

EQUAL TREATMENT UNDER THE LAW: A COST-BENEFIT ANALYSIS OF SAME-SEX BENEFITS POST-*WINDSOR*

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ABSTRACT

In June 2013, the U.S. Supreme Court delivered a landmark decision in *United States v. Windsor* (570 U.S. ___ 2013). The ruling advanced gay rights by striking down Section 3 of the federal Defense of Marriage Act (DOMA) and instating federal benefits to same-sex married couples. The ruling has widespread economic benefits for legally married same-sex couples including health insurance, flex-spending accounts, Social Security benefits, federal taxes, and veterans' benefits. Framed within a global context, this article analyzes the economic implications of *United States v. Windsor* and the subsequent implementation of the U.S. Internal Revenue Service (IRS) Rule 17 (Rev. Rul. 2013-17) by conducting a cost-benefit analysis of a state with marriage equality compared to a state prohibiting same-sex marriage. Findings indicate, despite the Supreme Court ruling, there is an unequal distribution of costs and benefits across states based on same-sex marriage. If all Americans are to receive equal treatment under the law, then all 50 states and Washington D.C. must comport with federal law and legalize same-sex marriage.

GLOBAL CONTEXT

We live in a global civil society, and the role of government in society is to protect human rights, promote social equity, and ensure justice. According to the United Nations (U.N.) Charter, collectively, our purpose is to “reaffirm faith in

fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women” (United Nations Charter, 2013). Moreover, the U.N.’s Universal Declaration of Human Rights states, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world” (<http://www.un.org/en/documents/udhr/>). These human rights pertain to race, sex, religion, politics, and most recently sexual orientation. In 2011, the U.N. Human Rights Council passed a resolution titled “Ending Violence Based on Sexual Orientation and Gender Identity” to support and protect equal rights for all, regardless of sexual orientation (<http://www.state.gov/r/pa/prs/ps/2011/12/178341.htm>). This resolution is significant because it opened the discussion on LGBT rights for the first time in the U.N., which was previously considered a taboo topic. It was signed by 85 countries. In the words of U.N. Secretary-General Ban Ki-moon, “We must: Tackle the violence . . . decriminalize consensual same-sex relationships . . . ban discrimination . . . and educate the public”(Ki-moon, March 7, 2012).

Despite these declarations, LGBT rights and laws—specifically same-sex behavior and marriage—vary widely around the globe (Wyatt-Nichol and Naylor, forthcoming). Some countries prohibit same-sex activity by criminalizing and penalizing it, while other countries provide for legal same-sex marriages. Currently, approximately 75 countries criminalize same-sex behavior. Of these 75, at least seven countries make male-to-male relationships punishable by death: Afghanistan, Iraq, Mauritania, Nigeria, Saudi Arabia, Somalia, and Sudan (www.igla.org). In contrast, same-sex marriage is legal in 17 countries. According to the Pew Research Center’s Religion and Public Life Project, these include: Argentina, Belgium, Brazil, Canada, Denmark, England/Wales, France, Iceland, the Netherlands, New Zealand, Norway, Portugal, Scotland, South Africa, Spain, Sweden, and Uruguay (<http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/>). In addition, two countries, both members of the U.N., only provide same-sex marriage in specific jurisdictions: Mexico and the United States. Currently, in the

U.S., 33 states prohibit same-sex marriage and 17 have legalized same-sex marriage (www.hrc.org). According to the Human Rights Campaign (n.d.), same-sex marriage in the U.S. is legal in the following 17 states plus the District of Columbia: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington.

