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GIFT AND ESTATE TAXES: THE CASE FOR DEUNIFICATION

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Abstract

For the last half a century, the federal gift tax has been relegated virtually out of existence. There are many reasons that the gift tax has met this fate, including the current size of the lifetime tax exemption amount and the fact that noncompliance has gone largely unchecked. However, the real culprit in the subversion of the gift tax is the academic community: several decades ago, in the name of theoretical tidiness, it prodded Congress to amalgamate the estate and gift taxes into a unified whole. In retrospect, this exercise has proven to be a blunder that needs to be undone. This analysis charts how Congress can resurrect the federal gift tax and restore it to its former vibrancy.

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I. Introduction

For many decades, the federal gift tax has been languishing in obscurity. Evidence for this proposition abounds: fewer than 3,000 taxable gift tax returns are filed annually,[1] the gift tax contributes less than $2 billion to the more than $3.3 trillion of annual federal revenue generated,[2] and gift tax noncompliance is rampant.[3]

The gift tax has met this dark fate for many reasons, including the fact that Congress has set the lifetime exemption at a historically high dollar amount (currently, $11.4 million),[4] and the courts and Internal Revenue Service ("IRS") have judicially and administratively sanctioned asset value-minimization strategies.[5] These factors, combined with the fact that there is

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[1] *See SOI Tax Stats: Statistical Tables for 2017,* Internal Revenue Serv., https://www.irs.gov/statistics/soi-tax-stats-total-gifts-of-donor-total-gifts-deductions-credits-and-net-gift-tax [https://perma.cc/3Y88-T2FP] (last updated Jan. 8, 2020) (depicting that, in 2017, taxpayers filed only 2,876 federal gift tax returns that were taxable).

[2] *See* Internal Revenue Serv., Internal Revenue Service Data Book, 2017, at tbl.1 (2018) (depicting that, in 2017, total federal revenues were $3.33 trillion and the gift tax contribution to this amount was approximately $1.93 billion).

[3] *See, e.g.*, David Barstow, Susanne Craig & Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father*, N.Y. Times (Oct. 2, 2018), https://www.nytimes.com/interactive/2018/10/02/us/politics/donald-trump-tax-schemes-fred-trump.html [https://perma.cc/3Y36-ZJV9] ("Much of this money came to Mr. Trump because he helped his parents dodge taxes. He and his siblings set up a sham corporation to disguise millions of dollars in gifts from their parents, records and interviews show."). President Trump and his family apparently are not alone in their gift-dodging games. *See* David Cay Johnston, *I.R.S. Sees Increase in Evasion of Taxes on Gifts to Heirs*, N.Y. Times (Apr. 2, 2000), https://www.nytimes.com/2000/04/02/business/irs-sees-increase-in-evasion-of-taxes-on-gifts-to-heirs.html [https://perma.cc/G6DU-9LMW] ("More than 80 percent of the 1,651 tax returns reporting gifts of $1 million or more that were audited last year understated the value of the gift, the I.R.S. found. The average understatement was about $303,000, on which about $167,000 in additional gift taxes was due. This alone cost the government about $275 million last year. Understatement also appears to be flagrant among the quarter-million Americans who each year make smaller gifts, I.R.S. records show."); Robert W. Wood, *IRS Mines Real Estate Deeds to Collect Gift Tax*, Forbes (June 4, 2011), https://www.forbes.com/sites/robertwood/2011/06/04/irs-mines-real-estate-deeds-to-collect-gift-tax/#600402625593 [https://perma.cc/53GX-7764] ("You may think gifts are never caught, and the gift tax is the most notoriously uncollected tax.").

[4] I.R.C. § 2505(a) (2018).

[5] *See* William S. Blatt, *Minority Discounts, Fair Market Value, and the Culture of Estate Taxation*, 52 Tax L. Rev. 225, 226 (1997) ("The allowance of minority discounts encourages transactions designed to reduce transfer taxes."); James R. Repetti, *Minority Discounts: The Alchemy in Estate and Gift Taxation*, 50 Tax L. Rev. 415, 416 (1995) ("A common tool of estate planning involves the purposeful diminution in value of family property in order to reduce estate and gift taxes."). *See generally* Karen C. Burke & Grayson M. P. McCouch, *Family Limited Partnerships, Discounts, Options, and Disappearing Value*, 6 Fla. Tax L. Rev. 649, 655–65 (2004); Mary Louise Fellows & William H. Painter, *Valuing Close Corporations for Federal Wealth Transfer Taxes: A Statutory Solution to the Disappearing Wealth Syndrome*, 30 Stan. L. Rev. 895 (1978); Brant J. Hellwig, *On Discounted Partnership Interests and Adequate Consideration*, 28 Va. Tax Rev. 531 (2009); Ronald H. Jensen, *The Magic of Disappearing Wealth Revisited: Using Family Limited Partnerships to Reduce Estate and Gift Tax,* 1 Pitt. Tax Rev. 155 (2004).

no independent third-party information reporting that facilitates IRS oversight,[6] have relegated the gift tax into a status of virtual nonexistence.

But a major player in undermining the federal gift tax has kept its profile under wraps and has yet to acknowledge its culpability. This wrongdoer is none other than the academic community. Consider the fact that Congress instituted the gift tax in 1924,[7] repealed it two years later,[8] and reinstituted it in 1932.[9] In their original iterations, each gift tax system that Congress devised functioned entirely and independently on its own: separate and apart from the estate tax, each had its own exemption amount and tax rate structure.[10] As a stand-alone tax, the gift tax was vibrant, playing a meaningful role in raising revenue and controlling the transfer of gratuitous wealth.[11]

Enter the academic community. It was a loud and vocal critic of the nation's transfer tax system; in particular, it complained that despite the fact that both the gift and estate tax regimes pertained to the gratuitous transfers of wealth, each functioned independently of the other.[12] Its membership harbored the strong belief that all gratuitous transfers should be taxed along the lines of a common matrix.[13] Accordingly, its members lobbied politicians to coalesce the gift and estate tax systems into a coherent whole. Congress ultimately listened: in 1976, the nation's legislative body "unified" the gift and estate taxes into an amalgamated tax system, marked by a single exemp-

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[6] *See* Mitchell M. Gans & Jay A. Soled, *Reforming the Gift Tax and Making It Enforceable*, 87 B.U. L. REV. 759, 776 (2005) ("When it comes to gift tax enforcement, however, the issuance of any third-party information returns is noticeably absent, and there is no self-policing mechanism in place.").

[7] Revenue Act of 1924, ch. 234, §§ 319–24, 43 Stat. 253, 313–16. *See also* Estate of Sanford v. Comm'r, 308 U.S. 39, 44 (1939) ("An important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes.").

[8] Revenue Act of 1926, ch. 27, § 1200, 44 Stat. 9, 125 (repealing the gift tax).

[9] Gift Tax Act of 1932, ch. 209, §§ 501–32, 47 Stat. 169, 245–59 (reenacting the gift tax).

[10] *See generally* Roswell Magill, *The Federal Gift Tax*, 40 COLUM. L. REV. 773 (1940).

[11] *Id.* at 776 ("Although the gift tax has approached the estate tax in productivity in only one year, 1936, it has yielded the considerable sum of $333 million in the fiscal years 1933 to 1939, inclusive.").

[12] These complaints were ultimately memorialized in a comprehensive report that was issued by the American Law Institute. *See* AM. LAW INST., FEDERAL ESTATE AND GIFT TAXATION: RECOMMENDATIONS OF THE AMERICAN LAW INSTITUTE AND REPORTERS' STUDIES (1969). At the helm of this report were two Harvard professors, James Casner and William D. Andrews. In addition, approximately half of the "consultants" to this report were also professors. Their names and university affiliations are as follows: Boris I. Bittker, Yale Law School; Walter J. Blum, University of Chicago Law School; Robert Kramer, George Washington University Law School; Alan H. Polasky, University of Michigan Law School; and Joseph T. Sneed, Stanford University Law School.

[13] In particular, Jerome Kurtz and Stanley S. Surrey, who taught taxation at the University of Pennsylvania and Harvard, respectively, were adamant and vocal advocates for a unified transfer tax system. *See* Jerome Kurtz & Stanley S. Surrey, *Reform of Death and Gift Taxes: The 1969 Treasury Proposals, the Criticisms, and a Rebuttal*, 70 COLUM. L. REV. 1365, 1368 (1970) ("It would seem obvious that any notion of equity would require that aggregate wealth transfers of equal size should bear equal amounts of taxes. Moreover, progressivity, a notion accepted in theory, requires that the greater the transfer, the greater should be the ratio of the amount of the tax to the amount of the transfer. The existing system is clearly deficient in both of these respects.").

tion (able to be used during life or upon death) and moored to a common progressive tax rate schedule.[14] The academic community could thereafter celebrate: theoretical tidiness had prevailed.

And yet, unification of the gift tax with the estate tax has sown the seeds of the former tax's gradual undoing. Taxpayers are known to be notoriously poor recordkeepers, even over an annual accounting period.[15] With the unification of the gift and estate taxes, Congress implicitly requires taxpayers to be astute recordkeepers over the entirety of their lives, a feat that few are able to fulfill faithfully. Compounding the recordkeeping problem is the fact that noncompliance is met with a limited IRS response.[16] The noncompliance problem is further exacerbated when no gift tax is owed (which, due to the current size of the transfer tax exemption amount,[17] is apt to be true in the vast majority of cases); in those instances, even though this information may be critical in the computation of future transfer tax liability, the Internal Revenue Code ("Code") does not penalize taxpayers who intentionally or mistakenly fail to file gift tax returns.[18]

This analysis argues that Congress should restore the gift tax to its former significance. More specifically, Congress should once again separate the gift and estate taxes and make them distinct, able to function independently of one another. To advance this argument, Part II details the nature of the original gift tax and its historical roots as an independent tax. Part III then explores the unification of the gift and estate taxes, how the unified system has essentially operated for the last half-century, and the many shortcomings of the unified system. Part IV posits the need to reinvigorate the gift tax, resurrecting it from the ashes of oblivion, and sets forth exactly how Congress can accomplish this goal. Part V concludes.

II. History of the Independent Gift Tax

When the gift tax initially came into being, it functioned separately and apart from the estate tax. In its independent status, the gift tax flourished,

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[14] Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 200–10, 90 Stat. 1520, 1846–48 (codified as amended throughout 26 U.S.C.) (unifying estate and gift taxes and adding a tax on generation-skipping transfers).

[15] *See, e.g.*, Comm'r v. Webb, 394 F.2d 366 (5th Cir. 1968) (taxpayer's poor recordkeeping led to the imposition of a fraud penalty); Estate of Olivo v. Comm'r, 102 T.C.M. (CCH) 35 (2011) (taxpayer's poor records resulted in the Tax Court disallowing a substantial deduction on a federal estate tax return for caregiving services); Westbrook v. Comm'r, 66 T.C.M. (CCH) 1823 (1993) (veterinarian and his wife's poor records precluded their ability to treat farming activity as a business activity).

[16] *See* Jonathan Feinstein & Chih-Chin Ho, *Predicting Estate Tax Filings and Taxable Gifts*, *in* 1500 The IRS Research Bulletin 47–53 (1999) (estimating that approximately one-half of all gift tax payments are evaded); Internal Revenue Serv., *supra* note 2, at tbl.9a (indicating that the IRS audits less than one percent of all gift tax returns).

[17] *See* I.R.C. § 2505(a) (2018).

[18] In the absence of a gift tax being due, no accuracy-related penalty, failure-to-file penalty, or failure-to-pay penalty may apply. See the operative language of I.R.C. §§ 6662(a), 6651(a)(1), and 6651(a)(2).

painting a broad and bright picture of possibilities.[19] Portrayed in this favorable light, consider the (A) origin, (B) salient features, and (C) multiple accomplishments of the independent gift tax.

A. *Origin of the Independent Gift Tax*

Congress did not one day arbitrarily decide that the nation's destiny required the institution of a gift tax. Instead, the need for a gift tax was born out of practical necessity as the nation's tax landscape shifted away from tariffs and customs duties as the primary means to raise revenue.[20] Consider the driving forces, namely, the imposition of the income and estate taxes, that led to the advent of the modern gift tax regime.

In 1913, to provide sufficient funds to the federal government to propel the nation forward, a sufficient number of state legislatures ratified the Sixteenth Amendment to the Constitution, authorizing an income tax.[21] Shortly thereafter, Congress enacted a progressive income tax system.[22] Distilled down to its essentials, the income tax's purpose was to raise sufficient revenue for the country to conduct its affairs and simultaneously reduce burdensome tariffs;[23] a secondary purpose was equitable in nature, namely, there should be an element of redistributive justice as the associated tax burden was calibrated based upon each taxpayer's ability to pay.[24]

An examination of the tax rate structure associated with the 1913 income tax is revealing. An elementary review of the rate structure indicates that Congress unwittingly gave financial incentives to taxpayers to manipulate outcomes by assigning income between and among related parties to minimize their overall tax burden. In the absence of a gift tax and in the context of a family unit, this sort of planning made monetary sense. By way of example, suppose a wealthy taxpayer who earned \$100,000 in 1913 owned a \$20,000 income-producing bond that commanded a five percent yield, or \$1,000 annually. If the taxpayer retained ownership in the bond, the income tax owed on the \$1,000 interest income would be \$50 (i.e., \$1,000 x

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[19] *See* Magill, *supra* note 10, at 773.

