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The Changing Meaning of "Gift": An Analysis of the Tax Court's Decision in *Carson v. Commissioner*

Jeffrey Schoenblum

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The Changing Meaning of "Gift": An Analysis of the Tax Court's Decision in *Carson v. Commissioner*

Jeffrey Schoenblum*

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I. INTRODUCTION

The complexity of detail that characterizes the Internal Revenue Code (Code) has been the subject of intense criticism¹ and only

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1. In January 1978 a major conference on federal income tax simplification was held under the joint auspices of the American Law Institute and the American Bar Association. The introductory speaker, Sidney I. Roberts, proposed a "Commission on Complexity." Al-

faint praise.² Yet, one of the more striking anomalies of the Code is that its often suffocating detail coexists with the sparest definitions of many key terms.³ The term "gift" is a prime example. Although its meaning plays an instrumental role in income and gift taxation, the Code nowhere defines the term. As a result, the task of fleshing out its meaning has largely fallen on the Treasury, through the issuance of regulations and rulings, and on the courts, which over the years have crafted a unique common law.⁴

One of the more peculiar and provocative aspects of this common law is that the term "gift" has been accorded quite distinct meanings for purposes of income taxation and gift taxation.⁵ Follow-

though not sanguine regarding its chances for simplifying the Code, he saw the alternative as one of leaving "the same forces at work to work their further deterioration." Roberts, *Simplification Symposium, Opening Remarks of Sidney I. Roberts, January 4, 1978*, 34 TAX L. REV. 2 (1978). See also McDaniel, *Simplification Symposium, Federal Income Tax Simplification: The Political Process*, 34 TAX L. REV. 27 (1978); Roberts, *Simplification Symposium Overview: The Viewpoint of the Tax Lawyer*, 34 TAX L. REV. 5 (1978). Roberts' comments were largely the outgrowth of a prior report criticizing the statutory complexity of the income tax law. Roberts, Friedman, Ginsburg, Louthan, Lubick, Young, & Zeitlin, *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 325 (1972) (report adopted by New York State Bar Association, Tax Section, Committee on Tax Policy). Almost all these discussions of the complexity question have focused on the income tax.

2. One commentator, in particular, has argued that:

A practitioner is not expected to understand, much less be an expert on the entire Code, which purports to govern all economic activity. Perhaps fewer than 200 people in the country could work with the recently repealed minimum distribution rule, with its 50 pages of regulations in small type. But those who needed to, did; and the detail of the regulations achieved a high degree of predictability.

Kingson, *The Deep Structure of Taxation: Dividend Distributions*, 85 YALE L.J. 861, 862 (1976) [hereinafter cited as *Dividend Distributions*]. The author contends that although most criticism has been directed at statutory complexity, the idea that tax law can be made more understandable by simplifying the language simply does not respond to the "essential difficulty and challenge of tax practice." *Id.* In his view, the difficulty in understanding tax law "most frequently arises from failure by those who use basic concepts to grasp their meaning." *Id.* at 861. One such term singled out is "gift." *Id.* at 861-62.

Kingson's remarks apparently struck a raw nerve. Martin Ginsburg, a prominent tax practitioner and co-author of the New York State Bar's *A Report on Complexity and the Income Tax*, *supra* note 1, fired off a blistering response. Ginsburg, *Correspondence: The Deep Structure of Taxation*, 86 YALE L.J. 798 (1977). Kingson replied in kind. Kingson, *Author's Reply*, 86 YALE L.J. 806 (1977).

3. In this regard, Kingson has commented on "the large proportion of Supreme Court tax cases that have had to determine the meaning of everyday words: interest, dividend, sale, gift, trade or business, loss and bad debt, debt and stock, primarily, solely, and property." *Dividend Distributions, supra* note 2, at 862 (footnotes omitted).

4. For a general discussion of these developments, which have primarily occurred with regard to the income tax meaning of "gift," see B. BITTKER & L. STONE, *FEDERAL INCOME, ESTATE, AND GIFT TAXATION* 127-45 (4th ed. 1972). See also Klein, *An Enigma in the Federal Income Tax: The Meaning of the Word "Gift,"* 48 MINN. L. REV. 215 (1963).

5. See, e.g., *United States v. Davis*, 370 U.S. 65, 69 n.6 (1962); *Farid-Es-Sultaneh v. Commissioner*, 160 F.2d 812, 814 (2d Cir. 1947). For both income tax and gift tax purposes, the term has a meaning other than the traditional common law meaning. See *Commissioner v. Duberstein*, 363 U.S. 278, 285 (1960); *Commissioner v. Wemyss*, 324 U.S. 303, 306 (1945).

ing a trilogy of landmark decisions,⁶ the term has come to mean for income tax purposes a transfer motivated by "detached and disinterested generosity."⁷ To the extent that this was the transferor's dominant motivation, the transfer is a gift within the meaning of section 102(a) of the Code, and the value of the property transferred is not includable in the transferee's gross income.⁸

In contrast to the inquiry into motive called for by the income tax definition of gift, the gift tax meaning assigned to the term traditionally has been a far more objective standard. Section 2501(a) of the Code imposes the gift tax on "taxable transfers," that is, "on the transfer of property by gift . . . by any individual."⁹ This provision has required the interpretation of the scope of the terms "transfer,"¹⁰ "property,"¹¹ and "individual."¹² Few disputes, however, have arisen over the definition of gift, because it has been assumed that the meaning of the term can be derived directly from

6. See *Commissioner v. Duberstein*, 363 U.S. 278 (1960); *Stanton v. United States*, 363 U.S. 278 (1960); *United States v. Kaiser*, 363 U.S. 299 (1960).

7. J. FREELAND, S. LIND, & R. STEPHENS, *FUNDAMENTALS OF FEDERAL INCOME TAXATION* 76-77 (2d ed. 1977). This is actually a shorthand statement of the standard. The complete rubric, which was derived from early cases, is: a transfer that "proceeds from a detached and disinterested generosity, . . . out of affection, respect, admiration, charity or like impulses." *Commissioner v. Duberstein*, 363 U.S. 278, 285 (1960). But, as the Supreme Court makes clear, this simply presupposes inquiry into the "dominant reason" for the transfer. Ultimately, the triers of fact are left with the task of applying their "experience with the main-springs of human conduct to the totality of the facts" in order to determine the dominant reason for the transfer. *Id.* at 289. For a trenchant critique of the Court's handiwork in *Duberstein*, see Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 88-91 (1960).

8. I.R.C. § 102(a) provides: "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance."

9. I.R.C. § 2501(a).

10. See, e.g., *Burnet v. Guggenheim*, 288 U.S. 280 (1933).

11. See, e.g., *Bradford v. Commissioner*, 34 T.C. 1059 (1960).

12. The requirement that the donor be an "individual" was added to the Code in 1932. The accompanying committee reports suggested that gifts by corporations might be considered as made by their individual shareholders. H.R. REP. NO. 708, 72d Cong., 1st Sess. 27 (1932); S. REP. NO. 665, 72d Cong., 1st Sess. 39 (1939), reprinted in 1939-2 C.B. 457, 476-77. Taking its cue from the legislative history, the Treasury Department has promulgated regulations that, in fact, impose the gift tax on the individual shareholders of a corporation that makes a gift. Treas. Reg. § 25.2511-1(h)(1), 26 C.F.R. § 25.2511-1(h)(1) (1978).

Although there is no requirement that an individual be the donee of a gift, some courts have tended to attribute gifts to individuals, though the transfer has actually been made to a legal entity. The issue has arisen primarily because donors have sought to maximize their \$3000 annual gift tax exclusions per donee, I.R.C. § 2503(b), by claiming gifts were really being made to beneficiaries or shareholders, rather than to a trust or corporation itself. See, e.g., *Helvering v. Hutchings*, 312 U.S. 393 (1941) (gift to trust is attributable to beneficiaries); *Heringer v. Commissioner*, 235 F.2d 149 (9th Cir.), cert. denied, 352 U.S. 927 (1956) (gift to closely held corporation is attributable to shareholders). But see *Heringer v. Commissioner*, 21 T.C. 607 (1954) (following several earlier Tax Court decisions holding that gifts had been made to corporations and not their shareholders). See also Treas. Reg. § 25.2511-1(h)(1), 26 C.F.R. § 25.2511-1(h)(1) (1978).

section 2512(b), which provides that "[W]here property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift" ¹³ To be sure, there have been numerous cases concerning the meaning of "adequate and full consideration," ¹⁴ "money or money's worth," ¹⁵ and "value." ¹⁶ The Treasury also has promulgated regulations that eliminate the section's application to bad business bargains by providing that "a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from donative intent), will be considered as made for an adequate and full consideration in money or money's worth." ¹⁷ Nevertheless, the fundamental gift tax meaning of gift—the excess of the value of the property one gives over the economic value of what one receives as consideration—has remained intact.