Supreme Court Ruling

In June 2013, the U.S. Supreme Court delivered a landmark decision in *U.S. v. Windsor* (570 U.S. ____ 2013). According to U.S. Attorney General Eric Holder, the court's ruling means, "Americans in same-sex marriages are entitled to equal protection and equal treatment under the law" (Holder, January 10, 2014). The Supreme Court ruling significantly advanced gay rights by striking down DOMA and instating federal benefits to married gay couples. Specifically, the court ruled that Section 3 of DOMA is unconstitutional under the Due Process Clause of the Fifth Amendment. Prior to the ruling, marriage was defined at the federal level as a "legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife" (Public Law 104-199, Section 3). This means, under DOMA, the U.S. government would not legally recognize same-sex marriages, nor would states be required to do so either. As a result, over 1,100 federal benefits, rights, and privileges were denied to same-sex partners (U.S. GAO, 1994), which had a major negative economic impact on same-sex couples. Consequently, *Windsor* granted legally married same-sex couples over 1,100 federal benefits, rights, and privileges, such as Social Security benefits, family health insurance, veterans' benefits, and joint tax treatment (U.S. GAO, 1994). Collectively, these government benefits have a major impact on individual security, personal wealth, and economic mobility. These federal benefits are discussed below.

Federal Benefits

As a result of the *Windsor* ruling the U.S. Internal Revenue Service implemented Rev Rul. 2013-17 (effective

9/16/2013), which outlines new federal tax guidelines for same-sex married couples. Prior to IRS Rev Rul. 2013-17, same-sex couples were specifically denied 1,138 federal benefits and protections afforded to opposite-sex married couples.¹ Some of the critical federal benefits denied to same-sex couples are discussed below.

Social Security Benefits. Surviving spouses of working U.S. citizens are eligible to receive Social Security payments. Surviving spouse benefits (also called “widow benefits”) were denied to same-sex couples prior to the Supreme Court ruling in *Windsor*. Additionally, a same-sex couple was denied spousal benefits, where the lower-income spouse is eligible to collect 50% of the higher-income spouse’s monthly benefit.² Therefore, a same-sex couple who contributed an equal amount to Social Security would receive significantly reduced benefits than an opposite-sex couple. Social Security no longer is prevented from recognizing same-sex marriages for purposes of determining entitlement to or eligibility for benefits. Post-*Windsor*, “Social Security is now processing some retirement, surviving spouse and lump-sum death payment claims for same-sex couples and paying benefits where they are due. If you are in, or are a surviving spouse of a same-sex marriage or other legal same-sex relationship, we encourage you to apply right away for benefits.” (<http://ssa.gov/same-sexcouples/>)

Sale of Principal Residence. For federal tax purposes, a single taxpayer may exclude up to \$250,000 from the profit of the sale of his/her principal residence from taxable income. Opposite-sex married couples filing jointly may exclude up to \$500,000 on the sale of the home. Since same-sex couples were not considered married and could not file jointly, they were taxed on all profits above \$250,000.³ This inequity created a sizable tax penalty for same-sex married couples. This is critical

¹ U.S. Gen. Accounting Office, GAO-4-353R, *Defense of Marriage Act: An Update to Prior Report* (2004).

² 42 U.S.C. § 416.

³ I.R.C. § 121.

because homeownership can significantly increase personal wealth.

Estate-Tax Provisions An opposite-sex married couple can leave each other unlimited funds at death with no estate-tax consequences. Same-sex couples were denied this benefit.⁴ Therefore, same-sex couples would incur significant taxes and have limited options in estate and tax planning. The *Windsor* case serves as an example of the negative impact of the estate tax penalty.

Income Tax Filings. Same-sex married couples were denied the ability to file joint tax returns, make spousal IRA contributions, offset one spouse's income with the other spouse's losses, and generally treat their tax situation the same as opposite-sex married couples.⁵

Health Benefits Tax Consequences . For same-sex couples, the health benefits premiums of the spouse receiving the benefits were charged to the other spouse (who supplied the benefits) as imputed income, meaning s/he was taxed on those benefits as though they were income. Additionally, the receiving spouse did not qualify under federal law for the supplying spouse's medical flex-spending account.⁶ The receiving spouse also could not participate in spousal COBRA health benefits.⁷

Inherited Retirement Accounts. When a retirement plan participant dies, plan benefits must be distributed in a lump sum or remain in the plan to be distributed in accordance with the minimum distribution requirements. If the beneficiary is the deceased participant's surviving spouse, that spouse can transfer plan benefits to an IRA or a retirement plan in which s/he participates.⁸

⁴ I.R.C. § 2056.

