirement of preclearance for election changes basically tars the jurisdictions in question with the brush of bigotry. Basically they think Section 5 insults and stigmatizes those states and their populations or at least their white populations. That kind of umbrage is reflected in both the majority and dissenting opinions in Windsor there. Again Kennedy takes offense on behalf of the same sex couples who are stigmatized by DOMA. While the conservative justices make a real point of taking offense on behalf of the legislators whose votes for DOMA are being cast as no more than irrational prejudice or animus homophobia hatred.

[00:09:33] Great thank you thank you for explaining that because I just had to start with that because it was such a horrific decision I thought given what now some of these states are doing with voter ID laws and other ways that they're trying to limit people's voting rights. We did start there. Yeah it was a bittersweet week. So let's turn to the Windsor decision which overturned Section 3 of

the Defense of Marriage Act. Can you remind our listeners of the content of Section 3 of DOMA. Sure. Basically Section 3 defines marriage for all federal purposes as a union between a man and a woman. The whole DOMA was enacted in 1996 in response to same sex marriage litigation in Hawaii. That wasn't the first same sex marriage litigation in this country's history. But it was the first to be actually taken seriously by some of the judges who heard it right. So there was a real possibility right that same sex couples might get married somewhere in the United States and panic ensued basically across the country including in Hawaii. So Congress passes DOMA whose third section again basically says that even if a state like Hawaii were to change its definition of marriage to include same sex couples the federal government would not for its own purposes honor that designation OK. So what did the Windsor decision accomplish for same sex couples. OK so far as I can tell and much remains to be seen. It looks like Windsor has paved the way for married same sex couples legally married same sex couples. That is to say couples who were married in states that recognize same sex marriage. It paved the way for those families to have all or nearly all the rights and benefits and obligations of married couples under federal law.

[00:11:27] So for example the Treasury Department announced that it will recognize all same sex marriages that were down in the place of celebration. OK. Regardless of where the couple lives. The Department of Homeland Security to give another example has announced and is already acting on its determination that Windsor requires equal treatment of married same sex couples for the purpose of immigration laws which is a huge deal to tens of thousands of binational same sex couples who until now were basically treated by the federal government as legal strangers. The Social Security Department has instituted policies for paying benefits to same sex couples though here pursuant to another federal statute perhaps a regulation. I think it's statutory benefits are paid based on the couples domiciled where they live. Not on the place of some zation celebration. And so that obviously creates a problem. If a same sex couple say moves from New York to Texas and that's why I say that Windsor paves the way for married same sex couples to have nearly all of the same rights as opposite sex couples under federal law. And again the Windsor opinion notes several times that there are over a thousand provisions of the federal code that refer to marriage. So the examples I've just given are really important set of examples but just a handful of the changes we can expect. Also interestingly I mentioned that veterans benefits for example are controlled by a different statute which say independent of DOMA defines marriage as a union between a man and a woman. But the Department of Veterans Affairs has already conceded that Windsor controls the interpretation of that statute as well.

[00:13:19] So veterans benefits to those not directly implicated by DOMA are now going to flow to married same sex couples. What did the Windsor decision not accomplish in your view for same sex couples. Well first of all and I think that this probably corrects widespread misperception. Same sex marriage bans still stand right in the states that have adopted them. And that is as we know the vast majority of states the Supreme Court pointedly reserve judgment on the question of whether it's constitutional to deprive same sex couples the right to marry. The decision again merely says that DOMA that the federal government's refusal to recognize otherwise marriages is unconstitutional. Moreover several of Kennedy's pages of dicta and Domos inconsistency with principles of federalism creates more than enough room for state courts and lower federal courts to distinguish the unconstitutionality of Darma from the constitutionality of state prohibitions on same sex marriage. And Chief Justice Roberts and his dissent really hammered that point. He encourages lower courts to distinguish what he thinks is the federalism based holding of DOMA. From any challenges to state same sex marriage bans and other wounds or do not accomplish right. Section 2 of DOMA still stands. Hopefully we can talk more about that in a moment but Section 2 basically says that same sex marriages solemnized in one state say again you need not be recognized in another state where such marriages are otherwise illegal say Texas. And again the same federalism window that I mentioned just earlier is open there too right because that's a matter of states struggling to define marriage as they see fit. Finally Windsor maybe not.

