INCOME TAXATION AND THE REGULATION OF SUPREME COURT JUSTICES' CONDUCT

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In 2023, investigative journalists reported multiple instances where billionaires showered Supreme Court Justices with lavish gifts. Previously undisclosed luxury fishing trips, private jet travels, and yacht cruises ignited popular and scholarly debates about Congress's role in regulating Justices' conduct. This Article explains how income taxation can, and should, be used to regulate judicial misconduct where rules of judicial conduct fail.

The Article shows that in some instances income tax already serves as a backstop to rules of judicial conduct. Under current law, some of the "gifts" reported in recent press stories are likely taxable income to the Justices. If so, the Justices should have reported these amounts on their income tax returns and paid income tax on them. If the Justices indeed do so, many of the concerns raised in public and scholarly discourse on Justices' conduct are mitigated. If the Justices did not report and pay tax on certain gifts, they should be audited, and be subject to the same consequences as any other taxpayer who fails to properly report income and pay taxes.

The Article also explains that in some instances income taxation is a better regulatory instrument than rules of judicial conduct. Some commentators (and a few of the Justices) argue that congressionally imposed limits on Justices' gift receipts are unconstitutional. There is no such problem in the context of income taxation. Congress is clearly within its constitutional authority to require, and in certain cases current law already demands Justices to report certain receipts on their income tax returns. Congress can also expand income taxation laws to capture even more private transfers to Justices.

Moreover, even if laws directly regulating judicial conduct are valid, the consequences for Justices for failure to adhere to these rules are minimal. Not so in the context of income

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taxation. Failure to report income may carry significant civil, and even criminal consequences. As such, income tax offers a very potent threat against Justices for failing to disclose certain receipts.

The Article also considers several tax law reforms—all within Congress's constitutional power—to further improve income taxation to regulate Justices' conduct. Specifically, the Article offers to deny income tax exemption for any gifts received by Justices, to consider annual public disclosure of Justices' tax returns, and to mandate annual audits of Justices' tax returns.

Introduction

In April 2023, ProPublica published an investigative report finding that Supreme Court Justice Clarence Thomas failed to disclose luxury gifts he received from billionaire Harlan Crow.[1] According to the report, "[f]or more than two decades, Thomas has accepted luxury trips virtually every year from the Dallas businessman without disclosing them."[2] This story was only the first in a series of revelations. In the following months, ProPublica revealed that Crow also bought Thomas's mother's house at above-market rate, allowed her to continue to live there rent-free, paid for significant home improvements,[3] and paid

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1 Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, ProPublica (Apr. 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/6LAX-83C2].

2 *Id.*

3 Potomac Watch, *The Billionaire Who Bought Justice Thomas's Mother's House*, Wall St. J. (Apr. 21, 2023), https://www.wsj.com/podcasts/opinion-potomac-watch/the-billionaire-who-bought-justice-thomas-mothers-house/9efa40a6-8a56-4836-ae31-717e824c9833 [https://perma.cc/9QZ5-2UZF]; Brent D. Griffiths & Chris Panella, *GOP Megadonor Harlan Crow Isn't Charging Clarence Thomas' Mother Rent. Zillow Estimates Suggest That Would Have Saved Her $155,000 Since 2014*, Bus. Insider (Apr. 13, 2023),

for Thomas's nephew's private school tuition.[4] Another wealthy individual, Anthony Welters, "loaned" Thomas $267,000 to buy an RV, only to forgive the loan a few years later.[5] Thomas accepted at least 38 luxury vacations from multiple wealthy individuals.[6] Thomas reported none of these receipts on his annual financial disclosures. Thomas was not the only Justice who received lavish gifts from wealthy benefactors. ProPublica also discovered that Justice Samuel Alito received an all-inclusive luxury fishing trip to Alaska, including a private jet trip that ProPublica valued at $100,000, financed by billionaire Paul Singer.[7] Alito did not report this trip in his annual financial disclosure.[8]

A fiery public discourse followed. Several commentators accused the Justices of corruption.[9] Democrats called the Justices to resign or face impeachment,[10] and watchdog

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https://www.businessinsider.com/harlan-crow-clarence-thomas-mother-isnt-being-charged-rent-2023-4 [https://perma.cc/7WPZ-UVU3].

4 Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition*, PROPUBLICA (May 4, 2023), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus [https://perma.cc/8X48-AAHL].

5 Jo Becker & Julie Tate, *Clarence Thomas's $267,230 R.V. and the Friend Who Financed It*, N.Y. TIMES (Aug. 5, 2023), https://www.nytimes.com/2023/08/05/us/clarence-thomas-rv-anthony-welters.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/6R5X-R6L6]; Jo Becker, *Justice Thomas's R.V. Loan Was Forgiven, Senate Inquiry Finds*, N.Y. TIMES (Oct. 26, 2023), https://www.nytimes.com/2023/10/25/us/politics/clarence-thomas-rv-loan-senate-inquiry.html [https://perma.cc/3E33-SQC6].

6 Brett Murphy & Alex Mierjeski, *Clarence Thomas' 38 Vacations: The Other Billionaires Who Have Treated the Supreme Court Justice to Luxury Travel*, PROPUBLICA (Aug. 10, 2023), https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizenga-novelly-supreme-court [https://perma.cc/8XW8-NXCT].

7 Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/6SEJ-ZNA8].

8 *Id.*

9 Noah Bookbinder & Dennis Aftergut, *Opinion: Supreme Court Justice Clarence Thomas' Corruption Is Intolerable. Here's What We Can Do About It*, L.A. TIMES (Aug. 10, 2023), https://www.latimes.com/opinion/story/2023-08-10/supreme-court-justice-clarence-thomas-corruption-gifts-propublica-ethics-congress [https://perma.cc/3LDS-55F4]; Paul Waldman, *Welcome to the Supreme Court, Where Corruption Has No Meaning*, WASH. POST (June 22, 2023), https://www.washingtonpost.com/opinions/2023/06/22/supreme-court-corruption-alito/ [https://perma.cc/22UG-X3EU].

10 Prem Thakker, *The Growing Number of Lawmakers Calling on Clarence Thomas to Resign—or Be Impeached*, THE NEW REPUBLIC (May 4, 2023), https://newrepublic.com/post/172456/list-member-congress-calling-clarence-thomas-removal-court [https://perma.cc/U5SP-99EZ].

groups demanded investigations into the Justices' conduct.[11] On the other hand, some Republican lawmakers defended the Justices,[12] and conservative commentators blamed the media for attempting to "manufacture a scandal"[13] through a "multi-pronged offensive [that] is transparently ideological."[14]

The revelations also triggered a standoff between the Justices and Congress. The Democratic-led Senate Judiciary Committee asked the Judicial Conference—an administrative body with certain authorities to regulate judicial conduct[15]—"to refer Associate Justice of the Supreme Court Clarence Thomas to the U.S. Attorney General" for failing to report the gifts.[16] The Committee also held a hearing on judicial ethics,[17] and invited Chief Justice Roberts to testify.[18] The Chief Justice

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11 Letter from Citizens for Resp. & Ethics in Wash. to John G. Roberts, Jr., C.J., U.S. Sup. Ct. & Merrick B. Garland, U.S. Att'y Gen., U.S. Dep't of Just. (Apr. 14, 2023), https://www.citizensforethics.org/wp-content/uploads/2023/04/Justice-Clarence-Thomas-DOJ-Complaint-April-14-2023-1.pdf [https://perma.cc/FTP7-C7SQ]; Letter from Project on Gov't Oversight to Brian M. Boynton, Principal Deputy Assistant Att'y Gen., Civ. Div., U.S. Dep't of Just. (Apr. 16, 2023), https://www.pogo.org/letter/2023/04/pogo-calls-for-doj-to-investigate-clarence-thomas-seek-civil-penalties [https://perma.cc/CL4B-YVZC].

12 Igor Bobic, *Republicans Defend Justice Samuel Alito After Another Ethics Bombshell Drops*, HUFFPOST (June 21, 2023), https://www.huffpost.com/entry/supreme-court-samuel-alito-ethics_n_64933799e4b007604cf63886) [https://perma.cc/6PXU-5BPY].

13 Rebecca Shabad, *Allies Defend Clarence Thomas Over Revelation Harlan Crow Paid His Relative's Tuition*, NBC NEWS (May 4, 2023), https://www.nbcnews.com/politics/supreme-court/justice-thomas-allies-defend-latest-revelation-tuition-payments-wealth-rcna82850 [https://perma.cc/68ZL-WG5X].

14 Dan McLaughlin, *The Unjust Attacks on Thomas, Alito, and Roberts*, NAT'L REV. (May 11, 2023), https://www.nationalreview.com/magazine/2023/05/29/the-unjust-attacks-on-thomas-alito-and-roberts/ [https://perma.cc/5VWN-882T].

15 The authority of the Judicial Conference is discussed *infra* subpart I.B.

16 Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcomm. on Fed. Cts., Oversight, Agency Action & Fed. Rts. & Henry C. "Hank" Johnson, Jr., Ranking Member, House Judiciary Subcomm. on Cts., Intell. Prop. & the Internet to Roslynn R. Mauskopf, Jud. Conf. Sec'y (Apr. 14, 2023), https://www.whitehouse.senate.gov/imo/media/doc/Letter%20to%20Judicial%20Conference%20(Referral%20to%20AG)_04.14.2023.pdf [https://perma.cc/3KVM-59VF] [hereinafter AG Referral Letter].

17 Senate Judiciary Comm., *Hearing on Supreme Court Ethics Reform* (May 2, 2023), https://www.judiciary.senate.gov/committee-activity/hearings/supreme-court-ethics-reform [https://perma.cc/Y7QF-BW5P].

18 Letter from Richard J. Durbin, Chair, Senate Judiciary Comm., to John G. Roberts, Jr., C.J., U.S. Sup. Ct. (Apr. 20, 2023), https://www.judiciary.senate.gov/imo/media/doc/chair_durbin_invitation_to_chief_justice_roberts_to_testify_before_sjc.pdf [https://perma.cc/AA3V-DGES] (inviting to testify before the committee).

declined to appear.[19] Justices Alito and Thomas offered their own defenses,[20] with Alito blaming journalists for "misleading" their readers[21] and outright questioning Congress's constitutional authority to regulate Justices' conduct.[22] In response, Senator Sheldon Whitehouse filed an ethics complaint against Justice Alito.[23] The Senate Committee on Finance took interest in whether the billionaire donors complied with federal tax laws[24] and even authorized subpoenas for two of the individuals involved.[25] The donors, on their end, defended their conduct,[26] with one claiming that the sensational reporting was nothing

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19 Letter from John G. Roberts, Jr., C.J., U.S. Sup. Ct., to Richard J. Durbin, Chair, Senate Judiciary Comm. (Apr. 25, 2023), https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf [https://perma.cc/BH95-3JP8] (denying invitation to testify before the committee).

20 Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Defends Undisclosed "Family Trips" with GOP Megadonor. Here Are the Facts.*, PROPUBLICA (Apr. 7, 2023), https://www.propublica.org/article/clarence-thomas-response-trips-legal-experts-harlan-crow [https://perma.cc/YTN6-856F]; Samuel A. Alito, Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda [https://perma.cc/JYF4-ELKQ].

21 Alito, Jr., *supra* note 20.

22 In a recent interview, Alito is quoted as saying that "[n]o provision in the Constitution gives them the authority to regulate the Supreme Court—period." *See* David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7 [https://perma.cc/RZ2G-RBGC].

23 Letter from Sheldon Whitehouse, Chairman, Senate Judiciary Subcomm. on Fed. Cts., Oversight, Agency Action & Fed. Rts, to John G. Roberts, C.J., U.S. Sup. Ct. (Sep. 4, 2023), https://www.whitehouse.senate.gov/wp-content/uploads/imo/media/doc/2023-09-04_complaint_from_senwhitehouseenclosure.pdf [https://perma.cc/YUL3-TR8G].

24 Letter from Ron Wyden, Chairman, Senate Fin. Comm., to Michael D. Bopp, Partner, Gibson Dunn & Crutcher LLP (May 17, 2023), https://www.finance.senate.gov/imo/media/doc/051723chairmanwydenresponsetomichaelbopp.pdf) [https://perma.cc/M2NE-D499].

25 Andy Kroll, *Senate Committee Authorizes Subpoenas of Harlan Crow and Leonard Leo as Part of Supreme Court Ethics Probe*, PROPUBLICA (Nov. 30, 2023), https://www.propublica.org/article/senate-judiciary-harlan-crow-leonard-leo-subpoenas-scotus-thomas-alito [https://perma.cc/6CSE-W5PZ].

26 *See, e.g.*, Cheryl Hall, *Harlan Crow: There's Nothing Wrong with My Friendship with Clarence Thomas*, DALL. MORNING NEWS (Apr. 17, 2023), https://www.dallasnews.com/news/2023/04/17/harlan-crow-theres-nothing-wrong-with-my-friendship-with-clarence-thomas/ [https://perma.cc/XP84-NLYJ]; Becker & Tate, *supra* note 5 ("Here is what I can share. Twenty-five years ago, I loaned a friend money, as I have other friends and family. We've all been on one side or the other of that equation. He used it to buy a recreational vehicle, which is a passion of his.").

short of a "political hit job."[27] As a result of the mounting public pressure, the Supreme Court adopted, for the first time, a Code of Conduct in November of 2023.[28] But this Code of Conduct received less than favorable reviews, with many commentators pointing to critical flaws.[29]

This was not the Supreme Court's finest hour. Pundits declared "a crisis of ethics" in the Supreme Court,[30] and public perception of the Supreme Court's legitimacy plunged to an all-time low.[31]

The revelations and the discourse that followed demonstrate that the patchwork of laws and regulations that address gift receipts by federal judges and Justices[32] "leave large loopholes through which many high value gifts would be permitted and, possibly, go undisclosed."[33] This Article argues that where rules of judicial conduct fail, income taxation can serve as a powerful and effective regulatory backstop, if not a substitute.

All taxpayers, Justices included, must report their income to the Internal Revenue Service (IRS) every year. While the Internal Revenue Code (IRC) generally exempts gifts from income taxation,[34] some of the "gifts" to Justices revealed in news reports were unlikely to qualify for this exemption.[35] As such, they should have been reported by the Justices to the IRS. If the Justices indeed reported such "gifts" on their tax returns,

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27 Hall, *supra* note 26.

28 Ariane de Vogue & Devan Cole, *Supreme Court Attempts to Address Ethics Concerns with New Code of Conduct but Leaves Many Questions Unanswered*, CNN POLITICS (Nov. 13, 2023), https://www.cnn.com/2023/11/13/politics/supreme-court-announcement/index.html [https://perma.cc/7NMQ-UHQC].

29 *See* discussion *infra* subpart I.B.

30 The Daily, *A Crisis of Ethics at the Supreme Court*, N.Y. TIMES (May 8, 2023) https://www.nytimes.com/2023/05/08/podcasts/the-daily/supreme-court-ethics.html [https://perma.cc/DZ2H-QMYE]; Michael Waldman, *Clarence Thomas, a Billionaire Benefactor, and the Supreme Court's Ethics Crisis*, BRENNAN CTR. FOR JUST. (Apr. 19, 2023), https://www.brennancenter.org/our-work/analysis-opinion/clarence-thomas-billionaire-benefactor-and-supreme-courts-ethics-crisis [https://perma.cc/KKZ7-ADLM].

31 Ariane de Vogue, *Supreme Court Approval Ratings at Record Lows, New Gallup Poll Shows*, CNN POLITICS (Aug. 2, 2023), https://www.cnn.com/2023/08/02/politics/supreme-court-record-lows-gallup/index.html [https://perma.cc/H3JC-NL2Q].

32 The legal framework that applies to gift receipts by Justices is discussed *infra* subpart I.B.

33 Sung Hui Kim, *The Supreme Court's Fiduciary Duty to Forgo Gifts*, *in* FIDUCIARY GOV'T 205, 217 (Evan J. Criddle, Evan Fox-Decent, Andrew S. Gold, Sung Hui Kim & Paul B. Miller eds., 2018).

34 I.R.C. § 102.

35 *See* discussion *infra* subpart II.B.

it solves much—though not all—of the ethical concerns raised by Justices' failing to report gifts.[36]

Income taxation, in certain instances, may even be preferable to rules of judicial conduct in regulating gift receipts. Judicial rules of ethics are largely interpreted and enforced by judges and Justices themselves.[37] Justices have been very lenient in interpreting how these rules apply to them.[38] Income tax rules, however, are interpreted and enforced by the Department of Treasury. Justices do not get to decide whether to file a tax return and whether to disclose a gift. The IRC does, and the IRS enforces it.