[20] *See* Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894–1913*, 66 TAX LAW. 295, 329 (2013) ("Within the context of the 19th century system of protective tariffs that imposed a disproportionate share of the cost of government on laborers and farmers, a vote in Congress for an income tax was invariably coupled with a vote for tariff reduction.").

[21] *See* JOHN D. BUENKER, THE INCOME TAX AND THE PROGRESSIVE ERA 138–380 (1986) (describing the process of state ratification); ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX 1861–1913, at 209–25 (1993) (same).

[22] Revenue Act of 1913, ch. 16, § II, 38 Stat. 114, 166–81.

[23] Pollack, *supra* note 20, at 329 ("[Congress's] goal was to enact some tariff reduction, relying on a modest income tax to make up the lost revenue.").

[24] *Id.* at 325 ("Democrats and progressive Republicans similarly viewed the income tax as a tool to work justice. The main issues of contention concerned the rate structure and the size of the personal exemption. The House bill provided for an exemption of \$4,000, assuring that all but the wealthy would be exempt from taxation.").

.05);[25] instead, if the taxpayer gifted the bond to her daughter who was pursuing a law degree and had no other source of income, no tax would be owed on the $1,000 of bond interest.[26] With a progressive tax rate structure in place, the incentive to make gifts of income-producing property to low-income taxpayers was thus financially enticing.[27]

A few years after instituting the income tax, Congress sought another means of raising revenue and possibly reducing wealth inequity.[28] Therefore, in 1916 Congress enacted an estate tax,[29] which, akin to the income tax, had a progressive tax rate structure in place: the larger the decedent's estate, the correspondingly larger the concomitant estate tax burden.[30] And like taxpayers throughout history, taxpayers in the early-twentieth century undertook various measures to reduce their estate tax burdens and those of their offspring. Among other strategies,[31] well-advised taxpayers no doubt made large and orchestrated gifts that would escape the estate tax base.[32] A simple example illustrates this point: suppose a taxpayer who was worth $10 million had $3 million of potential estate tax exposure (i.e., $10 million x .3). To minimize this exposure, the taxpayer might make a $7 million gift to his son. As a result of engaging in this transfer, the taxpayer could hypothetically reduce his estate tax burden to $900,000 (i.e., $3 million x .3). The $2.1 million of tax savings (i.e., $3 million potential estate tax less $900,000

[25] *See* INTERNAL REVENUE SERV., FORM 1040, at line 8 (1913), https://www.irs.gov/pub/irs-utl/1913.pdf [perma.cc/8XKR-XEVK] (imposing a one percent "normal tax" plus a four percent "additional tax").

[26] *See id.* at instruction 1 ("This return shall be made by every citizen of the United States, whether residing at home or abroad, and by every person residing in the United States, though not a citizen thereof, having a *net income* of $3,000 or over for the taxable year . . . .").

[27] Historically, the IRS has tried to police these assignments of income. *See, e.g.*, Helvering v. Horst, 311 U.S. 112 (1940) (holding, where taxpayer gifted interest-bearing bond coupons to his children but retained the bond itself, that the bond interest remained taxable to the taxpayer). I query whether the IRS has ever had sufficient resources to monitor intrafamily income assignments of the sort described.

[28] *See* W. Elliot Brownlee, *Historical Perspective on U.S. Tax Policy Toward the Rich*, *in* DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 29, 41–42 (Joel B. Slemrod ed. 2000) (pointing out that from 1913 to 1915 only two percent of the labor force paid income taxes).

[29] Revenue Act of 1916, ch. 463, § 202, 39 Stat. 756, 777–78.

[30] *See* David M. Hudson, *Tax Policy and the Federal Taxation of the Transfer of Wealth,* 19 WILLAMETTE L. REV. 1, 16 (1983) ("Unlike earlier versions of a federal death tax, the 1916 tax was a true estate tax: a tax imposed on the privilege of transferring property at death, computed according to a progressive rate structure based on the size of the estate of the decedent.").

[31] For example, to defer estate exposure to a later generation, taxpayers would make gifts and bequests to grandchildren in lieu of their children. *Id.* at 23 ("With only the estate and gift taxes in effect, it was possible to transfer property in trust, providing for a life-estate to a grandchild for example, with the remainder to great-grandchild. There would perhaps be estate or gift tax liability upon the creation of the trust, but because there was no transfer of either property or any interest in property upon the death of the grandchild, no further transfer tax would be incurred.").

[32] *See* C. Lowell Harriss, *Legislative History of Federal Gift Taxation*, 18 TAXES 531, 533 (1940).

actual estate tax) made gift giving an attractive device, regularly employed to circumvent estate tax exposure.[33]

Notwithstanding the circumvention of taxpayers' income and estate tax obligations through the use of gifts, Congress was not stirred into action for over a decade. However, during the mid-1920s, the federal government experienced a pressing need for additional revenue.[34] Yes, the income and estate taxes were fulfilling their promises of generating revenue to help replenish the nation's depleted coffers, but even they were not enough to satisfy the seemingly insatiable appetite of the federal government, upon which ever-increasing financial demands were being made.

To meet these fiscal demands, one obvious option that Congress could consider was to raise income and estate tax rates. Yet, hiking tax rates is never a politically attractive option, and thus Congress sought alternatives. To preserve the existing tax bases of both the income and estate taxes and thereby maintain their abilities to generate revenue,[35] Congress chose instead to institute a gift tax.[36] Instituting a gift tax negated taxpayers' base-destroying tactics of transferring income-producing property to taxpayers (i) whose income was subject to lower tax rates and (ii) as an estate-tax avoidance maneuver.

Congressional institution of the gift tax did not go unnoticed. To the contrary, its introduction stoked the ire of the wealthy, who immediately demanded its elimination.[37] In 1926, with apparent political clout,[38] those in this class launched a successful lobbying effort to have congressional members repeal the gift tax.[39] And for the next several years, members compris-

[33] *See generally id.* (noting, based on legislative history, that the use of lifetime gift-giving was a strong motivating force to enact the gift tax).

[34] At least one commentator attributed the need to maintain the nation's transfer tax system to the ratification of the Eighteenth Amendment and Prohibition, due to an anticipated loss of revenue from taxes on alcoholic beverages. *See* Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 231 n.43 (1956).

[35] *See* Hudson, *supra* note 30, at 17 ("Although advocates of a gift tax supported their position with two basic arguments—the gift tax would protect the integrity of the income tax, and it was necessary to prevent large-scale avoidance of the estate tax—most emphasis was placed on its role in backstopping the estate tax.").

[36] Revenue Act of 1924, ch. 234, § 321(a)(1), 43 Stat. 253, 314.

[37] *See, e.g.*, Harriss, *supra* note 32, at 533 (noting that then-Secretary of Treasury Andrew W. Mellon argued that "[t]his tax also is a tax on capital . . . and, therefore, work[s] a destruction on the total capital of the country"); *Gift Tax Plan Held Menace to Capital*, N.Y. TIMES, Dec. 27, 1931, at 37 ("Attacking the proposed re-enactment of the 1924 gift tax as a serious menace to the normal flux of capital which would, furthermore, yield comparatively small revenue to the government, Clinton Davidson, authority on the subject of inheritance and gift taxes, says a concerted effort must be made to prevent its adoption in the present emergency.").

[38] *See* Harriss, *supra* note 32, at 538 (noting that a campaign against the gift tax was orchestrated "by a few persons but financed by several wealthy individuals and large corporations").

[39] *See* Revenue Act of 1926, ch. 27, § 1200, 44 Stat. 9, 125–26 (repealing the gift tax).

ing this class and other taxpayers were once again able to skirt their income and estate tax obligations.[40]

Then came the Great Depression, and the federal coffers once again became depleted.[41] As stories of wealthy taxpayers flouting their civic responsibilities became increasingly widespread,[42] these narratives created pressure on Congress to reinstitute the gift tax. And so in 1932 Congress succumbed to this pressure, voting to once again institute a national gift tax.[43]

B. The Salient Features of the Independent Gift Tax

A key distinguishing feature of the 1932 gift tax was its cumulativeness: while the 1924 gift tax viewed each year independently (i.e., a gift made in one year had no bearing on the gift tax burden of a gift made in a later year),[44] the new version aggregated the lifetime gifts that a taxpayer made.[45] Nevertheless, there was an underlying feature common to both the 1924 and 1932 gift taxes: both levied tax upon all gratuitous wealth transfers, regardless of whether they were direct or indirect and whether they were outright or in trust.[46]

There are three salient features that distinguish the 1932 version of the gift tax from today's gift tax: the tax rate structure, the exemption, and its relationship to the estate tax. Consider each of these features in turn.

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[40] *See* Harriss, *supra* note 32, at 536 ("[Congressman] Treadway asked how extensive avoidance was, and [Secretary of Treasury] Mills illustrated methods, both innocent and deliberate, [utilizing gifts].").

[41] *See* Stanley S. Surrey, William C. Warren, Paul R. McDaniel & Hank Gutman, Federal Wealth Transfer Taxation 6 (1977) (noting that the need for tax revenue was a driving force to strengthen the nation's transfer tax regime); Jeffrey Cooper, *Ghosts of 1932: The Lost History of Estate and Gift Taxation*, 9 Fla. Tax Rev. 878, 887 (2010) ("By 1932, significant budgetary surpluses had morphed into major shortfalls, and the United States confronted the largest budget deficit of any country on Earth."); Eisenstein, *supra* note 34, at 234 ("In 1931 a strange thing happened. Secretary Mellon revised his views on the estate tax as the Great Depression intensified the need for revenue.").

[42] *See, e.g.*, *Proposals Stir Capital*, N.Y. Times, Sept. 11, 1931, at 1 ("The real trouble with our estate tax is that it may be legally avoided through gifts and trusts with extreme ease. For instance, the records of the Joint Committee on Internal Revenue Taxation . . . disclose that many of our citizens, who have amassed enormous wealth during their lifetimes, entirely escape the estate tax by transferring their property to their sons prior to death . . . .").

[43] Revenue Act of 1932, §§ 501–32, 47 Stat. 169, 245–59.

[44] Revenue Act of 1924, § 319, Pub. L. No. 176, 43 Stat. 253 ("For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year . . . .").

[45] *See* Revenue Act of 1932 § 502 ("The tax for each calendar year shall be an amount equal to the excess of— (1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years over (2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.").

[46] *See* Revenue Act of 1932 § 501 ("The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible."); Revenue Act of 1924 § 319 (noting that the gift tax is imposed on "any property wherever situated, whether [the transfer is] made directly or indirectly").

Congress devised the tax rate structure of the 1932 gift tax to accelerate revenue generation.[47] The legislative history indicates that Congress purposefully made the gift tax rates equal to seventy-five percent of the graduated estate tax rates.[48] The reason was simple: by introducing a reduced tax rate schedule, taxpayers would be incentivized to make lifetime transfers.[49] By encouraging lifetime transfers, Congress hoped to collect immediate revenue rather than doing so via estate tax imposition, which inevitably would not transpire for years or decades later when taxpayers died.[50]

In terms of the exemption that applied to the 1932 gift tax, Congress fashioned the lifetime gift tax exemption to be sensitive to the fact that transfer taxes were supposed to apply primarily to the wealthy. The nation's legislative body accomplished this objective by providing a $50,000 lifetime gift tax exemption,[51] which in inflation-adjusted dollars would equal approximately $1 million today.[52] Well-advised wealthy taxpayers were therefore routinely instructed to make strategic use of this exemption; failure to avail themselves of this strategy translated into its forfeiture.[53] It does not take a leap of faith to assume that a large segment of economically well-to-do taxpayers pursued this course of action.

Finally, the amount of a person's lifetime transfers under the 1932 gift tax had no bearing on that person's subsequent estate tax burden. That being the case, in light of the highly progressive transfer tax rate schedules applicable to gifts (see Appendix A) and those applicable to estates (see Appendix B), it made immense sense for wealthy taxpayers to game the bracket structure. The easiest means to accomplish this objective was for taxpayers to gift some portion of their wealth during their lifetimes and another portion

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[47] *See* Cooper, *supra* note 41, at 911 ("[T]he architects of the 1932 gift tax did not intend to deter lifetime gifts by imposing a gift tax. To the contrary, they sought to incentivize such gifts."). Compared to the estate tax, another attractive feature of the gift tax was that it was designed to be tax exclusive rather than tax inclusive. In other words, no tax was levied on the tax payment itself. Consider the plight of a taxpayer who had already exhausted his lifetime exemption. If the taxpayer had $14 million and made a $10 million gift, he would owe $4 million of gift tax (i.e., $10 million x .4); in contrast, if the same taxpayer died and his gross estate was worth $14 million, a $5.6 million estate tax (i.e., $14 million x .4) would be due.

[48] *Id.* at 912 ("[T]he Congress of 1932 consciously designed the gift tax to induce gift-giving, by setting gift tax rates significantly below the estate tax rates imposed upon a similarly-sized transfer.").

[49] *See* 75 CONG. REC. 5903 (1932) (statement of Rep. Canfield) (noting that taxpayers who opted to pay gift tax will "lower their estate tax and increase the income to the Treasury while it is most needed").