This commonly accepted meaning of gift, however, has been seriously eroded by a recent Tax Court decision, *Carson v. Commissioner*, ¹⁸ which leaves the meaning of this critical term in limbo. In a rare display of disunity, the sixteen-judge court, while holding that certain political contributions were not gifts, ¹⁹ offered up five separate opinions revealing serious differences over the meaning of gift as well as over the authority and wisdom of the Tax Court formulating a new meaning for the term.

This Article will focus on the *Carson* case in an effort to identify the emerging meaning, if any, of gift. Following a consideration of the factual background of the case in Part II, Part III will analyze

13. I.R.C. § 2512(b).

14. See, e.g., *Harris v. Commissioner*, 340 U.S. 106 (1950).

15. See, e.g., *Commissioner v. Wemyss*, 324 U.S. 303 (1945).

16. See, e.g., *Merrill v. Fahs*, 324 U.S. 308 (1945).

17. Treas. Reg. § 25.2512-8 (1960). This exception, in fact, introduces an inquiry into the state of mind of the transferor, despite the statement in Treas. Reg. § 25.2511-1(g), 26 C.F.R. § 25.2511-1(g) (1978), that the question whether a transfer is a gift depends upon "objective facts . . . rather than on the subjective motives of the donor." The issue of motive might come into play, for example, in determining whether a transfer had been made "free from any donative intent." See generally D. KAHN & L. WAGGONER, *FEDERAL TAXATION OF GIFTS, TRUSTS, AND ESTATES* 427 (1977); C. LOWNDES, R. KRAMER, & H. MCCORD, *FEDERAL ESTATE AND GIFT TAXES* 779-80 (3d ed. 1974) [hereinafter cited as *ESTATE AND GIFT TAXES*].

Another important aspect of this exception is that it is not limited to ongoing business activities. Any transfer for profit motives or in settlement of a claim probably will fit within the scope of the exception. See, e.g., *Beveridge v. Commissioner*, 10 T.C. 915 (1948), acq. 1949-1 C.B. 1 (transfer in settlement of bona fide dispute over property between mother and daughter is not a gift when in making the transfer the mother was motivated by economic considerations rather than love and affection). See also text accompanying note 78 *infra*.

18. [1978 Transfer Binder] TAX CT. REP. (CCH) Dec. No. 35,536 (1978) appeal filed (10th Cir. Feb. 16, 1979) (docket no. not yet assigned).

19. Thirteen of the sixteen members of the court joined in holding that the political contributions at issue in the case were not gifts subject to gift tax.

critically and in-depth each of the five *Carson* opinions in an effort to decipher the various currents at play and any common ground that may still be shared by a majority of the court. Finally, Part IV will consider the decision's likely consequences and the long-term prospects for a settled meaning for gift, one that is not only workable, as is the case with the section 2512(b) formulation, but also sensible in light of the policy objectives underlying gift taxation.

II. THE FACTUAL BACKGROUND OF *Carson*

The facts of *Carson* hardly suggested the explosive potential that would so splinter the Tax Court. As Judge Wilbur made clear in his opinion, which was reviewed by the full court, "the sole issue we must decide in this case is whether expenditures made by petitioners to finance the election campaigns of various individuals for public office constitute transfers taxable as gifts."²⁰ Over a period of four years David Carson had made a series of rather substantial political contributions. The first such transfer occurred in 1967 when he deposited \$83,654 in a segregated account at the Guaranty State Bank of Kansas City, Kansas. Money in the account was dispensed during the year at Carson's direction to pay campaign expenses of various local candidates for election. In the subsequent years at issue, Carson chose not to establish a separate political fund. Instead, he dispensed sums directly to the campaign committees of state and local candidates or expended funds directly on their behalf.²¹ Typically, the money covered the cost of stationery, postage, printing, the employment of public relations experts, and the purchase of media time and newspaper advertisements.²²

In setting forth the stipulated facts, Judge Wilbur took special note of Carson's motives in making local and statewide political contributions. Specifically, Carson owned real property used in the production of oil and gas as well as agricultural land in the process of being made irrigable. He "was concerned about an oil depletion

20. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3696.

21. During 1968, Carson transferred \$8000 to the Chipman for attorney general campaign. In addition, he expended \$21,745.97 for advertising and postage expenses on behalf of that campaign. Two years later in 1970, Carson contributed \$19,000 to the general campaign fund of Bouska for attorney general, and \$14,059 to the general campaign fund of Frizell for governor.

In 1971, Carson continued his practice of making substantial political contributions. He gave \$40,404.04 to the Neath for mayor campaign, while retaining full direction and control over the disbursement of these funds for campaign expenses. In addition, he expended \$9000 for advertising and postage expenses on behalf of the candidate. Carson also transferred \$2000 to the Matson for Commissioner of Finance campaign, while once again retaining control over the expenditure of the funds. He also expended a total of \$4,609.24 directly for advertising and postage expenses of the Matson campaign. *Id.* at 3697.

22. *Id.* at 3699.

tax being imposed, and also was apprehensive that the State might impose water table levels in western Kansas generally conflicting with his irrigation efforts."²³

Apart from these property interests, which could be seriously threatened by adverse government policies and regulations, Carson had other "politically sensitive" interests. For some time he had owned a large stock interest in a major Kansas City bank. He also was a member of a law firm that had been retained to represent the Kansas City Urban Renewal Agency and had been employed by the city as professional counsel in procedures to annex the Fairfax Industrial District into Kansas City. Aside from these retainers, Carson "anticipated that his participation in the campaigns would result in referral of legal business of a general nature by the people he met during the course of the campaign as well as individuals he assisted."²⁴ Focusing on the individuals to whom contributions had been made, Judge Wilbur concluded that Carson had "selected the candidates he would support by singling out those he thought would be the most compatible with the advancement of his property interests, and would be the best for the business of his law firm."²⁵

The contributions by Carson were made in 1967, 1968, 1970, and 1971.²⁶ Both Carson and his wife filed gift tax returns for these years.²⁷ None of the returns filed by Carson or his spouse, however, reported any of the political contributions or expenditures on behalf of candidates as taxable gifts. The Internal Revenue Service (Service) mailed statutory notices of deficiency to the Carsons in September 1974. On the basis of slightly more than \$200,000 in contributions,²⁸ a gift tax deficiency of \$5,237.15 was asserted against each, with Mrs. Carson's liability apparently arising as a result of her having joined with her husband in making split gifts during the periods in question.²⁹ Rather than pay the asserted deficiencies, the

23. *Id.*

24. *Id.*

25. *Id.* With regard to certain candidates, personal factors may have come into play. It is noted in the opinion that Carson knew "Mr. Matson well" and that he had done legal work for both Matson and Neath. Judge Wilbur does not develop this further, though the relationship of the parties is, in fact, critical under the reasoning set forth in his opinion. See note 45 *infra* and accompanying text.

26. See note 21 *supra*.

27. Gift tax returns for the calendar years 1967 and 1968 were filed by Carson on April 12, 1969. Returns for 1970 and 1971 were not filed until May 23, 1974. Carson's wife filed returns for all the periods involved on May 23, 1974. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3699.

28. See note 21 *supra*.

29. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3697n.3. I.R.C. § 2513(a) permits spouses to consent to having all gifts made by either one during a particular calendar quarter treated as made one-half by each. In addition to her liability arising under the gift-splitting provision, the Service asserted further tax due from Mrs. Carson in the amount of \$284.09.

Carsons filed a petition in the Tax Court challenging the Service's contention that political contributions are taxable gifts.³⁰

III. THE FIVE *Carson* OPINIONS

Only one of every five decisions of individual Tax Court judges is reviewed by the entire court.³¹ In most cases, the trial judge's disposition is the final one. Thus, the intense divisions that boiled to the surface in *Carson* and resulted in no majority opinion represent a unique and extraordinary occurrence.³² Consideration of these opinions reveals that they are not mere disagreements over fine, technical points, but rather that they reflect major philosophical differences over the meaning of the term "gift" as well as the role that the Tax Court should play in developing that meaning.

A. Judge Wilbur's Opinion

Judge Wilbur's opinion undoubtedly served as the catalyst sparking the strident divisions in *Carson*. His objective was clear—to compel the court to rethink the meaning of gift in light of the purposes of the gift tax and to edge it away from its inflexible application of the section 2515(b) arithmetic formulation of what is a gift. Unfortunately, the ambiguities in his own formulation of a rule as well as his reliance on extremely ambivalent legislative history obscure his overriding objective, making his opinion an entirely unsatisfactory resolution of the issue at hand. Yet, despite its flaws, his opinion still was able to attract the support of six other judges,

The Service claimed that Mrs. Carson's failure to file tax returns for 1967 and 1968 in a timely fashion had not been shown to have been due to reasonable cause. Without such a showing, § 6657(a) requires an addition to tax as a penalty. Since it was ultimately held that Mrs. Carson had made no gifts and therefore was not required to file a return, the claim for the extra \$284.09 also was defeated.

