An Enigma in the Federal Income Tax: The Meaning of the Word Gift

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Federal Income Tax:
The Meaning of the Word “Gift”

The exclusion of gifts from taxable income has long been the subject of considerable debate. In an attempt to uncover a rational basis for the gift exclusion, Professor Klein extensively examines its legislative history and judicial application. He concludes that the gift exclusion is neither a product of reasoned legislative choice nor a reflection of any legitimate tax policy. On the basis of this conclusion, Professor Klein urges that Congress re-evaluate the exclusion, in light of the underlying theory, with an eye toward formulating a more justifiable tax treatment of gifts.

William A. Klein*

The familiar problem of defining broad, general terms used in any statute is always a formidable one. Although complete elimination of ambiguity would be too much to expect, satisfactory progress toward that end may be made by identifying the nature and the source of any conflict in goals that complicate the problem. When no such progress has been achieved over a long period of time, then one is moved to ask the question “why not?” It is this kind of question that has prompted the present article.

I. STATEMENT OF THE PROBLEM

Since the initial adoption of the modern income tax in 1913, “property acquired by gift, bequest, devise, or inheritance” has been expressly excluded from the broad enumeration of those receipts that are taxable as income. The problem of assigning a

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2. This nonexclusive enumeration is contained in Int. Rev. Code of 1954, § 61(a).
meaning to the term "gift" as used in that exclusion is the subject of the present inquiry.

The first reported case dealing with the issue was decided in 1924, and since that time there has been a substantial flow of decisions, with no sign of abatement. In 1953 Professor Chommie was prompted to remark that the exclusion "has proved to be a constant irritant both to taxpayers and the government." Six years later the Supreme Court elected to consider the problem, hopefully with the objective of soothing if not removing the irritant; during the following year its views were announced in three cases, the most noteworthy of which was Commissioner v. Duberstein. Taxpayer Duberstein had obliged his business associate, Berman, by giving the latter the names of potential customers. Berman did not offer nor did Duberstein expect any tangible reward for this information, but shortly thereafter the magnanimous Berman "gave" Duberstein a Cadillac automobile. The Commissioner claimed that the value of the automobile should be taxed as income, while Duberstein claimed that it was a nontaxable gift. The Tax Court held in favor of the Commissioner, but it was reversed by the Court of Appeals for the Sixth Circuit. The Supreme Court reinstated the decision of the Tax Court, pointing out that the statute used the term "gift" in its "colloquial sense," that the issue was one of fact turning on the "intention" of the transferor, and that the decision of the Tax Court, not having been "clearly erroneous," must be upheld.

The precise holding of the Court was not entirely clear, and

10. 363 U.S. at 286.
the opinion did little, if anything, to narrow the ambiguity that in earlier cases had proved to be inherent in the word “intention.”13 In apparent recognition of its failure to provide any new answers to that old problem, the Court observed that its approach might not “satisfy an academic desire for tidiness.”14 It satisfied even less the Government’s, and presumably the practicing lawyer’s, desire for a rule that would reduce the uncertainty and the amount of litigation. Moreover, an examination of the opinion fails to reveal the motivation for the Court’s ruling. The criticism evoked by this controversial decision was most eloquently summarized by Dean Griswold.15 He limited his expression of profound displeasure with the opinion to a few pages and concluded with this observation: “Come, gentlemen, you can’t do that.”16

Dean Griswold seems to imply that the persistence of uncertainty and dissatisfaction is attributable to the obtuseness of the courts, particularly the Supreme Court. He also seems to suggest that there was one clearly indicated correct answer but that the Court simply failed to see it.17 The result reached by the Court, however, seems to me to be one of a number of defensible alternatives; it is the process by which the Court arrived at and explained that result which seems responsible for the perpetuation of confusion. Moreover, an understanding of the nature of the problem requires an examination not only of the judicial process but of the legislative process as well. In any event, the fact is that the problem of determining the proper scope of the gift exclusion has proved to be a surprisingly thorny one.

Before the reasons for the difficulty of the problem can be clarified, the context in which it arises must be delineated. A close reading of the decided cases indicates that the principal area of litigable uncertainty is quite narrow. The bulk of the

14. 363 U.S. at 290.
16. Id. at 90-91. Dean Griswold derived this admonition from an anecdote and applied it to the Duberstein decision.
17. Where the transaction clearly has commercial or economic elements, where there is a quid pro quo, and no aspect of family love and affection, it would be more satisfactory . . . to rule as a matter of law that property transferred is not a “gift” rather than to leave each such case to the apparently unguided surmise of the trier of the facts. Id. at 89.
cases involves payments by employers, most frequently corporations, to employees or their widows, where the payment had not been bargained for and the employer was in no sense legally obligated to make the payment. Because of this remarkable homogeneity, the courts long ago could have developed a relatively specific, narrow rule that would have eliminated most of the litigation. In other words, certainty could easily have been achieved without going beyond the problem immediately in view. The courts could have defined the term "gift" to exclude payments motivated by an employment relationship. In fact, however, the courts have treated the question of gifts vel non as one that turns principally on the "intention" of the payor.

18. In recent years cases dealing with payments by corporations to widows of deceased corporate executives have provided the most litigation and attracted the greatest attention. See Yohlin, Payments to Widows of Employees, 40 Taxes 208 (1962); Note, Payments to Widows of Corporate Executives and Employees—Gift or Income?, 49 Va. L. Rev. 74 (1963). Apart from the widow cases, there have been over 140 decisions, including Treasury rulings, since 1920 that turned on the gift exclusion. Of these, 34 involved payments, mostly in the nature of bonuses, to employees of the payor where the employee continued to work for the payor after the payment. There were 57 cases involving payments to ordinary employees upon termination of employment and five cases involving such payments to ministers by their congregations. Thus, a total of 98 of the 141 cases clearly involved the employer-employee relationship. Another 20 cases involved payments made where services had been rendered by the payee to the payor but not pursuant to an employment relationship; the Duberstein case falls into this category. These cases can easily be lumped together with the employer-to-employee cases. Of the remaining 25 cases, 11 involved payments from the Government, and in some of these the payee had rendered services, 6 cases were classified as miscellaneous, and 7 involved prizes and awards, now covered expressly by the Code. Int. Rev. Code of 1954, § 74.

19. Dean Griswold suggested a somewhat broader rule that would have covered cases like Duberstein as well as the cases involving employer-employee relationships. See note 17 supra. In Duberstein the Commissioner argued that a gift must be "prompted solely by personal affection towards the payee" and not "by either anticipated benefit to the payor . . . or his sense of gratitude for the valuable services performed by the payee." Brief for Appellant, p. 13, Commissioner v. Duberstein, 363 U.S. 278 (1960). See also Chommie, supra note 4, at 628. While such a test would dispose of most of the cases, in favor of the Government, a limited area of dispute would remain: the cases where the payee is a personal friend of the payor as well as an employee. In such cases, a determination of which relationship prompted the gift would dictate its tax treatment. See, e.g., Neville v. Brodrick, 235 F.2d 268 (10th Cir. 1956); Richard L. Harrington, 17 CCH Tax Ct. Mem. 960 (1958); Michael Laurie, 19 T.C. 86 (1949). However, these cases are relatively few in number.

The meaning of the word "intention" has been a constant source of dispute. Perhaps the best clue to its meaning is found in the Duberstein Court's statement that the term "gift" should be used in a "colloquial sense." This suggests that the definition of "gift" is determined by the dominant mental image evoked in the mind of the average man when that word is used. A judge constructs this standard, of course, not by conducting an attitude survey but by examining his own reaction and experiences. This does not impose any serious limitation in the present instance, however, since no "scientific" proof seems necessary to establish that in the common image a gift is a transfer motivated by a particular state of mind, such as a feeling of good will, affection, or generosity—the state of mind that is associated with "donative intent."

This type of subjective mental phenomenon defies precise description. The trier of fact can determine its existence only with

22. Cf. Commissioner v. Wemyss, 324 U.S. 303 (1945), in which the Court, taking an approach antithetical to that adopted in Duberstein, stated:
   Had Congress taxed "gifts" simpliciter, it would be appropriate to assume that the term was used in its colloquial sense, and a search for "donative intent" would be indicated. But Congress intended to use the term "gifts" [for gift-tax purposes] in its broadest and most comprehensive sense. . . . Congress chose not to require an ascertainment of what too often is an elusive state of mind. For purposes of the gift tax it not only dispensed with the test of "donative intent." It formulated a much more workable external test.

Id. at 306.

23. In Duberstein the Court, reiterating earlier formulations, stated: "A gift . . . proceeds from a 'detached and disinterested generosity' . . . 'out of affection, respect, admiration, charity or like impulses.' " 363 U.S. at 285. Much earlier, Judge Learned Hand had summed it up neatly, although with a somewhat different emphasis, as follows: "A donor must not be moved to satisfy some uneasiness, some scruple, some sense that there is an outstanding claim which those would recognize to whose opinion he is sensitive: something which makes the payment more than an unconstrained act of affection or regard." Bogardus v. Helvering, 88 F.2d 646, 648 (2d Cir.), rev'd sub. nom. Bogardus v. Commissioner, 302 U.S. 34 (1937). Both these statements seem close to what is probably the dominant image of a gift. On further reflection one might be compelled to adopt the modification urged by the Government in Stanton v. United States, the companion case of Duberstein:

The idea . . . can be limited neither to free-flowing generosity nor to "good" motivations. It is apparent that many admitted gifts are prompted less by a freely-formed "desire" than by a sense of duty, perhaps enforced by social pressures—e.g., a duty to one's family (providing for a disliked but needy relative), a duty to society (contributing annually to charity), or a duty to God (tithes).

great difficulty. Moreover, judicial definition and application of such a vague test can result in the implicit adoption of standards that substantially alter the basic concept. To take an illustration from another field, the term "negligence" can be defined by a court in a manner that imports into the concept a rule of law based on public policy considerations that have little to do with the concept as originally formulated. Or a jury in "finding the facts" can, consciously or unconsciously, apply the negligence concept in a manner that gives effect to wholly extraneous factors. The cases dealing with the gift exclusion seem to manifest an identical process. In the period from 1920 to 1937 the courts gradually developed limitations on the concept of "donative intent." Although a payment by an employer to an employee might theoretically be a gift for tax purposes, as a practical matter, it could not.\(^{24}\) This result could be reached by reasoning that cor-
corporations lack donative capacity. For example, one court stated as a matter of fact that "corporations do not give presents unless they get something for it financially." Another court concluded that as a matter of law "a corporation cannot lawfully give away its assets." But the impact was the same each way, for the developing judicial attitude recognized virtually no payment from an employer to an employee as a gift.

In 1937 the Supreme Court, in *Bogardus v. Commissioner*, made its first major contribution to the interpretation of the gift exclusion. That case, a major taxpayer victory, constituted a rejection of the approach that had been developed by the lower courts; in fact, four separate courts of appeals had held in favor of the Commissioner in related cases involving the *Bogardus* fact situation. The main issue was whether a number of payments to various employees upon the termination of a business should be considered gifts. The Court emphasized that the owners of the business had made a good profit on its sale and were in a

the First, Second, Fourth, and Fifth Circuits that were overruled in *Bogardus v. Commissioner*, 302 U.S. 34 (1937). See note 30 infra. There were others, however. See *Fitch v. Helvering*, 70 F.2d 583 (8th Cir. 1934); *Levey v. Helvering*, 68 F.2d 401 (D.C. Cir. 1939); *United States v. McCormick*, 67 F.2d 867 (2d Cir. 1939); *Bass v. Hawley*, 62 F.2d 721 (6th Cir. 1939).


26. Ira A. Kip, Jr., 3 B.T.A. 50, 51 (1925). See *Levey v. Helvering*, 68 F.2d 401, 403 (D.C. Cir. 1939) ("obviously the corporation had no interest in giving away the corporate assets").

27. *Yuengling v. Commissioner*, 69 F.2d 971, 972 (3d Cir. 1934).

28. In *Duberstein* the Court rejected even a presumption that a corporation cannot make a gift, stating that "if it were applied as a determinative rule of 'law,' it would force the tribunals trying tax cases involving the donee's liability into elaborate inquiries into the local law of corporations . . . ." 363 U.S. at 288. Perhaps the "elaborate inquiries" that the Court feared really need not have been a cause for apprehension. The lower courts had not found such inquiries necessary because the proposition seemed self-evident. Of course, corporations may clearly make gifts to charities, but there seems to be little basis to believe that they can also make non-charitable gifts. See BALLANTINE, CORPORATIONS § 85 (1946); DODD & BAKER, CASES AND MATERIALS ON CORPORATIONS 830–83 (2d ed. 1951); 6A FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS §§ 9399–940 (1950).

29. 302 U.S. 34 (1937). The Court had previously dealt with the issue briefly in *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716 (1929). The *Old Colony Trust* case established that the mere fact of a voluntary payment, without legal obligation, does not make it a gift.