Moreover, there is an ongoing constitutional debate on whether Congress has the power to directly regulate Justices' gift acceptance at all.[39] Justice Alito believes that Congress lacks such power.[40] Chief Justice Roberts himself suggested as much in a 2011 report,[41] noting that the Supreme Court "has never addressed whether Congress may impose those requirements [regarding gift disclosure and acceptance] on the Supreme Court." In contrast, Congress is clearly within its constitutional authority to impose income taxation on Justices, including on their gift receipts.[42]

Justices claim to comply with rules of judicial conduct voluntarily, "as a matter of internal practice."[43] But a failure to follow such voluntary practices seems to have little consequence, amounting to no more than the burden of amending one's own disclosure forms.[44] Failure to report income tax, on the other hand, may carry significant civil and even criminal

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36 *See* discussion *infra* subpart III.A.

37 *See* discussion *infra* subpart I.B

38 *Id.*

39 Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 484 (2014) ("It is an open question, though, whether Congress has the authority to regulate the behavior of the Justices.").

40 Alito, Jr., *supra* note 20.

41 Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 446 (2013) ("With those words, Roberts put the nation on notice that Congress's authority to regulate the Justices' ethical conduct is an open question.").

42 *See* discussion *infra* subpart III.A.

43 JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6–7 (Dec. 31, 2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [https://perma.cc/8TTR-2FGY].

44 To date, this seems to have been the only consequence of Justice Thomas's failure to report certain transactions with a billionaire friend. *See* Ariane de Vogue, *Clarence Thomas to Amend Financial Disclosure Forms to Reflect Sale to GOP Megadonor*, CNN POLITICS (Apr. 17, 2023), https://www.cnn.com/2023/04/17/politics/

consequences. If the Justices failed to report "gifts" that are actually taxable income, they should face the same consequences as any other taxpayers who fail to report income.[45] In such a case, the IRS is clearly within its constitutional authority to enforce income tax laws against Justices. Thus, income tax laws offer a much stronger incentive for Justices to comply with reporting requirements than voluntary judicial disclosure rules. Moreover, given the constitutional certainty regarding congressional authority to impose taxes, Congress can amend the IRC to further strengthen the regulation of Judicial conduct.

It is important to make two normative comments at the outset, both of which frame the breadth of the discussion. First, the Article does not perceive tax law as the first-best solution to ethical challenges engulfing the Supreme Court. Tax law is "a" solution. One among many that have been proposed.[46] However, the need to discuss a tax solution stems from the fact that it has been, to date, ignored. Tax law—as currently drafted—already provides potent legal tools to address judicial misconduct. Tax law can also be further improved for such purposes, without the fear of constitutional challenge.

The second normative comment relates to the subjects of doctrinal scrutiny. The whole analysis herein pertains to Justices nominated by Republican presidents. This is not a deliberate choice. It is simply the case that the journalistic reports that exposed previously undisclosed gifts have all been in relation to Republican-nominated Justices. Certainly, Democratic-nominated Justices have also received gifts.[47] But as far as I was able to ascertain, the reason we know about these other gifts is that they have, in fact, been disclosed. In case of the few that were not disclosed, it seems the reason was because the amount of the gift was below the reporting value threshold.[48] As such, gifts—that we are aware of—to Justices nominated by Democrat presidents do not represent an example of a failure of the judicial financial disclosure rules. The purpose

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clarence-thomas-amend-disclosure-gop-megadonor/index.html [https://perma.cc/P2F3-S7RL].

45 *See* discussion of such consequences *infra* subpart III.A.

46 *See* discussion of proposed reforms *infra* subpart I.C.

47 For a summary of gifts received by various justices, see *A Staggering Tally: Supreme Court Justices Accepted Hundreds of Gifts Worth Millions of Dollars*, FIX THE COURT (June 6, 2024), https://fixthecourt.com/2024/06/a-staggering-tally-supreme-court-justices-accepted-hundreds-of-gifts-worth-millions-of-dollars/ [https://perma.cc/ZJS5-BXUF].

48 *Id.*

of this Article, however, is to examine cases where financial disclosure rules fail. As it happens, the examples we have for such instances are all from receipts by Republican-nominated Justices. There may be cases of Democratic-nominated Justices who also failed to disclose gifts they have received. We simply do not know about those, and therefore cannot analyze them. To the extent such cases exist, the same framework of analysis proposed in this Article must apply as well.

This Article is structured as follows: Part I summarizes the reasons for regulating gift receipts by Justices, and the legal framework that does so. Using recent examples exposed in the press, this part shows the shortcomings of this framework. Part I also outlines a few ethics reform proposals and notes the constitutional debate that is hindering Congress from adopting more robust rules of judicial conduct. Part II explains gifts to Justices in the context of our existing federal tax framework. It shows that several gifts reported in the media should have been reported by the Justices as taxable income. Part III explains how such income tax reporting assists in effectively regulating Justices' behavior where the standard rules of conduct fail. Part III also offers several tax reforms that can further improve the role of income taxation in regulating Justices' conduct.

I
The Failure of the Current Framework in Regulating Gifts to Justices

A. Why Do We Need to Regulate Gift Receipts to Public Officials

Bribery is corrupt and illegal, while gifts are associated with charitable behavior. But it is often difficult to distinguish between the two. Moreover, even if gifts do not rise to the level of a bribe as a legal matter, they are problematic if they affect how public officials execute their duties.[49] At its core, the controversy about gift receipts by Justices stems from the fact that acceptance of lavish gifts by government officials "raises the specter of corruption."[50]

Drawing the line between a socially acceptable gift to a public official and a corrupt gift is a difficult task. Social scientists

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49 Maximilian Alex Kuntze & Vanessa Mertins, *Lobbying through Gifts*, *in* 43 The Political Economy of Lobbying 201, 201 (Karsten Mause & Andreas Polk eds., 2023) ("[G]ifts are problematic, if they influence politicians in a direction that the fulfilling of official duties is negatively affected.").

50 Kim, *supra* note 33, at 207.

and corruption scholars have produced voluminous literature on this issue, and this part briefly summarizes the points that most saliently explain why and how we regulate gifts to public officials.

Anthropologists believe there is a normative similarity between gifts and bribes because they both "constitute the same type of social behavior."[51] Like in bribes, "[t]he most powerful driver of gift exchanges is reciprocity, a universal norm that can be found in almost all cultures."[52] All gifts have loan elements built into them.[53] Unlike a bribe, however, reciprocity in gifts is not immediate or specified. "Reciprocity is a gift-type exchange that creates a counterobligation, but the expectation of reciprocity is indefinite."[54] Recipients may operate under a sense of obligation, even if not consciously. For example, there is ample empirical evidence that physicians are substantially influenced by gifts from pharmaceutical companies "in the form of nonrational prescribing or self-serving adjustments to medication practices."[55] At the same time, "most of physicians think of themselves and their colleagues as being uninfluenced"[56] by the favors they receive.

The amorphous nature of reciprocity in gifts makes regulation challenging, because the "delayed countertransfer and the immaterial form of the exchanged resource blur the corrupt nature of the deal and make corruption more undetectable."[57] This explains why one of the main ways we regulate gifts to public officials is by imposing disclosure requirements. We want to make the public aware of the potential quid pro quo between the donor and the recipient. (For example, a litigant would want to know if the other party has given the judge a gift.) Another regulatory alternative is to simply ban the gift, thus preventing the reciprocity effect.

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51 Adam Graycar & David Jancsics, *Gift Giving and Corruption*, 40 INT'L J. PUB. ADMIN. 1013, 1015 (2017).

52 *Id.*

53 Colin Camerer, *Gifts as Economic Signals and Social Symbols*, 94 AM. J. SOCIO. 180, 181 (1988) ("In most anthropological accounts, reciprocity is essential—accepting a gift implies a solemn obligation of repayment (as in accepting a loan).").

54 David Jancsics, *Corruption as Resource Transfer: An Interdisciplinary Synthesis*, 79 PUB. ADMIN. REV. 523, 529 (2019).

55 Kuntze & Mertins, *supra* note 49, at 202 (inline citations omitted).

56 *Id.*

57 Jancsics, *supra* note 54, at 530.

If gift exchanges are part of a regular pattern, the parties have shared interest in secrecy as a joined good.[58] This, in turn, "promotes more frequent interactions within which actors affirm their intent to maintain secrecy,"[59] which "increase the relational cohesion of a corrupt social tie."[60] While an immediate exchange of favors makes the corrupt intent rather clear, a long-term trust building relationship between a private agent and a corrupt official is harder to identify. Again, disclosure requirements can help here. If the public is aware of a recurring practice of gift giving, it may become more suspicious.

Sociologists view gifts as a signaling device. "[G]ifts might serve many social functions, including conveying identity, controlling and subordinating, conveying unfriendliness, reducing status anxiety, enforcing distributive justice, providing suspense or insulation, defining group boundaries, and atoning for unseen social deviations."[61] The signaling effect makes gifts to public officials problematic for two main reasons. First, whether one perceives giving as a gift or a bribe "underlies a high degree of subjectivity."[62] Thus, what a Justice views as a gift can be understood as a bribe by the public. This may lead to a loss of public trust in public institutions. Second, signaling by giving may create a perception that "a small gift may act as a precursor to a corrupt relationship."[63] A small gift may create an expectation for a larger gift to follow. Public officials may change their behavior to facilitate future gifts. A donor may realize that a gift generates some unexpected benefits and give more in order to sustain the flow of benefits.

Psychology may offer a mitigating factor to the signaling effect. A public official is "exposed to psychological and moral costs if he allows himself consciously to be influenced by the gift to the detriment of his principal."[64] Self and public image may incentivize the official not to respond to a gift by acting corruptly. However, a large number of studies suggest that individuals tend to resolve such conflicts through rationalizations

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58 Edward J. Lawler & Lena Hipp, *Corruption as Social Exchange*, 27 ADVANCES IN GRP. PROCESSES 269, 282 (2010).

59 *Id.*

60 *Id.*

61 Camerer, *supra* note 53, at 181.

62 Kuntze & Mertins, *supra* note 49, at 203.

63 *Id.*

64 *Id.* at 206.

and self-deception, convincing themselves that gift receipts are morally acceptable.[65]

The sociological perspectives on gift giving suggest that regulating gift giving to public officials is important not only to prevent influence over public officials but also to maintain public trust in public administration.[66] Given the subjectivity by which individuals may interpret what a gift signals, the public should intervene by questioning such interpretation. Stated differently, the public should interpret the nature of the gift, not the official. This can be achieved by imposing disclosure requirements. Another way to address this is an outright ban (or limitation) on gift giving to public officials. This would prevent public officials from being in a position in which they need to interpret gift signals.

Economists have struggled to explain the act of gift giving, because from a purely utilitarian point of view, gifts are inefficient and irrational.[67] Thus, a rational actor model suggests an expectation of reciprocity. Indeed, field experiments have shown that charitable donation solicitation accompanied by a gift is much more likely to be reciprocated.[68] From the point of view of the charitable organization, "the initiation of a gift-exchange relation turns out to be profitable."[69] Moreover, the reciprocity effect increases as the gift increases.[70] This suggests that if we view reciprocity in the public administration as problematic, a regulatory tool limiting the size of allowed gifts is worth considering, as it may reduce the level of undesired reciprocity.

From the gift recipient's point of view, gifts may create a financial want of more gifts. This may incentivize the recipient to behave in a certain way, over-considering the interests of the

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65 *Id.* at 207.

66 Graycar & Jancsics, *supra* note 51, at 1018 ("Gift giving in the organizational circumstances . . . can result in a loss in revenue and an undermining of bureaucratic processes and confidence in those processes.").

67 Camerer, *supra* note 53, at 181 ("In the simplest theory of consumer choice, there is no place for the sort of inefficient gift giving we routinely observe between people . . . .").

68 Armin Falk, *Gift Exchange in the Field*, 75 ECONOMETRICA 1501 (2007).

69 *Id.* at 1501.

70 *Id.* at 1506 ("This shows that including a gift in our setup significantly increases the frequency of donations and that the larger the gift, the higher the frequency.").

donors, in order to facilitate future gifts.[71] This again suggests banning or limiting gift receipts by public officials as a regulatory instrument, in order to limit their incentive to behave in a way that favors the donor.

To summarize, research in social sciences suggests that we should regulate gift receipts by public officials both to prevent undue influence and to maintain public trust in institutions. Several types of regulation of gift receipts by public officials may be considered. First, disclosure requirements mitigate the reciprocity effect between the donor and recipient. In the context of corrupt gifts, reciprocity and secrecy amplify each other, and disclosure helps to break this cycle. Disclosure also mitigates the signaling effect of gifts and allows the public to participate in the process of interpreting the signal sent by the gift. This is important in order to maintain public confidence in public institutions and processes. Second, limitation on the size of gifts mitigate the reciprocity effects. It both reduces the expectation of the donor for reciprocity and the incentive of the recipient to behave in a reciprocal way. The third potential regulatory tool is the complete banning of gifts to public officials. This eliminates the reciprocity effect and the need to interpret the signals sent by gifts. As I discuss below, all three regulatory rules are currently employed in one way or another in the context of gifts to judges and Justices, albeit very unsuccessfully in the case of Justices.

B. Rules That Directly Address Gift Receipts by Justices

1. *Financial Disclosure Requirements*

Under the Ethics in Government Act of 1978 (The 1978 Act), certain federal officials must file annual financial disclosures that include, among others "[t]he identity of the source, a brief description, and the value of all gifts aggregating more than [a] minimal value."[72] The reports must be made available for public inspection.[73] Justices are covered by these rules,[74] and

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71 Kuntze & Mertins, *supra* note 49, at 206 ("When a politician has an economic incentive to behave in a certain way or to make a certain decision, an affect [sic] out of self-interest comes into play.").

72 5 U.S.C. app. § 102. The "minimal value" is prescribed by reference to § 7342 and is set at $100, subject to inflation adjustment. 5 U.S.C. § 7342. As of 2023, the inflation-adjusted amount is $480. *See* GEN. SERVS. ADMIN., GSA BULL. FMR B-54, FOREIGN GIFT AND DECORATION MINIMAL VALUE (2023).

73 5 U.S.C. app. § 105.

74 5 U.S.C. app. §§ 101(f)(11), 109(10).

must file their annual financial disclosures with the Judicial Conference of the United States.[75] The Judicial Conference is an administrative body created by Congress in 1922 to "assist in the administration of the federal judiciary."[76] The Judicial Conference is headed by the Chief Justice.[77]

"[A]ny individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report" may be subject to civil and criminal sanctions.[78] The Judicial Conference must also refer to the Attorney General the name of any individual who it believes "has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported."[79] It was in respect of this authority that the Senate Judiciary Committee asked the Judicial Conference to refer Justice Thomas to the U.S. Attorney General.[80]

In theory, "financial disclosure could empower the media to spotlight objectionable gift-giving practices for the public, which would enable public shaming to exert a deterrent effect on individual Justices' misbehavior."[81] The 1978 Act, however, leaves much to be desired in terms of gift disclosures by Justices.

The first problem with the 1978 Act is its scope. The 1978 Act exempts from reporting any gift of "food, lodging, or entertainment received as personal hospitality."[82] For that purpose, "personal hospitality" of an individual is defined as "hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of that individual or his family or on property or facilities owned by that individual or his family."[83]

Justices seem to have interpreted the term "personal hospitality" broadly to avoid reporting. For example, Justice Thomas did not disclose spending "nine days of island-hopping in a volcanic archipelago on a superyacht staffed by a coterie of attendants and a private chef" courtesy of billionaire Harlan Crow.[84] Responding to criticism, Thomas argued the gift was

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75 5 U.S.C. app. § 103(h)(1)(B).

76 Frost, *supra* note 41, at 451 n. 35.

77 28 U.S.C. § 331.

78 5 U.S.C. app. § 104.

79 5 U.S.C. app. § 104(b).

80 AG Referral Letter, *supra* note 16.

81 Kim, *supra* note 33, at 213.

82 5 U.S.C. app. § 102(a)(2)(A).

83 5 U.S.C. app. § 109(14).

84 Kaplan, Elliott & Mierjeski, *supra* note 1.

not subject to disclosure under "personal hospitality" exemption.[85] Similarly, after ProPublica reported that Justice Alito took a luxury fishing vacation in Alaska courtesy of billionaire Paul Singer,[86] Alito's response included a painstaking textual analysis—including references to the Random House Webster's Unabridged Dictionary—of why Singer's gifts fall within the definition "personal hospitality" and as such not subject to disclosure.[87] Similar conversations about "personal hospitality" occurred in 2016, after it was revealed that the late Justice Antonin Scalia took dozens of luxury trips funded by private sponsors.[88] Professor Sung Hui Kim argued that Scalia's nondisclosure of such trips stretched the meaning of "personal hospitality" in two ways.[89] First, it had the effect of "classifying certain benefits that are ordinarily purchasable on the market and thus have a readily ascertainable market value as personal hospitality."[90] Second, it allowed "lavish gifts to qualify as personal hospitality, even though the personal hospitality exception may have been intended to cover more mundane gestures of hospitality, such as a dinner invitation to a person's home".[91]

At least two watchdog organizations countered Thomas's and Alito's arguments, focusing on the fact both Justices received free private jet travel to their destinations.[92] The watchdog organizations suggested that travel portions of their trips did not qualify as "personal hospitality." As such, the cost

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85 Clarence Thomas, *Clarence Thomas Statement April 7, 2023*, Pub. Info. Off. (2023) ("Early in my tenure at the Court, I sought guidance from my colleagues and others in the judiciary, and was advised that this sort of personal hospitality from close personal friends, who did not have business before the Court, was not reportable.").