[50] *See* 75 CONG. REC. 5896 (1932) (statement of Rep. Hill) ("It takes a period of 18 months under existing law before you can get settlements of these estates, and we need money now.").

[51] Revenue Act of 1932 § 505(a)(1).

[52] Using the Consumer Price Index, $50,000 in 1932 would be worth $941,500 in 2020. *See* INFLATION CALCULATOR, https://www.in2013dollars.com/us/inflation/1932?amount=500 00 [https://perma.cc/8V3A-YXPG].

[53] *See* AM. LAW INST., *supra* note 12, at 2–3 ("But since the [gift and estate tax] systems ordinarily operate independently, consistent with this approach, the gift tax lifetime exemption, if not used up, cannot be carried over to increase the specific exemption . . . applicable to deathtime transfers.").

at death, strategically designed to capitalize on the progressive structure of each tax.[54] By engaging in this bifurcation strategy, taxpayers could minimize their overall transfer tax exposure. To illustrate, ignoring the then gift and estate tax exemptions, a taxpayer who was worth $2 million in 1942 would have been transfer-tax savvy to gift $1 million to a loved one and, upon her demise, say in 1946, bequeath the balance of her estate ($1 million). By engaging in this transfer tax-minimization strategy, rather than a $1,200,000 estate tax burden being levied (assuming a flat sixty percent estate tax rate) on her $2 million estate, her $1 million gift would have generated a $300,000 gift tax burden (assuming a flat thirty percent gift tax rate) and a $400,000 estate tax burden being levied (assuming a flat forty percent estate tax rate) on her $1 million remaining estate, yielding $500,000 of overall tax savings (i.e., $500,000 = $1,200,000 – $300,000 – $400,000).

The gift tax's three central components—namely, the tax rate structure, the exemption, and independence the gift tax enjoyed from estate tax—lifted its potency. While it would never be the bulwark of the nation's revenue-raising regime, it would safeguard those that were—the income and estate tax bases—from being plundered.

C. *The Vibrancy of the Independent Gift Tax*

A tax's so-called success depends upon it fulfilling certain designated objectives. From tax to tax, those objectives will vary. For example, some taxes seek to raise revenue;[55] others (e.g., cigarette and alcohol taxes) are Pigovian in nature and attempt to dissuade undesirable or inefficient behaviors;[56] and still others strive to promote equity.[57] Also, taxes can have one or more objectives, which is true of the gift tax. The 1932 gift tax's goals were to raise revenue,[58] preserve the income and estate tax bases,[59] and promote

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[54] *See* Kurtz & Surrey, *supra* note 13, at 1371–72 ("Since the taxation of gifts is based on a rate schedule completely separate from the estate tax rate schedule, total wealth transfers by an individual may be divided between lifetime transfers and testamentary transfers with each type of transfer taxed independently on a schedule beginning at the lowest rates.").

[55] *See* Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295, 334 (2011) ("Identifying the principal goal of the income tax system is easy: the tax system exists to raise revenue.").

[56] *See* Jeff Strnad, *Conceptualizing the "Fat Tax": The Role of Food Taxes in Developed Economies*, 78 S. CAL. L. REV. 1221, 1225–26 (2005) (explaining the use of sin taxes to influence consumer choice); *see also* Franklin Liu, *Sin Taxes: Have Governments Gone Too Far in Their Efforts to Monetize Morality*, 59 B.C. L. REV. 763, 765 (2018) ("The key to sin taxes is that the goods and services usually targeted by governments to be taxed as sins are demand inelastic, meaning that in theory, even modest sin taxes should generate considerable revenue.").

[57] *See generally* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002) (describing how different taxes and the way that they are formulated can be used as instruments to promote social justice).

[58] *See* Cooper, *supra* note 41, at 912 (explaining how the quest for new revenue in 1932 led Congress to reintroduce the gift tax).

[59] *See* Sandford's Estate v. Comm'r, 308 U.S. 39, 44 (1939) ("An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes . . . .");

redistributive justice.[60] As measured by these criteria, consider how the independent gift tax has fared.

In terms of raising revenue, the results surrounding the independent gift tax were a mixed bag. As reflected in Appendix C, from 1933 to 1977, the gift tax generated only a modest amount of revenue, ranging from 0.07% to 0.42% of the entire federal revenue budget. Therefore, over this forty-five-year period, on average, the gift tax raised approximately 0.12 percent of the annual federal budget. The actual dollar amounts generated ranged from $5 million to $1.8 billion. Yes, the direct dollars that the gift tax raised contributed to the nation's solvency but, as evidenced by the percentage tallies, not in a highly significant fashion—particularly in comparison to the income and payroll taxes, which, during this same time period, roughly accounted for nearly 80–85 percent of the nation's revenues.[61]

But the revenue element of the gift tax must also be measured from an entirely different vantage point. More specifically, consideration must be given to how the mere presence of the gift tax led to the generation of additional income and estate tax revenues as taxpayers would be less inclined either to collusively park income-producing assets in the hands of lower-income taxpayers or to mitigate their estate tax exposure by gifting their assets to younger-generation friends and family members. Granted, the exact amount of revenue that the income and estate taxes generate is based on many factors. Such factors include, but are not limited to, tax rates, the strength of the national economy, state and local tax impositions, and congressional actions to expand and narrow the taxes' respective bases.[62] Isolating the specific role that the gift tax has played in buoying both the income and estate taxes and augmenting their revenue flow is thus almost impossible to ascertain. Suffice it to say, however, that Congressional retention of the gift tax over the course of multiple decades signified an explicit endorsement that, in terms of revenue generation, it had played a pivotal role in augmenting income and estate tax revenue flow.[63]

65 CONG. REC. 3119–20 (1924) (statement of Rep. William R. Green) (stating the gift tax was "needed on account of the income tax"); RANDOLPH E. PAUL, FEDERAL ESTATE AND GIFT TAXATION 359 (1942) (explaining the need for the gift tax lest taxpayers "distribute income among a greater number of taxpayers . . . to reduce the surtax brackets").

[60] In 1932, the Roosevelt administration sought to reinvigorate the estate tax as "[t]he [leveling] of hereditary fortunes was formally approved as one of its objectives." Eisenstein, *supra* note 34, at 235. Key to accomplishing this goal was the reintroduction of a national gift tax.

[61] OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES, at tbl.2.1 ("Receipts by Source: 1934–2024"), https://www.whitehouse.gov/omb/historical-tables/ [https://perma.cc/64ZY-UR96].

[62] *See generally* Jonathan Weisman, *Seeking Ways to Raise Taxes but Leave Tax Rate As Is*, N.Y. TIMES (Nov. 22, 2012), https://www.nytimes.com/2012/11/23/us/politics/congress-looks-at-ways-to-leave-top-tax-rate-as-is.html [https://perma.cc/BE72-TZW7] (describing factors and methodologies to raise tax revenue).

[63] *See, e.g.*, Jonathan G. Blattmachr & Mitchell M. Gans, *Wealth Transfer Tax Repeal: Some Thoughts on Policy and Planning*, 90 TAX NOTES 393, 396 (2001) ("But the repeal of the

Aside from generating revenue, one of the gift tax's foremost missions was to preserve the integrity of the income and estate tax bases. Based on this criterion, the gift tax has had remarkable success.[64] Once Congress instituted the independent gift tax, making gratuitous transfers no longer held their same attraction. Taxpayers were no longer at liberty to assign income to loved ones whose incomes were subject to low tax rates; in the presence of a meaningful gift tax, such transfers no longer made financial sense.[65] Likewise, the gift tax's presence has dissuaded many taxpayers from making lifetime property transfers to circumvent their estate tax obligations.[66]

Finally, regarding redistributive justice,[67] the gift tax has presumably played a contributory role in its achievement. Unlike revenue generation, when it comes to redistributive justice, there are no ready markers that define success or failure (i.e., the fact that the government collects more taxes does not necessarily mean that these additional resources pass to or are expended upon the less fortunate). What is incontrovertible is that the estate tax and, to a lesser extent, the income tax have both played important roles in redistributing the nation's wealth. Exactly how much each contributes to such redistribution is the subject of intense debate.[68] Nonetheless, assuming that the gift tax truly safeguards the integrity of the income and estate taxes, then it is axiomatic that it must also further redistributive justice.

As measured by the preceding criteria, the history of the independent gift tax is one marked by moderate success. It generated a modest amount of revenue, helped safeguard the integrities of the income and estate taxes, and, in all likelihood, contributed to redistributive justice. Does this mean that the independent gift tax functioned as a panacea to cure all of the nation's tax woes? Undoubtedly, the answer to this question is no (although there is no tax that can achieve such a high bar). However, for nearly half a century (i.e., 1924–1976), Congress and the general populace accepted and periodically even lauded the independent gift tax and the vital role that it played in helping maintain the nation's solvency.

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gift tax will create planning opportunities in terms of state and federal income tax, resulting in a revenue loss that must also be included in the "price tag" of repeal.").

[64] *See id.* ("Without gift tax, high-bracket taxpayers would be well advised to transfer their investments to relatives and trusted friends who are in a lower income tax bracket.").

[65] Both before and after the gift tax shed its independence, the gift tax's potential application ordinarily prevents income shifting.

[66] Both before and after the gift tax shed its independence, the gift tax's potential application disincentivizes taxpayers from avoiding their transfer tax obligations.

[67] *See, e.g.*, William J. Turnier, Pamela Johnston Conover & David Lowery, *Redistributive Justice and Cultural Feminism*, 45 Am. U. L. Rev. 1275, 1277 (1996) ("By redistributive justice we mean those processes whereby resources are transferred from those who have them in abundance to provide for the social and economic needs of those with scant resources.").

[68] *See generally* Jennifer Bird-Pollan, *Why Tax Wealth Transfers?: A Philosophical Analysis*, 57 B.C. L. Rev. 859 (2016) (positing the philosophical arguments for and against the nation's transfer tax regime).

III. Unification and Its Consequences

When it comes to issues of taxation, many academics spend their entire careers opining on how Congress can improve the Code to enable it to generate more revenue, foster equity, and facilitate administrative ease.[69] These academics should be commended for their efforts: the nation's tax system is immense, complex, and, in light of an ever-changing global economy, always in flux. On many occasions, academics have generated theories the institution of which have vastly improved the Code.[70] However, not all theories resulting in legislative reforms have led to betterment; to the contrary, some academic theories that have been instituted have resulted in practical hurdles whose challenges have ultimately proven insurmountable, resulting in their retroactive repeal.[71]

With this background in mind, consider the impact that the academic community has had in fundamentally shaping the transfer tax system. Subsection A examines the underlying reasons that Congress chose to unify the nation's transfer tax system, Subsection B describes how the unified transfer tax system functions, and Subsection C explores why the current unified system has fallen far short of achieving its intended goals.

A. The Rationale for Unifying the Gift and Estate Taxes

Whether a taxpayer makes a lifetime or a testamentary transfer of wealth, the effect to the recipient is the same: under the Code, the recipient has no taxable income.[72] The same is not true for the taxpayer. On the face of it, symmetry would suggest that a taxpayer who makes a gratuitous wealth

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[69] The focal point of many academic careers centers upon seeking to achieve these objectives. Recent emblematic examples of such dedicated academics include the ranks of James Alm, Mark Asher, Joseph Dodge, Calvin Johnson, Douglas Kahn, James Repetti, Deborah Schenk, Richard Schmalbeck, Lawrence Waggoner, and Lawrence Zelenak. A Westlaw search of their writings reveals their dedication to improving the nation's tax system.

[70] *See, e.g.*, Richard Schmalbeck, *Income Averaging After Twenty Years: A Failed Experiment in Horizontal Equity*, 1984 Duke L.J. 509 (1984) (the publication of which, in part, resulted in Congress repealing the income-averaging rules); Samuel C. Thompson Jr. & Robert Allen Clary II, *Coming in from the "Cold": The Case for ESD Codification*, 99 Tax Notes 1270 (2003) (the publication of which, in part, resulted in Congress codifying the economic substance doctrine).

[71] For many years, academics advocated that Congress repeal the so-called step-up in basis rule embodied in Code section 1014. *See, e.g.*, Michael J. Graetz, *Taxation of Unrealized Gains at Death—An Evaluation of the Current Proposals*, 59 Va. L. Rev. 830 (1973) (advocating that Congress replace the stepped-up basis rule with either a deemed realization or carryover tax basis rule); Philip E. Heckerling, *The Death of the "Stepped-Up" Basis at Death*, 37 S. Cal. L. Rev. 247 (1964) (same). In 1976, Congress heeded this advice, resulting in the repeal of Code section 1014 and the institution of a carryover tax basis rule. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2005, 90 Stat. 1520, 1872. However, two years later, this repeal was suspended, Revenue Act of 1978, Pub. L. No. 95-600, § 515, 92 Stat. 2763, 2884, and, in 1980, Code section 1014 was reinstituted, Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 401(a), 94 Stat. 229, 299.