30. *Hall v. Commissioner*, 89 F.2d 441 (4th Cir. 1937); *Simpkinson v. Commissioner*, 89 F.2d 597 (5th Cir. 1937); *Bogardus v. Helvering*, 88 F.2d 646 (2d Cir. 1937); *Olsen v. Helvering*, 88 F.2d 650 (2d Cir. 1937); *Walker v. Commissioner*, 88 F.2d 61 (1st Cir. 1937).
magnanimous mood, and this state of mind was the controlling fact. Perhaps the Court's most significant contribution was its comment that "a gift is none the less a gift because inspired by gratitude for the past faithful service of the recipient." This statement undercut a doctrine that had slowly developed in the lower courts over the previous 17 years.  

Bogardus apparently had a significant impact in some cases, but in others the pro-government attitude seems to have persisted. Moreover, Bogardus did not abate the struggle to find objective evidentiary criteria for determining whether the required subjective "intention" existed. Consequently, the Court found it necessary to consider the same issue some 23 years later in the Duberstein case. But Duberstein seems merely to reaffirm Bogardus, with a few refinements that may lend some support to the Commissioner's position. The aftermath of Duberstein is thus likely to be similar to the confusing and conflicting aftermath of Bogardus.

The general picture that emerges from the course of litigation is one in which competing forces have been operating but have never been fully resolved. There has been some effort to adhere to the avowed rule that the question of whether a payment is a

31. 302 U.S. at 44.

32. For example, in the opinion of the Court of Appeals for the Second Circuit in Bogardus, Judge Learned Hand stated: "We agree that a man may make a gift to an old employee without meaning it as 'compensation'; though probably such cases will be uncommon, especially if he declares that the payment is 'in recognition of' past services." 88 F.2d at 648.

33. See, e.g., Peters v. Smith, 231 F.2d 721 (5th Cir. 1955); Adams v. Riordan, 272 F.2d 721 (5th Cir. 1956); Judge Learned Hand stated: "We agree that a man may make a gift to an old employee without meaning it as 'compensation'; though probably such cases will be uncommon, especially if he declares that the payment is 'in recognition of' past services." 88 F.2d at 648.

34. See, e.g., Carragan v. Commissioner, 197 F.2d 240 (2nd Cir. 1952); Poorman v. Commissioner, 131 F.2d 946 (9th Cir. 1942); Willkie v. Commissioner, 127 F.2d 955 (9th Cir. 1942); Painter v. Campbell, 110 F. Supp. 503 (N.D. Tex. 1953); Ruth Jackson, 25 T.C. 1106 (1956); L. Gordon Walker, 25 T.C. 832 (1956).

35. Among the objective criteria most frequently relied on were the treatment of the payment on the books of the payor, the label used by the payor, and whether the shareholders sanctioned the payment. See Chommie, supra note 4, at 622–24; Rothschild, Business Gifts as Income, N.Y.U. 10th Inst. on Fed. Tax 147 (1961).

36. Indeed, the confusion and conflict has already appeared. It has been observed that since Duberstein the courts have been "in an extraordinary state of disharmony" and their "confusion may be attributed to conflicting judicial interpretations" of the Duberstein opinion. Note, Payments to Widows of Corporate Executives and Employees — Gifts or Income? 49 Va. L. Rev. 74, 78 (1963). See Yohn, supra note 12, at 215–14.
gift depends on the state of mind of the payor — on whether the payment was prompted by a "donative intent." The Supreme Court has twice insisted on this approach. On the other hand, the holdings as well as the language of many of the lower-court cases reveal strong support for the propositions that the tax liability of the payee should not turn on the payor's state of mind and that a payment to an employee or to a nonemployee who has rendered some service to the payor cannot be a gift for tax purposes. An explanation for the persistence of this conflict lies, to a significant degree, in the courts' failure to perceive distinctly the existence of the conflict or the policy considerations that underlie either position.

In choosing between tenable competing interpretations of a statute, a court should start by searching for a statutory purpose that can either be attributed to the legislature or supplied by the court itself. But in the host of decisions dealing with the gift exclusion no court has considered the purpose for excluding gifts from taxable income. The absence of a uniform standard can be attributed to this omission and to the consequent failure to identify the policy considerations inherent in each decision. The remainder of this Article is devoted to identifying the possible origins and purposes of the statute, and to suggesting the relationship between the process of judicial decision and assumptions as to those purposes.

II. THE PURPOSE OF THE STATUTE IN LIGHT OF TAX THEORY

It is necessary to preface the search for statutory purpose with a discussion of the strong theoretical argument to the effect that

37. "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense." Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand. L. Rev. 395, 400 (1950).

38. In all the discussion of the cases in the legal periodicals the only effort to suggest an answer to this question is a very brief statement in the article by Chommie, supra note 4, at 627: "Policy dictates that mere reallocation of benefits within the family should not be treated on the same plane as commercial transaction [sic]." In Stanton v. Commissioner, the Commissioner stated only that:

The justification for exempting gifts and devises from the income tax may be mooted, but surely at least one element of the policy is the idea that such transfers result only in the shifting, not the augmentation, of wealth and thus do not constitute "income" in the economic sense. Brief for Respondent, pp. 36–37, Stanton v. Commissioner, 363 U.S. 278 (1960).
there is simply no good tax policy reason for excluding gifts, or inheritances, from the income-tax base and that consequently the term “income” must, for tax purposes, be construed to include gifts. Before presenting this argument, however, one semantic problem must be clarified. As a matter of common parlance a distinction exists between the terms “gift” and “income”; therefore, to treat gifts as income requires a rather broad definition of the term “income” for tax purposes. Perhaps a more acceptable approach would be to add gifts to wages, rents, dividends and other such receipts to determine the base for what might be called a “personal gain tax” instead of an “income tax.” The term “income tax,” however, has been accepted, perhaps irretrievably, as the appropriate label for the kind of tax that should be imposed on such gains. Thus, for tax purposes expedience has permitted expansion of the flexible term “income” to include all receipts that seem properly subject to this kind of tax. To insist that gifts cannot be taxed as income because they are not described as income in common parlance is to insist on precision of language at the expense of sound tax policy. In this instance precision of language may properly be sacrificed to permit a statement of the issue in terms of whether income should be defined to include gifts and inheritances.

The argument for taxing gifts as income must begin with a brief consideration of the nature of, and the justification for, income taxation. As a general proposition, governments should provide for equal tax treatment of persons who are similarly situated. Like most general statements of ultimate goals, however, this does not reveal a method of achieving the ideal. It does indicate that the taxing authority should focus on individuals

39. This suggestion may seem somewhat startling in view of the fact that the exclusion has been a part of the modern income tax since 1913. It is for this reason that the argument for treating gifts and inheritances as income must be made at this point as a basis for further discussion.

40. See Musgrave, The Theory of Public Finance 162 (1959): “To avoid semantic troubles, it might be well to refer to the income tax as an accretion tax.”

41. See Stein, What’s Wrong with the Federal Tax System?, 1 Tax Revision Compendium, 86th Cong., 1st Sess. 107, 110 (Comm. Print 1959):
We start with the proposition that equals should be treated equally as the basic standard of justice. But this does not get us far. The troublesome question is to determine the relevant dimension for measuring equality.

Compare Simons, Personal Income Taxation 30 (1938):
Neglecting the good ad rem levies, we may say that tax burdens should bear similarly upon persons whom we regard in substantially similar circumstances, and differently where circumstances differ. This may
and their circumstances rather than on transactions and things.\textsuperscript{42}

Establishing the criterion of equality remains a difficult problem. It can be said that equality for tax purposes implies equality of capacity to contribute to the cost of governing. The chosen criterion should be as objective as possible.\textsuperscript{43} The amount of an individual's annual consumption, the value of his property, or the number of cigarettes he smokes might be workable standards, but each seems to fall short of satisfying widely held concepts of justice.\textsuperscript{44} The criterion that seems most appealing is annual economic gains or accretions.\textsuperscript{45} Annual earned income, rents, dividends—those receipts commonly labeled "income"—are certainly the major components of annual economic gains. If the focal point is the individual and his capacity to contribute to the cost of government, any distinction based upon the source of receipts or the circumstances that gave rise to them seems unjustified. Thus, if "income" is to be the criterion for determining equality, the term must be defined broadly to eliminate such distinctions;\textsuperscript{46} in other words, "income" must be defined to include gifts.

\textsuperscript{42} Although this proposition may seem excessively obvious, it is frequently ignored. See text accompanying notes 159–75 infra.

\textsuperscript{43} Stein points out that a tax system in which individual burdens are determined on the basis of the tax assessor's "intimate knowledge" of the circumstances of each taxpayer could be adopted. He goes on to state that:

Such a system, "properly administered," could be very fair. Certainly, it can take account of many relevant variables other than income. The U.S. tax system may be trending in this direction, with the Ways and Means Committee... making fine distinctions in the tax treatment of different classes of taxpayers. But it is fundamentally a kind of system that we do not like or regard as fair. We prefer the justice—admittedly rough—that comes from the even application of general rules. We are suspicious of the kind of justice that results from case-by-case discrimination among classes of citizens and taxpayers.

Stein, supra note 41, at 118. Simons favors objective criteria as a means of avoiding "a rambling, uncharted course pointed only by fickle sentiments." Simons, op. cit. supra note 41, at 31 (1936). But see text accompanying note 60 infra.

\textsuperscript{44} See Stein, supra note 41, at 111.

\textsuperscript{45} "The choice, as in all matters of equity, is essentially a matter of value judgment." Moskowitz, op. cit. supra note 40, at 163.

\textsuperscript{46} Simons' definition seems the best as a theoretical starting point:

Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in value of the store of property rights between the beginning and end of the period in question.
The idea that gifts should be treated as income for tax purposes was argued elaborately, articulately, and most forcefully by Simons in his classic work, *Personal Income Taxation*, published in 1938. Simons’ position is simply that for tax purposes, there is no reason to distinguish gifts from other receipts: “it is hard to defend exclusion of certain receipts merely because one has done nothing or given nothing in return” and “considerations of equity surely afford little ground for excluding (or including) particular receipts according to the intentions of second parties.” His attitude toward the taxation of gifts was basically determined by his views that taxes must focus on the individual and that the best objective measure of equality of individuals for tax purposes treats all forms of enrichment alike.

Simons, *op. cit. supra* note 41, at 50. This definition itself probably cannot be used in our income tax because of many practical problems. See Surrey & Warren, *The Income Tax Project of the American Law Institute: Gross Income, Deductions, Accounting, Gains and Losses, Cancellation of Indebtedness*, 66 Harv. L. Rev. 761, 770 (1953). This fact does not, however, undercut the utility of the definition as a theoretical concept that can be applied to answering the question of whether gifts should be included in taxable income.

As Richard A. Musgrave has pointed out:

Administrative considerations do not always permit drastic adherence to this general concept of accretion, but this does not obviate the need for a consistent theoretical concept. Without such a concept as a normative standard, we have no basis from which to deal with each practical problem as it arises.

Musgrave, *op. cit. supra* note 40, at 165.

47. He assumed, of course, that if gifts were taxed under the income tax, the gift tax would have to be modified if not repealed. Simons, *op. cit. supra* note 41, at 129. He was also willing to concede some modification of his basic scheme; for example, “some special exemptions ... for widows and other dependents incapable of self-support but not for direct heirs as such.” Id. at 142.

48. Id. at 135.

49. Id. at 134.

50. Simons was careful to point out, however, that “we must avoid the implication that our definition [note 46 supra] establishes any decisive presumption regarding policy in income taxation.” Simons, *op. cit. supra* note 41, at 57 n.19.

Simons did not deal adequately with the serious problem of distinguishing between “gifts,” which would be taxed as income and “support payments,” which presumably would not. The conceptual difficulties and administrative burdens involved in drawing this line would no doubt be formidable. It can be compared with, and in fact might be related to, the problem of defining “dependent” for the purpose of the dependency exemption. Int. Rev. Code of 1954, §§ 151, 152. Arguably, the gift exclusion can be explained as a device for avoiding this kind of problem. Theoretically, the problem of distinguishing between gifts and support payments also arises under the gift tax. Under the gift tax, however, the problem is largely avoided by the
The Simons view of the proper definition of income, which requires that gifts be taxed under the income tax, has been widely accepted by economists. But there is nothing particularly novel or academic about the thinking that has led to this acceptance. For example, a somewhat extravagant statement made by Congressman Green on the floor of the House in 1924 reflects Simons' view:

I do not see why we should tax the man who has labored hard day by day and who accumulates small savings, sometimes a nickel, or sometimes a dollar at a time, on which he hopes to live in his declining years, and then not tax a gift of $40,000 or $50,000. I can not imagine.

And in 1926 Senator Norris actually proposed including gifts and inheritances in income. In defense of his proposal, Norris added to the notion of equal treatment a good dose of the Calvinist morality that had lurked in Mr. Green's statement:

Is it right for those who have to toil and work and then pay an income tax on their savings that the man who neither toils nor spins should go tax free if somebody gives him something?