86 Elliott, Kaplan & Mierjeski, *supra* note 7.

87 Alito, Jr., *supra* note 20.

88 Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, N.Y. TIMES (Feb. 26, 2016), https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html [https://perma.cc/W2D7-FWHQ].

89 Kim, *supra* note 33, at 214.

90 *Id.*

91 *Id.*

92 Letter from Project on Gov't Oversight, *supra* note 11 ("The Senate Select Committee on Ethics explained in its 2003 ethics manual that the personal hospitality exception was unavailable for gifts of transportation accepted in lieu of commercial travel."). Letter from Citizens for Resp. & Ethics in Wash., *supra* note 11, at 7 ("While there is an exception for reporting gifts of 'food, lodging, or entertainment received as "personal hospitality of an individual,"' the list of items covered by that exception clearly does not include travel.").

of private jet travel should have been disclosed under the 1978 Act.

To summarize, under current practice interpreting the term "personal hospitality," exorbitant trips remain undisclosed. Even skeptics of this interpretation focus their criticism on the travel portions of the trips, rather than on the hospitality itself. If billionaires can legally shower Justices with millions of dollars' worth of luxury travel with no disclosure, the disclosure rules are far from adequate in achieving the purpose "to spotlight objectionable gift-giving practices."[93]

Another issue with the 1978 Act is the extent of disclosure, albeit this issue has been mitigated in 2022. In 2022, Congress adopted the Courthouse Ethics and Transparency Act[94], which mandates the creation of an online database of judicial financial disclosure, including Justices' disclosures. Before 2022 (meaning, in a period covering all the gifts discussed herein) the law required that judges' and Justices' financial disclosure forms be made public[95], but did not require a particular form of publication. The federal judiciary has consistently objected to making the reports available online.[96] Instead, the disclosures were available for an in-person inspection at the offices of the Administrative Office of the U.S. Courts in Washington D.C. ("A.O."), by appointment made at least five days ahead of viewing.[97] Disclosures were held by the A.O. for six years, after which they are destroyed.[98] Moreover, when a request was made for a financial disclosure, the judge is notified and is given an opportunity to make reduction, including of statutory mandated information, if they believe the dissemination of the information would put the judges or their family members at risk.[99] These limitations significantly burdened litigants who

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93 Kim, *supra* note 33, at 213.

94 Courthouse Ethics and Transparency Act, Pub. L. No. 117-125, 136 Stat. 1205 (codified at 5 U.S.C. app. § 105(c)).

95 5 U.S.C. app. §105.

96 James J. Alfini, Charles Gardner Geyh & James Sample, Judicial Conduct and Ethics 7-63 (6th ed. 2023) ("The federal judiciary has nonetheless resisted calls to post financial disclosure statements online, opting to supply disclosure statements only on request—citing lingering safety concerns.").

97 Guide to Judiciary Policy, vol. 2, pt. D, § 540.10 (2022), https://www.uscourts.gov/sites/default/files/guide-vol02d.pdf [https://perma.cc/4E69-HE5W] (last visited Dec. 23, 2024).

98 *Id.* § 550.10.

99 *Id.* § 550.30.

were interested in investigating potential conflict of interest of a judge in their case.[100]

Even now, after the enactment of the Courthouse Ethics and Transparency Act, reports are filed in May with respect to financial transactions that occurred in the previous year "resulting in potentially long delays for the reporting of certain gifts, which could detrimentally impact the ability of litigants to exercise their right to request recusal in a timely manner."[101]

Another problem with disclosure laws is lax enforcement of such rules. The Judicial Conference, the principal policy-making body of the federal judiciary, is the agency tasked by the 1978 Act to develop rules and guidance of financial disclosure.[102] Thus, the interpreters of the financial disclosure rules are the same people who are subject to these rules. The head of the Judicial Conference is the Chief Justice. The current one, Chief Justice Roberts, has expressed doubt that the financial disclosure rules apply to Justices at all and explained that Justices abide by them voluntarily.[103] It is difficult to expect subjects of enforcement to carefully comply with inconvenient disclosure rules if the head enforcer suggests they do not have to. To emphasize, the institutional problem here does not stem from the fact the Justices and judges regulate themselves. Most judges probably comply with disclosure rules. The problem is sourced in the fact that some of the Justices, including the Chief Justice, not only regulate themselves, but believe the regulations—that they are in charge of enforcing—do not constrain them as currently written.

A telling example of this comes from the recent revelation regarding Thomas's and Alito's reliance on the "personal hospitality exemption" for nondisclosure. In justifying his nondisclosure of the Harlan Crow gifts, Justice Thomas noted that the disclosure rules are "being changed," suggesting that as previously written he had no obligation to disclose the gifts.[104] Similarly, Justice Alito claimed that he was not required to disclose his gifts from Singer under the reporting rules that had been in place "until a few months ago."[105] The change that both Alito

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100 Despite the existence of an official process, one court activist shared with the author that until 2017, he could fax in a request for disclosures, and then the disclosures office would mail him the copies of the disclosures. Starting in 2017, he could sometimes email the request, and would be mailed back a thumb drive with the disclosures or could pick the thumb drive up in person.

101 Kim, *supra* note 33, at 215.

102 5 U.S.C. app. § 111.

103 ROBERTS, JR., *supra* note 43, at 7.

104 Thomas, *supra* note 85.

105 Alito, Jr., *supra* note 20.

and Thomas refer to is a March 2023 change that amended the definition of "personal hospitality of any individual," narrowing it somewhat, explicitly stating that the exemption "applies only to food, lodging, or entertainment and is intended to cover such gifts of a personal, non-business nature."[106] Moreover, gifts given by an entity, rather than an individual, would be subject to reporting.[107] This reliance on new interpretation of the rules to explain past non-disclosure seems odd. The 1978 Act under which these rules are promulgated has always limited the personal hospitality exemption to "food, lodging, or entertainment" and always only applied to gifts by an individual, and not a corporation. If these trips did not qualify as "personal hospitality" under the law, there is no need for a regulatory amendment to reaffirm what the law has always clearly said.

Finally, even when Justices fail to disclose gifts, there does not seem to be any significant consequence under the 1978 Act. There may be some public ire, and inconvenience associated with amending past disclosures, but that is all. Responding to criticism, Justice Thomas recently amended his financial disclosures to include certain receipts from Harlan Crow.[108] Justice Alito has yet to amend his financial disclosures and judging by his fierce defense——claiming he was not required to disclose the gifts from Singer—it seems reasonable to assume he will not amend his forms.

2. *Direct Limitations on Gift Receipts*

The Ethics Reform Act of 1989[109] (the 1989 Act) added a hard limit on the amount that certain federal officials, including Justices, may receive as "outside earned income."[110] It also prohibits such officials from receiving "anything of value from a person . . . seeking official action from" the federal official[111] or from a person "whose interests may be substantially affected by the performance or nonperformance" of the official's

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106 GUIDE TO JUDICIARY POLICY, vol. 2, pt. D, *supra* note 97, § 170.

107 *Id.*

108 Nina Totenberg, *Now-Released Forms Reveal More Trips Gifted to Justice Clarence Thomas by Harlan Crow*, NPR (Sep. 1, 2023), https://www.npr.org/2023/08/31/1196993118/justices-thomas-alito-financial-disclosures [https://perma.cc/C6CT-7SYM].

109 Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989).

110 5 U.S.C. app. § 501. The cap is set at 15% of the basic pay of Level II of the Executive Schedule. For 2024 this means the limit cap is $33,285. *See* OFF. OF PERS. MGMT., SALARY TABLE NO. 2024-EX: RATES OF BASIC PAY FOR THE EXECUTIVE SCHEDULE (EX) (2024).

111 5 U.S.C. § 7353.

duties.[112] The 1989 Act is also weak safeguard against improper gift-giving to Justices.

The limitations to a person "seeking official actions" or whose "interests may be substantially affected" makes the law's reach limited. The law seems to contemplate a rather direct link between the official and the action sought. Consider, for example, a person seeking immigration status determination from an immigration official. In that case, the 1989 Act policy is clear. We would not want immigration officials receiving gifts from the person seeking the official's determination in the person's case. But this is not analogous to Supreme Court litigation. While very few people seek direct relief from the Supreme Court, the consequences of a Court decisions are rarely limited to the named litigants. That said, any benefit that may accrue to non-litigants is speculative, so it is difficult to clearly point to someone outside the docket whose interests "may be substantially affected."

For example, at the time of writing, the Supreme Court is considering *Moore v. United States*.[113] The petitioners in the case challenge the constitutionality of Section 965 in the Internal Revenue Code,[114] added as part of the Tax Cut and Jobs Act of 2017. Section 965 imposed a one-time tax on certain earnings held in foreign corporate subsidiaries controlled by U.S. taxpayers. Moore, who paid about $14,000 in tax under Section 965, is now challenging the constitutionality of that tax. But striking down Section 965 will have very broad implications, affecting many taxpayers other than the Moores. Section 965 was estimated to generate approximately $340 billion in taxes from fiscal year 2018 to 2027, mostly from very large multinational corporations, who were the true target of this tax.[115] All of these taxes – not just Moore's $14,000—would have to be refunded if the Court finds Section 965 unconstitutional. Many very affluent taxpayers who paid much more than $14,000 stand to benefit if the Court finds in favor of Moore. Any such affluent taxpayer may still shower the Justice with gifts

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112 *Id.*

113 *See* Moore v. United States, 144 S. Ct.1680 (2024) (This case has been decided in favor of the government after the article has been mostly drafted.).

114 I.R.C. § 965.

115 For a discussion explaining the background and operation of I.R.C. § 965, see *Section 965 Transition Tax*, IRS, https://www.irs.gov/businesses/section-965-transition-tax [https://perma.cc/V2NM-F29S] (last visited Sep. 9, 2024). For the revenue estimates, see JOINT COMM. ON TAX'N, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R.1, THE "TAX CUTS AND JOBS ACT" (2017).

notwithstanding *Moore*, simply because they are not in Court. It would be difficult to speculate about the person's interest, or how "substantially" it may be affected as a result of the Moore case. The Moore lawsuit is spearheaded by multiple conservative organizations. It is possible that some of these organizations received significant donations from people who gifted the Justices expensive gifts. Unfortunately, we cannot tell if this is the case since this information is not necessarily publicly available. We can be reasonably suspicious, however. For example, the Manhattan Institute—a conservative think tank—submitted amicus briefs in support of the Moores (one brief for the certiorari and another one on the merits). The Chairman of the Manhattan Institute is Paul Singer, and Kathy Crow, the wife of Harlan Crow, is a trustee.[116] Their documented relationships with Justices seem problematic, but it is doubtful whether they are captured in any way by the 1989 Act.

Another shortcoming of the 1989 Act is that the supervising authority in charge of promulgating rules is, again, the Judicial Conference.[117] Under the regulations, "A judicial officer . . . is not permitted to accept a gift from anyone who is seeking official action from or doing business with the court . . . or from any other person whose interests may be substantially affected by the performance or nonperformance of the judicial officer's . . . duties."[118] The definition of "gift," however, does not include "social hospitality based on personal relationships."[119] This raises the same concerns discussed above, associated with excepting personal hospitality from disclosure requirements. In this context, the problem is further exacerbated by the fact that the regulations do not define the term "social hospitality," nor the scope of "personal relationship" covered by the exclusion. This creates the possibility that "[j]ustices may theoretically accept generous gifts of social hospitality even from litigants, so long as there is some basis for claiming a 'personal relationship' to such litigant."[120] In addition, the regulations

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116 Stephanie Kirchgaessner & Dominic Rushe, *Billionaire-linked US Think-tank Behind Supreme Court Wealth Tax Case Lobbying*, THE GUARDIAN (Aug. 25, 2023) https://www.theguardian.com/us-news/2023/aug/25/us-thinktank-billionaires-supreme-court-wealth-tax-lobbying [https://perma.cc/GKD2-5H5F].

117 5 U.S.C. § 7353.

118 GUIDE TO JUDICIARY POLICY, vol. 2, pt. C, § 620.35, https://www.uscourts.gov/sites/default/files/vol02c-ch06.pdf [https://perma.cc/VAV2-YMWZ] (last visited Jan 1, 2025).

119 *Id.* § 620.25.

120 Kim, *supra* note 33, at 210.

allow an exception for gifts from friends and relatives.[121] This "could be interpreted to authorize all gifts from friends, even if the friend is 'seeking official action from or doing business with the court.'"[122] Thus, under the regulations, a friend of a Justice could give the Justice lavish gifts even if the friend stands to benefit personally from an upcoming decision.

A final issue with the 1989 Act is that the regulations under it are not applicable to Justices. Section 620.20 of the regulations explicitly excludes Justices from their reach, notwithstanding the fact that the law under which they are promulgated is applicable to Justices. Stated differently, the law appoints the Judicial Conference to issue regulations on gifts limitation on Justices, but the Judicial Conference seems to have decided to promulgate regulations that are applicable to all judicial officials *except* Justices.

In a 2011 report, Chief Justice Roberts explicitly stated that "the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body."[123] As discussed further below, there is a debate on whether Congress has the constitutional authority to regulate gift receipts by Justices. But as a matter of practice, some Justices believe that Congress has no such authority, and act accordingly.

3. *Indirect Legal Limitations on Gift Receipts*

In addition to direct regulation of gifts, other laws may indirectly curtail inappropriate gift practices. Recusal laws are one such example. A Justice must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned,"[124] as well as in several other enumerated reasons "such as bias or prejudice, personal participation in the case, pecuniary interest, or a family connection to a lawyer or party to the case."[125] Thus, one might hope Justices will recuse themselves in cases where their impartiality might be questioned as result of gifts they received from interested parties. The main difficulty with this rule is that "the longstanding practice has been for each Justice to decide for him or herself whether to

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121 GUIDE TO JUDICIARY POLICY, vol. 2, pt. C, *supra* note 118, § 620.35(b)(4).

122 Kim, *supra* note 33, at 210–11.

123 ROBERTS, JR., *supra* note 43, at 4.

124 28 U.S.C. § 455.

125 Frost, *supra* note 41, at 449.

step aside, usually without issuing any explanation."[126] In addition, given the inefficacy of disclosure rules, it is unlikely that adversely affected parties will even be aware of the relationship between a Justice and the other party. It is also constitutionally unclear "whether the federal disqualification statutes can even be enforced against the Justices."[127] Scholars of judicial ethics generally agree that recusal statutes are weak instruments for regulating Justices' conduct.[128]

Bribery laws are another example sometimes mentioned as an instrument of gift regulation. Where "gift" is a pretense for a bribe in exchange for some judicial relief, then criminal laws may serve as a deterrent. However, bribery laws require some reasonably particular suspicion for the authority to even begin an investigation. Most gifts are unlikely to trigger such suspicion. Moreover, bribery laws "require some link between the benefit accruing to the public official and an 'official act' of the public official,"[129] which is unlikely the case in the context of most gifts.[130] Even if it is the case, it would require a fact-intensive inquiry to prove. The result is that "most gifts received by the Justices are unlikely to fall under the purview of [bribery] statutes."[131] Even so, gifts to Justices can be problematic even if they do not rise to the level of a bribe, due to the reciprocity and signaling effects.[132]

4. *The New Supreme Court's Code of Conduct*

In response to mounting criticism over the revelations regarding undisclosed gifts, the Supreme Court adopted in November of 2023, a "Code of Conduct for Justices of the Supreme Court of the United States" (SCCoC),[133] which contains a section concerning gift receipts.[134] The SCCoC largely follows, both in language and structure, the Code of Conduct

126 *Id.* at 450.

127 Kim, *supra* note 33, at 217.

128 *Id.* at 214–17 and sources cited therein.

129 *Id.* at 208.

130 *See supra* notes 53-56 and accompanying discussion.

131 *See supra* notes 50-53 and accompanying discussion.

132 *See supra* notes 51-54 and accompanying discussion.

133 de Vogue & Cole, *supra* note 31.