30. The Carsons also argued that the deficiencies were barred by the relevant statute of limitations. The court described this contention as "plainly without merit." [1978 Transfer Binder] TAX CT. REP. (CCH) at 3696n.2. If the argument had had merit, it would have offered an especially narrow ground on which to decide the case. Whether the court would have opted for that narrow approach is open to considerable doubt. See text accompanying note 78 *infra*.

31. See S. SURREY, W. WARREN, P. McDANIEL & H. GUTMAN, FEDERAL WEALTH TRANSFER TAXATION 30 (1977) [hereinafter cited as WEALTH TRANSFER TAXATION]. The decisional process employed by the Tax Court is quite unique:

The Tax Court judge who hears a case will, after considering the evidence and submissions of the parties, write an opinion which is then referred to the Chief Judge for consideration. The Chief Judge either permits the trial judge's opinion to constitute the decision of the Tax Court or refers the case to the full court, which then decides the suit en banc (resulting in a decision "reviewed by the Court").

M. GARBIS & A. SCHWARTZ, TAX COURT PRACTICE ¶ 1-2, at 1-6 (1974).

32. During the Tax Court's entire 1977-78 term, 87 decisions were officially reported. Of these, there was only one case in which there was no majority opinion. See *Carriage Square, Inc. v. Commissioner*, 69 T.C. 119 (1977).

making it the plurality position and indicating strong support for the views he expressed.³³

Judge Wilbur made four major arguments in support of his conclusion that Carson's political contributions were not gifts. First, he posited the novel concept that transfers to unrelated social and political entities that further the transferor's "objectives in life" are not gifts.³⁴ Second, he argued that political contributions should not be taxed since their taxation would not further the original purpose of the gift tax—to deter *inter vivos* transfers made to avoid the estate tax. Third, he maintained that a long history of failure to impose the gift tax on political contributions estopped the Internal Revenue Service from subsequently altering its policy and taxing such transfers. Finally, Judge Wilbur expressly declined to decide the case on narrower grounds that would have avoided a broad redefinition of gift.

(1) The Nontaxability of Transfers Intended To Further the Transferor's Personal Objectives

In delineating his views, Judge Wilbur begins by distinguishing transfers to a candidate for the candidate's personal use, which are to be treated as gifts, and transfers to a candidate qua candidate, which would not be gifts. In the latter case, according to Judge Wilbur, the candidate is simply a vehicle through which the transferor uses his "resources to promote the social framework [he] considers most auspicious to the attainment of his objectives in life."³⁵ The objectives need not be exclusively economic in nature, as was the case in *Carson*. "[O]thers may focus on a social structure advancing their own notions of social justice, or conditions they deem essential for world peace or public order."³⁶ Regardless of the objective,³⁷ however, the crucial factor is that the transferee is simply

33. Judge Wilbur was joined by Chief Judge Featherston and Judges Scott, Fay, Dawson, Irwin, and Wiles.

34. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3701.

35. *Id.*

36. *Id.*

37. Presumably, the objective of the transferor does not actually have to be attained. Otherwise, there would necessarily be a "wait-and-see" requirement that could suspend the determination of tax liability in many cases.

It is less clear whether the objective that the transferor has must be of a particular quality. Judge Wilbur refers to "economic aspirations," "social justice," and "world peace or public order" as possible ends of the transferor served by his contribution. *Id.* But would less noble and more personal goals also qualify? For example, if a contributor who was defeated by the current incumbent in the previous election gives to the incumbent's current challenger, will the contribution be exempt from taxation? What if the contributor's reason for giving is that he will derive intense personal satisfaction out of seeing defeated an individual who defeated him?

“the means to the ends of the contributor”³⁸ and is not the true object of his bounty.

This approach to the meaning of gift represents a radical departure from the commonly understood gift tax conception of the term.³⁹ Most significantly, the approach appears to call for an inquiry into the transferor's motive. Whereas previously a transferor would be taxed to the extent he had received less than adequate and full consideration in exchange for his transfer, he might now escape taxation by manifesting the requisite *Weltanschauung*. Specifically, unabashed self-interest would appear to cloak the transferor with immunity from gift taxation.⁴⁰ Moreover, much of the administrative efficiency and predictability resulting from the section 2512(b) objective standard would be sacrificed.⁴¹ The same confusion that has plagued the subjective income tax conception of gift⁴² would threaten to ensnarl the gift tax meaning of the term. Indeed, Judge Wilbur has tried his hand at semantics with very broad-brushed strokes, leaving vast areas of uncertainty and contradiction.

For example, although Judge Wilbur's test turns on the transferor's motive, which is often difficult for the trier of fact to establish,⁴³ the opinion fails to allocate the burden of proving or disproving the requisite state of mind,⁴⁴ and does not specify the appropriate disposition in the case when motives are mixed, a not uncommon situation.⁴⁵ Thus, in the political context, a donor might contribute to a candidate who is also a close associate or relative. While recognizing that transfers to a related party or a “natural object of

38. *Id.* Apparently, the fact that the transferee benefits incidentally is irrelevant.

39. See text accompanying note 5 *supra*.

40. *But see* note 37 *supra* and accompanying text. The self-interest may have to be of a special quality. *Id.*

41. In *Commissioner v. Wemyss*, 324 U.S. 303, 306 (1945), the Supreme Court stressed: “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.’ [sic] It formulated a much more workable external test”

42. For discussions of these difficulties, see Griswold, *supra* note 7; Hochman & Tack, *A Gift Is Not a Gift Until the Court Says It Is a Gift*, 43 TAXES 578 (1965); Klein, *supra* note 4; 6 *LOY. L.A. L. REV.* 234 (1973).

43. In the income tax setting the search for motive has taken on a metaphysical tone. See Hochman & Tack, *supra* note 42, at 583. Indeed, one court has likened it to Gestalt theory. *United States v. Pixton*, 326 F.2d 626, 628 (5th Cir. 1964).

44. The extent of appellate review also is open to doubt. If the income tax test is any guide, the appellate courts will be deprived of any consequential role, since they will only be able to overturn findings that are “clearly erroneous.” This virtually assures unpredictability and diversity of result. See Griswold, *supra* note 7, at 88-91. See also *United States v. Stanton*, 287 F.2d 876, 877 (2d Cir. 1961). *But see* *Poyner v. Commissioner*, 301 F.2d 287 (4th Cir. 1962) (one of a limited number of cases in which the Tax Court's findings have been held erroneous).

45. For example, there is no directive to identify the dominant reason for the transfer as in the income tax setting. See note 7 *supra*.

the donor's bounty" may pose difficult problems and require "careful scrutiny of all the facts,"⁴⁶ Judge Wilbur fails to indicate the criteria by which a particular case should be decided.

Even when mixed motives are not involved, the standard proves troublesome. Suppose for a moment that Carson had transferred large sums of money to an unrelated candidate's campaign fund, doing so out of an egotistical desire to be a "king maker"—indeed, in terms of their social and political affiliations the contributor and candidate were totally alienated. Nevertheless, the candidate still would be serving as a vehicle for the end sought by Carson, although admittedly an end of a highly personal quality.

This raises the question whether an exclusively self-interest motive for the transfer will be enough to insulate the transfer from gift taxation. Based on Judge Wilbur's recitation of the appropriate test, the self-interest may have to be of a certain quality; that is, it may have to be the kind effected through "the promotion of [a particular] social framework."⁴⁷ Of course, this would leave our "kingmaker" with a taxable transfer that some other political contributors would not have. It also would encourage him to conceal his true motive and construct a record establishing the tax-free motive. This elevation of form to a position of preeminence would be without justification, especially since, from a policy perspective, the motives of the contributor do not have a relationship to any ac-

46. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3700. For Judge Wilbur, a close relationship between transferor and transferee is not, in and of itself, enough to make the transfer a gift. Rather, he appears to consider it as some evidence that the transfer was intended to benefit the transferee personally rather than to use the transferee merely as a vehicle for the transferor's own ends. *See id.*

47. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3701. This dovetails with Judge Wilbur's other requirement that the transferor's "objectives in life" be served. *See* text accompanying note 35 *supra*. Several possible combinations come to mind. First, a contributor may give to a campaign fund to assist in the election of a candidate who shares his interest in achieving social justice in the world. For Judge Wilbur, this clearly would not be a gift. A social structure is being promoted, which happens to accord with the contributor's objective of introducing social justice in the world.