In more recent years there has been little serious discussion of the hypothesis that gifts and inheritances should be taxed as income. But the idea that income should be broadly defined seems to have gained increasing support. For example, in Commissioner v. Glenshaw Glass Co., the Supreme Court held that money received as a gift is taxable as income.

3. See Musgrave, op. cit. supra note 40, at 169. This does not mean, however, that there can be no exceptions or modifications. See id. at 175-76. Compare note 47 supra.

52. See Musgrave, op. cit. supra note 40, at 165. See also Allen & Brownlee, Economics of Public Finance 240 n.18 (1947), which states that the "most frequently cited American proponent" of the notion that income should be defined as net accretion is Haig, The Federal Income Tax (1921).

53. 65 Cong. Rec. 3120 (1924). Although the statement seems to support taxing gifts as income, it was actually made in support of a gift tax. The important aspect of the statement is that it focuses on the circumstances of the recipient of a gift as compared with the recipient of wages.

54. 67 Cong. Rec. 3831 (1926). Compare the statement of Congressman Hull in 1918: "Gifts, especially during the war, should be taxed at the normal income rate, but not subjected to supertax." 50 Cong. Rec. 10165 (1918).

55. 67 Cong. Rec. 3832 (1926).


57. 348 U.S. 426 (1955); see Commissioner v. LoBue, 351 U.S. 243 (1956).
ceived as exemplary damages for fraud or as the punitive two-thirds portion of a treble-damage antitrust recovery must be reported by a taxpayer as gross income. The Court emphasized the "sweeping scope" of the statute and stated that "Congress applied no limitations as to the source of taxable receipts." The same attitude toward the scope of the income tax is also reflected by those expressing concern with "erosion of the tax base." This concern is only justified by accepting the general proposition, at least as a theoretical starting point, that the income tax should be based on net economic gain, or accretions, in which case gifts should be taxed as income.

The fact that Congress has persistently whittled away at the tax base through exemptions and deductions does not indicate its rejection of a broad definition for the term "income" or its acceptance of the idea that receipts should be differentiated on the basis of their source. Rather, it reflects a readiness to take advantage of the flexibility of the income tax as a device for accomplishing various social and economic objectives, such as providing tax advantages for potentially needy individuals, favoring certain "merit" wants, and providing economic incentives to par-
ticular kinds of activities. The proponents of the argument that gifts should be taxed as income seem willing to concede for the sake of argument that these are proper objectives of the income tax, but it seems implicit in the argument that gifts should be taxed as income that no such objectives can be found to justify the gift exclusion. This is a contention which assumes that the legislature, in preserving the exclusion, acted irrationally, and such a contention must be viewed with skepticism. It is reasonable to suppose that the legislative record will reveal a rational legislative purpose that will challenge the contention. However, if the opposite is true the legislative history should at least reveal the events and circumstances that led to the legislature's irrational behavior.

III. THE PURPOSE OF THE STATUTE IN LIGHT OF ITS LEGISLATIVE HISTORY

Any effort to understand how and why the exemption of gifts from the income tax evolved requires a brief survey of the origin and development of the income tax, the estate tax, and the gift tax. Of these, the first two are of principal significance; the gift tax was largely an afterthought.

A. GENERAL ASPECTS

1. The Civil War Revenue Acts

Before the Civil War, tariffs constituted the principal source of revenue for the federal government. After 1816 tariffs were relied on not only as a convenient source of revenue but also as a means of protecting the industrial interests of the Northeast from foreign competition. The agrarian interests of the South and West were naturally arrayed against the protective tariff, but as long as the revenue needs of the government were modest, there was no sustained impetus for other forms of taxation. The Civil War brought about a dramatic increase in the need for funds; after some experimentation with loans, it became apparent that the establishment of new revenue sources was essential to the

63. INT. REV. CODE OF 1954, § 117 (exclusion of certain grants and awards).

64. SUTHER & WARREN, FEDERAL INCOME TAXATION 2 (1980).

65. GROVES, FINANCING GOVERNMENT 668–69 (5th ed. 1958); PAUL, TAXATION IN THE UNITED STATES 6–7 (1954); RATNER, AMERICAN TAXATION 35 (1942).

66. Taxation of income and inheritances was seriously urged during the War of 1812. However, pressure for this new form of taxation abated with the end of the war. PAUL, op. cit. supra note 65, at 6–7; RATNER, op. cit. supra note 65, at 34.
preservation of the nation's solvency. The income tax and the inheritance tax seemed to be obvious choices, for both had been used in England and other European countries and had proven to be productive and politically palatable. For each, the doctrinaire rationalizations that seem to be useful in rallying public support had long since been developed; the nation as a whole, inspired by patriotism, was psychologically receptive to these bold measures.

Competing measures undoubtedly seemed puny and shopworn by comparison. The leading competitor was a direct tax on real

67. Paul, op. cit. supra note 65, at 8-9; Ratner, op. cit. supra note 65, at 63-66.


In this country, death taxes had been used to a minor extent by the states before the Civil War, but the state death taxes were not sufficiently numerous or well developed to permit the inference that they operated as significant precedent for the Civil War federal tax system. See Oakes, Development of American State Death Taxes, 26 Iowa L. Rev. 451 (1941): "The turning point in the development of state death duties appears to have been the enactment of the New York collateral tax of 1888." Id. at 457.

69. An ethical doctrine is usually a barefaced assumption, backed up by ex post facto utilitarian rationalization; when a sufficient number of people accept it and perhaps act upon it, it becomes an ethical "principle." The tide of popular opinion changes and with it the current fashion in "ethical principles": in the field of fiscal economics, the "quid pro quo" justifications have been replaced by the "faculty" justifications; doubtless these latter, in turn, will bow before future popular successors.

Shultz, op. cit. supra note 68, at 198-99. Compare Eisenstein, op. cit. supra note 59, which states that "taxes . . . are a changing product of earnest efforts to have others pay them." Id. at 11. He then states the corollary:

Reasons have to be given for the burdens that are variously proposed or approved. In time the contending reasons are skillfully elaborated into systems of belief or ideologies which are designed to induce the required acquiescence. Of course, if an ideology is to be effective, it must convey a vital sense of some immutable principle that arises majestically above partisan preferences.

Id. at 11-12.

70. See Paul, op. cit. supra note 65, at 9; Ratner, op. cit. supra note 65, at 67-68.

71. The federal government had sporadically relied on a variety of taxes, such as excises, stamp duties, and taxes on dwellings, lands, and slaves. Ratner, op. cit. supra note 65, at 27-35.
property, which would have necessitated the administratively cumbersome procedure of apportionment among the states according to population. Moreover, this tax was widely resisted because of its presumed discrimination in favor of investors in stocks over farmers, and in favor of the Northeast over the Southwest and West. The income tax was accepted as the lesser of necessary evils.

Opposition to income taxation was, however, quite heated and the ensuing debate naturally focused on the basic concept at the expense of any consideration of refinements. In fact, the first income tax act, adopted in 1861, was so badly drafted that the Secretary of the Treasury did nothing to enforce it; indeed, it was intended to be provisional and was nullified by the 1862 act. The 1862 act taxed inheritances as well as income. At the same time Congress imposed a wide variety of excise and stamp taxes and increased the tariff rates. As soon as the war was over, however, the opponents of the income and inheritance taxes renewed and intensified their attack: in 1867 they succeeded in lowering the income tax rates; in 1870 Congress further reduced the income tax rates and abandoned the inheritance tax; and two years later the income tax was repealed.

During this period the principal debate focused on the wisdom and fairness of an income or inheritance tax and the rate of taxation. Questions relating to the scope of each tax were subordinate, and even among these subordinate questions the proper treatment of gifts was a relatively insignificant issue. The 1862 statute did subject to the inheritance tax gifts that were intended to take effect after death. But the only exception to the general disregard of inter vivos gifts was a provision of the 1864 statute taxing succession to real estate; the provision was “so broad as to con-

72. Apportionment was required by U.S. Const. art. I, § 9.
73. See Groves, op. cit. supra note 65, at 148; Ratner, op. cit. supra note 65, at 148; Surrey & Warren, op. cit. supra note 64, at 3.
75. Act of July 1, 1862, ch. 119, 12 Stat. 478; see Ratner, op. cit. supra note 65, at 67-68.
stitute virtually a tax on gifts of real estate,” yet “in the brief debates no references seem to have been made to gifts or to any problem that might arise with respect to them.” Apparently no one in the Treasury Department or in Congress was concerned by the fact that all other transfers by gift wholly escaped taxation.

2. 1894 to 1913

In 1894 the federal government again taxed incomes and inheritances, but this time gifts were not ignored. As before, congressional action was motivated primarily by a need for revenue. The choice of the most effective tax was not, however, dictated solely by its revenue raising capacity. By this time the Populists had begun to assert their influence, along with the reformers and intellectuals; these and other similarly oriented groups favored placing the tax burden on the wealthy. Thus, class interests were added to the sectional interests of the South and West, which continued their opposition to the protective tariff.

The result was the 1894 Income Tax Act, which somewhat remarkably included in taxable income “money and the value of all personal property acquired by gift or inheritance.” Congress

82. Harriss, supra note 79, at 532 (1940).
83. Randolph Paul states, in a footnote to an essay on the taxation of corporate distributions, that “the word 'income' under the 1864 Act was interpreted by the Treasury to include gifts, but not to include bequests or devises, because the latter were subject to legacy and succession duties.” PAUL, SELECTED STUDIES IN FEDERAL TAXATION 159 n.28 (2d Series 1938). Paul cites no authority for this proposition, however, and his statement may have been erroneous. None of the other important authors who wrote about Civil War taxation mentioned any such Treasury practice or ruling. On the contrary, the leading authority on this issue, C. Lowell Harriss, in his article, Legislative History of Federal Gift Taxation, 18 TAXES 531 (1940), cites only the ruling of the first Commissioner of Internal Revenue. This ruling was to the effect that gifts or donations to a minister from the members of his congregation are taxable income when they are “in the nature of compensation for services . . . .” but that “gifts of money from father to son, when clearly not in the nature of payment for services rendered . . . . are not liable to taxation as income.” BOUTWELL, A MANUAL OF THE DIRECT AND EXCISE TAX SYSTEM OF THE UNITED STATES 305 (1863).
84. PAUL, op. cit. supra note 65, at 30-39; RATNER, op. cit. supra note 65, at 160-60; Eisenstein, The Rise and Decline of the Estate Tax, 84TH CONG., 1ST SESS., FEDERAL TAX POLICY FOR ECONOMIC GROWTH AND STABILITY 819, 821-22 (Joint Comm. Print 1955) [hereinafter cited as The Rise and Decline of the Estate Tax], reminds us that the principal objective of the early inheritance tax was to collect revenue, not to eliminate or reduce hereditary fortunes. Compare text accompanying notes 103-08 infra, with note 155 infra.
86. Ibid. Transfers of real property were excluded because of the assumption on the part of the drafting committee that a tax on such transfers would
demonstrated commendable sagacity by refusing to be lured into an inviting semantic trap—it rejected the argument that gifts and inheritances must be exempted from the "income tax" for the reason that they are not "income" in the traditional sense of the word. Instead, Congress realized that although the label "income tax" might have been ill-advised, the issue was not whether gifts or inheritances were "income" but rather whether these receipts might be combined with typical items of "income"—such as wages, rents, and interest—for the purpose of levying a tax on the individual. On the other hand, to infer that Congress had anticipated a more sophisticated tax theory by concentrating on individual economic accretion and accepting the idea that gifts and inheritances should be part of the income tax base, would be unreasonable. The rate of taxation was a flat two percent on incomes above 4,000 dollars and there was no separate federal death tax in effect at the time. Since the rate was not progressive, the effect of the unified tax scheme was essentially the same as separate taxes at two percent on income, on the one hand, and on gifts and inheritances on the other. The congressional debates strongly support the view that Congress justified the tax on gifts and inheritances as an inheritance tax and included it in the income tax merely as a matter of convenience. Thus, this episode in tax history does not reveal the basis for the separation of the inheritance and income taxes. If anything, it indicates that by 1894 separateness had been accepted as a hallowed tradition that could not readily be challenged; if gifts were to be taxed at all, they presumably would be lumped together with inheritances rather than with "income."

In 1895 the Supreme Court invalidated the 1894 Act in its entirety because an inseparable part of it violated the constitu-

be a direct tax subject to the requirement of apportionment. 26 Cong. Rec. 6821–22 (1894).

87. Senator Platt stated, during debate on the bill, that personal property acquired by gift or inheritance should be excluded because it is not "any part of yearly income." He went on to state that in England "death duties are very odious, and they ought to be odious in this country. They are no part of a person's real income." 26 Cong. Rec. 6821 (1894). The Senator did not explain why death duties were "odious" but income taxes were not. Perhaps he had concluded, consciously or intuitively, that the battle against the income tax was lost and that the time had come to salvage what he could, even though equally deserving candidates were beyond saving.