[72] I.R.C. § 102(a) (2018).

transfer should bear identical tax consequences (in this case, incurring a transfer tax burden) regardless of whether such transfer occurs during life or upon death. After all, inter vivos and testamentary acts of gratuitous wealth transfers simply distill down to a timing issue.[73]

Consider the theoretical pureness of having a unified transfer tax system. Two central components epitomize such a unified system: (i) a single exemption that could be used during life and, to the extent not exhausted, upon death; and (ii) a single tax rate schedule that likewise measures the aggregate amount of wealth that a taxpayer transfers during life and then upon death.[74] Therefore, it would not matter whether taxpayers chose to make lifetime or testamentary transfers. For example, ignoring the tax-exclusive nature of the gift tax and the tax-inclusive nature of the estate tax,[75] a taxpayer with a $100 million net worth would have the use of the same exemption whether he made a lifetime transfer or waited to bequeath this wealth upon death; furthermore, applying an identical tax table, his tax burden would be the same whether he made a gift or a bequest.

Academics could and did make a compelling case that fairness and theoretical purity required Congress to unify the gift and estate taxes into a coherent whole.[76] And consistent with their charge to improve the Code, they proceeded to make their case for transfer tax unification in academic journals, congressional hearings, and the popular press.

First, consider the role that academic journals play to tease out novel ideas. This is the forum in which many academics tout and test their ideas among their peers to ascertain whether their proposals are well received or ridiculed. These journals function as petri dishes of sorts to learn if an idea has viability and will thrive or wilt and metaphorically die on the publica-

[73] *See, e.g.*, Paul B. Stephan III, *A Comment on Transfer Tax Reform*, 72 VA. L. REV. 1471, 1474 (1986).

> The arguments for eliminating the different rates for gifts and testamentary transfers fall into three groups: 1) because nothing fundamental distinguishes these transfers, it is unfair to tax them differently, 2) the difference invites disputes and uncertainty, and 3) the apparently inevitable safeguard of reinclusion is especially costly as well as potentially perverse.

[74] Applicable gift tax sections, namely, I.R.C. §§ 2502(a)(1) (2018) and 2505(a) (2018), cross-reference the estate tax sections, namely, I.R.C. § 2001(c) (2018) (tax rates) and I.R.C. § 2010(a) (2018) (exemption amount).

[75] *See, e.g.*, Theodore S. Sims, *Timing Under a Unified Wealth Transfer Tax*, 51 U. CHI. L. REV. 34, 34 (1984) ("Under existing law, the gift tax base systematically excludes the transfer tax paid, whereas the estate tax base does not.").

[76] For example, professors at Columbia and Harvard were lead advocates for gift and estate integration. CARL S. SHOUP, FEDERAL ESTATE AND GIFT TAXES 15 (1966) ("[Integrating the gift and estate taxes] would be closer to a neutral tax, not influencing the distribution of transfers between those inter vivos and those at death."); Stanley S. Surrey, *An Introduction to Revision of the Federal Estate and Gift Taxes*, 38 CAL. L. REV. 1, 11 (1950) ("Integration of the estate and gift taxes into a single transfer tax, therefore, is primarily required for the purposes of simplification and equity among taxpayers."). *See also* STAFF OF S. COMM. ON FIN., SUMMARY OF TREASURY DEP'T TAX REFORM STUDIES AND PROPOSALS 25 (Comm. Print 1969), https://www.finance.senate.gov/imo/media/doc/Prttax13.pdf [https://perma.cc/5E4K-7LCL] ("The Treasury report recommends full unification of the estate and gift taxes into a single transfer tax.").

tion's pages.[77] In the tax sphere, common academic outlets include general law reviews and specialized tax journals, such as *National Tax Journal*, *Taxes Magazine*, and *Tax Notes*. Beginning in the 1960s, a series of academic articles began appearing in these journals proclaiming the virtues associated with transfer tax unification.[78] And despite the usual harsh critiques that most novel tax ideas endure, the notion of transfer tax unification largely went unchallenged, greeted with almost unabashed enthusiasm.[79]

But testing ideas strictly limited to the purview of an academic environment only goes so far. Academics know that their peers do not hold seats of power and cannot provide meaningful traction for reform. Instead, academics have learned that their path to making meaningful legislative changes is to be vocal participants in congressional hearings. The proposal to unify the gift and estate taxes was no exception to the traditional route necessary to galvanize political support. That being the case, on numerous occasions, the *Congressional Record* is punctuated with academics testifying in support of transfer tax unification to a largely receptive bipartisan legislative crowd.[80]

To round out sponsorship for legislative proposals, savvy academics know that securing public support is another pathway to obtaining legislative success. In yesteryear, when the Internet was still in its infancy, the best medium to gain positive acclaim was to make persuasive arguments in widely circulated newspapers and magazines. Adhering to this tried-and-true formula regarding unification, tax academics took their case to the public. And, notwithstanding the esoteric nature of the subject matter, in the Fourth Estate the academic community contended that the nation would be on much sounder financial footing if Congress unified the gift and estate taxes.[81]

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[77] Needless to say, my metaphor is no way to suggest that journal editors are mold or fungi; instead, they are astute "scientists" who cull those ideas worthy of attention and bring them into the public domain.

[78] *See, e.g.*, Jerome Kurtz & Stanley S. Surrey, *Reform of Death and Gift Taxes: The 1969 Treasury Proposals, the Criticisms, and a Rebuttal*, 70 Colum. L. Rev. 1365 (1970) (specifying the need for a unified system, declaring that "[i]t would seem obvious that any notion of equity would require that aggregate wealth transfers of equal size should bear equal amounts of taxes.").

[79] *See generally* H. Comm. on Ways & Means and S. Comm. on Finance, 91st Cong., 1st Sess., Tax Reform Studies and Proposals 329–409 (Comm. Print 1969).

[80] *See, e.g.*, *Estate and Gift Hearings Before the H. Comm. on Ways & Means*, 94th Cong. 224, 227 (Mar. 16, 1976) ("Another important change in death taxation would be to unify the estate and gift tax.") (statement of Gerard M. Brannon, Professor of Economics at Georgetown University); *Estate and Gift Hearings Before the H. Comm. on Ways & Means*, 94th Cong. 100, 107 (Mar. 17, 1976) ("Treatment of one transfer tax makes sense, with the rates being lower and slightly progressive for transfers up to $200,000, with a significant increase in progressive rates for transfers over $200,000.") (statement of Gerald P. Moran, Associate Professor, University of Toledo College of Law).

[81] Even the then-commissioner of the Internal Revenue Service, Sheldon S. Cohen, commented on the duality of the two-tax system: "Since the gift tax is essentially a complement to the estate tax, and exists only for that reason, it really makes sense to unify the estate and gift taxes into one cohesive tax system." Sheldon S. Cohen, *Tax Laws and Social Motivation*, 26 N.Y. Bar J. 102, 108 (1968).

Among the many proponents for reform, Congress finally listened to the entreaties of the academic community and those who comprised its ranks. In the Tax Reform Act of 1976,[82] Congress coalesced the gift and estate taxes into a unified system. At the time, this effort was greeted with tremendous enthusiasm and little skepticism. People believed that these congressional reforms would spark new respect for the nation's transfer tax enterprise.[83] Thus, with much anticipation, these efforts were overwhelmingly applauded.[84]

B. The Unified Transfer Tax System and Its Application

The current unified gift and estate tax system is supposed to function like a well-oiled machine, with all of its "parts" working harmoniously.[85] Chronologically, over a taxpayer's lifetime, here is how transfer tax-related events were designed to unfold.

During their lifetime, taxpayers may choose to make gifts. If taxpayers make future-interest gifts or ones that exceed the annual exclusion,[86] they are supposed to file a gift tax return (Form 709).[87] This tax return requires that a taxpayer not only report the value of the current gift but also the value of any prior gifts. If and when the value of a taxpayer's aggregate gifts exceeds the entirety of the lifetime gift tax exemption (which is the equivalent of the estate tax exemption),[88] gift tax will be due and owing. Under the Code, the gift tax rate schedule mirrors the estate tax rate schedule and mandates its use.[89]

To the extent that a taxpayer does not deplete his wealth vis-à-vis gifts, the value of the taxpayer's assets faces potential estate tax exposure upon his death. At the risk of oversimplification, here is how the estate tax computation is supposed to operate:

- the value of the taxpayer's gross estate is tabulated and placed on line 1 of the estate tax return (Form 706);[90]

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[82] Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 2001–10, 90 Stat. 1520.

[83] *See generally* Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259 (1983) (discussing the virtues of the nation's transfer tax system).

[84] *But see* Kurtz & Surrey, *supra* note 78 at 1389 ("One of the most frequently voiced criticisms of the Treasury proposals is that the unification of the estate and gift taxes into a single transfer tax system would discourage lifetime gifts.").

[85] Stanley S. Surrey, *Reflections on the Tax Reform Act of 1976*, 25 CLEV. ST. L. REV. 303, 319–28 (1976) (detailing the history and nature of the legislative changes that overhauled the transfer tax system).

[86] I.R.C. § 2503(b) (2018).

[87] *Id.* § 6019(a).

[88] *Id.* § 2505(a).

[89] *Id.* § 2502(a).

[90] *Id.* § 2033.

- then, after allowable deductions are taken into account, adjusted taxable gifts are added to this figure, and a tentative estate tax for this aggregate figure is computed;[91] and
- finally, the actual estate tax due is computed by subtracting from the tentative estate tax the total gift tax that was previously paid or is payable.[92]

Why does the Code require these computational machinations? The goal is to ascertain, during the entirety of a taxpayer's existence, the taxpayer's overall wealth transfers. In particular, when both the gift and estate taxes had highly progressive bracket structures, aggregating the value of prior asset transfers was key to subjecting such transferred wealth to higher tax rates.

Central to the functioning of the unified transfer tax system is pluperfect recordkeeping during a taxpayer's lifetime. Every time a taxpayer makes a transfer that is a future interest or exceeds the annual exclusion, a taxpayer is supposed to file a Form 709; this is the case even though in the vast majority of cases, due to the lifetime exemption amount (currently, $11.4 million), no tax will be owed even though failure to file a return will not result in the taxpayer being penalized.[93] Income tax returns ordinarily should be retained for seven years;[94] in contrast, however, in order to ensure accurate computation of the taxpayer's remaining transfer tax exemption and his ultimate estate tax liability, many practitioners advise that gift tax returns be retained throughout a taxpayer's lifetime.[95]

One other feature of the unified transfer tax regime is worth highlighting. Recall that when the gift tax was independent,[96] the prevailing mantra was to use the lifetime exemption or lose it. However, once Congress unified the gift and estate taxes, this philosophy fell by the wayside. That being the case, taxpayers are far more apt to retain their assets until death because, by

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[91] *Id.* § 2001(b)(1)(B).

[92] *Id.* § 2001(b)(2).

[93] *See supra* note 18.

[94] *How Long Should I Keep Records?*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/how-long-should-i-keep-records [https://perma.cc/XE6H-NKUS] (last updated Jan. 16, 2020). The IRS website provides a number of different retention rules. Prophylactic in nature, the one applicable to most taxpayers reads as follows: "Keep records for 6 years if you do not report income that you should report, and it is more than 25% of the gross income shown on your return." *Id.*

[95] Retention of one's gift tax returns makes it easier for estate executors and administrators to prove a taxpayer's remaining estate tax exemption amount. *See* Deborah L. Jacobs, *Gift Tax Returns: What You Need to Know*, FORBES (Apr. 9, 2014), https://www.forbes.com/sites/deborahljacobs/2014/04/09/gift-tax-returns-what-you-need-to-know/#1cc61987a474 [https://perma.cc/CDZ2-CSAB] ("Since the *$5.43* million lifetime exclusion from gift tax and any gift tax you pay are cumulative, you must keep the returns indefinitely. Your heirs need them to calculate the tax, if any, on your estate. And the most likely time for the IRS to flag unreported gifts or to question the value of the gifts you made is after you die. You do everyone a favor by leaving all the documentation behind." (emphasis in original)).

[96] *See supra* Part II.B.

doing so, they do not necessarily increase their estate tax exposure; furthermore, taxpayers are habitually concerned that they may exhaust their lifetime savings if they live long enough and thus, as a matter of financial preservation and prudence, would prefer asset retention.

C. Shortcomings Associated with Unification

As previously pointed out, through unification, the fates of the gift and estate taxes have become deeply intertwined. The problem is that for the last three decades, the estate tax has been routinely castigated as causing a long parade of horribles. Such supposed horribles include, but are not limited to, the loss of thousands of jobs,[97] the destruction of family-owned enterprises,[98] and constraints on the capital growth of the nation's economy.[99] In response to these real or fictional disasters, Congress has raised the estate tax exemption,[100] lowered estate tax rates,[101] and generally ignored gaping loopholes that allow vast amounts of wealth to pass transfer tax-free down generational lines.[102]

Although congressional ire has targeted the estate tax, the gift tax has been similarly emasculated. Over the last three decades, through legislative

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[97] *See, e.g.*, *President George W. Bush's Weekly Radio Address*, 37 Wkly. Compilation Presidential Documents 12, at 463–508, https://georgewbush-whitehouse.archives.gov/news/releases/2001/03/text/20010317.html [https://perma.cc/CNP4-N7TV] (Mar. 17, 2001) ("On principle, every family, every farmer and small business person should be able to pass on their life's work to those they love. So we abolish the death tax.").