The rule becomes more difficult to apply when either the elements of "promotion of the social framework" or the "objectives in life" of the transferor is absent. For example, a contribution to a good friend who is running for office, and which is made solely because he is a good friend, might be considered a gift by Judge Wilbur, although it is a political contribution and does further an objective in the life of the transferor—that is, preserving a close friendship.

On the other hand, a contributor's objectives may be tied to vital, self-serving business goals, as in *Carson*. While a campaign contribution may effectively purchase influence for him if his candidate is elected, he cannot be said to have promoted a particular social framework, unless one is prepared to place influence-buying in this category. This suggests that the requirement that the transfer be used to promote a conducive social framework is so attenuated in meaning that it may really mean anything but transfers for the benefit of the transferee.

knowledgeed purpose of the gift tax.⁴⁸

Moreover, as currently stated, Judge Wilbur's standard apparently requires not only a demonstration that the transferor's resources were used to promote a particular social framework, but also that the transferor "considered" that framework to be the one "most auspicious to the attainment of his objectives in life."⁴⁹ But can Judge Wilbur really be contemplating yet another inquiry into the state of mind of the transferor?⁵⁰ Furthermore, what does he mean by "social framework?"⁵¹ How likely is it that the trier of fact would have found that Carson was using his resources to promote a particular social framework when he contributed to political candidates on the state and local level? Apart from these ambiguities, Judge Wilbur's seriousness about the standard he proposes is unclear. For example, the opinion concludes rather perfunctorily that a contribution to a candidate for his personal use is a gift.⁵² But is this correct under Judge Wilbur's own test? The transfer for the candidate's personal use may actually influence the candidate to give more weight to the views expressed by the transferor and may even suc-

48. See text accompanying note 60 *infra*.

49. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3701.

50. This raises an interesting question as to burden of proof. See note 44 *supra*. How does a contributor establish that he considered the particular social framework promoted by his resources to be the one "most auspicious to the attainment of his objectives in life"? Must he actually show that consideration was given to other alternatives? If the evidence shows that he made a spur-of-the-moment contribution on the basis of a hell-raising speech by the candidate, what would be the result, even assuming the social framework most conducive to the attainment of his objectives in life was effectively promoted?

51. See note 47 *supra*.

52. This conclusion is largely based on Revenue Procedure 68-19, 1968-1 C.B. 810, 811, which provides:

Political funds are not taxable to the political candidate by or for whom they are collected if they are used for expenses of a political campaign or some similar purpose.

However, any amount diverted from the channel of campaign activity and used by the political candidate for any personal purpose is income taxable to such candidate

Judge Wilbur interprets this Revenue Procedure as supporting his distinction between political contributions, which are not for the candidate's personal benefit, and gifts. The analogy, however, is too strained to be sustained. The Revenue Procedure, which is concerned exclusively with income taxation, correctly excludes contributions from the candidate's income, presumably because the income tax is imposed on accessions to wealth. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955). There is no such accession when the candidate is obligated to use the funds for campaign purposes. See Lehrfeld, *The Gift Tax Implications of Political Contributions*, 54 A.B.A.J. 1032 (1968). In fact, the Code currently exempts political contributions from income only when the sums contributed go into a segregated fund or to a qualifying political organization and are used for a qualified campaign purpose. See generally I.R.C. § 527.

By contrast, the gift tax is a transfer tax. Concern over to whom the transferred property flows, whether the transfer is directly to the donee, and whether the donor derives any benefit should all be irrelevant, except insofar as these factors define the term "gift." Revenue Procedure 68-19 offers no assistance in this regard since it is simply concerned with the question of to whom the campaign contribution should be attributed as "income."

ceed more in this regard than would a typical contribution to the candidate's campaign committee.⁵³

In addition to these difficulties with the formulation, the motive test suffers from yet another major flaw. By judicial fiat, the entire system of charitable contributions would be undermined. Congress has provided that contributions to certain tax-exempt organizations, which are exclusively religious, charitable, scientific, literary, or educational in purpose, will be deductible in calculating the value of gifts subject to the gift tax.⁵⁴ Contributions to other tax-exempt entities, most notably organizations operated for "the promotion of social welfare," business leagues, and chambers of commerce, do not qualify for the deduction.⁵⁵ Judge Wilbur's opinion, however, would alter this scheme since contributions to these entities almost certainly could be described as made for the purpose of fostering a social framework conducive to the transferor's goals in life and thus would not be regarded as gifts. Moreover, as Judge Chabot emphasizes in dissent,⁵⁶ the very availability of the gift tax deduction for contributions to only certain types of organizations strongly suggests that Congress regarded transfers to these as well as nonqualifying entities as gifts subject to tax. Otherwise, the charitable contribution deduction would not have been necessary at all, let alone on a highly selective basis.

Finally, it is important to note that Judge Wilbur's standard does not actually say what a gift is. Rather, it indicates some of the transfers that are not gifts. This distinction produces an especially destabilizing impact. It makes clear that the objective standard set forth in section 2512(b) of the Code is not an absolute one, but it leaves unanswered the future role and scope of that section. For example, will section 2512(b) still apply in all cases in which transfers are not made to promote a particular social framework in furtherance of the donor's life objectives? Furthermore, if the court was

53. Doubt about Judge Wilbur's commitment to his standard is also raised by his treatment of *Du Pont v. United States*, 97 F. Supp. 944 (D. Del. 1951). In that case, a contribution had been made to the National Economic Council, an organization having as its purpose publicizing the virtues of private enterprise, a viewpoint shared by the transferor. The court likened him to a contributor to a political party and upheld the imposition of gift tax.

Judge Wilbur distinguished this case on the ground that it did not involve contributions to a candidate. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3702n.9. Nevertheless, it was a use of resources to promote a social structure that clearly would accomplish the transferor's objectives.

54. I.R.C. § 2522(a)(2). These are the more prominent types of tax-exempt organizations specified. The list also includes organizations serving such diverse objectives as international amateur sports competition and the prevention of cruelty to children and animals.

55. I.R.C. § 2522(a).

56. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3708-12.

willing to carve out one exception, will it be prepared to carve out others on the basis of equally unpersuasive rationales? In short, after Judge Wilbur's opinion we are still left without a comprehensive, explicit definition of gift. In addition, however, the viability of the workable, objective standard derived from section 2512(b) has now been severely cast in doubt.⁵⁷

(2) Political Contributions Should Not Be Treated as Gifts Since Their Taxation Would Be Unrelated to the Purpose of the Gift Tax

Admittedly, Judge Wilbur does offer an approach for ascertaining whether there has been a gift transfer. Specifically, he foresees a resort to the legislative history to determine whether taxing the transfer would further the purposes of the gift tax. Applying this test to political contributions, he concludes that:

the legislative history of the gift tax clearly demonstrates that it was intended to backstop the estate tax—to impose a tax on *inter vivos* dispositions to beneficiaries under circumstances that (aside from the time of making the arrangements) are akin to dispositions generally made at death. We fail to see how a campaign contribution can be considered this type of disposition A campaign contribution is simply not a transfer that avoids the death tax, or property that, but for the transfer “would be subject in its original or converted form to the tax laid upon transfers at death.”⁵⁸

One difficulty with this approach is that it is simply too unwieldy to apply on a case-by-case basis. An efficient tax system should not require a resort to legislative history spanning several decades each time a transfer is contemplated.⁵⁹ A related difficulty is that, despite Judge Wilbur's attempt to show otherwise, the legislative history of the gift tax is a confusing maze of contradictory statements and goals, susceptible to many conflicting inferences.⁶⁰

57. One possibility that may be inferred from Judge Wilbur's opinion is that § 2512(b), which appears in the Code under “Valuation of Gifts,” will be interpreted exclusively as a valuation provision. That is, once a determination has been made that there is a gift, § 2512(b) will measure its value, which would be the difference between what was given and what was received as consideration in money or money's worth.

This, of course, would leave entirely unanswered the question what is a gift? Moreover, it would be in derogation of the role assigned § 2512(b). As one authority has noted:

Under the 1939 Code, section 1002 was a separate section, entitled “Transfers for Less Than Adequate and Full Consideration.” In the 1954 Code it was made a part of section 2512, “Valuation of Gifts.” This reorganization did not signal a change in the prior interpretation of the “transfer for consideration” provisions. Thus, the courts have continued to treat section 2512(b) as a substantive measure and not simply as a provision dealing only with valuation problems in part-gift, part-sale situations.

WEALTH TRANSFER TAXATION, *supra* note 31, at 170.

58. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3703.