88. Compare text accompanying notes 39–40 supra.

89. 26 Cong. Rec. 6821–23 (1894) (remarks of Senator Chandler). Senator Chandler said of the provision: "It purports to be an income tax, but it is an inheritance tax upon personal property." 26 Cong. Rec. 6821 (1894). No one disputed his point.
tional prohibition against unapportioned direct taxes. As a result of this decision, the federal government did not levy an income tax again until the sixteenth amendment was ratified in 1913. In the interim, however, the egalitarian forces of the times remained viable. The inheritance tax gained respectability and appeal through supporters whose theories and judgments could not be attacked and belittled as mere self-serving rationalizations and socialist heresies. These included the academic dissertations of Professor E. R. A. Seligman and Dr. Max West and the more impassioned and extreme statements of Andrew Carnegie, who favored outright confiscation of all of a decedent’s estate after modest provisions for immediate heirs. The revenue needs generated by the Spanish-American War combined with these forces to spawn the federal inheritance tax of 1898.

The 1898 act was not strictly an inheritance tax. True, the rates were higher for distant relations than for close relations. But for all recipients the rates increased as the size of the estate increased, not as the size of the individual’s share increased. Thus, it can properly be described as a “modified estate duty”; “the emphasis . . . was on the transmission of the property” not on accretions to individual wealth. In other words, it was more a tax on the “thing” than on the person.

The 1898 statute, like its 1894 predecessor, taxed only transfers of personal property, but unlike the 1894 act, the 1898 act did not tax gifts other than those intended to take effect after death. In this respect it followed the precedent of the Civil War legislation. The congressional debates fail to explain this choice between conflicting precedents, and if the opposite choice had been made by the original draftsman of the bill, that choice might have been accepted just as readily by Congress. There is nothing to indicate that the exclusion of gifts from the inheritance tax implied an intention to include gifts as a proper part of an income tax system. Prior and subsequent historical evidence is clearly to the contrary. The one general observation that does seem justified

93. SULLIVAN, op. cit. supra note 68, at 159-64.
94. See text accompanying notes 84-87 supra.
95. See text accompanying notes 76-81 supra.
is that the problem of gift taxation was not considered one of great moment.

By 1902 the need for revenue had sufficiently diminished to enable the opponents of the inheritance tax to bring about its repeal.\textsuperscript{98} The victory was temporary, however, as the agitation for inheritance and income taxation continued. Ultimately, the outnumbered opponents of both taxes were unable to turn the tide of popular sentiment.

3. 1913 and Afterwards

By the time of the adoption of the modern income tax in 1913,\textsuperscript{97} a pattern had been established: incomes and inheritances were subject to separate systems of taxation; gifts were given little, if any thought, but when they were considered they tended to be placed in the same category as inheritances. In 1913 this pattern became firmly embedded. The income tax enacted in that year contained graduated rates ranging from one percent on the first 20,000 dollars of taxable income to seven percent on amounts over 500,000 dollars. It excluded “property acquired by gift, bequest, devise or descent.”\textsuperscript{98} There was no federal tax levied on transfers at death or by gift. This failure to tax, although probably of no great significance in this study, was not the result of mere oversight. Senator Norris introduced an amendment that would have imposed an estate tax with fairly modest rates for estates under 1,000,000 dollars, increasing to 75 percent of the amount of an estate in excess of 50,000,000 dollars.\textsuperscript{99} His avowed purpose was to “break up the swollen fortunes,”\textsuperscript{100} an objective that could not have been achieved under the income-tax rates of that time. Norris’ amendment evoked little opposition in the Senate debates, but it was defeated by a vote of 58 to 12.\textsuperscript{101} On the day this vote was taken, an amendment embodying an inheritance tax was defeated by a vote of 39 to 29.\textsuperscript{102} The legislative rejection of, and apparent indifference to, these proposals surely cannot be interpreted as a manifestation of confirmed opposition to the concept of taxing death transfers. The more plausible explanation is that many members of Congress who might have supported modified

\textsuperscript{96} Act of April 12, 1902, ch. 500, § 7, 32 Stat. 96; Paul, op. cit. supra note 65, at 67.
\textsuperscript{97} Act of Oct. 3, 1913, ch. 16, § II, 38 Stat. 166.
\textsuperscript{98} Act of Oct. 3, 1913, ch. 16, § II (B), 38 Stat. 167.
\textsuperscript{99} 50 Cong. Rec. 4422 (1913).
\textsuperscript{100} 50 Cong. Rec. 4426 (1913).
\textsuperscript{101} 50 Cong. Rec. 4468-69 (1913).
\textsuperscript{102} 50 Cong. Rec. 4459-61, 4470 (1913).
versions of these proposals did not want to divert their own and their colleagues' attention from the main issue — "income" taxation.

With the adoption of the sixteenth amendment the proponents of income taxation had scored a major advance. Tactically, the battle over the inheritance tax could wait. During this period the exclusion of transfers by gift and inheritance from federal taxation resulted in a gap in the taxation of transfers of assets between individuals. This gap, however, does not seem indicative of a general conclusion that such transfers were not properly taxable. Rather, it indicates an intention to subject inheritances at least, if not gifts, to a different system of taxation than income.

The federal death tax, enacted in 1916, was strictly an estate tax — all inheritance tax features were abandoned. The tax was proposed and supported as a means of raising revenue for military purposes. This revenue-raising objective contrasts with the current notion that the main objective of federal death taxation is to "break down hereditary estates," but as in the cases of the Civil War and the Spanish-American War provisions, does not explain why this tax was selected in preference to others. One explanation may be that the estate tax was a familiar and seemingly convenient, practical means of raising revenue. The idea of an estate tax, however, had additional appeal for that substantial segment of the public that wanted to impose a heavier tax burden on the wealthy and attack family fortunes. Of course, the rates adopted could not be expected to raise substantial revenue or to bring about a peaceful social revolution. They ranged from one percent for estates under 50,000 dollars to ten percent for amounts over 5,000,000 dollars. But for that era these rates represented a significant achievement for the forces of egalitarianism.

104. The significance of this fact is indicated in note 110 infra.
105. PAUL, op. cit. supra note 65, at 105-06; RATHNER, op. cit. supra note 65, at 354-56.
106. The Rise and Decline of the Estate Tax 819.
107. See text accompanying notes 64-67 & 82-84 supra.
108. See PAUL, op. cit. supra note 65, at 108.
110. The estate tax is, of course, an imprecise method of attacking hereditary wealth. The tax increases with the size of the estate rather than the size of individual shares; as such it may impose a heavy tax on estates that, although large, are divided into enough shares so that no single recipient may be getting rich. To the extent that this scheme of distribution occurs the tax seems more an attack on the mere accumulation of wealth than on its perpetuation in transmission from one generation to the next.
Although gifts had been excluded from the income tax in 1913, they were also excluded from taxation under the estate-tax system enacted in 1916. This hiatus lasted until 1924, when Congress finally imposed a gift tax. Even then, gift taxation was not considered an independently justifiable levy, for it was adopted to protect the estate and income taxes by removing the exemption for inter vivos transfers. The gift tax, like the estate tax, was based on the transfer rather than the receipt of property; consequently, the rates of the gift tax depended not on the amounts of gifts received by an individual but on the amounts of gifts made by an individual during the year. Furthermore, the 1924 gift tax rates were identical to the estate tax rates.

In 1926 the provision for gift taxation was repealed, and the federal government returned to a system of taxation that may seem, by present-day standards, to contain an inexplicable gap. The gift tax returned, however, in 1932 and has been continuously in effect since that time. The subsequent legislative history relating to the gift tax does not concern questions that cast any additional light on the definition of "gift" within the meaning of the income-tax exclusion. Congress did consider that problem in 1954, in connection with the income-tax treatment of prizes, awards, and grants. Its action, however, was in response to a

112. See Harriss, supra note 79, at 538–35; Magill, The Federal Gift Tax, 40 Colum. L. Rev. 773 (1940). Dr. Max West had argued, in his thorough and scholarly study in 1893, that "for the purpose of preventing evasion of the inheritance tax it seems sufficient to make the [gift] tax applicable to gifts causa mortis, as is usually done." He went on to state that "a tax on all gifts would be impossible to enforce, even if it were otherwise desirable." West, The Inheritance Tax 170, 300 (Columbia Univ. Studies 1893). In the next major American study of inheritance taxation, W. J. Shultz took the position: "While a tax on gifts 'made in contemplation of death' must be considered supplementary to the inheritance tax, a general gift tax covering all gifts inter vivos should not. It is a separate independent transfer tax, with problems and considerations peculiar to itself . . . ." Shultz, op. cit. supra note 68 at 328.

113. A tax advantage would nevertheless be achieved by disposing of part of an estate through inter vivos gifts. The amounts transferred inter vivos and the amounts transferred at death would both be subject to the lower end of the rate schedule before the higher end was reached. Moreover, the amount of the gift tax paid would be eliminated from the estate.


115. For the views of the scholars of an earlier day, see note 112 supra.

116. Revenue Act of 1932, ch. 209, § 501, 47 Stat. 245 (1932). The circumstances that led to this action in 1932 are discussed in a subsequent part of this Article. See text accompanying notes 150–55 infra.

rather narrow problem and does not reveal the congressional conception of a "gift" or the purpose for excluding gifts from the income tax.

B. Specific Aspects

The above discussion has indicated the absence of any express legislative purpose for the gift exclusion. Yet certain specific aspects of the historical record may be of potential significance in determining whether any such purpose can reasonably be inferred.

1. The Fact That for a Time Gifts Completely Escaped Taxation

One of the most intriguing phenomenon in the historical development of gift taxation is the fact that for most of the period from 1916 to 1932 gifts were not taxed while estates were. Since most gifts apparently take the place of, or have the effect of, the distribution of an estate on the death of the owner, it seems that "the tax system should be neutral as between transfers by
gift inter vivos and transfers by bequest at death.”121 To achieve this equality gifts must be taxed under the estate-tax system.122 Yet the apparent need for correlation might be misleading; there may be reasons for taxing death transfers that do not apply to inter vivos transfers. An analysis of the reasons for taxing death transfers and of the applicability of these objectives to inter vivos transfers may reveal a clue to the meaning of the term “gift” as used in the income-tax exclusion.123

Two of the objectives of death taxes are quite closely related and often intertwined, for both derive from a dissatisfaction with the pattern of distribution of wealth. The first objective is to limit the amount of wealth that can be kept within a family and passed from one generation to the next.124 It is projected most clearly by the arguments that evoke the image of the idle male offspring who, by virtue of inheritance, acquires great wealth without working a day in his life;125 in other words, the attack is more upon the perpetuation of wealth than upon its accumulation or existence. This objective may be termed “anti-dynastic.”

The second objective is simply to tax away the large fortunes as such, without much concern for who holds them or what is done

121. HARRISS, GIFT TAXATION IN THE UNITED STATES 5 (1940). Harriss asserted that the sole justification for the gift tax was the need to prevent avoidance of the income tax and the estate tax. Id. at 1, 6. Nonetheless, I find in the quoted passage an additional, independent justification.

122. The argument for taxing gifts under the estate-tax system rests on the assumption that there should be separate approaches to the taxation of estates, on the one hand, and income, defined to exclude at the very least death transfers, on the other. Once this assumption is granted, the possibility that gifts should be taxed under the income-tax system may be excluded from consideration. The only serious question, then, is whether gifts should be taxed as a part of the estate-tax system, or as part of a system closely correlated to it, or not at all. Now the assumption is one that most current economists would not be willing to concede. See text accompanying notes 49–52 supra. What must be conceded, however, is that the assumption reflects a very basic and apparently irrevocable congressional choice. For this reason the assumption can be granted for the purpose of the present discussion of the question of how the failure to impose a gift tax can be reconciled with the taxation of estates.

123. This discussion will be concerned with objectives. The numerous theories of death taxation, which may be regarded as mere rationalizations, will not be mentioned here. For a penetrating discussion of such theories, see SHultz, op. cit. supra note 68, at 167–99. Shultz concludes his discussion with the iconoclastic statement quoted in note 69 supra. Another compilation of the theories is contained in a report to the Joint Committee on Internal Revenue Taxation. II STAFF OF JOINT COMMITTEE ON INTERNAL REVENUE TAXATION, FEDERAL AND STATE DEATH TAXES pt. 2, at 97–101 (1933).

124. See text accompanying notes 97–100 & 103–08 supra.

125. See, e.g., 50 Cong. Rec. 4424 (1913) (remarks of Senator Norris).
with them; the attack is not on the perpetuation but rather on the accumulation of wealth. The occasion of transfer at death is selected as the best time to accomplish this objective. This view is exemplified by a statement made by Andrew Carnegie in 1889: “By taxing estates heavily at death the state marks its condemnation of the selfish millionaire’s unworthy life.” Further, manifestations of the same view may be found in two once-popular theories: (a) the state is a co-owner of all property and (b) the estate tax is imposed in lieu of taxes that should have been imposed earlier. This view of the estate tax as an outright attack on wealth was summarized by an authoritative 1926 study: “In the case of the inheritance tax, at least, we have, of recent years, seen the sham trappings of rationalized legal or ethical excuses cast aside, and the tax boldly approved or condemned, as the case may be, because it is borne to a large extent by a rich minority of the population.” This objective may be termed “anti-accumulations.” The third objective of the estate tax is simply to raise revenue.

