

Widening the Critical Tax Lens

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Date : March 23, 2016

Lily Kahng, *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 **Cornell L. Rev.** (forthcoming 2016), available at [SSRN](#).

The road to same-sex marriage was paved with a tax decision. In [United States v. Windsor](#), 133 S. Ct. 2675 (2013), the United States Supreme Court recognized that same-sex spouses, like different-sex spouses, have the right to pass assets to each other tax-free at death. In arriving at that decision, the Court invalidated the portion of the Defense of Marriage Act that provided that the word “marriage,” for federal purposes, meant only a legal union between a man and a woman. With *Windsor*, a same-sex marriage that was valid for purposes of state law would be recognized for purposes of federal law. In a tax sense, *Windsor* put same-sex couples and different-sex couples on equal footing for federal purposes. Many commentators accurately predicted that the *Windsor* case laid the foundation for the Court’s recognition two years later of a constitutional right to same-sex marriage in [Obergefell v. Hodges](#), 135 S. Ct. 2584 (2015).

In the wake of the *Windsor* and *Obergefell* decisions, some tax scholars have drawn important attention to legal issues created in the period between *Windsor* and *Obergefell* for same-sex couples whose states did not recognize their marriages, as well as challenges faced by those who choose civil unions over marriage. Other tax scholars are wary of *Obergefell*’s glorification of marriage as the highest form of human fulfillment, and are skeptical that marriage is the correct foundation for a variety of procedural and substantive rules.

Enter into this conversation [Lily Kahng](#)’s thoughtful examination at how women in same-sex couples might fare from a tax perspective in a post-*Windsor*, post-*Obergefell* world. For almost twenty years, Kahng has been a leading and consistent voice in critiquing the fiction of marital unity in the tax law. In *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, Kahng turns on its head the assumption that same-sex marriage is a salutary shift in the legal landscape for same-sex couples. Kahng argues that under federal law, women in same-sex couples will be taxed unfavorably compared to women in different-sex couples.

Kahng builds her argument through studied examination of three areas of tax law: the joint income tax return, the estate and gift tax marital deduction, and the earned income tax credit. By showing how these laws impact hypothetical female same-sex couples, Kahng exposes the tax law’s improper channeling of benefits based on marital status. Through specific numerical illustrations involving hypothetical two-earner and single-earner couples, Kahng shows in a practical way how the marriage penalty and marriage bonus operate. She illustrates how middle-income couples and high-income couples are the most likely to receive a marriage bonus, and how two-earner upper income couples are the most likely to experience a marriage penalty. (For anyone who has ever struggled to understand precisely how the “marriage bonus” or “marriage penalty” operate, Kahng’s elegant numerical illustrations will quell any confusion.) Kahng then takes the important step of using census data regarding labor force participation of women in same-sex couples to show that they are more likely than women in different-sex couples to experience a marriage penalty and they are less likely to receive a marriage bonus. This is because women in same-sex couples tend to have both partners engaged in market labor and more equal incomes than different-sex couples. Although the reasons for these earning patterns are beyond the scope of Kahng’s article, the next step might be to understand why same-sex female couples are more likely than different-sex couples to have two working spouses, and why that income is more likely to be more equal. One suspects it has to do as much (or more) to do with the fact that women earn less for market labor than their male counterparts than any personal preference or traits unique to women in same-sex relationships.

Building on her understanding of earning patterns, Kahng turns to the QTIP trust, gift splitting and estate tax portability to ask what couples are likely to benefit from wealth transfer tax laws that accord preferences to married couples. Kahng's examples illustrate that all three of these techniques—QTIP trusts, gift splitting and portability—are applicable only to taxpayers who have wealth in excess of the wealth transfer tax exemption amount, or \$5.43 million in 2015 (\$5.45 million in 2016). And within that group of wealthy taxpayers, the control that QTIP trusts in particular afford will be especially appealing mostly to those who have less-wealthy spouses. Although Kahng acknowledges limitations in the data regarding the wealth of women in same-sex marriages, the spouses' relatively equal levels of labor force participation and income levels suggest that their wealth levels also are likely to be equal or close to equal as well, which means that they will be less likely than different-sex couples to benefit from gift and estate tax marital preferences. To the extent that women in same-sex couples might want to take advantage of QTIP trusts and the ability to direct the disposition of trust property upon the death of the surviving spouse, it may be to protect children from prior relationships.

Kahng uses census data to convey the stark reality that female same-sex couples are more likely than different-sex couples to be living in or near poverty and the spouses are more likely to have relatively equal incomes. The reasons for this are not well understood, but Kahng explains the tax context. Again through numerical illustrations, Kahng shows that a low-income unmarried couple comprised of two individuals with relatively equal earnings will receive a greater earned income tax credit than a similarly-situated married couple. That EITC marriage penalty might discourage some taxpayers—in both same-sex and different-sex couples—from marrying. To the extent that they are more likely than people in different-sex couples to have relatively equal earnings, women in same-sex couples will be more likely to either incur a marriage penalty or be deterred from marriage in greater numbers than women in different-sex couples.

For anyone interested in understanding the tax implications of the Supreme Court's recognition of same-sex marriage, Kahng's article is a must-read. Writing squarely within the critical tax tradition, Kahng looks at the tax system to ask important questions about advantage and disadvantage. For years, critical tax theorists have taken up the challenge of identifying ways in which the tax system privileged different-sex couples over same-sex couples. With this article, Kahng widens the critical tax lens further, inviting readers to consider the ways that women in same-sex couples might experience the tax law differently than men in same-sex couples or men and women in different-sex couples. The quest for fairness in taxation must be a nuanced one, as Lily Kahng's careful work demonstrates.

Cite as: Bridget J. Crawford, *Widening the Critical Tax Lens*, JOTWELL (March 23, 2016) (reviewing Lily Kahng, *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 **Cornell L. Rev.** (forthcoming 2016), available at SSRN), <http://tax.jotwell.com/widening-the-critical-tax-lens/>.