[98] *See, e.g.*, Jason Noble, *Despite Lawmakers' Warnings, Few Iowa Farmers Face Estate Tax*, Des Moines Register (Dec. 2, 2017), https://www.desmoinesregister.com/story/news/2017/12/02/tax-reform-iowa-farmers-estate-tax/906946001/ [perma.cc/AF93-A36A] ("It's harder than ever for families to pass down the family-run farm or business from one generation to the next. The death tax creates financial hardship for family businesses to survive and thrive.").

[99] *See, e.g.*, Michael J. Graetz & Ian Shapiro, Death by a Thousand Cuts: The Fight over Taxing Inherited Wealth, 81–82 (1st ed. 2005) (estate tax critics offer the following critique: "The Death Tax is simply unfair. It tells every American that no matter how hard you work or how wisely you manage your affairs, in the end the federal government is going to step in and take it away. The estate tax . . . punishes hard work and savings, it fails to raise the kind of revenues that might conceivably justify some of the damage it causes. It has been destroying businesses and ruining lives for four generations. . . ."); Dan Miller, Joint Econ. Comm., The Economics of the Estate Tax 3 (1998) ("The existence of the estate tax this century has reduced the stock of capital in the economy by approximately $497 billion, or 3.2 percent.").

[100] *See* I.R.C. § 2010(c) (2017) (setting the current estate tax exemption at $11.4 million, which, in absolute dollar amounts, is the highest amount ever permitted, even after adjusting the prior exemption amounts for inflation).

[101] *See id.* (setting the current estate tax rate at forty percent, which, by historical standards, is quite low).

[102] *See, e.g.*, Lawrence W. Waggoner, *Message to Congress: Halt the Tax Exemption for Perpetual Trusts*, 109 Mich. L. Rev. First Impressions 23 (2010) (decrying that Congress has essentially abdicated its responsibility to be fiscally responsible by allowing wealthy taxpayers to establish perpetual trusts that can be safeguarded from transfer taxation for millennia to come). Other academics share this opinion. *See* Ray D. Madoff, *America Builds an Aristocracy*, N.Y. Times (July 11, 2010), https://www.nytimes.com/2010/07/12/opinion/12madoff.html [https://perma.cc/EEA7-9GRF].

initiatives directed toward the estate tax, Congress has raised the gift tax exemption,[103] lowered gift tax rates,[104] and generally ignored gaping loopholes that allow vast amounts of wealth to pass transfer tax-free down generational lines.[105] These actions (and failures to act) have not resulted from any particular animus toward the gift tax; instead, they apparently all took place due to the pure happenstance of the unification of the gift and estate taxes.

A byproduct of the fact that Congress has largely done away with the estate tax is that the nation's gift tax is enduring the same fate and is likewise being relegated to obscurity. A side-by-side juxtaposition of the independent and unified gift taxes solidifies this point. As further elaborated below, (1) gift tax revenue generation is now anemic; (2) its ability to safeguard the integrities of the income and estate tax bases has fallen into disarray; and, finally, (3) its role in contributing to redistributive justice is no longer being served.

1. Anemic Gift Tax Revenue

Numbers are often revealing and convey important information. And this case is no exception: several numbers speak volumes in terms of the current state of affairs regarding gift tax imposition.

As reflected in Appendix D, the percentage of federal revenue that the gift tax generates has dwindled to the lowest levels ever recorded. Consider the fact that the gift and estate taxes were unified from 1977 to 2001 and from 2011 to the present; however, when Congress decided to raise the estate tax exemption in 2001,[106] it maintained a lower gift tax exemption amount from 2002 to 2010.[107] During the unification periods (i.e., 1977–2001 and 2011–present), the average federal revenue that the gift tax has generated is 0.909% of overall federal receipts, a far smaller percentage of what it generated as an independent tax. More specifically, as an independent tax, it generated 0.212% of the nation's revenue (as shown in Appendix C), or approximately thirty percent more than when it was unified with the estate tax.[108]

Another sign of this tax's precipitous decline is the number of gift tax returns annually filed that reflect taxable gifts. A review of such returns, comparing filings when the taxes were not unified with filings when the

[103] *See* I.R.C. § 2505(a) (2011) (setting the current gift tax exemption at $11.4 million, which, in absolute dollar amounts, is the highest amount ever permitted, even after adjusting the prior exemption amounts for inflation).

[104] *See id.* (setting the current gift tax rate at forty percent, which, by historical standards, is quite low).

[105] *See supra* note 5.

[106] Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 521(a), 115 Stat. 38, 71.

[107] *Id.* § 521(b).

[108] *See infra* Appendix C.

taxes were unified, reflects this point.[109] The paucity of such returns leads them to fade from public consciousness, a contributing factor to why gift tax noncompliance is apparently so rampant.[110] Another reason that gift tax return is so lackluster is that taxpayers' failure to file gift tax returns is met with impunity (i.e., there is no penalty associated with failing to file a gift tax return if no tax is due).[111] In addition, taxpayers are notoriously poor recordkeepers;[112] asking them to retain records over the entirety of their lifetimes is truly asking for the nearly impossible to occur.

Beyond taxpayer noncompliance, the reason that gift tax revenue is virtually nonexistent is no secret. Congress has made the lifetime exemption so high that only those taxpayers who gift away significant fortunes risk gift tax exposure.[113] And, even when gratuitous transfers are taxed, by historical standards, the tax rate is relatively low, contributing to lackluster revenue collections.[114] Finally, Congress continues to ignore the important issue of valuation,[115] empowering taxpayers to take aggressive minority and marketability discounts that have been met with administrative and judicial acquiescence.[116]

2. *Lack of Ability to Safeguard the Income and Estate Tax Bases*

As originally formulated, Congress designed the gift tax to safeguard the integrity of the income and estate tax bases.[117] And, for decades, the independent gift tax fulfilled this mission;[118] however, the same cannot be said of the unified gift tax. Due to the massive size of the gift tax exemption, it has de facto abdicated its prior role as the guardian of the income and estate tax bases, opening the proverbial door for taxpayers to engage in all sorts of stratagems to narrow the income and estate tax bases. In the income and estate tax contexts, consider how taxpayers' use of such strategies has now become commonplace.

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[109] *Compare* Appendix E(1) (depicting a recent time period when the gift tax was independent of the estate tax), *with* Appendix E(2) (depicting a recent time period when the gift and estate taxes were unified).

[110] *See supra* note 3.

[111] *See supra* note 18.

[112] *See supra* note 15.

[113] Married taxpayers who "split gifts" may now gift $22.4 million without gift tax exposure. I.R.C. § 2513(a) (2018).

[114] *See supra* note 2 and accompanying text.

[115] *See supra* note 5.

[116] Insofar as administrative acquiescence is concerned, see Rev. Rul. 93-12, 1993-1 C.B. 202 (the IRS declaring that in the context of closely held business enterprises, minority and marketability discounts are permissible). Insofar as judicial acquiescence is concerned, see Ronald H. Jensen, *The Magic of Disappearing Wealth Revisited: Using Family Limited Partnerships to Reduce Estate and Gift Taxation*, 1 Pitt. Tax Rev. 155 (2004) (describing how this valuation-diminution process works and presenting an excellent compendium of cases in which taxpayers were able to command valuation discounts).

[117] *See supra* Part II.A.

[118] *See supra* Part II.C.

Insofar as narrowing the income tax base is concerned, two gift-giving strategies have become commonplace. The first strategy involves capitalizing upon the basis-equal-to-fair-market-value rule found in Code section 1014.[119] In the absence of a meaningful gift tax, many taxpayers are gifting highly appreciated assets to their elderly loved ones with the expectation that such assets will be returned in the form of subsequent bequests.[120] When the gifted assets are received, a carryover tax basis rule applies in the recipients' hands;[121] however, upon the demise of the recipients, application of Code section 1014 extinguishes the embedded gain in the gifted property.[122] The second strategy, while elementary in nature, promises immense income tax savings: a taxpayer whose income is subject to high income tax rates gifts income-producing property (e.g., title to a rental building) to a loved one whose income is subject to lower income tax rates. Over a period of time, the latter collects the rent; pays tax (presumably at a lower overall tax rate than the original owner); and then, after sufficient time passes, gifts the property and after-tax proceeds back to the original owner.[123] The only loser in this circular arrangement is the federal government, which lacks the resources to police these strategic arrangements; and, even if it had the necessary oversight resources, it is unclear if and when the so-called step transaction doctrine (i.e., when taxpayers use multiple steps instead of one,

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[119] I.R.C. § 1014(a) (2018). More specifically, when a decedent owns title to property and such property is includable in a decedent's estate, the tax basis of such property becomes equal to its fair market value on the date of death. So, if a decedent owns Google stock that she purchases for $100 and, at the date of death, is worth $1,000, the latter dollar figure is the recipient's tax basis for purposes of computing subsequent gains/losses on the disposition of such stock.

[120] *See, e.g.*, Elizabeth L. Pack, *Income Tax Planning Strategies for Estate Plans Under the TCJA*, 46 Est. Plan. 19, 22 (2019) ("In one form of this technique, a member of a younger generation would gift assets with a low basis to a member of an older generation outright. Then, the gifted assets will receive a step-up in basis to fair market value at the death of the member of the older generation."). Years ago, when Congress contemplated gift tax repeal, commentators made this identical point. *See, e.g.*, John Buckley, *Transfer Tax Repeal Proposals: Implications for the Income Tax*, 90 Tax Notes 539, 540 (2001) (suggesting that the gift tax eliminates transfers of property to aged relatives, a transaction that might otherwise become attractive upon repeal of the gift tax).

[121] I.R.C. § 1015(a).

[122] *Id.* § 1014(a).

[123] *See, e.g.*, Blattmachr & Gans, *supra* note 63, at 395 ("[T]hose who seek repeal . . . have not considered the ways in which taxpayers will be able to 'game' the income tax system, and thereby undermine its progressive character, if repeal of the gift tax is achieved."); *Attorney's Testimony at W&M Hearing on Bush Tax Relief*, Tax Notes Today, Mar. 21, 2001, LEXIS, 2001 TNT 56–83 (summarizing Lauren Y. Detzel's congressional testimony that "[i]f the gift tax is repealed, . . . taxpayers [will] give income producing assets to others in lower income tax brackets at no gift tax cost"). In debating whether Congress should retain the gift tax in the aftermath of estate tax repeal, effective in 2010, the Joint Committee advocated its retention based on "50 cents or more of lost income taxes for every dollar lost directly from estate and gift tax repeal." *See* Staff of Joint Comm. on Taxation, 107th Cong., Estimated Budget Effects of the Conference Agreement for H.R. 1836, at 181–82 (Comm. Print 2001).

attempting to avoid an otherwise tax-averse outcome) would apply in this context.[124]

Concerning the estate tax, taxpayers employ all sorts of gift-giving devices designed to minimize the future estate tax burden that their estates endure. Some of these devices are statutorily authorized. For example, taxpayers are at liberty to establish grantor-retained annuity trusts during their lives, which allow them to contribute property into trust and, due to the corresponding size of their retained interests, to report $0 as their taxable gift.[125] With the gift tax exemption being so large, even if the IRS conducts audits, the agency knows that there is little chance that it will be rewarded for its efforts (i.e., an actual gift tax will be owed). Beyond statutorily sanctioned devices and capitalizing upon the gift tax's large exemption, many taxpayers use gift-giving techniques to reduce their overall tax exposure. One technique is giving fractional interests in closely-held businesses (e.g., mother gifts a twenty percent share of her wholly owned S-corporation to her daughter) that command marketability and minority interest valuation discounts;[126] another technique is to "freeze" the value of gifted property so that all of its subsequent appreciation occurs outside of the estate tax base.[127]

Separate and apart from the income and estate tax bases being threatened, there is yet one more financial aspect associated with the nation lacking an effective gift tax: its absence indirectly places an additional financial burden on Medicaid. More specifically, to qualify for Medicaid to cover their nursing home expenses, many taxpayers have sought to divest themselves of their assets.[128] In the absence of a meaningful gift tax, this strategy

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[124] *See* Jay A. Soled, *Use of Judicial Doctrines in Resolving Transfer Tax Controversies*, 42 B.C. L. Rev. 587 (2001) (explaining that judicial doctrines are often ill-suited to address transfer tax issues). *But see* Ronald D. Aucutt, *Gift Tax Repeal Bill Minimizes Income Tax Problems*, 91 Tax Notes 1015, 1016 (2001) (arguing against the need for retaining the gift tax in light of laws that remove opportunities for income tax abuse); Charles D. Fox IV & Svetlana V. Bekman, *Gift Tax Repeal: Responding to Opponents' Concerns*, 92 Tax Notes 1733, 1736 (2001) ("[G]ift tax supporters underestimate the ability of . . . laws to anticipate and prevent abuses.").

[125] *See, e.g.*, Carlyn S. McCaffrey, Lloyd Leva Plaine & Pam H. Schneider, *The Aftermath of Walton: The Rehabilitation of the Fixed-Term, Zeroed-Out GRAT*, 95 J. Tax'n 325, 335 (2001) ("The fixed-term, zeroed-out GRAT is an extremely valuable estate planning tool for individuals who want to transfer property to family members without paying gift tax.").

[126] *See supra* note 5 and accompanying text.