⁵ 26 U.S.C. § 6013.

⁶ I.R.C. § 125.

⁷ Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. § 1167.

⁸ I.R.C. § 401(a)(9).

Under federal and pension law, same-sex married couples were treated as “strangers.” Therefore, same-sex couples had to take the entire proceeds of the inherited 401(k) in a lump sum and pay taxes immediately at a much higher rate, rather than rolling over the funds into their own name, tax free, as surviving opposite-sex spouses can do.⁹ Again, this law disadvantages same-sex couples.

Family and Medical Leave Act (FMLA). FMLA guarantees family and medical leave to employees to care for parents, children, or spouses. Under FMLA, same-sex married couples were denied this option. The law did not provide leave for a same-sex married spouse to care for his/her spouse or that spouse’s family members.¹⁰

Cost-Benefit Analysis

To determine the financial and economic impact of the *Windsor* decision and implementation of the subsequent IRS Rule 17 (Rev. Rul. 2013-17, effective on 09/16/2013) a cost-benefit analysis is used to provide a basis for comparison (Shaffer, 2010). Federal and state benefits are compared before and after the *Windsor* ruling in a state that legally recognizes same-sex marriage, Maryland, and a state that prohibits same-sex marriage, Tennessee. The cost-benefit analysis assumes that a same-sex married couple living in Tennessee has been married in one of the 17 states that provides for marriage equality. A brief overview of same-sex marriage laws are discussed in each state followed by itemized federal and state benefits and costs.

CASE STUDY 1: MARYLAND RESIDENTS

Maryland passed a domestic partnership act on July 1, 1988 offering very limited rights to registered domestic partners. The state of Maryland—as an employer—began offering domestic partnership health benefits in July 2009. Some private organizations offered domestic partnership benefits, but the

⁹ 26 U.S.C. §408.

¹⁰ Family and Medical Leave Act of 1993, 29 U.S.C. § 2601.

policy varied by employer. In February 2010, Maryland's Attorney General issued an opinion that the state would recognize legal same-sex marriages performed in other states.¹¹ That ruling was affirmed by the Maryland Court of Appeals in May 2012.¹² Further, the Maryland General Assembly passed a same-sex marriage law in 2012,¹³ which was later approved by Maryland voters in the 2012 election. Same-sex marriage became legal in Maryland on January 1, 2013. Finally, in June 2013, the U.S. Supreme Court struck down section 3 of DOMA and, thereby, recognized same-sex marriages for federal purposes.¹⁴ The IRS quickly issued Rev. Rul. 2013-17,¹⁵ outlining new federal tax guidelines for same-sex married couples effective September 16, 2013.

State Benefits in Maryland

Prior to the passage of domestic partnership laws and same-sex marriage in Maryland, same-sex couples were denied state benefits and protections afforded to opposite-sex married couples:

Property Ownership. Same-sex couples could hold title to their houses as "joint tenants." They shared an undivided interest in their principal residence. The main advantage of a joint tenancy is the right of survivorship. Upon the death of one of the joint tenants, the surviving joint tenant retains an undivided ownership interest in the property. However, that ownership interest is subject to state and federal estate and inheritance taxes as well as bankruptcy proceedings.¹⁶

Estate and Inheritance Taxes . Maryland estate and inheritance taxes were "coupled" with the federal laws.

¹¹ [95 Opinions of the Attorney General 3 \(2010\)](#).

¹² [Port v. Cowan](#), 426 Md. 435, 44 A.3d 970 (2012).

¹³ Civil Marriage Protection Act. 2012 Md. Laws, ch. 2, § 1.

¹⁴ [U.S. v. Windsor](#), 570 U.S. ___, 133 S. Ct. 2675 (2013).