134 CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, 4D(3) (2023), https://s3.documentcloud.org/documents/24164429/supreme-court-of-the-united-states.pdf [https://perma.cc/5ZGB-5J6X] (last visited Dec. 28, 2024).

for United States Judges (the "Code of Conduct").[135] The Code of Conduct itself was first adopted by the Judicial Conference in 1973 and has occasionally been updated.[136] The Code of Conduct by its own terms excludes Justices,[137] but even before the adoption of the SCCoC, Chief Justice Roberts commented that Justices "consult the Code of Conduct in assessing their ethical obligations."[138]

Unfortunately, the adoption of the SCCoC is almost certain to make no difference in regulating gift practices. Like the Code of Conduct, the SCCoC prescribes that a Justice "should comply with the restrictions on acceptance of gifts . . . set forth in the Judicial Conference Regulations."[139] However, unlike the Code of Conduct, which generally refers to "Gift Regulations,"[140] the SCCoC limits its reach to compliance with regulations "now in effect."[141] It is difficult to discern the purpose of this tweak in language, which is otherwise copied from the Code of Conduct word for word.[142] One reasonable interpretation is that the Justices are not willing to subject themselves to any future amendments to gift regulations.

The SCCoC also omits a line found in the Code of Conduct "that says lower court judges can't accept outside compensation that exceeds 'what a person who is not a judge would receive for the same activity.'"[143] This opens the door for Justices to accept excessive compensation, for example, for book deals and paid lectures, and never report it as a "gift."

With respect to financial disclosures, including those prescribed by the 1978 Act, the SCCoC states that "[f]or some time, all Justices have agreed to comply with the statute governing

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135 *See* CODE OF CONDUCT FOR UNITED STATES JUDGES (2019), https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges [https://perma.cc/9TWL-P9MS] (last visited Dec. 28, 2024).

136 Wheeler, *supra* note 39, at 500.

137 CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 135, at 2 ("This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.").

138 ROBERTS, JR., *supra* note 43, at 4.

139 CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 134, at 4D(3).

140 CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 135, at 4D(4).

141 CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 134, at 4D(3).

142 The only other exception is replacing the word "Judge" with "Justice."

143 Zoe Tillman, *Supreme Court Rules Depart from Ethics Code for Other Judges*, BLOOMBERG L. (Nov. 14, 2023), https://news.bloomberglaw.com/us-law-week/supreme-court-rules-depart-from-ethics-code-for-other-judges [https://perma.cc/M7FW-GZ3T].

financial disclosure, and the undersigned Members of the Court each individually reaffirm that commitment."[144] Not only does this not improve Justices' commitment to financial disclosure, but it also affirmatively acknowledges they all see gift disclosures prescribed by law as voluntary. In addition, this reaffirmation of their commitment is explicitly limited to current Justices who signed the SCCoC, effectively exempting any future-appointed Justice from this voluntary "commitment."

Finally, the SCCoC is rather meaningless in terms of enforcement. The SCCoC lacks any enforcement mechanism. As such, the SCCoC was criticized as an "honor system, with individual justices deciding for themselves whether their conduct complies with the code."[145] Experts of judicial conduct characterized the SCCoC as "toothless." [146]

C. Reform Proposals and the Constitutional Debate

The shortcomings of judicial rules of conduct did not go unnoticed. In recent years, multiple commentators have advanced various proposals to remedy the failures described above.[147] Multiple bills—none that became law—have been introduced or reintroduced in Congress to the same end.[148] Most recently, Rep. Hank Johnson (D-GA) and Sen. Sheldon Whitehouse (D-RI) reintroduced the Supreme Court Ethics, Recusal, and Transparency Act of 2023.[149] The Act would require disclosure of *any* gift received by Justices.[150] In addition, Justices would have to recuse themselves from any case if "[they], their spouse, their minor child, or a privately held entity owned by any such person received . . . a gift" from an interested party.[151] In addition, parties, lawyers representing the parties,

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144 CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 134, at 4H.

145 Adam Liptak, *Supreme Court's New Ethics Code Is Toothless, Experts Say*, N.Y. TIMES (Nov. 14, 2023), https://www.nytimes.com/2023/11/14/us/politics/supreme-court-ethics-code-clarence-thomas-sotomayor.html [https://perma.cc/QN57-H5LH].

146 *See Id.*

147 *See, e.g.*, Kim, *supra* note 33; Wheeler, *supra* note 38, at 524–26; James J. Alfini, *Supreme Court Ethics: The Need for Greater Transparency and Accountability*, 21 PROF. LAW. 10 (2012).

148 *See*, *e.g.*, Supreme Court Ethics Act, S. 325, 118th Cong. (2023); Supreme Court Ethics Act of 2013, H.R. 2902, 113th Cong. (2013); Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. (2011).

149 S. 359, 118th Cong.(2023-2024).

150 *Id.* § 3.

151 *Id.* § 4.

and amici in any case in front of the Supreme Court would have to disclose gifts made to Justices in a period beginning two years before commencement of the proceedings, and ending with final resolution of proceedings.[152]

Rep. Pramila Jayapal (D-WA) and Sen. Elizabeth Warren (D-MA) reintroduced the Judicial Ethics and Anti-Corruption Act.[153] The Jayapal-Warren bill would amend the 1989 Act by imposing a ban on receiving any gifts from any person seeking official action, and would include personal hospitality (including travel, food, and lodging), within the amount limits on receipts by federal officials.[154]

There are two difficulties with such reform proposals. The first is that they are politically contentious and would face uphill battles in a divided Congress, as evident from the fact none have become law. The second, and more permanent difficulty, is the fact that such proposals will undoubtedly face significant constitutional challenges on which the Justices themselves will have to rule. Whether Congress can regulate Justices' gift receipts at all is a matter of some scholarly debate. Some of the Justices themselves are clearly skeptical of such congressional authority.[155]

The Constitution "leaves vital questions about the Supreme Court's daily activities unanswered."[156] The "necessary and proper" clause authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States."[157] Commentators who believe that Congress has the authority to regulate Justices' conduct argue that the combination of the constitutional ambiguity on the Supreme Court's operations, and the necessary and proper clause "justify a wide range of legislation concerning judicial administration, including the ethical conduct of the judges and Justices who serve on those courts."[158] Under this authority, among others, Congress created the role of the Chief Justice,

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152 *Id.* § 6.

153 H.R. 3973, 118th Cong. (2023-2024).

154 *Id.* § 3.

155 *See supra* notes 20-22 and accompanying discussion.

156 Frost, *supra* note 41, at 457. Frost's article offers the most comprehensive account to date on the constitutional debate regarding congressional authority to regulate Justices' behavior. The discussion herein draws significantly on Frost's excellent analysis.

157 U.S. CONST. art. I, § 8.

158 Frost, *supra* note 41, at 457.

determined (and changed on occasion) the Court's size, established quorum requirements, and granted the Supreme Court Justices authority to hire clerks.[159]

The main objection to congressional authority to regulate Justices conduct stems from the fact that "Article III of the Constitution creates only one court, the Supreme Court of the United States,"[160] leaving Congress the authority "to establish additional lower federal courts that the Framers knew the country would need."[161] Under such view, congressional action establishing the Court's operational procedures is within the necessary and proper clause, because it is required for the Court to function. Ethics rules are not necessary for the Court's operational capacity, and as such are not within congressional constitutional authority.[162]

Professor Amanda Frost believes this argument is unconvincing. "Congress has enacted many statutes that are not essential to the Court's very existence . . . without any Justice raising a constitutional complaint."[163] It seems intellectually inconsistent to only raise such an argument in the context of rules of judicial conduct. Moreover, some laws "viewed as purely administrative seek to control judicial behavior in much the same way that ethics legislation does."[164] Consider, for example, the congressionally mandated oath of office, which requires Justices to solemnly swear to "administer justice without respect to persons and do equal right to the poor and to the rich" and "faithfully and impartially discharge and perform all the duties incumbent upon them before taking their place on the Court."[165]

Many scholars of judicial ethics agree with Frost's analysis according to which Congress has broad (but not unlimited) constitutional authority to regulate Justices' conduct.[166] But

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159 *Id.* at 458 (discussing the Judiciary Act of 1789).

160 ROBERTS, JR., *supra* note 43, at 4.

161 *Id.*

162 Frost, *supra* note 41, at 459 ("[L]egislation setting the Court's size and the dates on which it is to hold its sessions are necessary for the Court to function, but laws regulating ethics are not.").

163 *Id.* at 460.

164 *Id.* at 461.

165 *Id.* (citations omitted).

166 *See, e.g.*, Kim, *supra* note 33, at 231 ("I am persuaded by the academic commentary that concludes that Congress has the broad (but not unlimited) constitutional authority to regulate the ethical conduct of the Justices."); Daniel Epps & Ganesh Sitaraman, 134 HARV. L. REV. F. 398, 404 (2021) ("Professor Amanda Frost has argued that well-crafted legislation would fall within Congress's 'broad, but not unlimited, authority to regulate the Supreme Court Justices' ethical conduct.'").

even if one is convinced by this analysis, there is little doubt that any significant congressional effort to regulate Justices' gifts receipts will face a constitutional challenge. Then, the Justices will have to decide the issue.

D. Summary: Why Current Gift Regulations Fail

The discussion thus far shows that the regulation of gift receipts by Justices falls short of achieving its purposes of preventing undue influence and maintaining public trust. As discussed above, three types of regulations may help achieve such purposes: disclosure rules, banning gifts, and limiting the size of gifts. All three are adopted in current laws, but none is actually effective for the following reasons:

First, applicable rules exempt from their reach most gifts of hospitality. Hospitality is not limited in scope and offers an avenue to permissibly shower Justices with lavish gifts. Second, there is the problem of opacity. Again, the exclusion of hospitality gifts, as well as other gifts based on personal relationships, means that many of these gifts remain undisclosed. The third problem is that of lax enforcement. The subjects of the rules, judges and Justices, are also the regulators and enforcers of most rules. The current head enforcer—the Chief Justice—seems to hold the position that Justices' adherence to gift regulations is voluntary. The last problem is that of constitutional ambiguity. Even if Congress were to adopt robust regulation of gift giving to Justices, such a law would face significant constitutional challenges. And the Justices themselves will likely have the last word.

Another set of rules, effective, enforceable, and not constitutionally ambiguous, is required. Income taxation already offers such a framework.

II
Income Taxation and Gift Receipts by Justices

Thomas, Alito, and other Justices' receipt of luxury travel and hospitality may have not been captured by rules regulating judicial conduct. But these transfers may require reporting and payment of taxes under our existing federal tax system. If so, many (but not all) of the concerns about Justices' gift receipts are mitigated.[167] If some gifts were not captured by our federal tax system, Congress can amend our income tax

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167 *See* discussion *infra* subpart III.A.

law—without fear of a constitutional challenge – so that no gifts escape reporting and taxation.[168]

A. Gifts to Justices and the Federal Tax System

There are two types of federal taxes that may apply to gift transfers: income taxation and gift taxation. This subpart explains the difference between the two and posits that income taxation is better suited to offer a framework to regulate gift receipts by Justices.

1. *"Gifts" Under Federal Income Tax*

Under our *income tax* system, tax is imposed on any "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[169] The source of income does not matter.[170] Taxpayers must report all income and pay tax on it.[171] The normative justification to tax all accession to wealth is that taxpayers should pay income tax based on their "ability-to-pay."[172] Taxpayers who are more affluent should pay higher effective rates than less fortunate taxpayers.

The I.R.C., however, includes several exceptions to the general rule of inclusion. Most importantly, in the context of this Article, is Section 102, under which "[g]ross income does not include the value of property acquired by gift."[173] Unfortunately, the term "gift" is not defined in Section 102, nor anywhere else in the I.R.C. Instead, the definition of "gift" for income tax purposes has been developed through a voluminous body of adjudication.

The Supreme Court decision in *Commissioner v. Duberstein*[174] is the leading authority. The decision was a consolidated discussion of two cases. In one case, the taxpayer—Duberstein—received a Cadillac from a long-time business acquaintance, Berman. Berman was under no obligation to give the car to Duberstein and apparently did so to thank

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168 *See* discussion *infra* subpart III.B.

169 Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

170 I.R.C. § 61 ("[G]ross income means all income from whatever source derived . . . .").

171 I.R.C. § 1.

172 JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 65–67 (4th ed. 2008) (explaining the "ability-to-pay" principle).

173 I.R.C. § 102.

174 363 U.S. 278 (1960).

Duberstein for useful business information he provided.[175] Treating the Cadillac as a gift, Duberstein claimed the value of the Cadillac does not constitute "income." The IRS disagreed, claiming the transfer is better characterized as payment for services, which is taxable. In the second case, the taxpayer—Stanton—received a large amount of money as a gratuity after resigning from his long-term employment with a church. Stanton claimed the payment was a non-taxable gift. The IRS countered that the payment was part of a severance package, and, as such, taxable. The Court ruled in favor of the IRS in the case of Duberstein and remanded Stanton's case for additional fact-finding.

In deciding for the IRS in the case of Duberstein, the Court established the oft-cited standard under which gifts are transfers made out of "a 'detached and disinterested generosity' . . . 'out of affection, respect, admiration, charity or like impulses.'"[176] Thus, the only clear aspect of the Court's ruling in *Duberstein* is that the controlling factor is the donative intent of the transferor, not the perception of the transferee.[177] For income tax purposes, whether Justices Alito and Thomas perceived their receipt of luxury travel and hospitality as a "gift" is irrelevant. What matters is whether the billionaires who gave the gifts did so out of detached and disinterested generosity. "Payments made out of 'any moral or legal duty' or in anticipation of an economic benefit . . . do not constitute gifts."[178]

The *Duberstein* decision thus requires us to identify the subjective intent of the transferor. Unfortunately, the decision is not a model of clarity, and offers sparse guidance on how to do that.[179] Instead, the Court stated that such determination "must be reached on consideration of all the factors."[180] In making the determination, the Court also invited future

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175 *Id.* at 280 ("Berman telephoned Duberstein and said that the information Duberstein had given him had proved so helpful that he wanted to give the latter a present. Duberstein stated that Berman owed him nothing. Berman said that he had a Cadillac as a gift for Duberstein . . . .").

176 *Id.* at 285 (citations omitted).

177 *Id.* ("[T]he most critical consideration . . . is the transferor's 'intention.'").

178 Kathleen DeLaney Thomas, *Taxing Nudges*, 107 VA. L. REV. 571, 592 (2021).

179 The author is of the opinion that *Duberstein* is one of the most terribly written tax decisions of all time.

180 *Duberstein*, 363 U.S. at 288.

taxpayers to rely on their "maxims of experience"[181] and "the mainsprings of human conduct."[182]

The Court considered, and rejected, an IRS invitation to promulgate a clear-cut test.[183] Notwithstanding the rejection of a clear test, the Court did consider all the factors that the IRS put forward. While stating that no factor is determinative on its own, the Court agreed that all factors are "doubtless relevant to the over-all inference."[184] The *Duberstein* decision, as well as post-*Duberstein* courts, "have examined a number of objective indicia of the transferor's intent":[185]

1. *Employee-employment relationship.* Under the IRS's view in *Duberstein*, any payments between employers and employees should be taxable.[186] While the Court rejected this bright line presumption, Congress later explicitly adopted it by amending Section 102 to include in income all "gifts" transferred from an employer to an employee.[187] Under current law, gifts received by employees from employers may only be excluded as fringe benefits under a different set of rules.[188] These exclusions are usually limited to small amounts, and must meet strict qualifying requirements.[189] This factor is irrelevant in the context of this article, because none of the Justices were employed by any of the donors.
2. *Whether the transferor claimed a deduction in respect of the gift.* Under the IRS view, "the concept of a gift is inconsistent with a payment's being a deductible business expense."[190] Indeed, a deduction of the gift's value generates an economic benefit to the transferor, suggesting that the giving is not disinterested. In *Duberstein*, the Court noted the fact that Berman deducted the cost of the car,[191] and other courts similarly considered whether the transferor deducted the value of "gifts" when

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181 *Id.* at 287.

182 *Id.* at 289.

183 *Id.* at 287–88.

184 *Id.* at 287.

185 Emily Cauble, *Presumptions of Tax Motivation*, 105 IOWA L. REV. 1995, 2002 (2020).

186 363 U.S. at 287.

187 I.R.C. § 102(c).

188 I.R.C. § 132 (excluding certain employment fringe benefits from income).

189 *Id.*

190 *Duberstein*, 363 U.S. at 287.

191 *Id.* ("[I]t is doubtless relevant to the over-all inference that the transferor treats a payment as a business deduction . . . .").

determining the transferors' motivations.[192] In addition, after *Duberstein*, Congress added Section 274(b) to the I.R.C.[193] Section 274(b) disallows a deduction for any transfer in excess of $25 as a business expense, if the transfer qualifies as a gift to the transferee.[194] Thus, today, a deduction by a transferor is a strong indication against donative intent: a donor who claims a business deduction in respect of a transfer cannot, at the same time, reasonably argue an intent to make a gift. Since gifts are not deductible, this would make the deduction illegal. I.R.C. § 274(b) is good tax policy. It creates symmetry. Someone has to pay tax on the transfer. If the recipient is exempt, then the donor bears the burden by being denied a deduction. If the recipient is taxable, then it makes sense for the donor to claim a deduction.