[00:15:17] Finally there are many things I suppose when you didn't resolve one her mild disappointment is that Windsor did not resolve the question that some LGBT rights advocates had hoped if not expected would be resolved. Now the question of the precise level of scrutiny that courts should give to laws that discriminate on the basis of sexual orientation. For one thing the court did not take up the Obama administration's position that sexual orientation should be treated as a suspect classification. Interestingly it mentions that recommendation in the opinion but completely in passing and then proceeds to analyze Dawna's constitutionality under a standard of review that is to say the least ambiguous. I very much enjoyed reading your recent article. Sexual liberty and same sex marriage. An argument from bisexuality in which you claim that same sex marriage bans should be held unconstitutional under the Supreme Court's decision in Lawrence v. Texas which struck down sodomy laws. And if I understand correctly what you just explained the Supreme Court in the Windsor decision did not do that. That's right. Right. So what role did Lawrence play in the Windsor decision. Did that play any role. Well it's interesting. It played arguably a greater role than even the plaintiffs in that case had proposed right. Windsor proceeded on inequality claim all the way right. She did not say that there was a fundamental right to marriage that was being infringed. She did not say and this is the theory I set forth in the article you mention that her right to enter into a same sex relationship was infringed. She said simply that this law denies equal protection. I think that it's correct to read Windsor primarily as an equality decision.

[00:17:16] Nonetheless Kennedy does mention Lawrence twice and it's kind of unclear precisely what role Lawrence is playing. He says for example that private consensual sexual intimacy between two adult persons of the same sex may not be punished by the state. And it can form but one element in a personal bond that's more enduring. SEE Lawrence right. And then by its recognition the validity of same sex marriages performed in other jurisdictions. New York gave further the protection and dignity to that bond. The state acted to give their lawful conduct a lawful status. OK. And then later on Kennedy writes the differentiation that dominated in acts between same sex and opposite sex couples demeans the couple whose moral and sexual choices the Constitution protects. SEE Lawrence and whose relationship the state has sought to dignify. So I don't know if that's just window dressing or just a signal that the constitutionally protected nature of the underlying relationship is all the more reason why we should in a sense defer to a state's decision. As in Kennedy's words dignify it by making it eligible for marital status. Well let's just say that it is not. Laurence Tribe a very prominent constitutional law professor at Harvard wrote in the aftermath of Windsor that the decision followed easily from Lawrence. And I think that's true philosophically right. I agree that a right to same sex marriage does follow easily from Lawrence and I think it ought to be true doctrinally but I don't think that that is actually opinion.

[00:19:00] We got in that article you also wrote that all of the arguments currently used by same sex marriage proponents and I'm quoting you implicitly concede that deterrence of homosexuality is bad because it is useless not because it is wrong. Could you say more about that. I found your idea of the eraser of bisexuality in the same sex marriage debate. Very interesting. Sir thank you for asking. I'll begin by saying that the main argument that that article was that same sex marriage bans are unconstitutional because they channel people to coerce people into heterosexual relations and relationships. And I argue that that channeling is violates or at least infringes on in a way that is constitutionally significant people's right under Lawrence versus Texas to choose same sex relations in relationships that basically same sex marriage bans put a thumb on the scales in favor of pursuing opposite sex relationships. And the article posits the bisexual as the person perhaps with the best perspective on that court. Right. The idea being that all things being equal a bisexual would choose to pursue heterosexual relationships over homosexual relationships even the favored treatment favored status they receive through marriage. Now making that argument troubles I think certain prominent arguments in gay rights litigation generally and certainly in same sex marriage particularly the easiest example are I think the best known example is what I'm calling the

immutability excuse. This is the born that way idea rights don't discriminate against me because I'm born that way I can't I can't help it. Right. And that certainly is I think how a lot of queer people come at least initially to a certain kind of self acceptance. And I certainly do not want to deny anyone that comfort.

[00:21:09] However as a matter of constitutional law I do not think that one's rights should be determined by whether one's sexual orientation is fixed whether one has a choice in the matter. So that's the first way in which gay rights argumentation sometimes you know suggest that anti gay discrimination is wrong because it's useless not because it's just wrong in itself. Another example would be that is conduct conflation where we sort of imagine that a law that so for example had same sex marriage bans prevent two people of the same sex as we know from marrying marrying is a Conda. I mean also catapults you into a status but it's a Konda right. And so with gay rights advocates sometimes do is they say that conduct defines the class right. The only people who want to engage in same sex marriage just as the only people who want to engage in same sex sodomy are homosexuals. And I suggest that we all know there are others who we might call them by we might call them something else right. But again those people are making a choice in some sense or are more visibly making a choice to pursue a particular kind of relationship. There's also the claim raised in same sex marriage litigation. Well first of all those who defend same sex marriage bans will sometimes say well gay people are still entitled to marry. Everyone's entitled to marry someone of the opposite sex right. No one asks you what your sexual orientation is when you go to get a marriage license. OK. And obviously that's not a very satisfying argument. And courts have not accepted it even courts that do not rule in favor of same sex marriage.