59. The complexity of the income tax, which has been criticized so severely, see note 1 *supra*, would be easily overshadowed by the highly speculative inquiries into ambiguous legislative history that would be demanded by the gift tax.

60. This conclusion is inescapable following a comparison of Judge Wilbur's reading of

While the principal purpose of the gift tax may have been to prevent complete avoidance of the estate tax through lifetime gifts, this unquestionably was not its exclusive purpose. Indeed, commentators have long recognized other prominent reasons for enactment of the gift tax. The early versions of the gift tax in the 1920's and 1930's apparently were attributable as much to political compromise, the revenue needs of the federal government, the unconstitutionality of an attempt to tax only gifts made within two years of death, and the deterrence of income-splitting, as they were to an interest in creating a backstop to the estate tax.⁶¹

Indeed, some authorities have identified the true inspiration for both the gift tax and the estate tax as being a concession by lawmakers to populist sentiment for imposing significant tax on the transfer of property by the wealthy.⁶² While most of the populist rhetoric may have been aimed at intrafamily transfers, the well-to-do were also severely attacked at the time for the inordinate power they wielded through large political contributions.⁶³ A gift tax that introduced a disincentive for substantial political contributions by wealthy contributors would arguably further the populist objectives of the law.

In short, the purposes underlying the gift tax are diverse and difficult to classify in terms of relative importance. The legislative history is ambivalent, though it is clear the drafters of the gift tax law had no solitary objective. Like other Code provisions, the final product was the result of a long series of legislative and executive compromises.⁶⁴ To assign a unitary purpose to the tax may provide a facile solution to the problem at hand, but certainly not an accurate one. Moreover, while complete betrayal of original legislative intent is generally not condoned, neither is wooden adherence to the original purposes of a statute. It is axiomatic that laws have an organic quality and are capable of adaptation to changing circumstances and needs. Particularly when, as is the case here, a statute on its face appears to require taxation, the showing of a contrary legislative purpose should be persuasive.

Apart from its shaky historical underpinnings, Judge Wilbur's foray into history is difficult to square with the previous portion of

the legislative history with the interpretations accorded that same history by the dissenting opinions.

61. See, e.g., ESTATE AND GIFT TAXES, *supra* note 17, at 639-40; WEALTH TRANSFER TAXATION, *supra* note 31, at 4-5; Harriss, *Legislative History of Federal Gift Taxation*, 18 TAXES 531 (1940).

62. See, e.g., WEALTH TRANSFER TAXATION, *supra* note 31, at 3-4, 6.

63. See, e.g., D. ADAMANY & G. AGREE, POLITICAL MONEY 43-44 (1975); 1 CONG. QUART., DOLLAR POLITICS 15 (1971).

64. See Harriss, *supra* note 61, at 538.

his opinion. An individual might very well want to leave his estate to a certain organization that will further his viewpoint on the appropriate social structure for society. If there were no gift tax, he might choose to avoid the estate tax by making a lifetime transfer to the organization. Applying Judge Wilbur's standard, since the purpose of the gift tax is to avoid this result, the transfer presumably would be subject to the tax. Judge Wilbur previously argued, however, that such transfers should not be taxed since they involve "the use of [the donor's] resources to promote the social framework [he] considers most auspicious to the attainment of his objectives in life."⁶⁵

(3) Exemption from Taxation Due to Administrative Failure To Enforce the Pertinent Statute

The shortcomings with Judge Wilbur's opinion already identified are magnified by his dramatic procedural argument, which provided an alternative ground for his decision. Finding that "until quite recently, the Service took no action even suggesting it considered *inter vivos* gifts and campaign contributions as cognate concepts rather than two conceptually different phenomena,"⁶⁶ he concludes that "a change in this settled interpretation [by the Service] was inappropriate absent a change in the statute."⁶⁷

Had this been the sole ground for holding the political contributions by Carson tax-exempt, the opinion concededly would have had the virtue of having limited substantive law implications. On January 3, 1975, Congress enacted a statute, effective May 14, 1974, exempting certain qualifying political contributions from gift taxation.⁶⁸ Thus, the court's decision presumably would impact only on pre-May 14, 1974, transfers, making *Carson* a case of negligible precedential value.⁶⁹ Additionally, since the basis for decision would have been exclusively related to political contributions, it would in no way have put in question the meaning of gift. Carson's contributions would have escaped taxation for the reason that the Service had historically failed to treat such transfers as gifts, rather than

65. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3701.

66. *Id.* at 3702.

67. *Id.*

68. Act of Jan. 3, 1975, Pub. L. No. 93-625, § 14(a), 88 Stat. 2108, 2121 (codified at I.R.C. § 2501(a)(5) (1975)) (provides that the tax imposed on the transfer of property by gift "shall not apply to the transfer of money or other property to a political organization (within the meaning of section 527(e)(1)) for the use of such organization.") One reading of the provision is that political contributions are gifts, but if made to a qualifying political organization, they will be exempted from the tax. See also note 91 *infra*.

69. In fact Judge Wilbur carefully avoids considering the interaction of his opinion and I.R.C. § 2501(a)(5). [1978 Transfer Binder] TAX CT. REP. (CCH) at 3700 n.5.

because they were, in fact, not gifts.

While the substantive implications of a decision based exclusively on this administrative nonenforcement argument would have been marginal, its procedural implications would have been immeasurable. Simply stated, Judge Wilbur's proposition that failure by the Service to enforce a provision of the Code effectively rescinds the legislation endows that agency with an administrative veto of tax legislation. It would sanction the Service's failure to enforce the law and would prevent it from subsequently altering its position and adopting an enforcement posture.⁷⁰ Moreover, there appears to be no basis for limiting that veto to political contributions or even gift taxation.

Judge Wilbur may have only had in mind the situation in which a taxpayer has relied on a position taken by the Service and then found himself being challenged after having relied on it. While there may be some injustice in such a situation, the facts of *Carson* certainly do not fit this description. Prior to 1959, the Service had never made a formal statement to the effect that political contributions were not subject to gift taxation.⁷¹ At best, there was an unsubstantiated belief in some quarters that the Service was not concerned with taxing such transfers.⁷² Even if this were a sound basis for reliance, it should have evaporated in 1959, when a revenue ruling

70. Of course, Congress has acted on numerous occasions to overturn the Service's interpretation of a provision of the Code. See, e.g., I.R.C. § 84; S. REP. NO. 1357, 93d Cong., 2d Sess. 32 (1974), reprinted in [Series I Primary Sources] TAX MNG'T (BNA) § 84. This section now taxes a *transferor* when appreciated property is transferred to a political organization. The Service had ruled that the transfer was a gift and that the *transferee* political organization was subject to tax on all the appreciation when it disposed of the contributed property. Rev. Rul. 74-21, 1974-2 C.B. 112.

71. Despite this, the Service noted in 1972 that it had pursued a policy of enforcing the gift tax with regard to political contributions all the way back to the enactment of the tax in its current form in 1932. Rev. Rul. 72-355, 1972-2 C.B. 532. Indeed, in 1956 Assistant Commissioner Justin Winkle had indicated before a congressional subcommittee that political contributions were taxable. *Hearings on 1956 Presidential and Senatorial Campaign Contributions and Practices Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 84th Cong., 2d Sess. 353 (1956). See also Streng, *The Federal Tax Treatment of Political Contributions and Political Organizations*, 29 TAX LAW. 139, 172 n.183.

Judge Wilbur takes issue with this authority. He regards Revenue Ruling 72-355 as conclusory and suggests its authority is tainted by the fact that it was "issued nearly half a century after enactment of the first gift tax." [1978 Transfer Binder] TAX CT. REP. (CCH) at 3702. As for Assistant Commissioner Winkle's remarks before the Senate, Judge Wilbur simply states without discussion: "We do not believe this requires any change in our review of the legislative history." [1978 Transfer Binder] TAX CT. REP. (CCH) at 3702 n.8.

72. One commentator stated as recently as 1973 that "[p]olitical contributions have played a somewhat shadowy role on the gift tax scene. The popular conception seems to be that they are not really gifts subject to tax and it has been widely speculated that substantial contributions are never reported for gift tax purposes." Faber, *Gift Tax Planning: The New Valuation Tables; Net Gifts; Political Gifts; and Other Problems*, 31 N.Y.U. INST. FED. TAX 1217, 1244 (1973).

issued by the Service stated unequivocally that "campaign contributions are subject to the gift tax."⁷³ All of Carson's contributions were made subsequent to this ruling.