Logically, these three objectives serve as independent motivations for gift taxation, but for practical reasons, they may be somewhat less compelling as motivations for gift taxation than for estate taxation. The anti-dynastic objective obviously applies to transfers by gift that are part of a distribution of family assets to members of the younger generation. A gift is just as much a means of transmitting wealth and just as much a “windfall” to the recipient as is an estate distribution. It seems likely, however, that inter vivos gifts are generally thought of as being substantially smaller in amount than transfers at death. Logically, this should make no difference since it is taken into account in the rate structure. It may nevertheless have substantial psychological impact; in the minds of legislators, the image of gift transfers may be quite insipid as compared to transfers at death.

The anti-accumulations objective of the estate tax is clearly applicable to the gift tax. In determining whether a tax fulfills this objective, the only question that need be answered is whether

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128. Schultz, op. cit. supra note 68, at 190.
129. See note 84 supra.
130. By assumption, these gifts are the only ones under consideration here.
See note 120 supra. Only two propositions are presently being demonstrated: (a) for some gifts at least there are purposes for taxation apart from the desire to protect the income and estate tax, and (b) the purposes are essentially the same as the purposes for estate taxation.
the tax falls primarily on the wealthy. The gift tax certainly has as much potential in this respect as the estate tax. This conclusion depends, of course, on the proposition that the estate tax, in so far as it is used to accomplish the anti-accumulations objective, is wholly arbitrary in its selection of the taxable event and that, accordingly, the date of gift is just as appropriate a moment of reckoning. If this is so, then instead of waiting for either event, the objective might be accomplished by imposing an annual tax or, better yet, by constructing an income tax that prevents accumulations in the first place. The reason why this latter suggestion seems to go too far may lie in the notion that, for purposes of incentive and to satisfy natural human acquisitiveness, a man should be permitted to accumulate substantial wealth; but at the moment when the individual parts with his accumulated wealth, the countervailing public desire to reduce inequality takes precedence. If this is so, then whether the individual parts with his wealth by choice through gift or by necessity at death should not determine the taxability of the receipt. However, there may be another, less rational, explanation for the date of death as the best moment for accomplishing the anti-accumulations objective:

It is much more merciful to avaricious human nature to deprive it of something it has never had than to lop off anything—however superfluous—which has actually been enjoyed . . . . On the whole, I

131. Compare the remarks of Senator Clapp, in the Senate discussion in 1913 of Senator Norris' proposal for an estate tax. 50 Cong. Rec. 4424 (1913). Senator Clapp supported the proposal as a means of reconciling the public to instances in which heirs become rich without effort; but he perceived an element of folly, if not injustice, in taking by taxation that which had been permitted to be accumulated in the first place. He suggested that Congress should study methods by which the people might retain "in the first instance . . . that which properly belongs to them" instead of letting a man make "millions to which he is not entitled."

To me, man is the product of tensions caused by the antinomies of his nature. . . . He is inclined to be generous in giving aid to others; but he is also selfish and acquisitive. . . . He believes in equality; but he also strives for inequality. . . . These and other antithetical characteristics shape man's institutions and the best and most durable of them are those which permit temperate expression of such traits and predispositions.

133. Since gifts are made by choice, the gift tax may impede such transfers. To the extent that this results, it merely means that the tax will be postponed until death. There may be a public policy in favor of encouraging inter vivos dispositions; but this does not affect the basic motivation for gift taxation; it merely requires a refinement by which gifts are taxed at a rate slightly lower than estates.
can see no better way to diminish the natural pangs attendant upon paying taxes than to collect as much income as possible in the fleeting moments when the property belongs to no one in particular.\textsuperscript{184}

To the extent that this observation is an accurate representation of the public mind, the estate tax may be preferable to the gift tax on the simple pragmatic ground that it is more palatable. This does not mean that the gift tax fails to serve the same objectives as the estate tax; it merely means that because of the peculiarities of the public attitude, the objective may be accomplished one way but not another.

The revenue-raising objective of the estate tax is served as well by the gift tax as by the estate tax. The estate tax may be expected to raise considerably more revenue than the gift tax, but the total amount of revenue produced is not the proper test of the desirability on revenue grounds. If it were, then most excise taxes would have to be discarded; but many modest revenue producers can, in combination, produce as much as a single large producer. If the cost of collecting the tax is reasonable in relation to the amount collected, then the revenue raising objective is satisfied.

The history of the gift tax sustains its role in raising revenue. Even in 1925 the amount raised was by no means insignificant. In that year the gift tax produced 7,500,000 dollars in revenue and the estate tax produced 101,400,000 dollars,\textsuperscript{185} while in the same year the federal excise tax on trucks produced about the same amount as the gift tax.\textsuperscript{186} If the excise on trucks can be considered a good source of revenue, then so can the gift tax.\textsuperscript{187} The fact remains, however, that although the gift tax may be as “good” a source of revenue as any other tax, it is not as critical a source. In other words, when Congress passes up gift taxation, it may be passing up a “good thing” from a revenue standpoint, but the loss


\textsuperscript{185} 1925 Comm’r of Int. Rev. Ann. Rep. 70. In the same year the individual income tax produced 845.4 million dollars, the corporate income tax 916.2 million dollars, and the tobacco tax 345.2 million dollars.

\textsuperscript{186} The amount was 7.8 million dollars. Ibid. In 1962 the estate tax produced 1,796.2 million dollars while the gift tax produced 239 million dollars and the tax on trucks and buses 256.3 million dollars. 1962 Comm’r of Int. Rev. Ann. Rep. 162–53.

\textsuperscript{187} The point to be made here is that there is an independent revenue-raising objective of the gift tax, but it should be recalled that the gift tax has an added and perhaps more significant revenue function as a protector of the income and estate taxes.
of that revenue will not be as noticeable or distressing as a loss of the revenue from the income tax would be. 138

To summarize, transfers by gift serve much the same wealth-distribution function as transfers at death. Moreover, the objectives that motivate the taxation of death transfers should equally motivate the taxation of gifts; thus, the failure to tax gifts seems theoretically incompatible with the taxation of estates. This does not mean that either the gift tax or the estate tax is good or bad, just or unjust, ethical or unethical, or moral or immoral. Even if such a judgment were possible, it is not necessary for the purposes of this discussion. But as a matter of logic, the taxation of one and not the other must be the product of a process other than reasoned choice based on an intelligible theory of taxation. Therefore, contrary to what might be expected, the failure to tax gifts from 1913 to 1924 and from 1926 to 1932 does not reveal any rationale that will help to define the word “gift” as used in the income tax exclusion. This episode in history may be ignored in the search for such a definition.

If the process were not one of reasoned choice, then it may have resulted from factors, in addition to those mentioned above, that an historical analysis should reveal. Although such an analysis will probably be as speculative and inconclusive as the above analysis, it will serve to challenge the hypothesis that the choice must have been made on the basis of some undetected rational theory.

Turning to the historical record, the most crucial fact is that during most of the period from 1916 to 1932 the estate tax itself was under major attack. Although the attack was successful only in reducing rates, its goal was repeal, and in fact, the continued existence of the tax was frequently in peril. The attack was based on a deep antagonism toward the whole concept of an estate tax. Whether this antagonism derived from principle or from self-interest is unimportant; the important point is that the antagonism existed, that it was virulent, and that it was politically potent. 139 The fortunes of the gift tax seemed to vary with the vigor

138. Possibly there was some thought in 1916 that a tax on gifts would be more difficult to enforce than a tax on death transfers. Transfers by gift may be quite informal and secret, while death transfers involve formal documents, lawyers, and courts. This seems to be a weak reason for abolishing the gift tax, but even if this administrative problem does help to explain the failure to tax gifts, it is the kind of explanation that does not help determine what a gift is.

139. See Paul, op. cit. supra note 65, at 121-42; Ratner, op. cit. supra note 65, at 415-16, 424-30; Harriss, supra note 79, at 535; The Rise and Decline of the Estate Tax 826-28.
of the support for the estate tax. The gift tax was adopted in 1924, when the estate tax rates were raised to an historic high; it was repealed in 1926 when the estate tax rates were substantially reduced.\textsuperscript{140}

The failure to expand the scope of the estate tax to include gifts may be explained by these facts. Suppose that flawless reasoning could demonstrate that if estates were to be taxed then gifts should also be taxed. The opponents of estate taxation might have no answer to the argument. If these opponents were deeply committed to the notion that the estate tax is a bad tax that ought to be abolished, and should there be a reasonable prospect of abolition, as there was,\textsuperscript{141} then their acceptance of the conclusion that gifts should be taxed, would be unlikely. Acceptance of the gift tax might be evidence of the permanency, and perhaps even the wisdom, of the estate tax and any relief, however capricious, from the despised tax would not be sacrificed merely for the sake of consistency. Thus, they would oppose the gift tax even though they would not dispute its natural correlation to the estate tax; some would no doubt find rationalizations that would remove the inconsistency.

Should this group lose the battle on the estate tax, it might enlarge its numbers sufficiently to win on the gift tax, by enrolling some uncommitted legislators who would not favor the estate tax enough to push it to its logical extreme in the face of heated opposition. For many in the uncommitted group, the immediate image of gifts would probably vary from that of estates; to them the inconsistency of taxing one and not the other would not be immediately apparent. Their interest in the problem would be insufficient to go beyond the immediate image, and even if it were, they might not be disturbed by the inconsistency. Their apathy toward the relatively insignificant gift tax would result in a victory for the group that devoted the most energy to the issue. During the 1920's all the extra energy was at the disposal of the opponents of the gift tax. The supporters were "on the defensive, fighting to preserve the estate tax, and were, therefore, in no position to fight for increasing its effectiveness."\textsuperscript{142}

\textsuperscript{140}. See Ratner, \textit{op. cit. supra} note 65, at 419, 425.
\textsuperscript{141}. See Paul, \textit{op. cit. supra} note 65, at 139; \textit{The Rise and Decline of the Estate Tax} 826.
\textsuperscript{142}. Harriss, \textit{supra} note 79, at 535-36.

While this analysis seems to me the most plausible, it is not the only possible analysis. It may, for example, over-emphasize the strength of the opposition to the estate tax. After all, the supporters of the tax were strong enough to preserve it. On this view, with the forces more evenly balanced,
This analysis explains the inertia between 1916 and 1924 more effectively than it explains the affirmative act of repeal of the gift tax in 1926. In that year, however, opposition to the estate tax had reached its peak. Moreover, there were additional factors favoring opponents of the gift tax. In the first place, the gift tax of 1924 was poorly drafted, so that it operated somewhat capriciously and unfairly. The attack on the concept of gift taxation was no doubt materially assisted by the weakness of the particular gift tax law with which Congress had had experience. Second, the 1924 gift-tax rates were no lower than the estate-tax rates. This added to the concern of those who favored early distribution of estates and feared that the gift tax discouraged inter vivos transfers. Moreover, in 1926 “tax reduction was the order of the day” as both the income and estate tax rates were reduced substantially. Congress was simply in a magnanimous mood toward the wealthy, and it could inexpensively sacrifice the gift tax.

the outcome of the issue of gift taxation becomes far more uncertain; the outcome is likely to turn on legislative inertia or on behind-the-scenes activity that never appears in the public record. This kind of analysis, however, would also support the hypothesis that the failure to tax gifts was not the result of a reasoned policy choice. Neither analysis conclusively disproves the hypothesis that the failure to tax gifts was based upon some rational theory, but either underscores the deficiencies of that hypothesis.

143. See note 139 supra.
144. SHULTZ, op. cit. supra note 68, at 163.
145. Ibid.
146. See text accompanying notes 112-13 supra.
147. Harriss, supra note 79, at 534, refers to “an argument which appears occasionally in the debates, namely that death taxes are to encourage the breaking up of estates and to prevent the concentration of wealth but that a gift tax, hindering the making of gifts, would impede rather than encourage this basic objective of death taxes.” This argument seems to be faulty for it is based on the unverified and probably unwarranted assumption that inter vivos gifts have a greater tendency to break up estates than do transfers at death. Although the argument may have been faulty, it may nevertheless have appealed to some Congressmen who generally supported the objectives of the estate tax.

Compare Report to the Joint Committee on Internal Revenue Taxation:
As has been stated before, the rates of the gift tax (as of 1933) are approximately one-fourth less than those of the Federal estate tax. The reason for this difference in rates appears to be that Congress wishes thereby to encourage the making of gifts and the distribution of property in the lifetime of the owner, which, of course, is a worthy purpose.