¹⁵ [Revenue Ruling 2013-17](#) in 2013-38 I.R.B. 201.

¹⁶ Md. Code Ann, Cts. & Jud. Proc § 14-113.

Therefore, same-sex married couples were not afforded a spousal deduction on estate or inheritance taxes.¹⁷

Table 1
Maryland Benefits Status Before and After the Windsor Ruling

Benefits	Before <i>Windsor</i>	After <i>Windsor</i>
Federal Benefits		
Social Security Benefits	Denied	Eligible for widow and spousal benefits
Sale of Principal Residence	\$250,000 limit each	\$500,000 limit as couple
Estate Tax Provisions	Estate tax on all assets	Unlimited funds with no estate tax
Income Tax Filings	Single tax returns; No spousal IRA contributions	Joint tax returns; Spousal IRA contributions
Health Benefits Taxes	Spouse's benefits treated as imputed income	Spouse's benefits not treated as imputed income
COBRA	No COBRA benefit for spouse	Spouse eligible for COBRA benefits
Inherited Retirement Accounts	Lump-sum distribution; Significant tax penalty	No tax penalties
Family Medical Leave Act	Denied for spouse and spouse's family	Eligible
Maryland State Benefits		
Property Ownership	Joint tenants or tenants in common (tax consequences)	Tenants by the entirety (no tax consequences)
Estate & Inheritance Tax	Estate tax on all assets	Unlimited funds with no estate tax
Medical Rights & Decisions	Limited rights to make medical decisions	Full rights to make medical decisions

¹⁷ Md. Code Ann., Est. & Trusts § 9-211.

Medical Rights and Decisions. Same-sex couples in Maryland were not entitled to make hospital or nursing home visits, end-of-life choices, organ donation, or other medical decisions for their spouses. They also did not have the right to make funeral arrangements. These rights were not expressly barred; however, medical institutions did not have to honor such requests.

As illustrated in Table 1, with the passage of Maryland’s Civil Marriage Protection Act and the *Windsor* decision, same-sex couples have an entirely different legal and financial relationship.

Table 2
Actual Dollar Benefit Changes

Benefit	Value	Federal	State - MD	After Windsor
Sale of Principal Residence	Sales Price: \$385,000	\$385,000 - \$250,000 = \$135,000 taxable income each	\$385,000 - \$250,000 x 2.75% = \$3,712.50 each	Up to \$500,000 no taxable income
Health Insurance Benefits	Employee + spouse = \$223.28/month	\$5,716.80 taxed as imputed income	\$5,716.80 taxed as imputed income	No taxable income
COBRA		No spousal benefit	N/A	Spousal benefit
FMLA		No spousal benefit	N/A	Spousal benefit
Health Care FSA	\$3,100 for individual	No spousal benefit	N/A	\$2,500 for family ¹⁸

¹⁸ Dollar limit changed as a result of the Patient Protection and Affordable Care Act of 2010, Pub L. No, 111-148, 124 Stat. 119, (codified as amended in scattered sections of the I.R.C. and in 42 U.S.C.).

CASE STUDY 2: TENNESSEE RESIDENTS

Unlike Maryland and the other 16 states that provide for legal same-sex marriage, Tennessee does not permit the marriage of same-sex couples. The state prohibits, both by statute and in its constitution, the recognition of same-sex marriages and other forms of same-sex partnership performed in other jurisdictions. In November 2006, the constitutional amendment defining marriage (as between a man and a woman) was approved by 81% of voters in a referendum.¹⁹

Same-sex behavior is legal in Tennessee.²⁰ The state allows single persons to adopt children. There are no explicit prohibitions on adoptions by same-sex couples or second-parent adoptions. However, few—if any—Tennessee judges have granted second-parent adoptions, so the likelihood of obtaining second-parent adoptions is very low.²¹