Despite this formal announcement of policy, it has been argued that the Service continued to pursue de facto a policy of nonenforcement.⁷⁴ This clearly would not have been the case, however, at least with regard to contributions made by Carson in 1970 and 1971. These transfers were made at the very time a widely publicized case involving the same issue of the gift taxation of political contributions was being litigated before the Fifth Circuit Court of Appeals.⁷⁵ Stripped to its core, then, the implications of Judge Wilbur's procedural argument may be even more far reaching than his unsuccessful attempts to demark the semantic boundary line between gifts and other kinds of transfers. As with those attempts, the precise scope and meaning of this argument is unclear.

(4) Refusal To Decide on Narrower Grounds

The difficulties that plague Judge Wilbur's opinion could have been avoided. *Carson* was not the first case in which the question of the appropriate gift tax treatment of political contributions had been raised. The same basic question confronted the Fifth Circuit Court of Appeals in *Stern v. United States*.⁷⁶ That court, however, chose to resolve it on considerably narrower grounds.

In *Stern*, a number of concerned Louisiana business people had contributed to a fund that then dispensed money to various candidates. These candidates were selected on the basis that they would alter the state's economic and tax structures in a way that would benefit the contributors' numerous investments. The Service sought to tax the contributions as gifts. After paying the asserted tax, one contributor sought a refund, arguing that her contribution had been made in the ordinary course of business to protect her investments and that therefore no gift tax was due. The district court held for the taxpayer, agreeing that the contribution was not taxable as a gift. The court of appeals affirmed, emphasizing that:

In a very real sense, then, [the contributor] was making an economic investment that she believed would have a direct and favorable effect upon her

73. Rev. Rul. 59-57, 1959-1 C.B. 626. Judge Wilbur criticizes the ruling as "simply declaring, without the benefit of any analysis, that campaign contributions are subject to the gift tax." [1978 Transfer Binder] TAX CT. REP. (CCH) at 3702.

74. See Faber, *supra* note 72, at 1245.

75. *Stern v. United States*, 304 F. Supp. 376 (E.D. La. 1969), *aff'd*, 436 F.2d 1327 (5th Cir. 1971). Moreover, the Service had been litigating the matter in the district court since 1966. See also *Du Pont v. United States*, 97 F. Supp. 944 (D. Del. 1951) (discussed at note 53 *supra*).

76. 436 F.2d 1327 (5th Cir. 1971).

property holdings in New Orleans and Louisiana. These factors, in conjunction with the undisputed findings of the lower court that the expenditures were bona fide, at arm's length and free from donative intent, lead us, in light of what we have said above, to the conclusion that the expenditures satisfy the spirit of the Regulations and are to be considered as made for an adequate and full consideration.⁷⁷

Stern was decided on the basis of Treasury Regulation section 25.2512-8. That section was intended to except bad business bargains from the "adequate and full consideration" standard of section 2512(b) of the Code.⁷⁸ A transfer for less than adequate and full consideration, though ordinarily subject to tax, is not taxed if made "in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from donative intent)."⁷⁹ The *Stern* court interpreted the parenthetical as defining the entire phrase "ordinary course of business." Thus, it rejected the view maintained by the Service that, in addition to the three criteria set forth in parentheses there must also be "an ongoing business." The court then held that the contributions satisfied the three parenthetical criteria and were therefore not subject to tax.⁸⁰ In *Carson*, however, Judge Wilbur was unwilling to sidestep what he perceived to be the basic issue through this technical interpretation of the regulation. He concluded that:

While the holding of the Fifth Circuit supports and is consistent with the result we reach herein, we prefer to rest our holding on the broader grounds that campaign contributions, like those before us, when considered in light of the history and purpose of the gift tax, are simply not "gifts" within the meaning of the gift tax law.⁸¹

B. *The Tannenwald Concurrence*

In a brief concurrence joined by Judges Raum and Sterrett,

77. *Id.* at 1330.

78. *Commissioner v. Wemyss*, 324 U.S. 303, 306 (1945); see note 17 *supra* and accompanying text.

79. Treas. Reg. § 25.2512-8 (1960).

80. In other contexts, Treasury Regulation § 25.2512-8 has been interpreted in the same way. See, e.g., *Shelton v. Lockhart*, 154 F. Supp. 244 (W.D. Mo. 1957); *Messing v. Commissioner*, 48 T.C. 502 (1967); *Beveridge v. Commissioner*, 10 T.C. 915 (1948). In *Rosenthal v. Commissioner*, 205 F.2d 505, 509 (2d Cir. 1953), the Second Circuit Court of Appeals concluded that "even a family transaction may for gift tax purposes be treated as one 'in the ordinary course of business' as defined in this Regulation [§ 25.2512-8] if each of the parenthetical criteria is fully met." *But see Harris v. Commissioner*, 340 U.S. 106, 112 (1950) ("This transaction [property settlement between husband and wife] is not 'in the ordinary course of business' in any conventional sense. Few transactions between husband and wife ever would be.").

81. [1978 Transfer Binder] *Tax Ct. Rep.* (CCH) at 3704-05. Would a decision based on *Stern* have reached political contributions motivated by the contributor's affinity with the candidate's views? Although no business interest would be involved, would not the same three factors—bona fide transaction, arms-length dealing, and absence of donative intent—be satisfied?

Judge Tannenwald indicated agreement with the plurality's result, but made clear his strong disagreement with its reasoning: "I would eschew the various arguments related to political support in order to attempt to achieve social or economic objectives of a taxpayer and protection and advancement of the taxpayer's property interests . . . or relating to inferences to be drawn from the legislative history of the estate and gift tax."⁸² While dismissing without explanation Judge Wilbur's reasoning, Judge Tannenwald offered an alternative ground for the court's outcome. In his view, contributions should be exempt because they are "an inextricable part of the election process—one of the most sensitive elements in the fabric of the democratic way of life."⁸³

There is no doubt that campaign finance plays an important role in the electoral process and that gift taxation would impact directly on campaign finance.⁸⁴ Judge Tannenwald's conclusion, however, that contributions should therefore be exempt from tax does not necessarily follow. For example, the only beneficiaries of a gift tax exemption would be those contributing more than \$3000 per candidate, since any smaller contribution is already covered by the

82. *Id.* at 3705.

83. *Id.* Judge Tannenwald cites as direct support *Nichols v. Commissioner*, 60 T.C. 236, 239 (1973), *aff'd per curiam*, 511 F.2d 618 (5th Cir.), *cert. denied*, 423 U.S. 912 (1975). The court's opinion in that case, which he wrote, rejected the taxpayer's assertion that filing fees to run for office were deductible expenses. Indeed, the fact that the electoral process was involved persuaded the court not to permit a deduction in the absence "of an explicit legislative mandate." *Id.* Far from following his own opinion in *Nichols*, Judge Tannenwald has opted for an activist position in a situation in which the statute argues for a different result on its face and recent legislative history indicates an intention on the part of Congress to grant only a limited exemption from the gift tax for political contributions. See note 68 *supra*. See also *McDonald v. Commissioner*, 323 U.S. 57, 63 (1944) (upholding the disallowance of a deduction of campaign expenses incurred in contesting unsuccessfully an election for a judgeship on the ground that there was no specific provision permitting the deduction).

84. Indeed, attempts to avoid gift taxation reached their peak in the 1972 election, prior to enactment of I.R.C. § 2501(a)(5). In one instance, more than \$2,000,000 was contributed to separate Nixon campaign committees by the writing of 700 checks in amounts of no greater than \$3000 each. By this technique, it was hoped that each check would be regarded as going to different donees and thereby qualify for the \$3000 per donee annual exclusion provided for in I.R.C. § 2503(b). See Rogovin, *Revenuers vs. Republicans*, *NEW REPUBLIC*, July 7, 1973, at 18.

The degree of concern over the impact of the gift tax on large political contributions was further manifested by White House pressure brought to bear on the Internal Revenue Service to approve the above-described technique for taxless giving. See 23 *CATH. U. L. REV.* 322, 325 (1973). The Service issued a favorable ruling on the technique, treating each paper committee as a separate donee as long as one-third of a committee's officers or candidates were different than any other committee's officers or candidates. Rev. Rul. 72-355, 1972-2 C.B. 532. Following this ruling, a successful suit was filed seeking to enjoin its enforcement. *Tax Analysts & Advocates v. Shultz*, 376 F. Supp. 889 (D.D.C. 1974). The case was appealed by the government, but the entire matter was held to have been mooted by the enactment of I.R.C. § 2501(a)(5).