[127] *See, e.g.*, Karen Burke, *Valuation Freezes After the 1988 Act: The Impact of 2036(c) on Closely-Held Businesses*, 31 Wm. & Mary L. Rev. 67, 70 (1989) ("In its simplest form, an estate freeze involves the transfer of an interest representing future appreciation by an older generation transferor, coupled with the retention of another interest having a fixed value.").

[128] *See, e.g.*, Laura Herpers Zeman, *Estate Planning: Ethical Considerations of Using Medicaid to Plan for Long-Term Medical Care for the Elderly*, 13 Quinnipiac Prob. L.J. 187, 190, 204 (1998) ("Medicaid estate planning is the controversial practice of divesting one's resources on expenditures and transfers other than health care costs for the purpose of appearing impoverished in order to become eligible for Medicaid.").

comes at zero tax cost, often leaving the federal government holding the tab of those who may then qualify for Medicaid coverage.[129]

3. No Meaningful Contribution to Redistributive Justice

In yesteryear, when the independent gift tax was in place, it no doubt played an important role in sending a message to the public. The message was that the government was pursuing an agenda to foster a world in which its citizens would emerge from an equal starting point (this philosophy is best epitomized by the nation's public school system).[130] While this starting point was certainly mythical in nature, it was designed to set the bar. How did the presence of the gift tax help deliver this message? It, along with a meaningful estate tax, curtailed significant wealth accumulations so that, by birth, no one would have an immediate financial advantage.[131] Admittedly, even when the independent gift and estate taxes were in their heyday, perfect equality did not result, but the presence of these taxes constituted a true effort in this direction.

Now that the gift and estate taxes function as a unified whole and, for all intents and purposes, have both been vanquished, another message has become resounding. There is now a pervasive winner-take-all message[132]—namely, you may keep what you sow, as may your offspring and their offspring as well.[133] Congress has reoriented the tax system to reward wealth accumulation and its distribution solely to taxpayers' loved ones and not others. As presently designed, the gift tax no longer seeks to extract funds from the wealthy and to redistribute it to the less fortunate. As such, the gift tax fails to contribute to the historic mission of supporting redistributive justice: wealth can now be much more readily transferred between and among those who are already wealthy, which is likely to perpetuate economic inequality.

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[129] *See, e.g.*, Ellen O'Brien, *What Is Wrong with the Long-Term Care Reforms in the Deficit Reduction Act of 2005?*, 9 Marq. Elder's Advisor 103 (2007) (discussing the financial pressures that drove Congress to try to close the loopholes associated with Medicaid qualification).

[130] *See, e.g.*, Molly McUsic, *The Use of Education Clauses in School Finance Litigation*, 28 Harv. J. on Legis. 307, 311 (1991) ("Every state constitution contains an education clause that generally requires the state legislature to establish some system of free public schools.").

[131] Andrew Carnegie, *The Advantages of Poverty*, *in* The Gospel of Wealth and Other Timely Essays 54 (1900) (documenting Carnegie's 1891 quote that "the parent who leaves his son enormous wealth generally deadens the talents and energies of the son, and tempts him to lead a less useful and less worthy life than he otherwise would.").

[132] Coauthor of the book *The Winner-Takes-All Society*, Robert H. Frank wrote an op-ed that appeared in the *New York Times* that made this identical point. Robert H. Frank, *The Estate Tax: Efficient, Fair and Misunderstood*, N.Y. Times, May 12, 2005, https://www.nytimes.com/2005/05/12/business/the-estate-tax-efficient-fair-and-misunderstood.html [https://perma.cc/3YQE-AZA9] ("Many parents say they dislike the estate tax because they fear it will prevent them from doing all they can to assure that their children are financially secure.").

[133] *See* Eric A. Kades, *Of Picketty and Perpetuities*, 60 B.C. L. Rev. 145, 174–83 (2019) (describing how state legislatures permit perpetual trusts which allow wealth transfers to continue ad infinitium).

IV. Decoupling the Gift Tax from the Estate Tax

In order to put the gift tax on more secure footing, this analysis calls for its independence as a stand-alone tax. More specifically, Congress should decouple the gift tax from the estate tax. By instituting this reform, Congress can restore the gift tax to its former vibrancy.

While calling for an independent gift tax is easy, specifying its exact contours, political viability, and method of institutionalization must be addressed. This part seeks to accomplish these goals. Section A details the proposal, Section B explains the political need to have a special small-business carve-out, and Section C sets forth transitional rules.

A. Proposed Reform

When devising how Congress can restore the gift tax to its former vibrancy, the adage "when something isn't broken, don't fix it" comes immediately to mind. Before the academic community sought to make the gift and estate tax systems function as a coherent whole, the independent gift tax functioned admirably in many respects, fulfilling multiple public policy objectives.[134] As such, its essential features should serve as the lodestar for how Congress reinstitutes an independent gift tax; however, even yesteryear's independent gift tax could be improved (i.e., even when it was independent, the then gift tax failed to raise significant revenue and, furthermore, it was riddled with gaping loopholes that permitted vast amounts of wealth to escape transfer tax free). Below are four important features of a twenty-first-century independent gift tax.

First, akin to the original 1924 gift tax, the proposed independent gift tax would have an annual, rather than a lifetime, exemption. This annual exemption amount could be sprinkled between and among numerous recipients or targeted to one recipient;[135] it would be in addition to the annual exclusion,[136] and it would be equal to some multiple of the latter. More specifically, beyond the annual exclusion, every year a taxpayer could gift property up to the annual exemption and not bear a gift tax or let it lapse, starting the following year anew. This analysis advocates that Congress make the annual exemption equal to $75,000 (or five times whatever is the annual exclusion, which is presently equal to $15,000). This dollar figure (or one similar to it) would allow the vast majority of taxpayers to transfer (i) the

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[134] *See supra* Part II.C.

[135] This is distinguishable from the annual exclusion, which is calibrated on a taxpayer-by-taxpayer basis. *See* I.R.C. § 2503(b) (2018) ("In the case of gifts . . . made to any person . . . .").

[136] The purpose of the gift tax annual exclusion is "to obviate the necessity of keeping an account of and reporting numerous small gifts, and yet to fix the amount sufficiently large to cover in most cases wedding and Christmas gifts and occasional gifts of relatively small amounts." S. Rep. No. 708, at 41 (1932).

bulk of their net worth or (ii) specific items (e.g., title to a new car) to their loved ones over the course of one or more years.[137]

Second, the gift tax rate should be flat and set at whatever is the highest estate tax rate.[138] The rationale for a flat high rate is simple: taxpayers whose gifts exceed the annual exemption amount must be in a strong financial position to be able to divest themselves of assets with significant value, and the value of their estates are correspondingly apt to be ultimately taxed at or around the highest estate tax rates.[139]

Third, by design, an independent gift tax recognizes the fact that taxpayers are notoriously poor recordkeepers. They have trouble keeping track of their business records and affairs.[140] When it comes to lifetime gift giving, matters are likely to be far worse as taxpayers usually view recordkeeping and gift giving as mutually exclusive. In short, maintaining a record of lifetime gift giving is beyond the recordkeeping capabilities of many taxpayers; and, furthermore, many taxpayers would consider such a requirement to be overly intrusive in terms of their personal affairs.

Fourth, to enhance the stability of the gift tax and enable it to fulfill its various objectives, Congress needs to expand its base. Current law permits taxpayers a range of options to circumvent their gift tax obligations. One of the biggest culprits in this sphere is the congressional endorsement of the grantor-retained annuity trust (GRAT).[141] Without getting into mind-numbing specifics of this category of trust,[142] a GRAT allows taxpayers to make significant property transfers; report zero dollars as being transferred; and, if

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[137] Taxpayers who complain that the proposed annual exemption is too modest need to undertake some simple arithmetic. Ignoring inflation, over a thirty-year time period, a single taxpayer could divest himself of $2,250,000 (i.e., $75,000 x 30), and married taxpayers could divest themselves of $4,500,000 (i.e., $150,000 x 30). In light of the fact that the average net worth of most taxpayers (single and married) is well below these two dollar figures, *see* Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?* (Nat'l Bureau of Econ. Research, Working Paper No. 24085, 2017), https://www.nber.org/papers/w24085 [https://perma.cc/8TZ5-3HND], the size of this annual exemption is quite generous.

[138] The current gift tax regime aggregates taxpayers' lifetime gifts. Congress instituted this feature to determine the apropos tax rate in accordance with a progressive transfer rate structure. I.R.C. § 2502(a).

Recall that, in the past, in an endeavor to spur revenue generation, the independent gift tax rate was purposefully set lower than the estate tax rate. *See supra* note 48. While this rate reduction undoubtedly achieved its objective of raising additional revenue, it came at the price of sacrificing equity. Compared to the estate tax, gift giving is already tax advantageous (i.e., it is tax exclusive rather than tax inclusive), *see supra* note 47; providing a tax rate reduction would enable the truly well-heeled to be even better positioned to part with their wealth at an earlier stage in life and, relative to their less well-heeled counterparts, to do so at a tremendous transfer tax savings.

[139] Nevertheless, bear in mind that taxable gift giving would remain attractive insofar as the independent gift tax would still be tax exclusive and the estate tax would be inclusive. *See supra* note 48.

[140] *See supra* note 15.

[141] I.R.C. § 2702(b)(1).

[142] For a comprehensive overview of grantor-retained annuity trusts, see McCaffrey, Plaine & Schneider, *supra* note 125, at 325.

the property significantly appreciates beyond the applicable federal rate, have wealth inure transfer-tax free to the trust recipients.[143] The advantages associated with GRATs are well known; their effects are widespread and are corrosive to the functioning of the gift tax.[144] Beyond GRATs, another problematic area in the sphere of gift tax administration is that of valuation. For decades, taxpayers have routinely availed themselves of valuation discounts even though justification for their existence rests on shaky theoretical grounds.[145] Consider a simple such case. Suppose Taxpayer A owns a closely held business, the stock of which is worth $10 million. She may transfer a forty-nine percent stock interest to her daughter, but, rather than such stock being valued at $4.9 million (i.e., $10 million x .49), the estate planning bar would contend, based upon the fact majority-interest shareholders often orchestrate business enterprises in their favor (e.g., according themselves overly-generous salaries) relative to minority-interest shareholders, that a forty, fifty, or sixty percent discount was appropriate; the courts and the IRS would likely acquiesce in this determination,[146] significantly narrowing the gift tax base. However, the reality is that in the preceding scenario, both mother and daughter are apt to act in a lockstep, symmetrical fashion, negating those factors that traditionally diminish values concerning fractional interests. Congress would, therefore, be wise to take measures to repeal GRATs, eliminate valuation discounts, and address other maneuvers (e.g., make the use of so-called naked Crummey powerholders to exploit the gift tax annual exclusion impermissible[147]) that have enabled taxpayers to minimize their gift tax exposure.

The institution of an independent gift tax marked with these four salient features would put it on a secure footing, freed from the reins of the estate tax.[148] Notwithstanding the nation's need to have a solid gift tax, Congress may nevertheless balk at its institution, fearful of a political backlash spurred

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[143] *See, e.g.*, Peter Melcher, Matthew Zuengler & Warren L. Rosenbloom, *Creating the Optimal Structure for Discounted Zeroed-Out GRATS*, 17 PRAC. TAX PLAN. 25, 34 (2003) ("Because a zeroed-out GRAT would produce no taxable gift, there is no risk that taxpayers would pay gift tax that later turned out to be unnecessary or use up any applicable exclusion amount.").

[144] *See generally* Steven J. Arenault, *Grantor Retained Annuity Trusts: After $100 Billion, It's Time to Solve the Great GRAT Caper*, 63 DRAKE L. REV. 373 (2015) (describing how taxpayers orchestrate grantor-retained annuity trusts to defeat their gift tax obligations).

[145] *See supra* note 5.

[146] *See supra* note 5 and accompanying text.

[147] *See, e.g.*, Kristin L. Zook, *A Not-So-*Crummey *Way to Avoid Taxes: A Call for Congressional Action to Eliminate Abuse of the Present Interest Requirement*, 58 SYRACUSE L. REV. 583, 585 (2008) ("A popular device used to artificially structure gifts to qualify for the annual exclusion is referred to as the 'Crummey powers,' named after the seminal Ninth Circuit case from which the powers became a legal means to obtaining the annual exclusion.").

[148] By extension, the generation-skipping transfer (GST) tax should be revamped in a similar fashion. Right now, the GST exemption may be used during life or upon death. I.R.C. § 2631(c) (2018). Consistent with what is being proposed in this analysis, to eliminate lifetime recordkeeping obligations and to ensure better taxpayer compliance, Congress should establish an annual GST exemption. If taxpayers exceed this threshold, an immediate GST tax would be due and owing.

on by lobbyists funded by small-business enterprises and farmers. Not oblivious to these concerns, the next subsection addresses one of the central areas critical to this proposal's political success.

B. Special Rules for Family-Owned Small-Business Enterprises and Farms

For the last several decades, when it comes to issues of taxation and small businesses and farms, politicians have been particularly sensitive. This sensitivity echoes throughout the transfer tax realm. For example, there is a cadre of provisions sprinkled throughout the estate tax regime to make death less financially onerous to small business owners or farmers and their families.[149] Politicians who ignore the clout that small business owners and farmers command do so at their own political risk and peril.[150] Regarding the deunification proposal, its proponents should take this political factor into account.