Prior to Rev Rul. 2013-17, Tennessee same-sex couples were denied the same 1,138 federal benefits and protections afforded to opposite-sex married couples in all states.²² [See Federal Benefits for a list of the most common benefits.] In addition, the same-sex couple in Tennessee was denied some additional benefits that were not applicable to the Maryland couple:

Social Security Benefits. In addition to the benefits already outlined above, a same-sex couple was denied surviving-parent benefits. The Tennessee same-sex couple was legally married in Maryland and has two children. If the deceased worker was not the biological parent nor eligible to adopt the children through second-parent adoption, the children are not eligible for surviving-child benefits and the surviving parent is not eligible for surviving-parent benefits.²³

¹⁹ Tenn. Code Ann. §36-3-113.

²⁰ *Campbell v. Sundquist*, 926 S.W.2d 255 (1996).

²¹ *In Re Shelby L.B.* No. M2010-00879-COA-R9-PT (Tenn. Ct. App. Mar. 31, 2011).

²² U.S. Gen. Accounting Office, GAO-4-353R, [Defense of Marriage Act: An Update to Prior Report](#) (2004).

²³ 42 U.S.C. §402.

Veterans and Military Benefits. Many veterans' benefits affect spouses and children, including "widow pension" benefits and survivor benefits payments, GI Bill rights, life insurance benefits, funeral and burial arrangements, and access to VA hospitals and nursing homes.²⁴ Same-sex couples were denied these important rights before the *Windsor* ruling.

Head-of-Household Status. The same-sex couple was expressly denied the benefit of head-of-household status to taxpayers supporting non-biological, non-adopted children.²⁵ Therefore, a same-sex taxpayer who supports his/her spouse's children—and who is not eligible to adopt the children under state law—pays more taxes than an opposite-sex couple in the same situation.

Child Tax Credit. Taxpayers who meet eligibility requirements are entitled to a tax credit for qualifying children in their households. According to the federal statute, the child tax credit did not include children of the taxpayer's same-sex spouse if the children were not related to the taxpayer biologically or through adoption.²⁶

As illustrated in Table 3, following the *Windsor* decision, Tennessee same-sex couples have a quagmire of benefits. They have no recognition of their legal marriage in Tennessee and, as such, do not qualify for state-level benefits. Yet they qualify for many federal benefits because of their legal union in Maryland.

²⁴ 10 U.S.C. §1448.

²⁵ 26 U.S.C. § 2.

²⁶ 26 U.S.C. § 32(c)(3)(B).

Table 3
Tennessee Benefits Status Before and After the Windsor Ruling

Benefits	Before <i>Windsor</i>	After <i>Windsor</i>
Federal Benefits		
Social Security Benefits	Denied	Eligible for widow, surviving child, and spousal benefits
Sale of Principal Residence	\$250,000 limit each	\$500,000 limit as couple
Estate Tax Provisions	Estate tax on all assets	Unlimited funds with no estate tax
Income Tax Filings	Single tax returns; No spousal IRA contributions	Joint tax returns; Spousal IRA contributions; Head-of-household status
Health Benefits Taxes	Spouse's benefits treated as imputed income	Spouse's benefits not treated as imputed income
Military Benefits	Denied	Eligible for all spousal benefits
COBRA	No COBRA benefit for spouse	Spouse eligible for COBRA benefits
Inherited Retirement Accounts	Lump-sum distribution; Significant tax penalty	No tax penalties
Family Medical Leave Act	Denied for spouse and spouse's family	Eligible
Tennessee State Benefits		
Property Ownership	One spouse owns principal residence (tax consequences)	No change
Estate & Inheritance Tax	Estate tax on assets over \$1.25 million	No change
Health Benefits Taxes	No state income taxes	No change
Medical Rights & Decisions	Limited rights to make medical decisions	No change