\$3000 annual gift tax exclusion.⁸⁵ Moreover, with regard to federal elections, Congress has concluded that contributions over \$3000 purchase an undue degree of influence and therefore should be curtailed in the interest of that same "democratic way of life" Judge Tannenwald invokes.⁸⁶ Thus, there is now a prohibition against contributing more than \$3000 to a candidate.⁸⁷ A limit of \$25,000 by a contributor to all candidates also has been imposed.⁸⁸ At the state level, a number of similar provisions have been enacted and the trend is undoubtedly in this direction.⁸⁹ In light of these developments, Judge Tannenwald's policy argument fails. Indeed, "the democratic way of life" might actually be better served by *imposing* a gift tax on contributions, thereby introducing a disincentive for making large contributions that acquire for the contributor inordinate political influence.

Entirely apart from this substantive policy issue, however, Judge Tannenwald's opinion is disconcerting in that it suggests the absence of limits on judicial decisionmaking. The idea that the Tax Court may inject its own notions of proper public policy when the statute on its face and the legislative branch clearly indicate otherwise is a novel and far reaching conception of the court's role.⁹⁰ In this regard, the recent enactment by Congress of a gift tax exemption for contributions made only to certain qualifying political organizations would be jeopardized by Judge Tannenwald's approach, which extends a common law exemption to political contributions that might not qualify for the statutory exemption.⁹¹

85. I.R.C. § 2503(b); see note 84 *supra*.

86. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, tit. IV, 88 Stat. 1263.

87. 2 U.S.C. § 441a(a)(1) (1976). A maximum of \$1000 may be contributed for each election. Thus, \$1000 could be contributed for a primary, a run-off, and general election, for a total of \$3000. Contributions to a candidate's authorized political committees are counted along with contributions to the candidate.

88. 2 U.S.C. § 441a(a)(3) (1976). In addition, no more than \$20,000 in any year may be contributed to the political committees of a national political party and no more than \$5000 to any other political committee not authorized by the party or candidate. 2 U.S.C. § 441a(a)(1)(B)-(C) (1976).

89. See generally CAMPAIGN MONEY: REFORM AND REALITY IN THE STATES (H. Alexander ed. 1976); Note, *Loophole Legislation—State Campaign Finance Laws*, 115 U. PA. L. REV. 983 (1967).

90. In *McDonald v. Commissioner*, 323 U.S. 57 (1944), the Supreme Court emphasized that courts should tread lightly in the area of campaign finance. In response to the taxpayer's attempt to read into the Internal Revenue Code a deduction for campaign expenses, the Court stated: "But, as a system, tax legislation is not to be treated as though it were loose talk or presented isolated abstract questions of law casting upon the federal courts the task of independent construction." *Id.* at 64.

91. A political contribution is defined in I.R.C. § 271(b)(2) as "[a] gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable." It is noteworthy

Understandably, Judge Tannenwald was bothered by the breadth of the plurality's position and the quicksand of legislative history and policy serving as its foundation. He viewed his opinion as a way to narrow the grounds of the decision and to "stay [the court's] hand."⁹² To a certain degree, his concurrence accomplishes this since it limits the issue to political contributions and thus avoids confronting the issue of the meaning of the term gift. Nevertheless, it is fair to criticize the concurrence on the basis that it substitutes other significant problems. As has been noted, this approach sanctions judicial decisionmaking based on largely personal perceptions of desirable policy, even though those perceptions may run counter to the actual thrust of legislative policy. As a corollary, it appears to recognize a role for the Tax Court in formulating policy and reshaping the legislative scheme, rather than simply interpreting it. Needless to say, this signifies a striking and unwarranted aggrandizement of the powers granted to the court.⁹³

C. *The Hall Concurrence*

Three other judges—Hall, Drennen, and Goffe—chose to concur on an altogether different ground. The opinion, written by Judge Hall, focused, as had Judge Wilbur's opinion, on the transferor's motive. Referring to political contributions, Judge Hall wrote: "I do not believe any gift is usually involved for gift tax purposes because there is rarely, if ever, a desire to benefit the donee in his personal capacity, but rather only a desire to further the donor's own political objectives through the candidate."⁹⁴

Judge Hall went on to analogize political expenditures to payments for advertisements in newspapers, which are not gifts to the newspaper. In both, "the recipient is primarily viewed as a means

that the Code, in fact, explicitly recognizes that a political contribution can be a gift. This point was not addressed in any of the opinions in *Carson*, although it weakens the arguments of both Judge Tannenwald and Judge Wilbur. Moreover, even though I.R.C. § 2501(a)(5) provides an exemption, it is limited to political contributions to "political organizations." A political organization is defined in I.R.C. § 527(e)(1) as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." An "exempt function," in turn, is defined as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual . . ." I.R.C. § 527(e)(2). It should be apparent that there are many traps along the way that could result in loss of the gift tax exemption.

92. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3705.

93. The Tax Court has an exceedingly limited jurisdiction. Its principal responsibility is to determine disputes over tax deficiencies asserted against taxpayers by the Service. I.R.C. § 6213(a). Until 1969, when it was made an Article I court, it was considered an independent agency of the Executive. See I.R.C. § 7441.

94. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3705.

for propagating the taxpayer's own views."⁹⁵ This reasoning, however, is transparently faulty. The transfer of money to a newspaper in exchange for advertising space is admittedly not subject to gift taxation. This has nothing to do, however, with the fact that the one placing the advertisement does not really seek to benefit the newspaper. The reason is that a commercial exchange has taken place. Payment has been made and full and adequate consideration in money's worth has been received. Indeed, to the extent the advertising space has an economic value less than or in excess of what was paid for it, a gift would be recognized under section 2512(b). In contrast to purchased advertising space, the benefits obtained in exchange for political contributions cannot readily be assigned a specific economic value. Thus, contributions made for the purpose of obtaining such benefits are not made for adequate and full consideration in money or money's worth and are gifts under section 2512(b).

While the Hall opinion thus is unpersuasive analytically, it is critically important from the standpoint of deciphering a majority position on the Tax Court. Judges Hall, Drennen and Goffe apparently agree with Judge Wilbur that political contributions are not gifts on the ground that the motive for such contributions is to accomplish the goals of the transferor and rarely, if ever, to benefit the transferee.⁹⁶ Thus, a majority of ten of sixteen judges on the Tax Court adhere to this view, despite its striking deviance from the long-recognized meaning of gift. It remains to be seen, however, whether this majority will stand firm if and when asked to apply the reasoning of their respective positions in *Carson* to situations not involving political contributions. Having endorsed such a broad, general rule, they may well find it a difficult one to limit.

D. *The Simpson Dissent*

The three opinions supporting the exemption from taxation of Carson's political contributions were counterbalanced by two dissenting opinions. While there were no major differences among the three dissenting judges, two did choose to express their views in separate opinions. The first and shorter dissent, written by Judge

95. *Id.*

96. But in most cases, even when made out of affection for the candidate, a contribution is not intended to benefit the candidate in his "personal capacity." Rather, it is made to facilitate his election. Judge Hall suggests a distinction between contributions to a candidate to further his election and contributions made available for his personal use. If so, this would be a departure from Judge Wilbur's standard, which essentially requires a showing that the transferor is motivated by self-interest, rather than an interest in benefiting the candidate in a personal or professional capacity. See text accompanying notes 37-38 *supra*.

Simpson and with which Judges Quealy and Chabot expressed agreement, targeted Judge Tannenwald's concurrence as its prey. Without actually mentioning the concurrence, Judge Simpson made a point of reminding the other judges of the court's proper role:

At the outset, I want to emphasize that we are not called upon to express our individual views as to whether political contributions should, or should not, be subject to the gift tax. As a court, it is our responsibility to take the law as enacted by Congress, to ascertain the legislative purpose, and to apply the law so as to carry out such purpose.⁹⁷

Judge Simpson then went on to review specific aspects of the legislative history, demonstrating that there was no clear-cut authority for the proposition that political contributions are exempt from gift taxation.⁹⁸ He also stressed that the 1975 statutory scheme that introduced the gift tax exemption for qualifying political contributions simultaneously burdened those contributions with certain income tax consequences.⁹⁹ Thus, he pointed out, congressional policy was a complex matrix of statutory provisions designed to accomplish several not readily evident goals. Just as with the contributions covered by the statutory framework,

[i]f earlier gifts are to be exempt from the gift tax, then Congress should so provide, subject to such restrictions as it may decide are appropriate to carry out its tax policies. As a court, we cannot, and should not, make such policy decisions and decide under what conditions and limitations political contributions should be exempt from the gift tax.¹⁰⁰

E. *The Chabot Dissent*

Judge Chabot's dissent, with which Judges Simpson and Quealy indicated agreement, is lengthier and more free-wheeling than Judge Simpson's dissent. Whereas the latter primarily takes on Judge Tannenwald, Judge Chabot concentrates his fire on Judge Wilbur's plurality opinion. He begins by stating that the reasons presented in what he incorrectly identifies as the "majority" opinion: "(1) [will] have the effect of repealing several provisions of the Internal Revenue Code, (2) are warranted by neither the Code, the legislative history, nor prior Court rulings; and (3) are likely to

97. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3706.