3. *The existence of personal relationships.* In *Duberstein*, the government asked the Court to consider whether the "gift involves 'personal' elements.'"[195] Post *Duberstein*, courts are more likely to find the transfer to be an excludable gift to the recipient if one of the primary motivations of the transfer is 'personal affection.'[196]
4. *Expectation of economic benefit.* "[I]f the payment proceeds primarily from . . . 'the incentive of anticipated

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192 *See*, *e.g.*, Keck v. Comm'r, 66 T.C.M. (CCH) 1361, 1363 (T.C. 1993) (stock bonuses not gifts to employees where the company "treated the stock bonus as compensation and claimed a $1 million wage expense deduction"); Zelinsky v. Comm'r, 58 T.C.M. (CCH) 335 (T.C. 1989) (a $50,000 payment not a gift where the transferor "deducted the $50,000 payment as compensation on its own return"); Estate of Carter v. Comm'r, 453 F.2d 61, 63 (2d Cir. 1971) (a transfer by a firm to the widow of a deceased executive is gift, and hence not included in income, where, among other considerations, the "firm would not deduct the payments"). The deduction factor is not determinative, however. *See, e.g.*, Larsen v. Comm'r, 95 T.C.M. (CCH) 1273 (T.C. 2008) (payment from an employer to employee was income, not a gift, even though the employer did not deduct the cost of the payment); Evans v. Comm'r, 39 T.C. 570, 580 (1962), *aff'd*, 330 F.2d 518 (6th Cir. 1964) ("It may be added that the fact that the corporation deducted the payments is some evidence, although not in itself conclusive, that the corporation did not regard the payments as gifts.").

193 Revenue Act of 1962, Pub. L. No. 87-834, § (4)(b), 76 Stat. 960, 960 (1962).

194 I.R.C. § 274(b).

195 363 U.S. at 287.

196 *See*, *e.g.*, Kavoosi v. Comm'r, 51 T.C.M. (CCH) 993, 996 (T.C. 1986) (transfers of financial assistance gifts, not income, where the transferor knew, and "felt a great deal of affection for" the taxpayer); Pascarelli v. Comm'r, 55 T.C. 1082, 1082 (1971), *aff'd*, 485 F.2d 681 (3d Cir. 1973) (transfers constituted gift where the "predominant motive in making the transfers was personal affection and disinterested generosity"); Mesinger v. Comm'r, 31 T.C.M. (CCH) 1127 (T.C. 1972) (allowing close family friends of the transferor stay rent free in the transferor's apartment is a gift, not income to the taxpayer).

benefit' of an economic nature, it is not a gift."[197] Post *Duberstein* courts clearly considered whether the transferors expected economic benefits on account of the transfer, whether directly or indirectly. For example, a car "gifted" to a celebrity athlete is not an excludable gift to the athlete, because "endorsement of commercial products is obviously valuable to various business interests" of the car manufacturer.[198] Whether the expectation of benefit is rational is immaterial. For example, tokes to casino dealers are taxable to the dealers, because "[t]ribute to the gods of fortune which it is hoped will be returned bounteously soon can only be described as an 'involved and intensely interested' act."[199]

5. *Whether the transferor is a corporation*. Under the government's view in *Duberstein* "a business corporation cannot properly make a gift of its assets."[200] The Court indeed considered whether "the transferor is a corporate entity"[201] to be a relevant factor. While the Court did not elaborate, it seems that the logic is the difficulty of establishing a "donative intent" in the case of a corporate entity. Several courts have indeed considered that fact as weighing against characterizing transfers as non-taxable gifts.[202]
6. *Statements by the transferor at the time of the transfer*. In *Duberstein*, the Court considered it relevant that Berman stated he gifted the car to Duberstein because of the useful business information Duberstein provided.[203] This made the transfer look like a payment for services, rather than pure generosity.

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197 *Duberstein*, 363 U.S. at 285 (citations omitted).

198 Hornung v. Comm'r, 47 T.C. 428, 440 (1967). *See also* Deisher v. Comm'r, 60 T.C.M. (CCH) 77, 83 (T.C. 1990) (A receipt does not constitute a gift where, among others, the transferor "gave money and valuable items . . . in an attempt to promote his business interests.").

199 Olk v. United States, 536 F.2d 876, 879 (9th Cir. 1976).

200 363 U.S. at 287.

201 *Id.*

202 *See*, *e.g.*, Prather v. United States, 296 F. Supp. 1323, 1326 n.5 (N.D. Tex. 1969) (citing the fact the donor is a corporation as a factor against finding that a transfer from a corporation was a gift); Meyer v. United States, 244 F. Supp. 103, 107 (S.D. Cal. 1965) (quoting *Duberstein*, 363 U.S. at 287) ("[I]t is doubtless relevant to the over-all inference that the transferor treats a payment as a business deduction, or that the transferor is a corporate entity.").

203 363 U.S. at 280.

2. *"Gifts" Under Federal Gift Tax*

Under Section 2501 of the I.R.C., *gift taxation* is imposed "on the transfer of property by gift during such calendar year by any individual."[204] Unlike income taxation, which is imposed on the recipient of the transfer, gift taxation is the liability of the donor.

Gift taxation serves as an anti-avoidance backstop for two other taxes. First, under the federal estate tax, we tax wealth transfers at death.[205] The tax is imposed on the net value of the estate.[206] Had the estate tax stood on its own, "testators would be tempted to defeat the tax by making some significant proportion of their wealth transfers in advance of their death."[207] If *inter-vivos* gift transfers are also taxable, this incentive disappears. Second, as discussed above, we do not tax gifts as income to the recipient. As such, taxing gifts to the donor serves as a backstop to income tax avoidance.[208] For example, a rich taxpayer looking to sell property is subject to income tax on the gain. In the absence of a gift tax, the property owner may choose to transfer the property as a "gift" to a trusted transferee who is less affluent and have them sell the property. Assuming Section 102 applies, this transfer is not taxable. Then, the less affluent recipient–who is likely subject to lower income tax rates than the transferor–will sell the property and pay lower tax on the sale of the "gift." The original owner and the transferee can then share in the tax savings, avoiding income taxation. Gift taxation discourages such schemes by taxing the rich taxpayer on the transfer of the original gift.

Here again, the definition of what constitutes a taxable "gift" is not explicit. Treasury regulations define gifts broadly as "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax."[209] However, unlike in the case of income tax, "donative intent" is not required

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204 I.R.C. § 2501.

205 I.R.C. § 2001.

206 *Id.*

207 Richard Schmalbeck, *Does the Death Tax Deserve the Death Penalty? An Overview of the Major Arguments for Repeal of Federal Wealth-Transfer Taxes*, 48 CLEV. ST. L. REV. 749, 751 (2000).

208 Bridget J. Crawford, Victoria J. Haneman & Jonathan G. Blattmachr, *Gift Tax Consequences of Luxury Hospitality: An Introduction*, 179 TAX NOTES FED. 1157, 1162 (2023).

209 Treas. Reg. § 25.2511-1(c)(1) (1997).

to find that a transfer constitutes a taxable gift.[210] Instead, any transfer for which the consideration is less than the fair market value would constitute a gift for gift tax purposes.[211]

3. *Income Taxation Is Better Suited to Address Gift Receipts by Justices*

While both gift tax and income tax may capture the transfer of gifts to Justices, income tax is much better suited to regulate judicial conduct. Under income taxation, it is the recipient of the income who is the relevant taxpayer, i.e., the Justices. Under gift taxation, the taxpayer is the donor. Thus, to the extent tax can serve as a regulatory instrument to regulate judicial behavior, income taxation offers a more direct approach than gift taxation.

In addition, luxury gifts to Justices are more likely to be captured by current rules of income taxation than gift taxation. The tax consequences of a transfer qualifying as a "gift" are reversed in the context of gift taxation and income taxation. If a transfer is *not* a "gift," it is *not* taxable for gift tax purposes, but *is* taxable for income tax purposes, thus offering a regulatory opportunity. A recent analysis suggests that a gift of luxury travel is unlikely to be captured by federal gift taxation.[212] If gift tax is supposed to serve as a backstop for income tax avoidance, but is inapplicable to hospitality gifts, a sensible tax policy requires that these transfers be captured by income tax. Below I indeed show that some of the luxury travel gifts fail to qualify as gifts for income tax purposes, and, as such, should be subject to income taxation.

Income taxation is also of much broader application than gift taxation. For 2024, employees earning more than $13,850 ($15,700 for taxpayers 65 or older) must file an income tax return.[213] The amounts are doubled for married individuals filing jointly ($27,700 and $30,700, respectively).[214] Self-employed individuals are required to file an income tax return if they

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210 Comm'r v. Wemyss, 324 U.S. 303, 306 (1945) (analyzing legislative history to conclude that donative intent is not required for a transfer to constitute a taxable gift).

211 I.R.C. § 2512.

212 Crawford, Haneman & Blattmachr, *supra* note 208, at 1162–63 (calling the I.R.S. to issue guidance clarifying that gifts of luxury travel are subject to gift tax).

213 *Here's Who Needs to File a Tax Return in 2024*, IRS (Feb. 2024) https://www.irs.gov/newsroom/heres-who-needs-to-file-a-tax-return-in-2024 [https://perma.cc/Z9UK-SN8F].

214 *Id.*

make $400 or more annually.[215] Under such circumstances, any transfer of luxury travel in excess of $400 may be captured by income tax, if not exempt under Section 102 of the I.R.C.

On the other hand, gift tax is imposed only on the amount of gifts in excess of (i) an annual amount of gifts,[216] and (ii) an overall lifetime limitation.[217] These thresholds are substantial, and inflation-adjusted. For 2023, the annual exclusion amount was $17,000 for individual transferors of gifts ($34,000 for married transferor filing jointly).[218] The 2023 lifetime exclusion was $12,920,000 ($25,840,000).[219] The lifetime exclusion is intended to match the exclusion amount for estate tax purposes. The idea is to prevent taxpayers from circumventing the estate tax by transferring wealth as gifts during their lifetime. Even though the gift tax is imposed on an annual basis, donors "may apply their lifetime estate and gift tax exemption,"[220] thus avoiding any gift taxes until hitting the very high threshold of the lifetime exclusion. This immediately makes it clear that federal gift taxation is rarely paid.[221] With minimal tax planning, gift tax will only kick in after a donor has transferred at least $12,920,000.[222] Thus, given the threshold of applicability, gift transfers to Justices are much more likely to be captured by income taxation than by gift taxation.

B. Income Tax Analysis of Recent Gift Receipts by Justices

Investigative reports provide quite a lot of detail on many of the "gifts" received by Justices Alito and Thomas. This enables

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215 *Id.*

216 I.R.C. § 2503.

217 I.R.C. § 2010.

218 Rev. Proc. 2022-38, 2022-45 I.R.B. 445, § 3.43.

219 *Id.* § 3.41.

220 Crawford, Haneman & Blattmachr, *supra* note 208, at 1163.

221 For example, "[i]n 2020, revenues from federal estate and gift taxes totaled $17.6 billion (equal to 0.1 percent of gross domestic product, or GDP)." *See Understanding Federal Estate and Gift Taxes*, CONG. BUDGET OFF. 1 (June, 2021), https://www.cbo.gov/system/files/2021-06/57129-Estate-and-Gift-Tax.pdf [https://perma.cc/6RQU-7F9D].

222 Data on estate taxes, which have the same taxability threshold as gift taxes, also suggests that very few taxpayers are affected. For 2020, it was estimated that only about "4,100 estate tax returns will be filed for people who die in 2020, of which only about 1,900 will be taxable—less than 0.1 percent of the 2.8 million people expected to die in that year." *Who Pays the Estate Tax?*, TAX POL'Y CTR. (May 2020), https://www.taxpolicycenter.org/briefing-book/who-pays-estate-tax [https://perma.cc/HN5P-QHCN].

a rather detailed analysis under Section 102 of the I.R.C. and post-*Duberstein* adjudication.

All transfers discussed below constitute "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion,"[223] and, as such, constitute income under the general rule of I.R.C. Section 61. The only relevant question is whether the transfers were made out of "detached and disinterested generosity,"[224] and as such entitled to the gift exemption under Section 102.

As explained above, identifying the subjective intent of the donor is difficult. This requires a close inspection of facts and circumstances that courts deem relevant.[225] However, literature in behavioral sciences suggests that affluent donors are likely to be motivated by self-interest in their giving, not by generosity.[226] For example, an analysis of three experimental studies by Whillans, Carusob, and Dunn found that wealthy individuals are more likely to make charitable contributions if it advances their personal agency, while less affluent individuals are more likely to do so to advance communal goals.[227] A series of other studies found that affluent taxpayers are more likely to contribute in response to appeals that are framed in terms of utilitarian self-agency of the donor than in terms of communal need.[228] Another study finds that non-affluent donors tend to donate in response to urgent need (such as alleviating hunger) while affluent donors are more likely to donate to non-urgent causes (such as cultural activities).[229]

These studies are legally relevant. When questioning donors' motivations, the Supreme Court in *Duberstein* explicitly

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223 Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

224 Comm'r v. Duberstein, 363 U.S. 278, 285 (1960).

225 These factors are discussed *supra* notes 169-202 and accompanying text.

226 Daisy Grewal, *Wealthy People Give to Charity for Different Reasons Than the Rest of Us*, Sci. Am. (July 25, 2017), https://www.scientificamerican.com/article/wealthy-people-give-to-charity-for-different-reasons-than-the-rest-of-us/ [https://perma.cc/8D4E-TCPF].

227 Ashley V. Whillans, Eugene M. Caruso & Elizabeth W. Dunn, *Both Selfishness and Selflessness Start with the Self: How Wealth Shapes Responses to Charitable Appeals*, 70 J. Experimental Soc. Psych. 242, 248 (2017).

228 Judd B. Kessler, Katherine L. Milkman & C. Yiwei Zhang, *Getting the Rich and Powerful to Give*, 65 Mgmt. Sci. 4049, 4058 (2019); Ashley V. Whillans & Elizabeth W. Dunn, *Agentic Appeals Increase Charitable Giving in an Affluent Sample of Donors*, 13 PLOS One 1, 7 (2018), https://doi.org/10.1371/journal.pone.0208392 (concluding that "agentic (vs. communal) messages can increase donations among the affluent").

229 Yan Vieites, Rafael Goldszmidt & Eduardo B. Andrade, *Social Class Shapes Donation Allocation Preferences*, 48 J. Consumer Res. 775, 788 (2021).

requires us to look at the "maxims of experience"[230] and "the mainsprings of human conduct."[231] This is a call by the Justices for behavioral realism, an approach which insists that "law should incorporate a scientifically up-to-date model of human behavior."[232] Under such an approach, empirical evidence in behavioral sciences is undoubtedly relevant to unearth donors' intent. Current scientific evidence is suggestive that affluent taxpayers are unlikely to make contributions out of "detached and disinterested generosity."[233] As such, any "gift" made by affluent taxpayers should be considered suspicious for purposes of income tax law. Harlan Crow, Paul Singer, Robin Arkley, and Anthony Welters–the donors whose gifts to Justices are discussed below–are all very rich. This should weigh against finding that their transfers qualified as gifts for income tax purposes. The other factors used by courts to identify donors' intent are discussed below in the context of several examples.

1. *Alito's Luxury Fishing Trip: Almost Certainly Taxable to Alito*

The gift. In 2008 Justice Alito received an all-inclusive vacation to a luxury fishing lodge in Alaska.[234] The lodge owner was Robin Arkley II, an owner of a mortgage company then based in California. Paul Singer, a hedge fund manager who also attended the trip, flew Alito to Alaska free of charge on Singer's private jet. The trip included, among others, bush plane trips, guided fishing tours, and gourmet meals. Another guest on the trip was Leonard Leo, the president of the Federalist Society.

ProPublica estimated that the cost of Alito's flight alone would be about $100,000.[235] The lodge market rate was about $1,000 a night, and the party drank $1,000 bottles of wine.[236]

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230 Comm'r v. Duberstein, 363 U.S. 278, 287 (1960).

231 *Id.* at 289.

232 Jerry Kang, *Implicit Bias, Behavioral Realism, and the Purposeful Intent Doctrine*, *in* THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado, Emily Houh & Khiara M. Bridges eds., 2023) (forthcoming) (manuscript at 8).

233 *Duberstein*, 363 U.S. at 285.

234 Elliott, Kaplan & Mierjeski, *supra* note 7. Unless otherwise stated, all factual descriptions of Alito's trip are taken from this story.

235 *Id.*

236 *Id.*

It is therefore fair to estimate the value received by Alito was significantly higher than $100,000.