149. Magill states that the estimated revenue from the gift tax was only 2 million dollars and thus the tax “was fairly marked for slaughter.” Ibid.
By 1932 hostility toward wealth had increased. At the same time there was a widespread belief among conservatives that additional revenue was badly needed. Even Andrew Mellon—who had been Secretary of the Treasury under three Republican Presidents during the 1920's and “the chief political representative of concentrated wealth” had conceded the battle against the estate tax. “Torn between his dislike for deficits and his dislike for the estate tax,” the Secretary had reluctantly chosen to recommend an increase in its rates. The opposition to the gift tax suffered from precisely the same conflict: “The lack of opposition [to the gift tax] was probably due to the fact that the men who would ordinarily have opposed the bill were demanding a balanced budget and a sales tax — strategically a very weak position.” Thus, as in earlier years an increased need for revenue corresponded with a rising tide of egalitarianism. As a result, the income and estate tax rates were raised and the gift tax returned permanently.

2. The Fact That Inheritances Are Not Taxed as Income

This historical survey has not as yet revealed a rationale that would be useful in defining the term “gift” as used in the income-tax exemption. Before abandoning the quest, however, one aspect of the record and of the statute itself merits further analysis—the fact that gifts seem to be placed in the same category as inheritances. It is obviously inadequate to observe simply that “gifts” are “like” inheritances. Inheritances have many characteristics: they are generally non-recurrent; they are made voluntarily; they are usually received by members of the decedent's

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151. Magill, supra note 148, at 775; see Ratner, op. cit. supra note 65, at 447-50.
152. Ratner, op. cit. supra note 65, at 414.
153. Pau, op. cit. supra note 65, at 165.
154. Harriss, supra note 79, at 831, 835-86.
155. Eisenstein places all the emphasis on the revenue need:

When the estate tax was finally revived at the end of this dismal period [i.e., in 1932], the controlling motivation was a desire to obtain revenue and not a desire to break down estates. Among those who made tax policy the levy was still a fiscal measure.

The Rise and Decline of the Estate Tax 828. The revenue motive is not sufficient to explain the adoption of one tax in preference to another. See text accompanying notes 103-08 supra. Thus, in 1932 the need for revenue explains why opposition to estate and gift taxation was weak; it does not fully explain the strong support for estate and gift taxation that took advantage of this weakness. In the same year there was vigorous backing for a general sales tax, which was not adopted. Ratner, op. cit. supra note 65, at 446-47.
family; they are a means of distributing an estate. For purposes of taxation, isolation of the significant characteristics depends on the establishment of an acceptable rationale for exempting inheritances from the income-tax system and taxing them under the estate tax. In other words, the congressional “good reason” for adopting the two separate tax systems must be determined. The “good reason” refers to a choice based on criteria derived from some meaningful conception of the purpose of the tax system apart from raising revenue. If no such reason appears, the comparison of gifts to inheritances would result in a quantitative analysis of earmarks conducted with no basis for determining how much weight to attribute to each earmark.

Unfortunately, the development of the two separate systems can be explained most plausibly in terms of expediency and reaction to ephemeral circumstances. It is extremely difficult to find a “good reason” for the development.

The initial adoption of separate systems for taxing inheritances and incomes in this country during the Civil War can be attributed largely to the fact that the two systems of taxation had been fully developed in Europe and thus had the advantages of familiarity and precedent—they could be expected to provide the needed revenue with a minimum risk of public disfavor. The people whose interests are adversely affected by any new tax will always predict unfavorable consequences, but in the case of the tested income and inheritance taxes such predictions would have a somewhat hollow ring.

Thus it seems that Congress, in adopting the Civil War taxes, relied on precedent rather than reason; but it also seems that the precedent itself was not founded in reason. The most plausible explanation for the original irrationality may be found in the fact that the estate and income taxes were initially regarded as taxes on “things.” At the present time, tax specialists consider the income and estate taxes primarily as taxes on the person. Moreover, there is a tendency to assess all taxes in terms of their impact on individuals. Much of our current tax system, however, can be

156. Although the revenue-raising goal does not indicate the reason for selecting one tax in preference to another, it should not be minimized as a tax objective.

157. See text accompanying notes 68–69 supra.

158. An interesting comparison can be made between the frightening forecasts as to the effect of the adoption of the income tax in England at the beginning of the 19th century with the similar, but somewhat less strident, forecasts as to the effect of the adoption of the same tax in this country a century later. See Paul, op. cit. supra note 65, at 74–78, 100–02.
explained only as an effort to avoid the unpleasantness of recognizing the impact of the demands of government on the individual. This unpleasantness is avoided by imposing the tax on some inanimate, impersonal "thing."

The phenomenon of taxing things rather than persons may be described as a device by which the people can avoid facing reality, or as a means by which politicians are able to hide the harsh facts from their constituents. The fact is, however, that many taxes can be understood only if they are thought to fall on "things." A leading example is the highly productive corporate income tax\(^1\) that was originally imposed because the government was unable or unwilling to raise personal income taxes to supply a growing need for revenue.\(^2\) The tax is virtually impossible to defend either on grounds of equity or economic policy. To the extent that it is shifted forward through increased prices it amounts to a well disguised capricious consumption tax. To the extent that it is shifted to labor or other factors of production it is again capricious and probably introduces into the tax system an unintended source of regressiveness. And to the extent that it falls on shareholders it will result in relative over-taxation or under-taxation of the shareholders depending on their income-tax brackets and upon whether after-tax profits are distributed. Moreover, it no doubt results in indiscriminate and unintended distortions in the allocation of goods by the free-market system. It does serve as a device for dealing with the problem of undistributed profits; but as such it is a most inept, if not arbitrary, device. Apart from this, about all that can be said for the tax is that it raises a large amount of much-needed revenue and that if it has been shifted to consumers or factors of production or borne by former investors, its repeal would result in a windfall to the current owners of corporate shares.\(^3\)

There are many other taxes whose sole virtue is that they raise

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\(^1\) See Simons, op. cit. supra note 41, at 44.


\(^3\) See Paul, op. cit. supra note 65, at 94.
some revenue—for example, most of the excise taxes. The difficulty in determining who pays these taxes is sufficient to make them undesirable. To the extent that a government relies upon such taxes, its action is best characterized by the following passage from Randolph Paul:

David A. Wells, at one time Commissioner of Internal Revenue . . . referred to the traditional Irishman on his first visit to Donnybrook Fair who said: "Wherever you see a head, hit it." Wells added: "Wherever you find an article, a product, a trade, a profession, a sale, or a source of income, tax it."163

According to this philosophy, whether the head that is hit deserves to be hit is not a matter for serious concern. A system of taxation based on this kind of approach may seem to produce appalling results in terms of its impact on individuals. It may be more appealing to adopt such an approach, however, than to face the responsibility of confronting each individual in society with the knowledge of the dollar amount of his contribution to government.164

Reliance on taxes on “things” seems to have been even more prevalent in earlier societies than it is now; a regressive analysis of history reveals an increasing reliance on such taxes.165 Indeed, “the Greeks and Romans objected to direct taxes in any form; they regarded them as ‘derogatory to the dignity of a free citizen.’”166 This does not imply that people are now or ever were completely unaware of the impact on the individual of taxes on “things.”167 The reaction against the protective tariff in this coun-

164. This does not imply that all ad rem taxes are bad. In certain limited circumstances they are quite defensible, as, for example, where “the current activities of governments confer special benefits upon particular classes, where the classes are not regarded as proper objects of subsidy, and where special levies upon them are feasible.” Simons, op. cit. supra note 160, at 52. But even in such cases the tax is often associated with the thing and not with the individual who pays it. And there are many ad rem taxes for which no satisfactory justification can be found.
165. This phenomenon may be attributable in part to the fact of increasing understanding of the taxing process with the passage of time. It may also be a result of administrative necessity: A meaningful computation of individual income is, of course, essential to a tax on the person. No such computation is feasible, however, in an economy in which there is a substantial amount of barter and income from the performance of services for oneself.
166. Goyes, op. cit. supra note 65, at 611.
167. Indeed, taxes on “things” are sometimes imposed in a manner designed to yield a rough approximation of an income tax. Thus, in Great Britain there was a tax on, among other things, the carriages of the wealthy, the windows of the middle class, and the shops of the poor. This eventually de-
try at the end of the 19th century is an example of a directly opposite attitude. The fact remains that the tax is first thought of as falling on the thing itself.

The appeal of taxing things rather than people explains much of the thinking about inheritance taxes and, perhaps to a lesser extent, even the income tax. W. J. Shultz reached the conclusion that in the traditional theoretical justifications of the inheritance tax “it was property and not individuals and their circumstances that was considered.” This would be even more true of an estate tax than an inheritance tax.

The idea that “income” also is a “thing” rather than a measure of the tax-paying capacity of individuals found expression in the landmark Supreme Court decision in Eisner v. Macomber in 1920. In dictum that had a profound impact on the development of the notion of what kinds of receipts should be taxed as income, the Court stated that “‘income may be defined as the gain derived from capital, from labor, or from both combined,’ provided it be understood to include profit gained through a sale or conversion of capital assets. . . .” This dictum placed the emphasis on the source of the receipt, rather than the tax-paying capacity of the individual.

The influence of the same kind of thinking appears in the writings of the eminent Professor E. R. A. Seligman. In his treatise on the income tax published in 1911, he wrote that the provision developed into a primitive form of income tax, The Triple Assessment, that finally gave way to the income tax. See Groves, op. cit. supra note 65, at 616; Paul, op. cit. supra note 65, at 72-73; Seligman, op. cit. supra note 68, at 57-72.

168. See text accompanying notes 64-67 & 84-87 supra. Just as the income tax was adopted as a means of redressing the inequity of the tariff, its ancestor, the faculty tax, was used to achieve greater equity in situations in which chief reliance had previously been placed on the property tax. See Ratner, op. cit. supra note 65, at 51-54.

169. Shultz, op. cit. supra note 68, at 187. Henry Simons stated: “Death duties and gift taxes, in the main, are levies upon things or upon acts of transfer; they are essentially ad rem charges which take no account of the total circumstances of the recipient.” In Simons’ theory the income tax was a tax on persons rather than things. Yet he was aware that others might mistakenly take a different view and therefore was careful to point out that “the income tax is not a tax upon income but a tax upon persons according to their respective incomes.” Simons, op. cit. supra note 43, at 128.

170. 252 U.S. 189 (1920).

171. 252 U.S. at 207.

172. See, e.g., Wright, The Effect of the Source of Realized Benefits Upon the Supreme Court’s Concept of Taxable Receipts, 8 Stan. L. Rev. 164 (1956). Compare note 159 supra.
of the 1894 Revenue Act subjecting inheritances to the income tax was "illogical." It was "illogical" because incomes and inheritances were separate things and a tax on one therefore could not extend to the other. In a later work, however, Professor Seligman recognized that there were competing theoretical justifications for the inheritance tax: in one theory "it is a tax on the individual; in the other a tax on the thing. . . ."

The existence of separate taxes for incomes and inheritances and the concurrent dissatisfaction with the results may be explained on the basis of this tax-on-things analysis. The separate taxes were adopted because different things might reasonably be subject to different taxes, just as different import duties may reasonably be imposed on coffee and steel. This explains why the tax system is as it is, but it does not explain why anyone might rationally conclude that it ought to be that way. Taxes must ultimately be judged in terms of their impact on the individual. A consideration of the impact of the income and estate taxes reveals the irrationality of the system of separate taxes; the irrationality is readily illustrated. This explains the dissatisfaction. A tax on "things" will not be consistent—except perhaps fortuitously—with any rational scheme for distributing tax burdens. In other words, there is no justification for the results when measured against the only criterion by which taxes can rationally be appraised. As a result, the outer limits of each tax cannot be defined with reference to any tenable objective of taxation, and such reference must be made in formulating a satisfactory definition.

On the other hand, even though the process by which the separate taxes were adopted is basically irrational, the effect may not be. Separate taxes may effect a distribution of burdens that roughly approximates the result that would have followed a con-

173. SELIGMANN, op. cit. supra note 68, at 514.
174. SELIGMAN, ESSAYS IN TAXATION 136 (10th ed. 1925). While Seligman noted that inheritances "clearly add to the ability of the individual," he stated that because they are "irregular" there is "no room for" them in a "logical income tax." Id. at 133-34.
175. Id. at 136. In 1925 E. R. A. Seligman wrote:
so far as the recipient of an inheritance is concerned, the accretion to his capital wealth through an inheritance is just as much income, in the broadest sense of the term, as that which comes from gifts or capital gains or other irregular or aleatory sources. Yet for practical reasons the inheritance is not included in the taxable income . . . .