98. In particular, Judge Simpson noted that when the gift tax exemption was passed in 1975, strikingly divergent views were expressed in Congress as to whether political contributions were subject to the tax. In fact, the gift tax exemption barely survived by a tie vote in an attempt to strike it altogether from the bill in which it appeared. *Id.* See also WEALTH TRANSFER TAXATION, *supra* note 31, at 187-88.

99. For example, while certain political contributions were exempted from gift taxation, the transferor was made subject to income taxation to the extent that appreciated property was contributed. I.R.C. § 84. See note 70 *supra*.

100. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3707.

create unwarranted confusion for the future."¹⁰¹

Developing his first point, Judge Chabot maintains that Judge Wilbur's standard of what is not a gift would make section 2522 of the Code superfluous. That section provides a deduction for gifts to qualifying charitable organizations.¹⁰² To the extent such contributions were made to benefit the social or political goals of the transferor, which would be virtually every charitable contribution, there would be no gift under the plurality's definition of that term. Thus, Judge Chabot asks, if Congress really did not intend to tax such transfers, why did it bother providing for a gift tax deduction for charitable contributions?¹⁰³

The opinion proceeds by discussing a number of cases in which the gift tax deduction for charitable contributions was at issue when it was unclear whether a "charitable" contribution had, in fact, been made. In the cited cases, the courts determined that contributions intended principally for "civic and philanthropic purposes"¹⁰⁴ or for promoting social welfare¹⁰⁵ qualified as charitable contributions. On the other hand, previous decisions had declined to classify certain political-type contributions in this category. The most striking instance was the case of a contribution made to the Foundation for World Government by a taxpayer whose "dominant aim was to organize a foundation to assist in bringing about a world government as rapidly as possible."¹⁰⁶ As Judge Chabot points out, this decision would have to be reversed under Judge Wilbur's approach, which would not tax transfers in furtherance of a transferor's interest in affecting "social justice or conditions essential for world peace or public order."¹⁰⁷

Judge Chabot also notes that the deduction is not available to a charitable organization if a substantial part of its activities involve engaging in propaganda or otherwise attempting to influence legislation, or participating in a campaign on behalf of a candidate.¹⁰⁸ The provision manifests an intention on the part of Congress

101. *Id.*

102. See text accompanying note 54 *supra*.

103. Judge Chabot emphasizes, in particular, that the deduction for charitable gifts is traceable back to 1924. Thus, if Judge Wilbur's interpretation of the law is correct, "it appears that the charitable gift tax deduction was surplusage at all times during the history of the gift tax . . ." [1978 Transfer Binder] TAX CT. REP. (CCH) at 3710.

104. *M.D. Thatcher Estate Co. v. Commissioner*, 38 B.T.A. 336 (1938).

105. *Davis v. Commissioner*, 22 T.C. 1091 (1954); *Faulkner v. Commissioner*, 41 B.T.A. 875 (1940), *modified*, 42 B.T.A. 1079 (1941).

106. *Estate of Blaine v. Commissioner*, 22 T.C. 1195, 1213 (1954).

107. [1978 Transfer Binder] TAX CT. REP. (CCH) at 3701.

108. I.R.C. § 2522(a)(2) expressly limits the gift tax deduction to gifts to organizations "not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which [do] not participate in, or intervene in (including the publishing

to tax transfers effected for such purposes. But, if the plurality's interpretation of the meaning of gift were correct, the provision would make little sense, inasmuch as the transfer of property to an organization actively campaigning for a particular social or political goal or candidate would not be a gift in the first instance.

Following his consideration of these conflicts between the plurality's interpretation of the term gift and the current statutory scheme for taxing charitable contributions, Judge Chabot considers the relevant legislative history. In his view, that history is ambivalent and lacking in authority directly on point.¹⁰⁹ Focusing on Judge Wilbur's contention that the gift tax was intended as a backstop to the estate tax, the Chabot dissent alludes to the curious result that could arise. The estate tax charitable contribution deduction has evolved in the same manner as the gift tax deduction, so that contributions to the same sort of charitable organization would give rise to a deduction. A gift to an organization during life to further certain social or political purposes of the transferor might not be deductible, but nevertheless would not be subject to gift taxation pursuant to Judge Wilbur's opinion. If the transfer occurred at death, however, Judge Wilbur's rule would not apply. Since the estate tax charitable contribution deduction would not be available, the transfer would be taxed. Thus, the very purpose of the gift tax asserted by Judge Wilbur would be undermined. By making a lifetime transfer the estate tax could be avoided.¹¹⁰

Finally, Judge Chabot identifies areas of future difficulty with the court's decision. Specifically, with regard to Congress' recent exemption of *certain* political contributions from gift taxation, he wonders whether it has not been made superfluous, thereby undercutting the entire scheme for campaign finance taxation, of which the limited gift tax exemption constituted only one part.¹¹¹

or distributing of statements), any political campaign on behalf of any candidate for public office."

109. Judge Chabot notes:

In sum, the majority have combed the legislative history and have found nothing directly on point. From this, they conclude that the Congress did not intend to *subject* to the gift tax the transfers described in the majority's standards. However, the absence of statements directly on point could just as easily lead to the conclusion that the Congress did not intend to *exempt* such transfers from the tax. The important point here is that a clear legislative history is necessary if we are to depart from the Congress' enacted definition and statutory system of exclusions and deductions. Such clear expressions of intent have not been adduced . . .

[1978 Transfer Binder] TAX CT. REP. (CCH) at 3715.

110. *Id.* at 3713-14.

111. *Id.* at 3714-16.

IV. THE MEANING OF GIFT AFTER *Carson*

In *Carson*, the Tax Court confronted an especially unique case, one peculiarly susceptible to the diverse objectives of various coalitions on the bench. The court could have rendered a very narrow decision. Indeed the three dissenting judges saw this as the only appropriate course. Such a result would have comported with the letter of the statute and would have avoided creating serious definitional questions regarding the meaning of gift. Moreover, it would not have added to the confusion over the breadth of the post-May 7, 1974, tax exemption legislated by Congress, which the court's decision inevitably will do; nor would it have resulted in the overruling of firm Tax Court precedent that implicitly recognized the taxability of contributions made for the purpose of furthering a transferor's broad social, economic, or political objectives. Finally, the dissent would have kept the Tax Court out of the business of policy-making and legislating.

Unfortunately, the other members of the court were bent on transmogrifying an otherwise forgettable case into a policy statement of exceedingly broad dimensions, although several different versions of policy were announced. Certainly, Judge Tannenwald's allusions to the role of campaign contributions in the "democratic way of life" would represent a drastic alteration of the Tax Court's traditional role. Nevertheless, Judge Tannenwald viewed his opinion as a rein on the even broader implications of Judge Wilbur's opinion. Unlike Judge Tannenwald's concurrence, the plurality opinion threatens to undo not only standard assumptions regarding the taxation of political contributions, but also traditional learning as to the meaning of gift.

Had only the seven judges forming the plurality adopted the views concerning the gift tax expressed by Judge Wilbur, the *Carson* decision could be regarded as a case of potentially major significance, but one in which no consensus could be reached. The Hall concurrence, however, joined in by Judges Drennen and Goffe, makes clear that there may, in fact, be a solid majority of ten for the novel "social framework-ends of the donor" test enunciated, despite the ambiguity, confusion, and complexity that suffuses that definition.

Admittedly, the impulse motivating the Wilbur and Hall opinions was a reasonable one. The very virtue of the section 2512(b) standard—its objectivity—is also its weakness. Certain transfers may be swept-up into the tax mill although for reasons of policy they should go untaxed. Nevertheless, the task of drawing exceptions or redefining the term gift should be left to legislative and administrative action. *Carson* is an object lesson in the treacherous

terrain that awaits a court determined to fashion on its own a new meaning for gift. Indeed, far from introducing a reasonable element of flexibility to the meaning of the term, the *Carson* court has accomplished little more than draining from that term the commonly understood meaning that it previously had. Undoubtedly, attempts will be made in the future to extend Judge Wilbur's social framework-ends of the donor rubric to other situations. How well such attempts will fare is at this point open to considerable speculation. It can only be hoped that the Tax Court, as a whole, will have the good sense to reject them by limiting the precedential significance of *Carson* and reaffirming the standard set forth in section 2512(b) of the Code. That standard has proven to be a particularly efficient and successful means for accomplishing the overriding "desire of Congress to hit all the protean arrangements which the wit of man can devise."¹¹²

112. *Commissioner v. Wemyss*, 324 U.S. 303, 306 (1945).