Imagining the dynamics that would unfold in a political clash between this proposal's proponents and small business owners and farmers is easy: small business owners and farmers would likely decry this proposal, because of the proposed hefty transfer tax burden, of stripping them of their ability to keep their enterprises under the family umbrella. However, challenging the legitimacy of this complaint, the proposal's proponents could mount a strong defense. Notwithstanding the gift tax exemption's rather modest amount during most of the early- and mid-twentieth century, small businesses and farms appear to have thrived; in addition, the annual gift tax exemption combined with the annual exclusion would allow the vast majority of taxpayers to transfer their small businesses and farms free of gift tax to their loved ones.[151]

The strength of proponents' responses should quell the concerns of most small business owners and farmers. Nevertheless, to demonstrate traditional political sensitivity, Congress should entertain a special one-time gift tax deduction applicable to small businesses and farms. Here, Congress could borrow a page from the now-repealed qualified family-owned business interest (QFOBI) deduction that was once part and parcel of the estate tax regime.[152] In its reformulated role to facilitate transfers of small businesses and

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[149] *See, e.g.*, I.R.C. § 6166(a) (permitting deferral of estate tax in those instances when the value of an interest in a closely held business exceeds thirty-five percent of the adjusted gross estate).

[150] *See generally* William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287 (1996).

[151] *See supra* note 127.

[152] For the complete history of the qualified family-owned business interest deduction, see Shannon E. O'Brien, *Estate Tax Treatment of Family-Owned Businesses: The Evolution of Internal Revenue Code Section 2057*, 67 UMKC L. REV. 495 (1999). The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38, repealed this deduction for decedents dying after December 31, 2003. I.R.C. § 2057(j).

farms during a taxpayer's lifetime, the QFOBI deduction could be secured only if the following four conditions—which were designed to ensure that the business or farm in question was truly family-owned and operated and not simply a device to leave passive investments to intended beneficiaries while simultaneously deflecting all transfer tax exposure—were met:

- *Ownership.* The Code would define QFOBI as an interest in a trade or business carried on as a proprietorship or an interest in an entity carrying on a trade or business if at least (1) fifty percent of the entity is owned by a taxpayer and members of his family; (2) seventy percent is owned by members of two families, and the taxpayer and his family own at least thirty percent; or (3) ninety percent is owned by members of three families, and the taxpayer and his family own at least thirty percent.[153]
- *Material Participation.* To qualify for this deduction, a taxpayer would have to materially participate (as defined in Code section 469) in the business enterprise for at least five of the eight years immediately before the transfer.[154]
- *Deduction Cap.* The taxpayer could transfer a QFOBI, valued up to $1 million, and secure an offsetting gift tax deduction equal to this amount.[155]
- *Recapture Provision.* Once the QFOBI was in the recipient's hands, a recipient would have to materially participate in the business enterprise until the earlier of the next ten years or his or her death.[156] If the recipient failed to meet this qualification or disposed of the QFOBI, the result would be immediate imposition of gift tax equal to the then value of the QFOBI times the then effective gift tax rate.[157]

A simple example illustrates how the proposed QFOBI gift tax deduction would operate. Suppose a taxpayer owned a ranch that he has operated for the last four decades, and he has a son who also works on the ranch. As described, the ranch would constitute a QFOBI; as such, if its fair market value were $1 million, the taxpayer could transfer ownership to his son and secure an offsetting gift tax deduction. Assuming that his son continued to work the ranch for the next ten years, the recapture provision associated with this deduction would not apply. However, if the son subsequently sold the QFOBI (say in year four after receipt of the property) for $2 million, the son would owe a recapture tax equal to $800,000 (i.e., $2 million x .4 (assuming forty percent was the then highest gift tax rate)).

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[153] I.R.C. § 2057(e).
[154] *Id.* § 2057(b)(1).
[155] *Id.* § 2057(A)(1)–(2).
[156] *Id.* § 2057(f)(1).
[157] *Id.* § 2057(f)(2).

Having a QFOBI gift tax deduction would hopefully ameliorate the concerns of small business owners and farmers. Furthermore, by including in the proposal a provision sensitive to their concerns, perhaps the owners of such enterprises would not mount a campaign to challenge this proposal's legitimacy.

C. Need for Transitional Rules

If Congress enacts deunification of the gift and estate taxes and taxpayers make property transfers that exceed the annual exemption (as proposed, $75,000) and exclusion amounts (currently, $15,000) during any calendar year, they would owe gift tax; and, consistent with this approach, upon their demise, taxpayers' estate tax exemption would be fully intact. However, to ensure equity, whenever Congress institutes major reform initiatives such as the one being proposed, it must consider transitional rules. In this case, Congress is seeking to scale back the fiscal largesse offered vis-à-vis a unified gift and estate tax system and to strengthen gift tax compliance. Thus, a question worthy of exploration is whether Congress should enact this legislation prospectively or retroactively. Consider both approaches.

1. Prospective Approach

On the one hand, prospective deunification raises important equity issues. In particular, what effect, if any, should this legislation have upon those taxpayers who, in tax years before deunification, made gifts that exhausted part or all of their lifetime exemption? For example, suppose a taxpayer made $5 million worth of prior gifts (when the lifetime exemption was $11.4 million) and Congress decides to impose an annual gift tax exemption of $75,000. Under a prospective approach, the new law would not impose an immediate transfer tax; instead, the taxpayer's estate tax exemption would be adjusted to take into account prior transfers (i.e., for estate tax computational purposes, those taxpayers who already made taxable gifts could transfer that much less estate tax-free at their deaths).[158]

There are both advantages and disadvantages associated with this approach. Among the advantages,[159] taxpayers' expectations would be met in a way that would not negate their prior tax planning.[160] Along these lines, Con-

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[158] In the prior example, in which a taxpayer had made $5 million of prior gifts and the estate tax exemption was set at $11.4 million, the taxpayer would be able to transfer $6.4 million estate tax-free at death (i.e., $11.4 million – $5 million).

[159] *See* Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1138 (1996) (arguing that, at least in certain cases, Congress should offer guaranteed grandfathering of tax outcomes); Note, *Setting Effective Dates for Tax Legislation: A Rule of Prospectivity*, 84 HARV. L. REV. 436 (1970) (same).

[160] *See, e.g.*, U.S. DEP'T OF THE TREASURY, BLUEPRINTS FOR BASIC TAX REFORM 187–88 (1977).

gress could also permit a small window of time—say, from the enactment date to a later effective date—for taxpayers to avail themselves of the existing unified transfer tax system prior to its expiration; this way, taxpayers could not complain that they lacked opportunities that were available to other taxpayers.[161] But giving such a window would likely propel wealthy taxpayers to make a mad rush to engage in gift giving.[162] This mad rush to transmit wealth could reduce the gift tax base for many years or decades to come, making the gift tax far less able to generate much-needed revenue and, thus, less attractive politically. Consider, too, that a certain subset of taxpayers may feel that there is an arbitrariness surrounding a prospective rule.[163] For example, taxpayers who seek to make transfers a day, a week, a month, a year, or some other period of time after the legislation's effective date may feel slighted by the vicissitudes of this legislative change with an arbitrary demarcation date.

2. *Retroactive Approach*

On the other hand, compare the preceding outcomes with gift and estate tax deunification implemented retroactively. This would engender the following potential course of action: Congress could mandate that taxpayers who, in any prior calendar year, made gifts that exhausted any part of their lifetime exemption (e.g., made $5 million worth of gifts at a time when the lifetime exemption was equal to $11.4 million) would owe immediate gift tax equal to, say, forty percent of whatever dollar amount was exhausted, payable within nine months of the legislation's effective date.[164] A quid pro quo of the retroactive feature would be that the estate tax tabulation would

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[161] *See, e.g.*, Martin Feldstein, *Compensation in the Tax Reform*, 29 NAT'L TAX J. 123 (1976) (positing that fairness requires transitional relief for those taxpayers negatively impacted by legislative changes).

[162] *See* David Joulfaian, *The Federal Gift Tax: History, Law, and Economics* 1 (Office of Tax Analysis, Working Paper No. 100, 2007), https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-100.pdf [https://perma.cc/5B9L-XJ34] ("During the congressional deliberations in 1932 leading to the enactment of the gift tax, one individual is reported to have made about $100 million in gifts; another to have made gifts of about $50 million. Considering that the entire yield of the estate tax in 1932 was $400 million, the tax-free inter-vivos transfers of $150 million by these two individuals alone, not to mention likely gifts by scores of others, are indicative of the potency of the gift tax. Equally impressive is the acceleration in gifts that took place in 1934, 1935, and 1976 prior to the introduction of higher gift tax rates." (citation omitted)).

[163] *See, e.g.*, Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161, 171 (2003) ("In addition, transitions can have arbitrary effects that seem to violate horizontal equity, because similarly situated individuals may have taken what were materially equivalent actions ex ante that, due to subsequent changes in government policy, ultimately have different effects (for example, investments in activities that prior to a reform had identical after-tax returns but no longer do afterwards).").

[164] In theory, Congress could also impose an interest charge on the amount due, but, depending upon how long ago the taxable gift was made, the interest component of this computation might escalate the total amount due to a stratospheric level.

no longer necessitate taking into account taxable gifts as part of the equation.[165]

Like prospective legislation, retroactive legislation of the sort suggested has its advantages and disadvantages.

One of the positives that would flow from retroactive legislation is that it would likely help the gift tax achieve one of its original missions, namely, to be a more significant revenue-raising arm of the federal government.[166] In addition, retroactive legislation would help preserve the transfer tax base so that if and when Congress chooses to reinvigorate the estate and generation-skipping transfer taxes,[167] it could direct its efforts in this direction and thereby help replenish the nation's coffers

Yet, there are problems associated with retroactive legislation. The first and foremost is the political havoc that such legislation would likely spawn. Retroactive taxation would likely raise the ire of those taxpayers who feel that they are being undeservingly targeted with stealth taxes that subvert and undermine their reasonable expectations.[168] Another problem is taxpayer liquidity: under a retroactive gift tax regime, those taxpayers who made gifts years ago and exhausted part or all of their lifetime exemption and now owe gift tax might lack the resources to pay such taxes.

Finally, the IRS would be charged with the nettlesome task of combing through millions (billions?) of data points in its electronic files to determine whether taxpayers were fulfilling their retroactive filing and payment obligations.

Notwithstanding the transition debate, which is fairly routine with the implementation of any major tax reform measures, this Section makes a compelling case that Congress should make transfer tax deunification a high priority. The salutary effects of doing so would be multifaceted and immediate. Furthermore, reform of this sort would help alleviate the nation's continued and increasing reliance on labor income (relative to transfer taxes) as a revenue source.[169]

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[165] I.R.C. § 2001(b)(1)(B) (2018).

[166] *See supra* notes 34–35 and accompanying text.

[167] Paul L. Caron, *The One-Hundredth Anniversary of the Federal Estate Tax: It's Time to Renew Our Vows*, 57 B.C. L. REV. 823 (2016).

[168] Michael J. Graetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820, 1823 (1985) ("Fairness, the argument runs, requires compensation or grandfathered effective dates to protect people who might have altered their conduct 'in reliance' upon the continued existence of a tax benefit (or burden)."); Comm. on Tax Policy, N.Y. State Bar Ass'n, *Retroactivity of Tax Legislation*, 29 TAX LAW. 21, 21 (1975) ("Equally important to the taxpayer is the ability to conduct his affairs during the gestation of legislation without the crippling effect of tax uncertainty—the inability to act at all.").

[169] *See generally* Jay A. Soled & Kathleen DeLaney Thomas, *Automation and the Income Tax*, 10 COLUM. J. TAX LAW 1 (2019).

V. Conclusion

For nearly a century, the gift tax played multiple roles in the nation's pantheon of important taxes. It has served to raise revenue, preserve the integrities of the estate and income tax bases, and promote redistributive justice. However, as a product of transfer tax unification, the gift tax has tangentially met with the same fate as the estate tax: it has fallen out of political and public favor. In the gift tax's emasculated state, epitomized by a stratospherically high lifetime exemption amount and relatively low flat tax rate, it can no longer function to fulfill its historic missions.

To revitalize the gift tax, it must be decoupled from the estate tax. Assuming that Congress and the public continue to rely upon a vibrant income tax system,[170] a meaningful gift tax regime is a sine qua non. Indeed, the failure to have a gift tax system can wreak havoc on the income tax's progressive nature; this may necessitate reliance on other means (e.g., a national sales tax or value-added tax) to generate sufficient tax revenue as one of the nation's traditional workhorses for raising funds, namely, the income tax, essentially is relegated to pasture.

The elements of a stand-alone gift tax are outlined in this analysis. In a nutshell, this proposal calls for reinstituting the version of the independent gift tax that existed before unification. However, this analysis advocates for several improvements to the prior system and, to address political sensitivities, seeks the institution of a special rule applicable to family-owned businesses and farms.

The bottom line is that transfer tax unification has failed to achieve the objectives sought by the academic community. Instead, as Congress has largely dismantled the estate tax, the gift tax has followed suit. Gift tax salvation thus rests upon independence of the gift tax system. Will positioning the gift tax to stand again on its own footing propel it to national prominence? No. However, the enactment of this proposal would rejuvenate the gift tax, enabling it once again to fulfill its traditional, yet important, roles of raising moderate amounts of revenue, stabilizing the income tax system and the remaining remnants of the estate and generation-skipping transfer taxes, and promoting redistributive justice—laudable goals that Congress and the general populace undoubtedly cherish.