[00:22:44] However the way gay rights advocates have sometimes tried to surmount it is by what I call the claim of identity negation which is to say that to ask the person to or to even contemplate that a homosexual would enter an opposite sex relationship negates who they are. OK. And that that identity negation is what tells us that formal equality say is insufficient. Again that can't be said of a bisexual whose identity is not negated by entering into a heterosexual marriage but who may very well want to pursue a same sex marriage. So those are the three great great. That is a really interesting article. I'm glad that I found it. So we now have 13 states and the District of Columbia I think it's 13 states and the District of Columbia in which same sex couples can get legally married. And as you indicated we have the IRS and the Veterans Administration Homeland Security Social Security Administration to some extent saying that same sex couples will have access to benefits. How will the Windsor decision affect same sex couples in states that do not currently recognize or allow same sex marriages. I can see lots of chaos occurring. Welcome chaos chaos nonetheless. Yeah I think that's exactly right. I think there will be a lot of chaos which I suppose is to say a lot of litigation and perhaps a lot of political wrangling precisely over the question of how same sex couples legally married in another state are to be treated in the state which they move. That does not recognize same sex marriage. So basically I think we're going to get cases that test those unresolved questions. I mentioned earlier. So for example if Section 2 of DOMA constitutional.

[00:24:42] In other words kind of same sex couple effectively be married in one state and unmarried in another. Do you get your. Are you suddenly divorced right. When you cross the border basically by operation of state law. It's really hard to say how those cases are going to go because they do so strongly implicate federalism. And again the state's traditional role in defining marriage. There's a longstanding exception to the full faith and credit clause right for strong public policy objections to certain marriages. And what could be a more glaring indication of a strong public policy than your own state constitutional amendment banning same sex marriage right. That said however a federal district court in Ohio has already said that Section 2 is unconstitutional in light of DOMA precisely the same kinds of reasons Kennedy gives in Windsor to strike down Section 3 pertaining to Section 2. Likewise I think now we're going to see litigation around the very question that was not answered in Perry are same sex marriage bans unconstitutional. There are two concerns about federalism but

it is very hard for me to see how a distinction that in Kennedy's words means same sex couples humiliates their children right is not equally applicable to same sex marriage. Granted if that really is the heart of the unconstitutionality then I think we have some reason to be optimistic. Other questions will grow out of much more specific situation. So just to give one example of that. Michigan has a law that provides that public employers can only give benefits to an employee's cohabiting if that person is a spouse.

[00:26:25] But in 2004 Michigan passed a constitutional amendment refusing to recognize quote marriage or similar a union between two persons of the same sex. So that basically disqualifies same sex partners right from any kind of you know spousal benefits with the public employer. Now toward the end of this past June less than a month after Windsor came down a federal district judge in Michigan rejected the state's motion to dismiss a lawsuit that alleged that Michigan's public employee benefits law unconstitutionally discriminates on the basis of sexual orientation. Citing Windsor the judge held that plaintiffs were likely to prevail based on evidence that the law was motivated by antigay animus. Again it's hard to enumerate the many kinds of permutations of claims that will arise out of Windsor. But that's not of case. So now let's turn to the Supreme Court's decision in the Hollingsworth challenge to Proposition 8. Can you remind our listeners about Proposition 8 what it was and what it did. Sir I'll begin by bringing us back to a set of cases called In re Marriage Cases where the Supreme Court held in 2008 that same sex couples have a fundamental right under the California State Constitution to marry. It was quite a expensive opinion. In November of that year 2008 the decision was overturned by popular initiative amending the California Constitution. And that was Proposition 8. Proposition 8 didn't affect the many same sex couples in California who were domestic partnerships nor as was established in subsequent litigation. Did it void the marriages of people who married in the brief window between the California Supreme Court's decision and the adoption of Proposition 8 but Proposition 8 did ban future same sex marriages.

[00:28:20] So what did the Supreme Court's ruling accomplish for same sex couples in California. And what did it not accomplish. Well the Supreme Court's decision in Perry was I guess you could say a procedural rather than substantive. It said that the people who were defending Proposition 8 on appeal. The proponents of the initiative rather than the state of California which had refused to defend the law lacked standing to do so. I hope it suffices to say for present purposes that this holding that the proponents lacked standing to defend Prop 8 before the 9th Circuit left intact the federal district court opinion by Judge Vaughn Walker striking down copy. OK so basically what they're standing holding left us with was a now invalidated Ninth Circuit ruling on the unconstitutionality of Prop 8 and it left intact the lower court the federal district courts ruling to the same effect though on a much more expansive grounds. So what that meant practically despite some very early questions about the geographical applicability within California of Judge Walker's opinion is that the state of California is now back in the business of issuing marriage licenses to same sex couples. Thank you. Is there anything that you find particularly compelling and significant about this pair of decisions the Windsor decision and the Perry decision. Anything that you haven't mentioned. Sure I can think of a few things that are significant if not compelling. The first I think relates to the fact that both of these cases involve questions of standing and questions on the merits and the arrangements right votes on the standing questions. I think it quite incontrovertibly to Gary's justices desire to reach the merits.