176. This seems true by and large even if a tax is judged in terms of its effect on the growth and stability of the economy.
177. See text accompanying notes 46-55 supra.
conscious consideration of differences in personal circumstances. If the opposite were true, the increasing awareness of the impact on individuals probably would have demanded the abolition of separate taxes. This conclusion suggests that the major differences between incomes and inheritances must be analysed to determine whether these differences reflect, even roughly, a distinction between individual circumstances that justifies different tax burdens.\textsuperscript{178}

The dominant distinction between inheritances and the most common kinds of income lies in the irregularity of the former as opposed to the regularity of the latter. This factor might justify different treatment on the ground that the recipient of an inheritance may have a “bunching” problem. That is, under the progressive income tax, he may pay a higher tax than an individual who received the same amount over a number of years. Yet there may be no appreciable difference in the circumstances of the individuals that justifies a different tax. The resulting inequity could be eliminated by some sort of averaging device designed to spread the bunched income over several years. Averaging may not be administratively feasible, however, and therefore less satisfactory solutions might necessarily be adopted.

The most familiar alternate form of relief is to tax the irregular receipt at the lower capital-gain rate. This is a most inept means of dealing with the problem; for example, it may result in a tax on bunched income which is much lower than the total taxes that would have been paid if the amount of the receipt had been spread over the entire life of the recipient. This inept solution to the problem may nevertheless be regarded as better than no solution at all, and it does point out the distinction between irregular and regular receipts, in terms of a rational tax objective. Unfortunately, this does not contribute much to the solution of the basic problem of defining the term “gift.” The notion that inheritances receive special treatment because of their irregularity might justify a presumption against treating a receipt as a gift unless it is irregular.\textsuperscript{179}

\textsuperscript{178} Even if Congress did not act, even intuitively, in response to these distinctions, the courts may be justified in relying on them if doing so is the only means by which the statutory terms used by Congress can rationally be given meaning. This is merely an extension of the idea that courts not only can, but must participate fully in the law-making process. See, e.g., Standard Oil Co. v. United States, 221 U.S. 1, 69 (1911).

\textsuperscript{179} This can only be a presumption since there will be some regular receipts that must be treated as gifts unless the idea that words used in a statute have no meaning at all independent of the presumed purpose of the statute is carried to an absurd extreme. I reject that extreme position be-
But since there are obviously many forms of irregular receipts that are subject to the income tax, an additional theory would be required to determine which irregular receipts will be exempt from the income tax and which ones will not.

A second possible distinction between inheritances and income is that inheritances are usually transfers within an immediate family group. If the immediate family is regarded as a unit for purposes of taxation, then transfers of assets within the unit are of no tax significance because the heirs merely receive legal title to assets that they always considered their own. In the case of many small estates the immediate family, operating as a financial unit, receives most of the estate assets. To include such inheritances in taxable income might reasonably be considered unfair; in other words, if such receipts are to be taxed at all, it can be argued that the rate should be much lower than that on income. There may be other reasons as well for special treatment of modest estates where the breadwinner dies: a loss of his earning power has occurred and the family probably feels poorer rather than richer. It is a bad time to ask for taxes. The exemption of all cause it seems to undercut one of the basic objectives of a statute—the objective of providing people with a simple, straightforward means of knowing how they are going to be treated. Thus, where a father gives his adult son a check for $1,000 every year for twenty years at Christmas, I would say that the receipt should be considered a "gift" even if the sole purpose of the gift exemption is to provide special treatment for irregular receipts. This type of treatment can be defended, in terms of legislative intent, by pointing out that while the purpose of Congress was to provide special treatment for gifts, it also had a general purpose to create a document, the Internal Revenue Code, that would have some utility in itself for the people to whom it is addressed.

180. See Musgrave, The Theory of Public Finance 175 (1959). Compare the suggestion that support payments must be distinguished from gifts. See note 50 supra.

181. In fact, only anticipated income has been lost, and arguably such a loss is not cognizable in taxation, because the survivors are no worse off than families who never had a breadwinner to lose. This is, however, a somewhat Draconian view, to say the least. It does seem true that the person who has been living on an income of $10,000 per year and must adjust to an income of $5,000 has suffered a setback that leaves him in a somewhat worse position than the person who has never earned more than $5,000 per year. At the time of death there are, of course, other, less tangible losses as well. Perhaps the tax system should not attempt to assess and compensate for this kind of setback. But Congress has apparently thought otherwise in at least one other instance; it has exempted from taxation recoveries for personal injuries even where the recovery is for lost wages. Int. Rev. Code of 1954, § 104(a). Other kinds of damage recoveries have been exempt from taxation by administrative ruling and judicial decision. E.g., Hawkins v.
inherits from the income tax represents a poor solution to this kind of problem, and imposing an estate tax rather than an inheritance tax compounds the error.\textsuperscript{182} But the separate taxation of inheritances, even under an estate tax, may again seem a better solution than none at all. On this basis, if the only choice is between taxing death transfers under an estate tax and taxing them under the income tax, the choice of the estate tax may be reasonable.

At the other extreme are transfers of very large fortunes within a family. Here are the anti-dynastic objective,\textsuperscript{183} one of the principal objectives of death taxes, is relevant. For example, suppose that A inherits \$1,000,000 dollars on the death of his father and B receives \$1,000,000 dollars for the sale of a piece of otherwise worthless property on which oil is unexpectedly discovered. If the objective is to prevent perpetuation of wealth within a family, a higher tax should be imposed upon A than upon B. Stated in other terms, extreme wealth may be acceptable as long as everyone has an equal chance to achieve it.\textsuperscript{184} "This is essentially the justice of the distribution of prizes in an unrigged game that all can play."\textsuperscript{185} Much of this kind of attitude appears in statements made in the late 19th and early 20th centuries, when the basic contours of our tax system were being formed.\textsuperscript{186} Among the supporters of the income tax there was a discernible sentiment in favor of adopting much higher estate-tax rates than the then-contemplated income-tax rates.\textsuperscript{187} This sentiment was based largely upon the dislike of the perpetuation of wealth within families; in other words, upon

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\item[\textsuperscript{183}] 182. Under an inheritance tax a distinction can be made between gifts to immediate kin and gifts to strangers. Even under an inheritance tax no distinction has been made between those immediate kin who are dependent upon the decedent and those who are not.
\item[\textsuperscript{184}] 183. See text accompanying notes 124-30 supra.
\item[\textsuperscript{185}] 184. See BLUM \& KALVEN, THE UNEASY CASE FOR PROGRESSIVE TAXATION 86-87 (1953).
\item[\textsuperscript{186}] 185. Stein, \textit{What's Wrong With The Federal Tax System?}, 1 TAX REVISION COMPENDIUM, 86TH CONG., 1ST SESS. 107, 111 (Comm. Print 1959). The quoted sentence, in context, makes a point somewhat different from that for which it is used here. See also MUSGRAVE, \textit{THE THEORY OF PUBLIC FINANCE} 176 (1959).
\item[\textsuperscript{187}] 186. For example, Senator Norris proposed a top rate of 75\% for the estate tax at a time when there was no serious suggestion that the income-tax rates should be anywhere near as high. See text accompanying notes 97-100 supra.
\item[\textsuperscript{188}] 187. See DOS PASSOS, INHERITANCE TAX LAW § 1 (2d ed. 1895); PAUL, op. cit. supra note 65, at 65-66, 87-90; RATNER, op. cit. supra note 65, at 48-49, 97-98, 129, 192.
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a dislike of family dynasties supported by hereditary fortunes. Of course, the development of the estate and income taxes has not been consistent with this somewhat punitive attitude toward inherited wealth; generally speaking, the estate tax produces a lower tax burden than the income tax. There may, however, be hopes of altering this situation, and the fact remains that large inheritances evoke a different image than large receipts from other sources.

Summarizing the discussion of small and large inheritances, there may be acceptable reasons for exempting inheritances from the income tax and subjecting them to a separate tax system—even though the estate tax is a clumsy device for effectuating the presumed goals. The reasons suggested have to do with the fact that inheritances are usually transfers within a family. There will be many cases in which a "plain meaning" approach to statutory interpretation will require that transfers not falling within the intra-family category be treated as inheritances. In doubtful cases, however, it would be reasonable to hold that a transfer to a person who is not a family member should not be treated as an inheritance. And if "gifts" are thought to be transfers that are "like" inheritances, the same interpretive tool can be applied.

A third distinction between inheritances and income may be based on the motivations behind each type of payment; income is received in return for something of commercial value—a quid pro quo, while inheritances are usually received solely because of love or affection. As long as the courts attach significance to the common understanding of the meaning of statutory language, the distinction will play a significant role in the search for a solution to the gift-or-income problem. Thus, the presence or absence of a

188. See Bloch, Economic Objectives of Gratuitous Transfer Taxation, 4 Nat'l Tax J. 139, 140 (1951).

189. This assumption is probably justified as a general proposition. Yet if an estate is distributed among a large number of beneficiaries the estate tax may, depending on the beneficiaries, take a heavier toll than an income tax on each of the inheritances—especially if inheritances are subject to an averaging provision under the income tax.

190. See note 179 supra.
quid pro quo may be decisive as to a vast number of transfers and it may serve to limit the area of controversy. But a definition of quid pro quo for the purposes of the difficult cases arising under the gift exclusion and an analysis of its significance in relation to other factors will depend on the reason why it is considered relevant to that exclusion. Such a reason is difficult to discover. If personal income were thought of as shares of national income, and national income cannot increase in the absence of a quid pro quo, then there could be no increase in personal income without a quid pro quo. Henry Simons has pointed out, however, that the notion that total personal income for tax purposes cannot add up to more than national income is fallacious;\(^{191}\) if this is true, the quid pro quo distinction is useless in providing a definitional tool.

The significance of quid pro quo may lie in a distinction between earned and unearned income. Congress has, in the past, favored earned income.\(^{192}\) An explanation in these terms is inconsistent, however, with the fact that, in the lower ranges of income the estate and gift taxes provide a lower tax than that imposed on earned income. The absence of quid pro quo, therefore, is a significant characteristic of inheritances, but is useless in explaining why inheritances are exempt from the income tax.

Another possible distinction between "income" and inheritances is frequently asserted by those who strongly oppose the taxation of inheritances. The distinction is that inheritances are commonly regarded as "capital," while income is not.\(^{193}\) According to those who make this assertion, only an insidious tax system would permit the imposition of any tax on "capital." Even the most superficial analysis, however, reveals some very serious defects in the reasoning that must underlie this conclusion. Acceptance of the conclusion demands acceptance of the initial proposition that

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192. The means was the earned income credit, which was in force for most of the period from 1924 until World War II. Paul, op. cit. supra note 65, at 136, 177, 360.

In 1911 Seligman had stated:

Especially in modern times, with the immense growth of private fortunes, it has come everywhere almost instinctively to be recognized that an income derived solely from an individual's own strenuous personal exertions ought not to be treated in the same way as the income which comes, let us say, from government bonds or from the securities of a corporation in the management of which the bondholder or stockholder actually takes no part.

Seligman, op. cit. supra note 68, at 28–24.

193. See, e.g., Paul, op. cit. supra note 65, at 134; Schultz, op. cit. supra note 68, at 169.
people react differently toward periodic earned income on the one hand, and inheritances on the other. Presumably people equate inheritances with "capital" in the sense that they must be invested, rather than used for consumption. This is certainly not true of all inheritances; and many prudent individuals similarly feel compelled to save and invest a part of their earned income. Thus, the distinction is based on what is at best an imperfect factual assumption. Both large and small inheritances may be used for consumption. Moreover, if only relatively large inheritances are considered capital, the distinction may disappear in light of the fact that large, non-recurrent items of earned income are also usually invested rather than used for consumption. Consumption is usually adjusted to predictable, periodic receipts, and an argument for special treatment of large, non-recurrent receipts should not be limited to inheritances.

Even if inheritances are usually invested and earned incomes are usually used for consumption, there may be no basis for distinction. It might be argued that to impose a heavy tax on amounts that normally are invested would deplete the supply of funds available for investment and thereby impair economic growth and possibly even reduce the existing stock of capital. The prophets of gloom no doubt overstate their case on this issue. "No tax directly destroys capital." If the curtailment of economic growth is the point of major concern, other provisions of the tax law may more than offset any adverse effects of a high tax on inheritances. Phrased in these terms, the objection is somewhat less than valid; apparently it is a mere rationalization, rather than a motivating consideration behind the exemption of inheritances from the income tax system.

Even if the potential adverse effect on capital accumulation is a rational motivating factor in the adoption of the exemption, it adds nothing to the search for a definition of the term "gift." Arguably receipts should be treated as gifts if they are the kinds of receipts that are commonly regarded as "capital" in the sense of investments.

194. See HARRISS, op. cit. supra note 121, at 7.
196. See HARRISS, op. cit. supra note 121, at 7-9; SHULTZ, op. cit. supra note 68, at 201-06; BLOCH, supra note 188, at 141; BLUM, supra note 195, at 248.
197. The argument that the knowledge that accumulated wealth will be subjected to a substantial tax upon death will destroy, or at least impair, the incentive to save and invest has similar appeal and similar weaknesses. See SHULTZ, op. cit. supra note 68, at 206-07. This is quite similar to the proposi-
that they will ordinarily be invested, rather than used for consumption. The present understanding of human behavior, however, does not permit an accurate prediction of the type of receipts that will be invested, at least for the purpose of dealing with receipts whose status as "gifts" under the income tax has been the subject of litigation over the past forty years.