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[170] Office of Mgmt. & Budget, *supra* note 61, at tbl.11-1 (noting that, in 2016, the individual income taxes generated approximately one-half of the nation's federal revenue—a percentage figure that, over the coming decade, is estimated to grow).

APPENDIX A

EVOLUTION OF THE GIFT TAX RATE SCHEDULE (%)[171]

Wealth ($thousands)		1932–								1984–
From	To	1934	1935	1936	1940	1942	1977	1982	1983	2001
0	5	0.75	0.75	1.50	1.65	2.25	18.00	18.00	18.00	18.00
5	10	0.75	0.75	1.50	1.65	5.25	18.00	18.00	18.00	18.00
10	20	1.50	1.50	3.00	3.30	8.25	20.00	20.00	20.00	20.00
20	30	2.25	2.25	4.50	4.95	10.50	22.00	22.00	22.00	22.00
30	40	3.00	3.00	6.00	6.60	13.50	22.00	22.00	22.00	22.00
40	50	3.75	3.75	7.50	8.25	16.50	24.00	24.00	24.00	24.00
50	60	5.00	5.25	9.00	9.90	18.75	24.00	24.00	24.00	24.00
60	70	5.00	5.25	9.00	9.90	21.00	26.00	26.00	26.00	26.00
70	80	5.00	6.75	10.50	11.55	21.00	26.00	26.00	26.00	26.00
80	100	5.00	6.75	10.50	11.55	21.00	28.00	28.00	28.00	28.00
100	150	6.50	9.00	12.75	14.03	22.50	30.00	30.00	30.00	30.00
150	200	6.50	9.00	12.75	14.03	22.50	32.00	32.00	32.00	32.00
200	250	8.00	12.00	15.00	16.50	22.50	32.00	32.00	32.00	32.00
250	400	8.00	12.00	15.00	16.50	24.00	34.00	34.00	34.00	34.00
400	500	9.50	14.25	17.25	18.98	24.00	34.00	34.00	34.00	34.00
500	600	9.50	14.25	17.25	18.98	26.25	37.00	37.00	37.00	37.00
600	750	11.00	16.50	19.50	21.45	26.25	37.00	37.00	37.00	37.00
750	800	11.00	16.50	19.50	21.45	27.75	39.00	39.00	39.00	39.00
800	1,000	12.50	18.75	21.75	23.93	27.75	39.00	39.00	39.00	39.00
1,000	1,250	14.00	21.00	24.00	26.40	29.25	41.00	41.00	41.00	41.00
1,250	1,500	14.00	21.00	24.00	26.40	31.50	43.00	43.00	43.00	43.00
1,500	2,000	15.50	23.25	26.25	28.88	33.75	45.00	45.00	45.00	45.00
2,000	2,500	17.00	25.50	28.50	31.35	36.75	49.00	49.00	49.00	49.00
2,500	3,000	18.50	27.75	30.75	33.83	39.75	53.00	53.00	53.00	53.00
3,000	3,500	20.00	30.00	33.00	36.30	42.00	57.00	57.00	57.00	55.00
3,500	4,000	21.50	32.25	35.25	38.78	44.25	61.00	61.00	60.00	55.00
4,000	4,500	23.00	34.50	37.50	41.25	47.25	65.00	65.00	60.00	55.00
4,500	5,000	24.50	36.00	39.75	43.73	47.25	69.00	65.00	60.00	55.00
5,000	6,000	26.00	37.50	42.00	46.20	50.25	70.00	65.00	60.00	55.00
6,000	7,000	27.50	39.00	44.25	48.68	52.50	70.00	65.00	60.00	55.00
7,000	8,000	29.00	40.50	45.75	50.33	54.75	70.00	65.00	60.00	55.00
8,000	9,000	30.50	42.00	47.25	51.98	57.00	70.00	65.00	60.00	55.00
9,000	10,000	32.00	43.50	48.75	53.63	57.00	70.00	65.00	60.00	55.00
10,000	20,000	33.50	45.00	50.50	55.55	57.75	70.00	65.00	60.00	55.00
20,000	50,000	33.50	45.00	51.75	56.93	57.75	70.00	65.00	60.00	55.00
50,000	Over	33.50	45.00	52.50	57.75	57.75	70.00	65.00	60.00	55.00

[171] This chart is a product of the research conducted by David Joulfaian, *supra* note 162, at 40.

From 2002 to 2010, during an abbreviated period when the gift and estate taxes temporarily parted ways, a series of different rates and exemptions were in effect:[172]

Year	Gift Tax Rate Range	Gift Tax Exemption or Equivalent Amount
2002	18–50	1,000,000
2003	18–49	1,000,000
2004	18–48	1,000,000
2005	18–47	1,000,000
2006	18–46	1,000,000
2007	18–45	1,000,000
2008	18–45	1,000,000
2009	18–45	1,000,000
2010	18–35	1,000,000

From 2011 to 2019, as reflected in the chart below, Congress reunited the gift and estate taxes:

Year	Gift Tax Rate Range	Gift Tax Exemption or Equivalent Amount
2011	18–35	5,000,000
2012	18–35	5,120,000
2013	18–40	5,250,000
2014	18–40	5,340,000
2015	18–40	5,430,000
2016	18–40	5,450,000
2017	18–40	5,490,000
2018	18–40	11,120,000
2019	18–40	11,400,000

[172] This chart is a product of the research conducted by David Joulfaian, *supra* note 162, at 43.

APPENDIX B

ESTATE TAX EXEMPTIONS AND TAX RATES[173]

Year	Exemption (dollars)	Initial rate (percent)	Top rate (percent)	Top bracket (dollars)
	(1)	(2)	(3)	(4)
1916	50,000	1.0	10.0	5,000,000
1917	50,000	2.0	25.0	10,000,000
1918–1923	50,000	1.0	25.0	10,000,000
1924–1925	50,000	1.0	40.0	10,000,000
1926–1931	100,000	1.0	20.0	10,000,000
1932–1933	50,000	1.0	45.0	10,000,000
1934	50,000	1.0	60.0	10,000,000
1935–1939	40,000	2.0	70.0	50,000,000
1940	40,000	2.0	70.0	50,000,000
1941	40,000	3.0	77.0	10,000,000
1942–1976	60,000	3.0	77.0	10,000,000
1977	120,000	18.0	70.0	5,000,000
1978	134,000	18.0	70.0	5,000,000
1979	147,000	18.0	70.0	5,000,000
1980	161,000	18.0	70.0	5,000,000
1981	175,000	18.0	70.0	5,000,000
1982	225,000	18.0	65.0	4,000,000
1983	275,000	18.0	60.0	3,500,000
1984	325,000	18.0	55.0	3,000,000
1985	400,000	18.0	55.0	3,000,000
1986	500,000	18.0	55.0	3,000,000
1987–1997	600,000	18.0	55.0	3,000,000
1998	625,000	18.0	55.0	3,000,000
1999	650,000	18.0	55.0	3,000,000
2000–2001	675,000	18.0	55.0	3,000,000

[173] This chart is a product of research conducted by three statisticians. *See* Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, STAT. INCOME BULL., 2007, fig.D at 122, https://www.irs.gov/pub/irs-soi/ninetyestate.pdf [https://perma.cc/2GR2-5ZUJ]. This chart was further populated with additional years of data generated by these coauthors.

Year	Exemption (dollars)	Initial rate (percent)	Top rate (percent)	Top bracket (dollars)
2002	1,000,000	18.0	50.0	2,500.000
2003	1,000,000	18.0	49.0	2,000,000
2004	1,500,000	18.0	48.0	2,000,000
2005	1,500,000	18.0	47.0	2,000,000
2006	2,000,000	18.0	46.0	2,000,000
2007	2,000,000	18.0	45.0	1,500,000
2008	2,000,000	18.0	45.0	2,000,000
2009	3,500,000	18.0	45.0	3,500,000
2010	5,000,000 or 0	18.0	35.0 or 0	5,000,000
2011	5,000,000	18.0	35.0	5,000,000
2012	5,120,000	18.0	35.0	5,120,000
2013	5,250,000	18.0	40.0	5,250,000
2014	5,340,000	18.0	40.0	5,340,000
2015	5,430,000	18.0	40.0	5,430,000
2016	5,450,000	18.0	40.0	5,450,000
2017	5,490,000	18.0	40.0	5,490,000
2018	11,120,000	18.0	40.0	11,120,000
2019	11,400,000	18.0	40.0	11,400,000

APPENDIX C[174]

Gift Tax Revenues: Fiscal Years 1933–1977 ($ millions)[175]

Fiscal Year	Gift Tax	Gift Tax Share
1933	5	0.14
1934	9	0.08
1935	72	0.34
1936	160	0.42
1937	24	0.08
1938	35	0.08
1939	28	0.08
1940	29	0.08
1941	52	0.13
1942	92	0.22
1943	33	0.07
1944	38	0.07
1945	47	0.07
1946	47	0.07
1947	70	0.09
1948	77	0.09
1949	61	0.08
1950	49	0.07
1951	91	0.13
1952	83	0.10
1953	107	0.12
1954	72	0.08
1955	88	0.10
1956	113	0.10
1957	125	0.09
1958	134	0.10
1959	117	0.09
1960	187	0.12
1961	171	0.09
1962	239	0.12
1963	216	0.10
1964	305	0.13
1965	291	0.11
1966	447	0.15
1967	286	0.10
1968	372	0.12
1969	393	0.11
1970	439	0.12
1971	432	0.12
1972	363	0.07
1973	637	0.13
1974	441	0.09
1975	375	0.08
1976	432	0.08
1977	1,776	0.24
Average		0.1167[176]

[174] This chart reflects a one-year lag between the tax year involved and the next year when the return must be submitted (e.g., 1932 returns were thus filed in 1933 and so on and so forth).

[175] This chart is a product of the research conducted by David Joulfaian, *supra* note 162, at 44.

[176] Tallying all of the periods when the gift tax was independent, namely, 1933–1977 plus 2002–2011 (see Appendix D), the average gift tax share associated with independence is 0.1153%.

APPENDIX D[177]

Gift Tax Revenues: Fiscal Years 1978–2017 ($ millions)[178]

Fiscal Year	Gift Tax	Gift Tax Share
1978	139	0.03
1979	175	0.03
1980	216	0.03
1981	216	0.03
1982	108	0.01
1983	149	0.02
1984	152	0.03
1985	276	0.04
1986	381	0.05
1987	503	0.07
1988	426	0.06
1989	829	0.09
1990	2,128	0.19
1991	1,236	0.11
1992	1,044	0.09
1993	1,436	0.11
1994	2,089	0.14
1995	1,792	0.12
1996	2,191	0.13
1997	2,709	0.14
1998	3,289	0.14
1999	4,646	0.17
2000	4,023	0.14
2001[179]	3,883	0.14

[177] Bear in mind that this chart reflects a one-year lag between the tax year involved and the next year when the return must be submitted (e.g., 1977 returns were thus filed in 1978 and so on and so forth).

[178] This chart is a product of research conducted by David Joulfaian, *supra* note 162, at 44. This chart was further populated with additional years of data generated by Joulfaian.

[179] As a result of legislation that Congress enacted in 2001, namely, the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38, the gift and estate taxes were not unified for a ten-year period (2002–2011).

Fiscal Year	Gift Tax	Gift Tax Share
2002	1,626	0.06
2003	1,892	0.09
2004	1,400	0.06
2005	1,981	0.08
2006	1,933	0.07
2007	2,420	0.09
2008	3,280	0.12
2009	3,094	0.13
2010	2,820	0.12
2011[180]	6,572	0.27
2012	2,109	0.08
2013	5,778	0.20
2014	2,582	0.08
2015	2,089	0.06
2016	2,457	0.07
2017	1,948	0.05
		0.0883[181]

Gift and estate taxes function independently of each other.

[180] In 2010, the estate tax was elective. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, § 301(c), Pub. L No. 111-312, 124 Stat 3296.

[181] This percentage figure does not include the filing years 2002–2011, when the gift tax functioned independently of the estate tax.

APPENDIX E(1)

Annual Gift Tax Return Filings: Fiscal Years 2003–2011[182]

Fiscal Year	Total Returns	Taxable Returns
2003	235,782	6,049
2004	224,987	4,994
2005	261,370	7,018
2006	261,104	7,663
2007	243,686	8,384
2008	257,485	9,553
2009	234,714	10,718
2010	223,093	9,645
2011	219,544	10,982

[182] IRS Comm'r, Annual Report (various years); IRS Comm'r, Data Book (various years). Statistical information for 2002 is unavailable.

APPENDIX E(2)

Annual Gift Tax Return Filings: Fiscal Years 2012–2017[183]

Fiscal Year	Number	Taxable
2012	258,393	2,469
2013	369,063	5,638
2014	264,968	2,977
2015	238,617	2,515
2016	242,585	2,719
2017	239,590	2,876

[183] IRS Comm'r, Annual Report (various years); IRS Comm'r, Data Book (various years).