

**THE NOT-SO-MERRY WIVES OF *WINDSOR*:
THE TAXATION OF WOMEN IN SAME-SEX MARRIAGES**

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Abstract

In *United States v. Windsor*, the Supreme Court invalidated the Defense of Marriage Act definition of marriage as “between one man and one woman” and is now poised to recognize a constitutional right to same-sex marriage. *Windsor* cleared the way for same-sex couples to be treated as married under federal tax laws, and the Obama administration promptly announced that it would recognize same-sex marriages for tax purposes. Academics, policymakers, and activists lauded these developments as finally achieving tax equality between gay and straight married couples. This Article argues that the claimed tax equality of *Windsor* is illusory and that the only way to achieve actual equality is to eliminate taxation on the basis of marital status.

Focusing on the taxation of women in same-sex marriages, the Article explores what lies beneath the putative equality gains that result from according same-sex married couples the same status as different-sex married couples. The Article predicts, based on demographic statistics and other sociological and economic research relating to income levels, wealth holdings, child rearing, and employment patterns, that women in same-sex marriages will be less likely than other married people to reap the benefits, and more likely to suffer the detriments, of marriage taxation. In analyzing why women in same-sex marriages are likely to suffer adverse consequences from their new tax status as married, the Article builds on prior critical and feminist tax literature showing how the tax law—though purportedly neutral in its treatment of married couples—privileged traditional marriages in which men were the primary income earners and wealth holders, and adversely affected married women’s incentives and abilities to be workers, income producers and wealth holders. The Article argues that the tax law, through the fictitious construction of the married couple as an irreducible economic unit, continues to reward this anachronistic model of marriage and to penalize other, more egalitarian models of marriage. The Article proposes that taxation on the basis of marital status be curtailed through the abolition of the joint return and other reforms. More broadly, the Article demonstrates how taxation is a powerful tool by which the state regulates intimate relationships, and highlights the need for a careful and critical evaluation of other marriage laws as they extend their reach to same-sex relationships.