[00:30:23] In other words I think that the standing decisions are basically political expedience. It's nice because you get two cases right where you've got the same dynamic going on. And I think that that helps to underscore I think the very result oriented nature of our current court. More broadly we are to politics I just think it's interesting. Obviously we can see that the court is moving incrementally if not quite slowly toward same sex marriage recognition across the board. And it's interesting to see that it refuse to take the bait that was rather smugly thrown by David Boies and

Ted Olson in the Prop 8 variation that whole litigation was styled right so as to be the perfect case in which the Supreme Court was going to say it was going to be the loving versus Virginia of same sex marriage Loving versus Virginia struck down interracial marriage bans and this kind of liberal conservative team of Boies Olson they were going to be the heroes you know who wrote in to save the day and the court didn't do that. I would also say one thing that I do find anything that wins. Well first of all everyone has agreed that Windsor is a doctrinally murky and at times inscrutable opinion and I wholeheartedly agree with that assessment. Nonetheless a colleague of mine here who is a current fellow in the ball the center named or Basok noted that while on one hand Windsor seems to represent the complete breakdown of constitutional discourse in American law people just talking past each other. People again so clearly motivated by results that nonetheless if the only legal concept in the pain that really seems to have any heft right is that of status.

[00:32:05] And that echoes I think a law professor Jack Balkans take on the decision. He sees Windsor as the embodiment of a prohibition on class legislation which bark and looking to 19th century cases defined as legislation that picks out a group of people for special benefits and special burdens without adequate public justification. Suzanne Goldberg a longtime gay rights litigator and now a professor at Columbia and I believe Cass Sunstein a professor. Chicago I think had said the same thing about Romer vs. Evans where I don't know 16 years ago or more of the Supreme Court struck down Colorado's Amendment 2 which basically effectively shut LGB people out of the political process and that case specifically referred to Justice Harlan's statement in Plessy versus Ferguson in dissent that our Constitution neither knows nor tolerates classes among citizens. And I think that that's exactly what most of good Kennedy. Here was how DOMA basically constituted a new class and an underclass. So finally I think my last question is What do you see on the horizon related to marriage equality. Where do you think the country will be in five years. You know Justice Scalia dissent says that we're just waiting for the other shoe to drop. You know we're just waiting for our Loving Versus Virginia that it's basically inevitable that the Supreme Court is going to say that same sex couples have a constitutional right to marry under the federal Constitution. And I think that's true but that assumes of course that the court is not going to significantly change composition. I think that's an important concern.

[00:33:51] That said it's very difficult again for me to see how the Court's characterization of DOMA as the meaning of same sex couples dignity as creative of an underclass as a source of humiliation quote to the children of same sex couples isn't equally true of same sex marriage bans I think I do have one more question because as you were talking I thought well are there some issues that you would hope would enter the discussion of same sex marriage among proponents of same sex marriage issues that you think would be helpful for gay lesbian bisexual transgender civil rights organizations to take on that perhaps we haven't been taking on. Yeah I think certainly you know whether or not it's done in the context of same sex marriage litigation I think that LGBT rights organizations absolutely need to continue to be as they were for many years at the forefront of pushing for alternative forms of family recognition. One of the great dangers of success in same sex marriage field is that a very natural constituency for different conceptions of family different ideas about how benefits public and private should be distributed is now basically going to be lost sucked into the mainstream. Right. And you basically that natural constituency will no longer be there because they'll have access to marriage. So I guess that would be one answer. I also look forward to the day when LGBT rights organizations can turn to other business. We don't even have as you pointed out for this interview again we don't even have employment discrimination protections at the federal level and we don't even have that. And in most states we do have at this point a majority of Americans protected by other state or local laws against discrimination on the basis of sexual orientation. But again not in most states.

[00:35:59] And we have many many fewer protected against discrimination on the basis of gender identity. That's just seems to me a no brainer right. And something we've been trying to accomplish

since nineteen seventy 1971 and it still remains to be done. We've gotten what we thought was impossible same sex marriage and we had not gotten what we thought was possible and nondiscrimination detentions. Well thank you I want to thank you very much for your time this afternoon. Thank you. You've been listening to Michael Boucai discuss the impact and ramifications of the recent U.S. Supreme Court rulings related to the Defense of Marriage Act the Voting Rights Act and California's Proposition 8. In social work. Hi I'm Nancy Smyth professor and dean of the University at Buffalo School of Social Work. Thanks for listening to our podcast. We look forward to your continued support of the series. For more information about who we are as a school our history our programs and what we do we invite you to visit our Web site at www.socialwork.buffalo.edu.