One of the arguments Alito made against disclosure of the trip was that the seat on Singer's jet "would have otherwise been vacant . . . [and, hence,] would not impose any extra cost on Mr. Singer."[237] Even if this argument is relevant for financial disclosure purposes, it is irrelevant for income tax purposes. In fact, it may be detrimental to Alito's tax position, for two reasons: first, income is measured by accession to wealth of the recipient, not by the cost of the donor.[238] Alito was better off by accepting the value of a flight to Alaska. Whether Singer incurred no additional cost in providing such a trip is not relevant. Second, the I.R.C. already includes a specific exemption for certain benefits received by employees from employers, at "no additional cost" to the employers.[239] Alito does not qualify for this exemption. Such a "no additional cost" benefit must meet stringent requirements in order to be exempt from income for the employee. For example, the recipient must be an employee of the donor. There are also threshold limitations for certain discounts. Congress considered "no additional cost" exclusions from income and limited those to very specific circumstances. The existence of specific "no additional cost" exemption, for which Alito does not qualify, adds weight to the argument that Alito earned taxable income as a result of the trip.

Whether the transferor claimed a deduction in respect of the gift. Media reports on the trip do not directly discuss whether any of the costs of the trip were deducted by Arkley or Singer. This is a factual question. However, for the reasons stated below, it is reasonable to assume that some (if not all) costs were deducted by Arkley. It is difficult to tell whether Singer deducted any of the costs.

The fishing lodge owned by Arkley is a for-profit venture.[240] As such, employee salaries, equipment costs (such as vehicles and fuel), food, drinks, and other business expenses relating to operating the lodge were almost certainly deductible in the lodge's ordinary course of business. It seems unlikely the lodge's owner took upon themself the burdensome administrative task

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237 Alito, Jr., *supra* note 20.

238 *See* Comm'r v. Glenshaw Glass Co. 348 U.S. 426, 431 (1955).

239 I.R.C. § 132(a)(1), (b).

240 Elliott, Kaplan & Mierjeski, *supra* note 7 (The lodge "catered to affluent tourists seeking a luxury experience in the Alaskan wilderness.").

of calculating and separating out the costs associated with Alito's visit, just so they could *not* claim a deduction for these costs. This would require the painstaking work of, for example, figuring out the exact cost of Alito's food and drink, the amount of fuel used to transport Alito alone, and to figure out a way to apportion salary expenses of lodge workers who interacted with Alito to such interactions. In all likelihood, this was not done, which means the expenses in respect of Alito's trip were probably deducted as part of the lodge's general business expenses.

It is also possible that the costs of travel on Singer's private jet were deducted. A ProPublica investigation of leaked tax returns shows that private jet owners regularly purchase jets through their businesses, which enables them to deduct the cost of the jet purchase and operations against business income.[241] However, the IRS has specific guidance in place to prevent taxpayers from improperly deducting personal travel costs in private jets.[242] Whether or not Singer complied with these rules is a question of fact, which we cannot answer here.

The fact that the costs of the trips, at least in part, were probably deducted weighs in favor of finding the value of the trip taxable to Alito.

The existence of personal relationships. One of the criticisms levied against Alito, was that Singer had a case pending in front of the Supreme Court.[243] Responding to such criticism, Alito stated that he had no close relationship with Singer. He has "spoken to Mr. Singer on no more than a handful of occasions, all of which (with the exception of small talk during a fishing trip 15 years ago) consisted of brief and casual comments at events attended by large groups."[244] If we take Alito at his word, that he had no prior relationship with Mr. Singer, this weighs heavily against finding that Singer's intent in giving was "detached and disinterested."[245]

Moreover, according to ProPublica, Singer did not gift Alito the travel on his own volition, but seemingly was persuaded to do so by Leonard Leo, who "invited Singer to join, according to a person familiar with the trip, and asked Singer if he and

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241 Paul Kiel, *Private Planes and Luxury Yachts Aren't Just Toys for the Ultrawealthy. They're Also Huge Tax Breaks*, PROPUBLICA (Apr. 5, 2023), https://www.propublica.org/article/private-jets-yachts-wealthy-tax-deductions-irs-files [https://perma.cc/M4LR-3CMR].

242 Treas. Reg. § 1.274-10(e) (2012).

243 *See* accompanying discussion, *supra* notes 240-251

244 Alito, Jr., *supra* note 20.

245 Comm'r v. Duberstein, 363 U.S. 278, 285 (1960).

Alito could fly on the billionaire's jet."[246] This further weighs against finding that Singer's gift was made out of personal affection.

Neither ProPublica, nor Alito seem to have suggested there was any close relationship between Arkley and Alito prior to the trip. This also weighs in favor of finding the trip taxable to Alito.

Expectation of economic benefit. One of the core aspects of ProPublica's reporting was the fact that Singer had business in front of the court. Singer's hedge fund was involved in a bitter dispute with Argentina. In 2001, Singer's fund purchased Argentina's sovereign debt at a deep discount. Several years later it demanded Argentina to pay up, and in 2007 asked the Supreme Court to intervene for the first time. The Supreme Court refused.[247] The fishing trip happened in 2008, and in 2009 Singer's hedge fund again sued Argentina. After a lengthy process of litigation and appeals, the Supreme Court agreed to hear the case, and ruled in favor of Singer's hedge fund in 2014.[248] These facts raised concerns regarding Alito's impartiality in the case.[249] In response, Alito stated that he "was not aware and had no good reason to be aware that Mr. Singer had an interest in any party."[250] But Alito's state of mind is not the relevant question in the income tax context; Singer's state of mind is. At the time of the trip Singer probably knew his dispute with Argentina may end up before Alito. Whether he considered it or not is a question of fact. But the fact Singer had a dispute in respect of which Alito may have a say certainly raises the concern that Singer might not have been disinterested in Alito's potential future rulings. Arkley apparently had no business before the Court.

Both Arkley and Singer were familiar with another guest on the trip; Leonard Leo, the president of the Federalist Society. Per ProPublica, both were major donors to Leo's political groups. ProPublica also claimed that "Leo attended and helped

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246 Elliott, Kaplan & Mierjeski, *supra* note 7.

247 EM Ltd. v. Republic of Argentina, 552 U.S. 818 (2007).

248 Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134 (2014).

249 Elliott, Kaplan & Mierjeski, *supra* note 7 ("Abbe Smith, a law professor at Georgetown who co-wrote a textbook on legal and judicial ethics, said that Alito should have recused himself. If she were representing a client and learned the judge had taken a gift from the party on the other side, Smith said, she would immediately move for recusal.").

250 Alito, Jr., *supra* note 20.

organize the Alaska fishing vacation."[251] If Arkley and Singer indeed funded the trip at the request of Leo, then the transaction was not at all between them and Alito, but between them and Leo, a leader of causes they both support. Thus, they did not "gift" Alito anything. They gave something to Leo. They funded a trip for Alito at the request of a third party. If this is the case, Alito almost certainly earned taxable income on the trip, because he received the "gift" from Leo, not Arkley or Singer. It is difficult to see an argument under which the president of the Federalist Society grants Justices gifts out of "detached and disinterested generosity."[252]

Whether the transferor is a corporation. ProPublica reports do not offer details on how exactly the transactions were structured. However, it is reasonable to assume that both the fishing lodge and the jet are operated by for-profit business entities, and not as the sole proprietorship of Singer and Arkley. To the extent this is the case, it weighs against classifying the transfers as gifts for income tax purposes.

Statements by the transferor at the time of the transfer. In a narrated video taken during the vacation, one lodge employee stated, "[w]e take good care of [Alito] because he makes all the rules."[253] Such a statement seems odd in the context of disinterested giving. Why does it matter to the lodge employees that Alito "makes all the rules"? This suggests that the lodge workers have been briefed about Alito's identity and possibly were instructed to take particular care of him due to his status.

Summary. All factors in respect of which we have clear facts weigh against finding donative intent for both Arkley and Singer. Based on common business practices, factors in respect of which we have no clear facts would likely also weigh against finding donative intent. Alito's luxury fishing trip almost certainly constituted taxable income to him, and he should have reported its value as income on his tax return and paid tax on it.

2. *Thomas's RV Loan: Possibly Taxable to Thomas*

The gift. In 1999, Justice Thomas purchased a Mirage XL Marathon RV.[254] Thomas financed the purchase with a loan from Anthony Welters, an affluent friend of the Justice.

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251 Elliott, Kaplan & Mierjeski, *supra* note 7.

252 Comm'r v. Duberstein, 363 U.S. 278, 285 (1960).

253 *Id.*

254 Becker & Tate, *supra* note 5.

According to experts engaged by *The New York Times*, banks would have been unlikely to extend such a loan to Thomas both on account of his credit history, as well as the high level of customization of this particular RV model.[255]

Nine years after the purchase, Welters forgave the loan, and provided Thomas with a handwritten lien release.[256] A subsequent a Senate investigation found that "Justice Thomas failed to repay a 'significant portion'—or perhaps any—of the $267,230 principal."[257] The loan ended up being a gift.

Given the structure of the transaction as a loan, it is clear that Welters did not originally have a donative intent. The loan carried annual interest of 7.5% and was accompanied by a security agreement. Welters was also listed as a lienholder on the original title of the RV.[258] Thus, the transfer, as originally executed, was not a "gift" for federal income tax purposes. Moreover, the term of the loan was extended in 2004 to allow Thomas more time to pay the loan.[259] It is therefore clear that five years after inception, Welters still viewed the transfer as a loan, and not a gift.

Another aspect that is worth considering is the interest rate on the loan. If a loan is made at below-market rates, it may be treated as a gift for gift tax purposes.[260] As such, it would generate gift tax liability to the donor, in this case, Welters. Whether the loan is below market is determined with reference to an Applicable Federal Rate (AFR).[261] To avoid gift taxation in loans between relatives and friends, gift tax practitioners generally construct loans to have an interest rate just above the AFR.[262] According to a 2023 Senate report, the loan was issued

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255 *Id.*

256 *Id.*

257 Jo Becker, *Justice Thomas's R.V. Loan Was Forgiven, Senate Inquiry Finds*, N.Y. TIMES (Oct. 26, 2023), https://www.nytimes.com/2023/10/25/us/politics/clarence-thomas-rv-loan-senate-inquiry.html [https://perma.cc/3E33-SQC6].

258 Memorandum from Fin. Comm. Democratic Staff to Ron Ryden, Chairman, Senate Comm. on Fin. (Oct. 25, 2023), https://www.finance.senate.gov/imo/media/doc/senate_finance_committee_welters_thomas_memo_102523.pdf [https://perma.cc/9UAA-GLCQ].

259 *Id.* at 2.

260 I.R.C. § 7872

261 I.R.C. § 1274(d).

262 *See generally*, Jonathan G. Blattmachr, Bridget J. Crawford & Elisabeth O. Madden, *How Low Can You Go? Some Consequences of Substituting a Lower AFR Note for a Higher AFR Note*, 109 J. TAX'N 22 (2008).

in December of 1999.[263] The relevant AFR for a 5-year loan[264] in December of 1999 was 6.20%.[265] Had the loan been intended as a favor from Welters to Thomas, we should have expected the interest rate to be just above the AFR. This would be just enough to avoid gift taxation while keeping the cost to Thomas as low as possible. But the actual rate, 7.5%, was considerably higher. This suggests that when Welters set the interest rate, he did not do so simply to avoid gift tax consequences but may have viewed the loan as a commercial transaction.

Under the IRC, debt forgiveness clearly constitutes income for tax purposes,[266] unless explicitly exempt under particular qualifications listed in Section 108.[267] Justice Thomas has not made any claim to be exempt under Section 108, and there seems to be no exemption under which Thomas may qualify. Thus, the question is whether Welters changed his mind after the fact and decided to turn the original loan into a gift. This should place a heavy burden on Welters and Thomas—explaining the circumstances of Welters' change of heart.

Courts have occasionally considered whether cancellation of debt may constitute a gift, and as such exempt from income.[268] Courts, for example, are exceedingly suspicious of gift claims when the cancelled loans are made in the course of a business.[269] A lender's decision not to collect in order to

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263 Memorandum from Fin. Comm. Democratic Staff, *supra* note 258, at 1.

264 I assume the term of the original 1999 loan was five years, because the loan was extended in 2004.

265 Rev. Rul. 99-48, 1999-49 I.R.B. 600 (Nov. 20, 1999).

266 I.R.C. § 61(a)(11); United States v. Kirby Lumber Co., 284 U.S. 1, 3 (1931).

267 I.R.C. § 108 (enumerates instances where cancellation of debt income is exempt from tax).

268 Helvering v. Am. Dental Co., 318 U.S. 322, 326 (1943) ("If, however, a creditor merely desires to benefit a debtor and without any consideration therefor cancels the debt, the amount of the debt is a gift from the creditor to the debtor and need not be included in the latter's gross income"). Note, however, that this decision pre-dated the *Duberstein* decision that defined the donative intent standard. In *American Dental*, the Court stated that the fact the cancellation was made out of selfish interest was "not significant." *Id.* at 332. But under the later Supreme Court decisions, such a finding would be very significant, and would likely deny gift classification. *See* Waterhouse v. Comm'r, No. 17765-92, 1994 WL 513662, at *4 (T.C. Sep. 21, 1994) ("[T]he Supreme Court expressly abandoned the view that a release of 'something for nothing' necessarily implied a gift, and instead adopted a 'motive' test under which the presence or absence of donative intent on the party of the creditor becomes dispositive.").

269 Sutphin v. United States, 14 Cl. Ct. 545, 548 (1988) ("The cancellations here were not intended to be gifts. Gifts as a rule are on a personal basis. Plaintiff's creditors were in business. . . . These were business dealings.") (quoting Marshall Drug Co. v. United States, 118 Cl. Ct. 532, 541 (1951).

save time and resources is not an exempt gift.[270] In *Commissioner v. Jacobson*, the Supreme Court specifically considered the interaction between the gift exemption under the predecessor of Section 102 and the exemptions for cancellation of debt income under the predecessor of Section 108. The Court concluded that "If such [cancellation of debt] gains were already exempted as gifts under [the predecessor of Section 102], as representing something transferred to the debtor for nothing, there would have been no need for [the predecessor of Section 108]."[271] Thus, current Court precedent interprets a failure to qualify for exemption under Section 108 as weighing against finding the loan forgiveness to be a "gift."

It is difficult to assess the size of the gift here. At the minimum, it was the price of the R.V., or $267,000, since a Senate investigation found that Thomas likely did not pay any portion of the principal amount.[272] But it is unclear what amount of interest, if any, did Thomas pay.[273] Welters claims Thomas did pay interest in excess of the loan principal, but, by forgiving the loan, he gave up all previously agreed-upon future interest payments of $20,025 per year.

Whether the transferor claimed a deduction in respect of the gift. I was not able to ascertain whether Welters claimed a deduction in respect of the forgiven loan. Bad debts and other losses may be deductible under the IRC,[274] but it is impossible to speculate if Welters claimed such a deduction.

The existence of personal relationships. Thomas and Welters had personal relationships and considered each other friends. The *New York Times* report of the loan characterizes Thomas and Welters as "close friends."[275] This would generally weigh in favor of the loan forgiveness to be classified as an exempt gift. But in this case, there is an argument that this factor should only receive moderate consideration. Notwithstanding their close relationship, Thomas and Welters chose, explicitly, not to structure the transaction as a gift at first.

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270 *Waterhouse*, 1994 WL 513662, at *5 ("[W]aiver of petitioner's $52,816.33 repayment obligation due to financial hardship must be viewed as a formal business decision by the agency that it should write off what it felt was an uncollectible overpayment of excess disability benefits, and that spending additional agency resources trying to collect this debt would be futile.").

271 Comm'r v. Jacobson, 336 U.S. 28, 49 (1949)

272 Finance Committee Democratic Staff, *supra* note 258, at 4.

273 *Id.*

274 *See* I.R.C. §§ 165, 166.

275 Becker and Tate, *supra* note 5.

A trier of fact may reasonably be suspicious of the change of heart nine years after the fact. Indeed, in one case where the lender personally knew the borrower, the Supreme Court still assumed the lender operated out of personal interest when forgiving the loan.[276]

Expectation of economic benefit. It is clear Welters originally had expectations of economic benefit in the form of 7.5% of annual interest. When he forgave the loan in a handwritten note, he claimed to have done so because "Thomas had paid interest greater than the purchase price of the bus, and that Welters did not feel it was appropriate to continue to accept payments even though he had the right to them."[277] Thus, even per Welters' account, by the time he forgave the loan he received some economic benefit in excess of the original loan. However, Welters gave up any further economic benefit because he felt it was "not appropriate," which may reflect generosity. The "mainsprings of human experience" suggest that further factual inquiry is required into the circumstances that caused Welters to forgive the loan.

Whether the transferor is a corporation. Per the *New York Times* report, Welter personally made the loan to Thomas, and not through a business entity. This would weigh in favor of finding the forgiveness to be an exempt gift.