Nevertheless, the courts could make some effort to utilize the distinction between capital and income. They would, of course, be compelled to rely primarily on the unscientific data of personal experience; but they constantly rely on this type of process in making decisions. The courts might better decide cases on the basis of an intelligent estimate of whether a receipt is commonly regarded as capital, rather than concede that the decision must be made irrationally. The distinction between capital and consumable receipts would be useful in only a limited number of cases, and would provide only a negative presumption, but that might be better than no standard at all.

Another possible basis for objecting to taxing "capital" is that such receipts are not available for consumption and therefore should not be regarded as part of the measure of taxpaying capacity. This argument meets the problems of determining commonly held beliefs and attitudes discussed in connection with the immediately preceding argument. More fundamentally, it represents an implicit rejection of the theory that income is the best measure of taxpaying capacity. If our tax system favors receipts that the income tax impairs the incentive to work; it may be a fair description of the effect of the tax on some individuals, but not of the overall effect. "The effect of death taxation on the incentive to invest cannot now be estimated." Bloch, supra note 188, at 142. A high estate tax may well encourage greater accumulation, so that the after-tax amount equals what is regarded as a minimal estate. Andrew Carnegie thought that "captains of industry built up great fortunes, not so much for the sake of their posterity as for the pleasure involved in the struggle for wealth." Paul, op. cit. supra note 65, at 66. In addition, the effect of the entire tax system on capital accumulation must be considered; for example, what if the revenue gained from a higher inheritance tax were used to reduce the corporation income tax? Finally, the inclusion of inheritances in taxable income, subject to a fair averaging device, might well result in lower total death taxes than the present estate tax. Cf. Staff of Joint Committee on Internal Revenue Taxation, supra note 123, at 103, pointing out that "the estate tax produces more revenue than the inheritance tax at similar rates."

198. This is so because there will be many receipts that may be regarded as capital but clearly are not gifts, as well as some receipts that may not be regarded as capital and clearly are gifts. Compare discussion in note 179 supra.
in the form of inheritances because people do not consider them available for consumption, there is no reason to deny this favoritism to that part of earned income that is, by virtue of some personal compulsion, saved rather than invested. This would lead to a tax on expenditures or consumption rather than income.

Income, however, seems by far the more appealing measure of taxing capacity. This is, of course, a matter of value judgment; it cannot be "proved" and is difficult to explain. An expenditures tax favors receipts used to increase personal wealth; this tax can be ultimately justified only by accepting the theory that the tax laws should be used to enhance and reinforce tendencies toward inequality of wealth. This argument would obviously find little public support today.

Before leaving the topic of distinctions between incomes and inheritances, the argument that taxation of inheritances interferes with the transferor's right to enjoy his property must be disposed of. The argument attempts to establish a distinction based on the position of the donor rather than the donee. Surely no one would argue that if X pays his gardener 4000 dollars per year, the gardener should not be taxed because doing so interferes with X's "right" to use his property. The argument is equally without merit in the case where X pays 4000 dollars per year to his son, out of pure love and affection. While X probably does not want his son to be taxed, he is not so concerned about the gardener. Tax consequences, however, cannot be permitted to turn on considerations such as this.

199. See note 45 supra.

200. The accumulation of small amounts of capital may reflect the very respectable desire for security and self-sufficiency. To favor gifts and inheritances on this ground, however, is to discriminate egregiously against those who can satisfy the same desire only by setting aside a portion of their periodic earned income.

An expenditures tax would not necessarily significantly increase inequalities in wealth. Perhaps most people have a fixed saving goal that would not be affected by tax considerations.

201. This analysis may not do justice to the expenditures tax theory; such a tax can be defended on grounds of both equity and economic policy. See Kaldor, An Expenditure Tax (1955); Goode, Income, Consumption, and Property as Bases of Taxation, 62 Am. Econ. Rev. 327 (1962). See also Anthonio, Tax Reduction and Reform: A Lawyer's View, 63 Colum. L. Rev. 808, 809 (1963). Perhaps the basic appeal of the expenditure tax theory would explain why our federal income tax departs as much as it does from the accretion theory of income.

202. This attitude was expressed as follows in the dissenting opinion in Bromley v. McCaughn, 280 U.S. 124, 140 (1929): "The right to give away one's property is as fundamental as the right to sell it or, indeed, to possess it." The opinion goes on to state that a gift tax is a tax "on property."
CONCLUSION

This review of the theory and legislative history of the gift exclusion clearly indicates that the exclusion is not the product of a reasoned legislative choice and does not reflect, with any reasonable degree of precision, any legitimate objective of tax policy. Lacking purpose, the provision makes little if any sense, a fact that encumbers effective and consistent judicial construction of the statute. Several possible approaches to this problem may be briefly compared to determine the most workable method or methods of interpretation.

Under one approach the courts would become willing partners in the development of the law. There is, of course, a large area in which there is no opportunity to affect the application of the gift exclusion, however arbitrary it may seem. The courts are not free to eliminate the gift exclusion, regardless of their concurrence with the reasons for doing so. In ambiguous cases, however, the courts could accept guidance from the theory that points in that direction. Thus, a court might reasonably accept the theory that the ideal of a tax on accretions depends on a broad definition of income. Under this theory, the gift exclusion would be given as narrow an application as the language of the statute permits; the courts might adopt a rule sharply limiting, if not eliminating, the application of the gift exclusion to transfers made in a business context.

As a second approach, the courts might go even further in developing the law in accordance with their views of proper tax objectives. For example, while "income" should be defined broadly, a court could consistently adopt the theory that the income tax should be used to accomplish various social objectives such as relieving from taxation persons thought to be needy. The term

203. See text accompanying notes 41-62 supra.
204. See text accompanying notes 18-21 supra.
205. Willingness to adopt this kind of approach would depend on the view of the function of the income tax as discussed in note 60 supra. The use of the gift exclusion to accomplish this kind of objective is exceedingly capricious. For example, suppose an impoverished minister retires without any funds to live on and his congregation spontaneously establishes a pension fund for him or gives him a retirement "gift." Such payments have consistently been held to be within the gift exclusion. See, e.g., Schall v. Commissioner, 174 F.2d 893 (5th Cir. 1949); Rev. Rul., 55-422, 1955-1 Cum. Bull. 14. Such tax favoritism may be regarded as recognition of the recipient's meritorious occupation as well as his need. Yet if a provident, responsible congregation provides for a modest pension long in advance of retirement the amounts received are taxable income. Alvin T. Perkins, 34 T.C. 117 (1960).
"gift" might be construed, then, to encompass transfers made for charitable purposes, judged as objectively as possible.

The gift exclusion arguably constitutes a pro tanto rejection of the broad definition of income, and any attempt to apply the theory of this broad definition to limit the exclusion might be thought to exceed the limited lawmaking function of the courts. A court that accepted this view and that could find no applicable statutory purpose might consider that its only alternative was to attempt to determine the colloquial meaning of the statutory language. As suggested above, the question in each case would then be whether the transfer in question corresponded with the commonly held image of a gift.

A fourth approach would be to conclude that there is no statutory purpose, that none can be supplied from general principles, but that the legislative history does provide a clue to what Congress intended. Thus if gifts were thought by Congress to be like death transfers, and death transfers were treated specially because they were thought of as transfers within a family, then in doubtful cases, a court could construe the term "gift" to exclude transfers that bear no significant similarity to transfers within a family.

Any one of these approaches appears to be defensible, although the first seems by far the most appealing. Vacillation between the various approaches, however, is not defensible. Many of the lower court decisions are consistent with the first approach; some of the law seems consistent only with the second; and the Supreme Court decisions, and some of the lower court decisions, seem consistent with the third. The decisions do not clarify the reasoning process upon which they are based, and this fact is a principal source — together with the lack of legislative purpose — of the persistence of conflict and confusion. Suppose that the Supreme Court had written its opinion along the following lines:

"We are confronted with the problem of a statute whose purpose we are unable to determine. The legislative history is useless. We find in some lower court decisions a tendency to resolve the

206. See text accompanying notes 20--23 supra.
207. See text accompanying notes 179--89 supra.
208. See notes 24 & 34 supra.
209. See Crown, Payments to Corporate Executives' Widows, N.Y.U. 19th INST. ON FED. TAX 815, 826 (1961): "We venture the thought that widows can expect tax immunity only where the proof establishes that the directors' were concerned with the widow's financial plight, that the amounts bestowed were geared to the widow's economic needs and not equated to her departed husband's salary."
210. See text accompanying notes 6--11 & 26--32 supra.
issue in a manner calculated to accomplish social objectives (such as helping the needy) which, though commendable, are not the purpose of this statute and can only be accomplished under this statute in a most capricious fashion. We disapprove this tendency. On the other hand, we can understand and sympathize with a desire, manifested in many other lower court decisions, to limit the gift exclusion in accordance with the general policy (which we have endorsed in other cases) of defining income broadly. But we do not believe that that policy can be applied in this instance because it cannot be reconciled with the effect of the exclusion as applied to transfers whose status as ‘gifts’ cannot be disputed. Therefore, we are forced to adopt the admittedly unsatisfying approach of looking to the colloquial meaning of the term ‘gift.’ In our view this means that the question whether a transfer is a gift must turn on the state of mind of the transferor; on whether he was motivated, generally speaking, by pure beneficence.”

The Supreme Court could have indicated, in some such manner, a recognition of the nature of the problem, the appeal of competing solutions, and the reason for adopting its approach; in other words, it could have explained what it was doing and why. If it had done so, the conflict and confusion found in the lower court decisions could have been reduced, if not avoided. In fact, the Court merely indicated that the issue turns on the state of mind of the transferor — as if that proposition were self evident.

In Duberstein the Court arguably was bound to follow Bogardus and therefore was not free to make new law. A discussion of the merits of this argument exceeds the scope of the present Article. Even if the Court was bound by Bogardus, it should have used the Duberstein opinion as a vehicle for explaining Bogardus along the suggested lines. Otherwise there was little point in devoting its time to the case. If the meaning of Bogardus had been clear and the lower courts had merely been misled, by later cases, into rejecting the Bogardus rule, then a simple per curiam reaffirmation would have been sufficient. The history of post-Bogardus litigation, however, clearly indicates that Bogardus did not end the controversy and that a mere reaffirmation and restatement was not sufficient to prevent future controversy.

The gift exclusion is one of those provisions — by no means unique, especially in tax law — for which no statutory purpose can be found or supplied. This does not mean that a reasonable degree of certainty and predictability cannot be achieved; interpretive rules, where needed to remove ambiguities, can, of course, be developed. Yet, the rules that are developed will seem arbi-
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trary; as Karl Llewellyn pointed out, such rules will not "make sense." In an area such as taxation, different judges are likely to hold deeply seated values that conflict to a greater or lesser extent with the values held by other judges. In these circumstances the results in individual cases may reflect an implicit rejection of the arbitrary rule in favor of the judge's own view of the proper goals of taxation. In other words, judges can be expected to strive constantly to "make sense" out of a statute, in terms of their own value system. This apparently has happened in the gift cases. If consistency and predictability are to be achieved, an identification of the pertinent values and goals, and a clear explanation of the reasons why certain of these should or should not be regarded as controlling, is essential to an achievement of consistency and predictability. This is particularly important in an instance such as the Supreme Court's interpretation of the gift exclusion, where the objectives that were rejected have gained wide acceptance in other areas.

While the courts can reduce uncertainty and litigation, only Congress can resolve the basic issues in this area. Legislative reconsideration of the basic question of whether gifts and inheritances should be excluded from the income-tax base would be extremely useful. The problem of the proper tax treatment of gifts and inheritances raises a fundamental issue of tax policy: the proper standard for measuring tax-paying capacity. If this difficult problem is not solved, the provisions of the tax system will be irreconcilable with any intelligible, coherent scheme of values; the system's dominant theme will be the capriciousness that results from accepting on grounds of transitory political expediency first one value then its antithesis. Such a tax system may be regarded as the inevitable product of our non-authoritarian political system, having the virtue of accommodating, with a minimum of antagonism, the conflicting demands of individuals and groups with widely divergent values. This view is unacceptable to me, at least as applied to the issues considered in this Article. I find no evidence to support the view that the gift exclusion is a product of the kind of compromise, or that the reification of gifts is the kind of psychological device, that has social utility. I do not believe that the issues raised by the gift exclusion are sufficiently difficult or conflict-laden to justify legislative avoidance. Moreover, I feel certain that identification and optimum resolution of the pertinent diverse values in this area has not been achieved.

211. Llewellyn, Remarks on the Theory of Appellate Decision and Rules or Canons About How Statutes are to be Construed, 3 VAND. L. REV. 395, 400 (1950).