Table 4
Actual Dollar Benefit Changes

Benefit	Value	Federal	State - TN	After <i>Windsor</i>
Sale of Principal Residence	Sales Price: \$385,000	\$385,000 - \$250,000 = \$135,000 taxable income each	No taxes on sale of principle residence	Up to \$500,000 no taxable income
Health Insurance Benefits	Spouse + children = \$500/month; Individual = \$141/month	No imputed income because family health benefits through providing spouse who works in California	No state income tax	Family health premium: \$285 (because providing spouse works in CA and can have family health benefits)
COBRA		No spousal benefit	N/A	Spousal benefit
FMLA		No spousal benefit	N/A	Spousal benefit
Health Care FSA	\$3,100 for individual	No spousal benefit	N/A	\$2,500 for family ²⁷

DISCUSSION

The key finding of the analysis is there is an unequal distribution of costs and benefits across the two states based on the legal recognition of same-sex marriage. Same-sex married couples are better off financially in Maryland (and the other 16 states that recognize same-sex marriage) than in Tennessee (and the other 33 states that do not legally recognize same-sex marriage). Specifically, same-sex married couples can take advantage of state-level benefits such as property ownership, estate and inheritance tax exemptions, health benefits treatment, and medical rights and decisions. Economically, same-sex

²⁷ Dollar limit changed as a result of the Patient Protection and Affordable Care Act of 2010, Pub L. No, 111-148, 124 Stat. 119, (codified as amended in scattered sections of the I.R.C. and in 42 U.S.C.).

couples are treated differently and unequally based on the legal recognition of same-sex marriage. This is problematic for two core reasons. First, there is an unequal distribution of benefits. Same-sex married couples, who live in states that prohibit same-sex marriage, decrease the income, wealth, and purchasing power of same-sex couples. Wealth is known to drive consumption and personal investment decisions (Parker, Souleles, Johnson and McClelland, 2013). As such, same-sex couples who live in the 33 states that don't legally recognize marriage equality are at an economic disadvantage. For example, the inheritance tax and real property differences discourage capital accumulation by same-sex couples in states that prohibit same-sex marriages. These couples face a major constraint in building personal wealth. Second, there is unequal treatment. As Americans, a same-sex married couple living in Maryland should have the same rights as one residing in Tennessee, but this is not the case. As Attorney General Eric Holder summarized the court's ruling in *Windsor*, "Americans in same-sex marriages are entitled to equal protection and equal treatment under the law" (Holder, January 10, 2014). Based on these findings, Holder's description is not yet accurate. Approximately 70 percent of states across the country currently treat same-sex married couples differently, creating a separate system and possibly marginalizing this population of citizens.

CONCLUSION

Historically, the U.S. has been a leader in human rights. However, when it comes to same-sex marriage, the U.S. lags behind its European counterparts. The Supreme Court ruling in *U.S. v. Windsor* has significantly advanced lesbian and gay rights by instating federal benefits; however more federal policies are needed to protect LGBT rights and economic mobility. In the words of former U.S. Secretary of State Hillary Clinton, "Gay rights are a human right." (U.S. State Department, December 6, 2011).

The years 2012-2013 were watershed years for LGBT rights. In November of 2012, only four states recognized same-sex marriage, today 17 states and the District of Columbia

recognize same-sex marriage. However, gays and lesbians continue to suffer inequities. The U.S Congress has yet to pass an Employment Non-Discrimination Act to prohibit employment discrimination based on sexual orientation or gender identity, despite a decade of attempts. The Current federal law prohibits discrimination on the basis of sex, race, and national origin. But it does not stop an employer from firing or refusing to hire workers because they are members of the LGBT community. Equally important, some states do not allow married same-sex couples to adopt children from foster care (*Boseman v. Jarrell*) although 50 percent of gays and lesbians would like to be parents (Gates, Badgett, Macomber, & Chambers, 2007, p. 3). A federal policy example is the 1983 ban on gays by the U.S. Food and Drug Administration (FDA). The FDA still does not allow men who have sex with men to donate blood (Coyle, 2013). These are examples of policy areas that need to be addressed in order that LGBT citizens can receive equal treatment under the law—a human right to which they are entitled.

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