Statements by the Transferor at the Time of the Transfer. We lack any details regarding any statements made by Thomas or Welters contemporaneously with the cancellation of the loan. It is worth noting that in responding to the reports, Welters stated that "the loan was satisfied,"[278] not that he chose to forgive it. This characterization of how the loan ended requires further investigation. Were there additional terms associated with the "satisfaction" of the loan? This would certainly be of interest to the IRS and courts if they are called to examine the issue. Moreover, if the loan was indeed "satisfied," it was clearly not under the original terms of the loan. Restructuring of a loan in itself may give rise to a taxable event.[279]

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276 *Jacobson*, 336 U.S. at 50 ("The mere fact that the [lender] knew that he was selling to the maker of the bond as his only available market did not change the sale into a gift. In the absence of proof to the contrary, the intent of the seller may be assumed to have been to get all he could for his entire claim.").

277 Memorandum from Fin. Comm. Democratic Staff, *supra* note 258, at 3.

278 Becker & Tate, *supra* note 5.

279 Treas. Reg. § 1.1001-3 (treating certain loan modifications as taxable exchanges).

Summary. Different considerations weigh in different directions here. The personal relationship between Thomas and Welters, as well as the personal (rather than corporate) nature of the loan weigh in favor of finding the debt forgiveness to be an exempt gift. The original structuring of the loan, its extension, and the lack of explanation of the sudden change of heart seem to weigh the other way. Importantly, however, at least in one case the Supreme Court has specifically considered whether loan forgiveness can constitute a gift and decided it does not.[280] The Court seemed to have put significant emphasis on the fact that there are specific loan forgiveness income exemptions, and one cannot skirt their requirements simply by claiming that a loan forgiveness was a gift. I therefore believe that a court could reasonably conclude the loan forgiveness in this case was *not* a gift and thus constituted taxable income to Thomas. A 2023 Senate report indeed concluded that "[f]orgiveness of the loan result[ed] in a taxable event for Justice Thomas."[281]

Interestingly, two tax professors have considered the question, albeit in somewhat less detail, and reached opposite conclusions. Professor Jack Bogdanski claims that "unless there was a *quid pro quo* for the loan forgiveness, Thomas didn't cheat on his taxes by not reporting the deal as taxable."[282] As I explained at length, according to Supreme Court precedent the basic test for whether a transfer constitutes an exempt gift is the donative intent of the givers, not whether they actually received something in exchange. It is enough that the donors believed, even if irrationally, that they would benefit.[283] The Supreme Court has expressly rejected the quid-pro-quo test.

Professor Adam Chodorow, on the other hand, points to the fact that if the forgiveness had indeed been a gift, then Thomas had a legal obligation under the judicial ethics rules to disclose

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280 *Jacobson*, 336 U.S. at 50.

281 Memorandum from Fin. Comm. Democratic Staff, *supra* note 258.

282 Jack Bogdanski, *It Ain't a Tax Thing*, JACK BOG'S BLOG (Oct. 26, 2023), https://www.bojack2.com/2023/10/it-aint-tax-thing.html [https://perma.cc/9VCL-62YQ].

283 For example, tokes to Casino dealers—who provide nothing in return—are taxable to the dealers, because "[t]ribute to the gods of fortune which it is hoped will be returned bounteously soon can only be described as an 'involved and intensely interested' act." Olk v. United States, 536 F.2d 876, 879 (9th Cir. 1976).

such gift, and he did not do so.[284] Professor Chodorow's position seems to suggest that non-disclosure for legal ethics purposes should weigh against gift classification for tax purposes.

3. *Thomas's Luxury Trip to Indonesia: Probably Taxable to Thomas*

The gift. In 2009 Justice Thomas went on "nine days of island-hopping in a volcanic archipelago on a superyacht staffed by a coterie of attendants and a private chef."[285] The yacht was owned by Harlan Crow, a real estate magnate. Crow also flew Justice Thomas to the trip on Crow's private jet. Thomas did not report the trip on his financial disclosures. ProPublica estimated that "[i]f Thomas had chartered the plane and the 162-foot yacht himself, the total cost of the trip could have exceeded $500,000."[286] Per ProPublica, Crow hosted Thomas on multiple other luxury trips around the world over the years.

Whether the transferor claimed a deduction in respect of the gift. Crow likely claimed a deduction in respect of the costs of Thomas's trip. A subsequent report from ProPublica, based on Crow's leaked tax returns, concludes that the Crow company that owned the yacht regularly deducted its cost of operations.[287] From 2003 to 2015, for example, the yacht generated over $8 million dollars of net operating losses, which Crow deducted against other income to save taxes.[288] This fact weighs heavily against finding the gift to be "detached and disinterested." A recent Senate investigation found that these deductions may have been improperly claimed.[289] This does not matter for our purpose. If Crow claimed a deduction, legally or not, this weighs against finding he had a donative intent.

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284 Adam Chodorow, *Clarence Thomas' Forgiven RV Loan Isn't Just an Ethics Issue*, SLATE (Oct. 26, 2023), https://slate.com/business/2023/10/clarence-thomas-rv-loan-forgiven-debt-taxes-welters.html [https://perma.cc/27US-R79Z].

285 Kaplan, Mierjeski & Elliott, *supra* note 1. All descriptions herein are taken from this report unless otherwise specified.

286 *Id.*

287 Paul Kiel, *How Harlan Crow Slashed His Tax Bill by Taking Clarence Thomas on Superyacht Cruises*, PROPUBLICA (July 17, 2023), https://www.propublica.org/article/harlan-crow-slashed-tax-bill-clarence-thomas-superyacht [https://perma.cc/Q26S-2TVV].

288 *Id.*

289 Paul Kiel, *Senate Investigation "Casts Fresh Doubt" About the Validity of Harlan Crow's Yacht Tax Deductions*, PROPUBLICA (Feb. 6, 2024), https://www.propublica.org/article/senate-probe-casts-doubt-harlan-crow-yacht-tax-deductions [https://perma.cc/7GKU-U7KB].

The existence of personal relationships. Thomas and Harlan were close friends. Crow met Thomas at an event in DC in 1996, and the two remained in touch ever since.[290] "That grew into a deep friendship of the Crow and Thomas families" according to Crow.[291] Similarly, ProPublica reported that Crow and Thomas "have become genuine friends, according to people who know both men."[292] This fact weighs in favor of viewing the transfer as a genuine exempt gift.

Expectation of economic benefit. The fact Crow took a deduction for the cost of the trip suggests he expected some economic cost of the trip to be borne by others (read: US taxpayers). Notwithstanding this fact, it is likely that Crow still suffered an out-of-pocket cost for the trip. However, given Crow and Thomas's close friendship, and the fact Crow did not have a case before the court, it is difficult to point to a direct economic benefit that Crow may have enjoyed.

Whether the transferor is a corporation. Crow's yacht was operated by Rochelle Charter, a company wholly owned by Crow. This fact weighs against finding that the transfer was an exempt gift.

Statements by the Transferor at the Time of the Transfer. As far as I was able to ascertain, none of the reports mention any statements made by Thomas or Crow regarding the trip at the time of the trip.

Summary. It is difficult to assess how a court would rule had it been faced with the question of whether the trip was an exempt gift or taxable income to Thomas. However, the fact the gift was deductible and made by a corporation would give a serious headache to most tax lawyers. It is reasonable to assume that there are courts that would find the value of the trip to be taxable income to Thomas.

4. *Thomas's Mother's Apartment Purchase and Renovations: Partly Taxable and Reportable to Thomas*

In 2014, an entity owned by Harlan Crow—Savanah Historic Development LLC—bought "properties for $133,363 from three co-owners — Thomas, his mother, and the family of Thomas' late brother." ProPublica reported that "Crow also bought several other properties on the street and paid significantly less

290 Hall, *supra* note 26.

291 *Id.*

292 Kaplan, Mierjeski & Elliott, *supra* note 1.

than his deal with the Thomases,"[293] implying that the sale was at above-market rate.

If Crow paid above-market rate to Thomas, there is certainly a reason to be suspicious. For the purposes of this Article, however, this does not matter very much. Under the IRC, the sale of real estate is a taxable transaction, and Thomas had to report gain to the extent the amount he received from Crow exceeded Thomas's basis.[294] The price paid is a matter of public record. It is difficult to imagine Thomas did not report this transaction on his tax return.[295] In theory, Thomas could have claimed that the purchase price in excess of market value was, in fact, an exempt gift.[296] In such a case, Thomas could have reported the transaction as "part sale, part gift" and only pay tax on the "sale" portion of the transaction. This would reduce Thomas's tax liability, but the transaction would have been reportable, nonetheless.

The transaction included Thomas's mother's house. After the transaction, the mother kept living in the house. It is unclear if Crow charged Thomas's mother any rent. Moreover, Crow invested $36,000 in improvements in the house.[297] This investment probably increased the rental value of the house. If Thomas's mother did not pay rent, the amount of unpaid rent would constitute income, but to her, not to Thomas.

To summarize, there may be reasons to raise eyebrows in respect of several elements of these transactions. However, the real estate transaction was certainly taxable to Justice Thomas at least in part, not as a gift, but as a sale.

To the extent Crow allowed Thomas's mother to live in the house rent free, and to the extent this did not constitute a gift, then Thomas's mother, not Justice Thomas himself, had taxable income. Of course, a rich benefactor showering gifts on a

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293 Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal.*, PROPUBLICA (Apr. 13, 2023), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus [https://perma.cc/U9Q8-THV7].

294 *See* I.R.C. § 1001.; *See also* I.R.C. § 121, noting an exemption from tax for certain sales of "principal residence[s]." But nothing in the report implies that the real estate sold in these transactions was Justice Thomas's principal residence at the time. Moreover, if Crow paid more than the fair market value of the release, this may trigger a gift tax liability to Crow.

295 If Thomas did not report this transaction on his tax return—which I find hard to imagine—then a different, and much more consequential investigation, is warranted.

296 *See* Treas. Reg. § 1.1015-4.

297 Elliott, Kaplan & Mierjeski, *supra* note 293.

public official's loved ones may itself be problematic but goes beyond the scope of the inquiry here.

5. *Thomas's Grandnephew's Tuition Payments: Probably Not Taxable or Reportable to Thomas*

Justice Thomas was the legal guardian of his grandnephew. In 2008, Thomas enrolled the grandnephew at a private boarding school, where tuition cost was $6,000 a month.[298] A ProPublica investigation found that Harlan Crow paid the tuition for about a year, the entire period that the grandnephew attended the school.

The IRC provides a specific exemption from income for "qualified scholarships," which include "tuition and fees required for the enrollment or attendance of a student at an educational organization."[299] However, under the Department of Treasury's regulatory guidance, the term scholarship "does not include any amount provided by an individual to aid a relative, friend, or other individual in pursuing his studies where the grantor is motivated by family or philanthropic considerations."[300]

Thus, there is a good argument to be made that the tuition payments are *not* included in Thomas's income: If Crow's motivation is not philanthropic, then the payment *would* likely qualify as an exempt scholarship.[301] If the payments by Crow were made out of "philanthropic considerations," then it does *not* constitute scholarship, but the philanthropic motivation likely proves a "donative intent." This would make the transfer an exempt gift under Section 102.

6. *Summary: The Justices Had to Report Some of the Transfers on Their Income Tax Returns*

The transfers described above nicely portray a wide spectrum of tax outcomes. Thomas's sale of real estate is clearly reportable and taxable, at least in part. Alito's luxury fishing trip almost certainly constitutes taxable income to him. Thomas's grandnephew's tuition payment is probably not reportable or taxable. Thomas's RV loan and luxury trips are somewhere

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298 Kaplan, Elliott & Mierjeski, *supra* note 4.

299 I.R.C. § 117(b).

300 Prop. Treas. Reg. § 1.117-3(a).

301 Unless Crow received something in exchange for the contribution. *See* Bingler v. Johnson, 394 U.S. 741, 751 (1969) (defining exempt scholarships "as relatively disinterested, 'no-strings' educational grants, with no requirement of any substantial *quid pro quo* from the recipients").

in between. This means that at least some of the transfers to Justices—whether or not reportable under applicable judicial conduct rules—are captured by existing tax laws. We do not know whether the Justices did, in fact, report these transfers as income on their tax returns. If they did, many of the concerns about improper gift practices are mitigated, as explained in Part III below.

There is one additional important fact to note. At least in Thomas's case, the gifts are not "one time" gifts. They are continuous and regular. They have been granted by multiple donors. Viewed in aggregate, Thomas's receipts are qualitatively different. The "mainspring of human experience" suggests that there is a reason for concern when a public official regularly receives high value gifts from powerful individuals. This fact is also relevant for income tax analysis. When receipts are recurring and consistent, one may reasonably question whether they are given in exchange for something, or if they were solicited. A ProPublica investigative report found that Justice Thomas actively lobbied to increase Justices' pay, and that conservative activists were worried Thomas might resign if his financial situation is not improved.[302] If the recurring "gifts" to Thomas were part of conservative organizations' efforts to keep Thomas from resigning, then the transfers were certainly taxable to Thomas.

III
How Income Taxation Helps Where Rules of Judicial Conduct Fail

The fact that some of the gifts to Justices are captured by our current income tax framework mitigates some of the concerns raised by gift giving to Justices. Income tax also offers an avenue to further improve the regulations of Justices' conduct.

A. The Advantages of Income Tax Law over Judicial Ethics Rules

Scope of Applicability and Discoverability. The first benefit offered by income tax law in the context of gifts to Justices is its scope of applicability. At least some of the gifts discussed above do not seem to require reporting under existing disclosure rules (at least as interpreted by Justices) but require reporting under

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302 Justin Elliott, Joshua Kaplan, Alex Mierjeski & Brett Murphy, *A "Delicate Matter": Clarence Thomas' Private Complaints About Money Sparked Fears He Would Resign*, ProPublica (Dec. 18, 2023), https://www.propublica.org/article/clarence-thomas-money-complaints-sparked-resignation-fears-scotus [https://perma.cc/AVF2-94MH].

income tax law. These transactions probably do not constitute illegal bribes (or if they do, it will be immensely hard to prove). Yet, these "non-bribe, non-disclosable" gifts are still a cause of concern. If captured by income tax, then less gifts go completely unreported. In a sense, income taxation covers the regulatory no-man's-land situated between bribery laws, and judicial disclosure rules.

Moreover, these transactions may be reported by other parties to the IRS. For example, some of the gifts were deductible by donors. This means that the donors reported something about these transactions to the IRS and had to maintain records in respect of these transactions. This means the IRS, at the minimum, has a thread to pull, and further inquiry might link such transactions to the Justices. IRS officials potentially became aware of at least some of the transactions described above even if Justices did not self-report them. This, of course, is not as powerful a tool as public disclosure, but it is certainly more effective than non-disclosure.

If the Justices indeed reported these gifts as income, then Justices' income tax reporting plays a significant regulatory role in several ways. First, it can improve public trust in the institution by mitigating the signaling effect of gifts.[303] Interpreting the signal sent by a gift is a subjective endeavor. When a group of other government officials (the IRS), with significant enforcement authority have their own opportunity to interpret the gift, public confidence that that gift transfers are "kosher" may increase.

Second, secrecy and reciprocity reenforce each other, especially in the context of recurring gifts.[304] Disclosure of repeat gifts to IRS agents may raise red flags and cause the IRS to take a closer look at the transfer.

Finally, there is ample empirical evidence that taxpayers are less likely to engage in illicit behavior, if they perceive the chance of detection to increase.[305] This stands on the basis of the basic rational actor model of illicit behavior: the utility of illicit activity is measured by the benefit of the activity, against the chance of detection and the expected punishment if

303 *See supra* notes 61–65 and accompanying text.

304 *See supra* notes 49–60 and accompanying text.

305 For a summary of literature in the context of tax enforcement, see Leandra Lederman & Joseph C. Dugan, *Information Matters in Tax Enforcement*, 2020 BYU L. Rev., 145, 160–81 (2020).

detected.[306] Thus, it is reasonable to assume that donors and Justices are less likely to engage in illicit transfers, if they know the other party may report the transfer to the IRS.

The Tax Burden: Mitigating the Reciprocity Effect. The second benefit of income taxation over conduct rules is the tax burden itself. This can mitigate the reciprocity effect. As noted above, the larger the gift, the larger is the reciprocity. But in the income tax context, the larger the taxable transfer, the larger the tax. Taking a chunk out of the gift reduces the incentive of the Justice to reciprocate, as well as the donors' expectation of return. In the alternative, donors can choose to gross-up the amount of tax in order to achieve the net corrupt effect they are seeking from officials. This makes the gift significantly more expensive, adding a Pigouvian property to the taxation of the transfer.[307]

More importantly, in this context, is the fact that the gifts are in-kind, while tax must always be paid in cash. This means that when accepting taxable gifts, the Justice must come up with their own cash to pay the tax. Consider, for example, Justice Thomas's RV. In 2008, when the loan was forgiven, the highest marginal tax rate was 35%. Had the RV been treated as a taxable transfer, and assuming Justice Thomas was subject to tax at the highest bracket, he would have to come up with $93,450 in cash (35% *times* 267,000) to satisfy his tax liability for receiving the "gift." This would serve as a significant disincentive to receiving the gift in the first place. Donors could of course supplement any "in-kind" gifts with enough cash to pay the resulting income tax, relieving such burden on the Justices. However, undisclosed *cash* transfers to Justices, I suspect, would have created a much more furious public and congressional scrutiny.

The Mandatory, Proactive Nature of Tax Reporting. A third benefit of income tax applicability to certain gift transfers is the mandatorily proactive nature of reporting. As we have seen, judges themselves are in charge of issuing guidance on, and enforcing the rules of, disclosure of gift receipts. The Chief

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306 Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968); for applying a rational actor model in the tax evasion and avoidance context, see Sarah B. Lawsky, *Modeling Uncertainty in Tax Law*, 65 Stan. L. Rev. 241 (2013).

307 A Pigouvian tax is a tax that is not intended to raise revenue, but to cause the taxpayer "to internalize the social cost of the harmful activity." Victor Fleischer, *Curb Your Enthusiasm for Pigovian Taxes*, 68 Vand. L. Rev. 1673, 1675 (2015).

Justice himself is the head enforcer of these rules, and expressed skepticism that Congress even has the authority to regulate Justices' gift receipts. The new Code of Conduct for the Supreme Court was drafted by the Justices themselves, and its adoption is voluntary. There is also nothing to prevent Justices from amending it as they see fit.

Income tax law procedure and enforcement, however, is out of the Justices' hands. Every year, on April 15, every Justice *must* engage the IRS and file an income tax return. The manner of filing, and what is considered "income" subject to reporting, is prescribed by law. The Department of Treasury, not the Justices themselves, is charged with interpreting and enforcing these laws. Unlike rules of judicial conduct, there is nothing voluntary about compliance here. Alito, very likely, had to report the cost of his fishing trip. Thomas certainly had to report the real estate transactions with Crow. A conservative reading of the law would also suggest that Thomas had to report his forgiven RV loan and the value of this luxury yacht trip.

Reporting of income is done by default, as opposed to criminal investigations, such as in the case of bribery laws. These require the government to initiate some form of investigatory process to collect facts. Taxpayers—Justices included—must themselves actively engage the government every year, truthfully report all their income under penalties of perjury, and pay the resulting tax liability.

The Deterrence Effect of Tax Enforcement. Another advantage of using the income tax system for regulating gift receipts is tax law's deterrence effect. People choose to pay tax for many different reasons.[308] One prominent reason is the fear of sanctions.[309] A rational actor would account for an expected punishment in case an illicit behavior is detected. Under judicial conduct rules, failing to report a gift carries almost no consequences. This means there is little to no deterrence effect built into these rules. Not so in the context of income reporting and tax payments. Failure to report income and pay tax can carry

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308 For a summary of literature on why people pay taxes, see Joshua D. Blank, *Collateral Compliance*, 162 U. PA. L. REV. 719, 746–48 (2014).

309 *Id.* at 747.

with it significant civil penalties[310] and criminal sanctions.[311] This creates an incentive for Justices to be conservative on their income tax return, and report the gifts as income, even if they did not report them in their annual financial disclosures.

Constitutional Certainty. The final important advantage of our income tax system in the context of gift regulations is its constitutional certainty. Multiple commentators, including Justices, are skeptical of Congress's authority to regulate gift transfers to Justices. Income taxation of the same transfers, however, stands on a solid constitutional basis.

Under the Sixteenth Amendment, Congress has broad authority "to lay and collect taxes on incomes, from whatever source derived."[312] A recent historical analysis found that the clear purpose of the Sixteenth Amendment was to "'restore' the previous 'complete and plenary power of income taxation possessed by Congress from the beginning'" following several unfavorable Supreme Court decisions in the late Nineteenth Century.[313] There is no serious argument to be made that Congress lacks the authority to tax Justices' income. In *Glenshaw Glass*, the Supreme Court interpreted the term "income" to constitute any "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[314] Since all the gifts to Justices described above clearly constitute income under this test, there is no question Congress can choose to tax such gifts. Indeed, Congress has chosen to tax all income from whatever source,[315] unless explicitly exempt.[316] The only reason gifts are not subject to tax,

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310 *See*, *e.g.*, I.R.C. § 6651 (imposing penalties on failure to file a tax return or failure to pay tax); I.R.C. § 6662 (imposing accuracy-related penalties and underpayment penalties).

311 *See*, *e.g.*, I.R.C. § 7201 (making it a felony to willfully attempt to evade tax); I.R.C. § 7202 (making it a felony to willfully fail to pay tax); I.R.C. § 7203 (making a failure to file a return a misdemeanor).

312 U.S. CONST. art. XVI. For recent detailed discussions of Congress' constitutional power to tax, see, e.g., John R. Brooks & David Gamage, *Tax and the Constitution, Reconsidered*, 76 TAX L. REV. 75 (2022); Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 723–36 (2020).

313 John R. Brooks & David Gamage, *"From Whatever Source Derived": The Sixteenth Amendment and Congress's Income Tax Power*, SSRN JOURNAL, 6 (2023), http://dx.doi.org/10.2139/ssrn.4595884 (last revised Feb. 29, 2024) (quoting 44 CONG. REC. 4409 (1909) (statement of Rep. Bartlett); Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916)).

314 Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

315 I.R.C. § 61.

316 I.R.C. § 102.

is because Congress explicitly chose to exempt certain gifts. Congress can change that.

The only constitutional limitation on Congress' ability to tax justices is found in the Compensation Clause, under which judges shall "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[317] "[T]he Clause was intended to help protect federal judges from external pressures that might keep the judges from acting impartially."[318] If this limitation did not apply to taxation, Congress could circumvent this provision by applying disproportionate taxation to judges.[319]

The Compensation Clause does not, however, limit Congress' ability to tax gifts that Justices received from private parties. The Compensation Clause is aimed at preventing the other branches of the government from exerting undue influence by decreasing statutorily prescribed judicial salaries (including through excessive discriminatory taxation).[320] But the clause is not intended to allow private parties to exert undue influence through private transfers. Such transfers are not protected by the Compensation Clause. Under the current doctrine, "any 'direct' reduction of *statutory* judicial salaries is unconstitutional [and] . . . any nondiscriminatory 'indirect' reduction, such as a generally applicable income tax, is valid."[321] Exemption from taxation on gifts is not a tax, but a benefit. The IRC is full of benefits that are discriminatorily granted based on taxpayers' income, marital status, health, and even based on the taxpayer's profession. Denying a tax benefit on a privately-funded payment to Justices would not be captured by the Compensation Clause.

The Supreme Court has held that the Compensation Clause may prohibit unfavorable taxation of their statutory mandated salaries, if it singles out judges, but stated explicitly it does not prevent Congress from imposing a nondiscriminatory tax

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317 U.S. CONST. art. III, § 1.

318 Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence*, 56 CASE W. RSRV. L. REV. 965, 969 (2006).

319 *Id.* at 967.

320 *Id.* at 969–70 (discussing the mechanism by which the other branches of government may affect judicial compensation, concluding Congress is the likely culprit).

321 Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501, 528 (2002) (quoting United States v. Hatter, 532 U.S. 557, 561-71 (2001)) (emphasis added).

that applies to judges.[322] As I explain below, Congress can easily design non-discriminatory taxes to captured Justices' gift receipts,[323] for example, by applying such taxes broadly to certain public officials. And in any case, such tax would not affect statutorily mandated salaries. Thus, there is a reasonable argument that even discriminatory tax on justice receipts from sources outside their judicial salaries are not captured by the Compensation Clause.

B. Improving Income Taxation as a Regulatory Instrument of Judicial Conduct

As currently drafted, our income tax law offers an important regulatory tool of gifts transfers to Justices. It still falls short, however, for two reasons. First, many transfers that may be viewed as problematic from a public administration perspective, such as Harlan Crow's tuition payment for Thomas's grandnephew, are not captured by our current income tax system. Second, even those that are captured are subject to limited reporting on the Justices' tax returns, which may only be viewed by select IRS agents. This subpart offers several avenues to address both shortcomings. Because Congress has broad constitutional authority to levy taxes, such reforms are unlikely to face significant constitutional challenge, unlike judicial ethics reforms.

1. *Improving Regulation of Gift Receipts by Justices*

Deny or Limit Income Tax Exemption for Gifts received by Public Officials. The first, and the easiest reform to legislate, is simply to deny Justices' (or any public official for that matter) any income tax exemption on gifts they receive. To avoid compliance hassle, Congress may consider a *de minimis* threshold of exemption. For example, a $500 exemption per gift; or $2,500 aggregate annual amount. It may also be reasonable to allow exemption from gifts received by Justices from spouses and children.

Gifts are already income under our current framework. The exemption under Section 102 is a matter of legislative grace. There are good policy reasons *not* to allow such exemption to

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322 United States v. Hatter, 532 U.S. 557, 561 (2001). ("[T]he Clause does not prevent Congress from imposing a 'non-discriminatory tax laid generally' . . . but it does prohibit taxation that singles out judges for specially unfavorable treatment.") (inline citations omitted).

323 *See* discussion *infra* section III.B.1.

Justices.[324] In fact, Section 102 is already limited by its own terms in certain instances where it may be abused. For example, "any amount transferred by or for an employer to, or for the benefit of, an employee" can never qualify as an exempt gift.[325] This exception prevents employers and employees from classifying any payment for services as "gifts" and by doing so share in the tax benefit, for example, by offering lower (and non-taxable) salary.

As noted, the Compensation Clause does not prevent Congress from taxing gifts received by Justices from private parties. It only prevents Congress from reducing Justices' after-tax statutory compensation. However, some may argue that the Compensation Clause prevents Congress from imposing any discriminatory tax outcomes on Justices,[326] and any denial of exemption from income tax on gift receipts for Justices alone fails such a test. This can be easily solved by designing a tax that does not single out Justices. For example, by denying the exemption to all high-level public officials. By doing so, all gifts to Justices will have to be reported on income tax returns, and Justices will be required to pay income tax on their value. Indeed, we already have in the IRC several examples where we apply disparate tax outcomes on transfers that may have undesired effects on public administration. For example, section 162 denies deductions for certain illegal payments to government officials.[327]

Require Reporting of Non-Taxable Gifts Received by Public Officials. A similar reform, albeit not as powerful, is to simply require reporting of gifts on income tax returns, even if such gifts remain untaxable. This can achieve the desired effect from a disclosure perspective, even if the reciprocity effect remains unmitigated. Our income tax system already requires taxpayers to report certain receipts on their income tax returns, even if such receipts are exempt from tax.[328] Such a requirement can be extended to gifts received by Justices and other public

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324 *See* discussion *supra* subpart I.A.

325 I.R.C. § 102(c).

326 *See supra* notes 322-324 and accompanying text.

327 I.R.C. § 162(c). *See also* I.R.C. § 162(f) (denying deductions for certain fines).

328 IRS, FORM 1040 (2023), https://www.irs.gov/pub/irs-prior/f1040—2023.pdf [https://perma.cc/W9UD-RUKG]. For example, taxpayers are required to report tax-exempt interest on row 2a in their income tax return, non-taxable combat pay on row 1i, as well as certain non-taxable distributions from retirement accounts (rows 4a-6a).

officials. This will give the IRS an opportunity to scrutinize the transfers, and question whether they were actually gifts, or something else. Such reforms raise no constitutional issues.

2. *Income Tax and Justices' Conduct Beyond Gift Regulation*

The discussion of gift giving to Justices and the role played by our federal income tax system suggests that there is more that the tax system can do to regulate judicial conduct.

Public Disclosure of Justices' Tax Returns. One potential avenue would be to require annual disclosure of the Justices' tax returns. This will allow the public a much more detailed look into Justices' financial dealings. For example, we do not know if the Justices properly reported any of the gifts discussed in this Article. Had Justices' tax returns been available for public inspection, we would be able to tell whether Alito, for example, reported his Alaska trip as income. Justified public criticism would result if we discovered he did not.

Justices currently only disclose their tax returns to the Senate as part of their confirmation process, but the returns are rarely made public. Following confirmation, Justices' returns are not disclosed.

The public discussion around the failure of President Trump to disclose his tax return has been contentious.[329] If we learned anything from it, it is that a reform making presidential tax return disclosure mandatory is impractical under current political climate. I expect a public discourse about mandatory annual disclosure of Justices' tax returns to be at least as contentious. However, it is worth considering the benefits of such a disclosure.

In his Article, *Presidential Tax Transparency*, professor Blank considered the benefits of drawbacks of mandatory disclosure of presidential tax returns.[330] Many of Blanks' insights in the context of presidential tax returns can be applied to Judicial tax returns. In fact, I argue that in the context of Blank's framework, the justification for disclosing Justices' tax returns is stronger than the justification to disclose presidential tax returns.

Blank notes several benefits to annual disclosure of presidential tax returns: First, "[m]any voters view candidates' tax compliance as an indication of characteristics they believe are

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329 Joshua D. Blank, *Presidential Tax Transparency*, 40 YALE L. & POL'Y REV. 1, 4–10 (2021).

330 *Id.*

relevant to the office the candidates seek, including, among others, integrity, transparency, and respect for the law."[331] While Justices are not elected, perceptions of their "integrity, transparency, and respect for the law" are undoubtedly relevant to our political discourse. Increased tax transparency will enable the public to be better informed about Justices' traits and vices and increase public confidence in the Supreme Court. This seems especially salient given that public confidence in the Supreme Court is currently at historical lows.[332] Public disclosure of Justices' tax returns may be of particular help in restoring public confidence. This is of particular concern here, because the public cannot just vote-out a Justice who lost the public's confidence. The only way to restore confidence in the institution is to rebuild it.

Second, Blank argues that "increased transparency of candidates' and elected officials' tax affairs . . . could serve a valuable public-education function regarding the U.S. tax system."[333] A public discourse on the tax consequences of gift receipts indeed followed the revelations.[334] This discussion would have benefited from knowing if, and how, the Justices reported the gifts.

Finally, Blank suggests that increased transparency of presidential tax returns may emphasize the actions the IRS took, or did not take, in respect of the Justices' tax positions, thus enhancing " the public's ability to exercise oversight over the IRS."[335]

Such disclosure, however, may come with shortcomings as well. First, Blank notes that public discourse relating to the tax content of public officials' tax returns may bring about a politicization of tax administration.[336] I do not believe this is a particularly convincing argument against disclosure of Justices' tax returns. Justices are not elected, they are nominated. They are confirmed in a very politicized public hearing in the Senate. Moreover, public discourse of tax administration in general is already extremely politicized. Ironically, part of the reason for such politicization is the fact that President Trump did *not* disclose his tax returns, which brought about

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331 *Id.* at 53.

332 *See* de Vogue, *supra* note 31.

333 Blank, *supra* note 329, at 55.

334 *See*, *e.g.*, Chodorow, *supra* note 284; Bogdanski, *supra* note 282.

335 Blank, *supra* note 329, at 59.

336 *Id.* at 71–73.

a public backlash against the tax system. This backlash further intensified after *The New York Times* published information from leaked tax returns showing that Trump has taken aggressive tax positions over the years without facing any serious legal consequences.[337] Public perception of the tax system even further eroded when it was revealed that the IRS—under the IRS Commissioner appointed by Trump—did not audit President Trump's tax returns, contrary to a long standing internal procedure to audit all Presidents' tax returns.[338] It is difficult to imagine the IRS avoiding audit had the returns been made public.[339] And even if the IRS would not have audited the returns, plenty of other tax experts would have audited any publicly available information. Our existing discourse on tax administration is so extremely politicized that there is little to be lost from disclosing Justices' tax returns in terms of politicizing the discourse.

A second shortcoming of mandatory disclosure, according to Blank, is that it would disincentivize wealthy individuals from accepting public office (including Judicial nominations) as a result of the complexity of their tax returns. Increased tax transparency may expose information regarding "past IRS audits, settlements, and written tax advice."[340] I do not believe this is a good argument against tax disclosure of Justices' returns. This could even be a feature, not a bug. To the extent Judicial nominees feel they have financial information they prefer remain hidden, the public may prefer they do not become Justices. In such a context, disincentivizing nominees with ethically questionable financial dealings—even if all such dealings are completely legal—will achieve the purpose of increasing public trust in the institution.

Finally, Blank considers that mandatory disclosure would eliminate the signaling benefit that the public gains from decisions by public officials "to disclose tax information voluntarily."[341] I agree with Blank that there is a certain

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337 Russ Buettner, Susanne Craig & Mike McIntire, *Trump's Taxes Show Chronic Losses and Years of Income Tax Avoidance*, N.Y. TIMES (Sep. 27, 2020), https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html [https://perma.cc/GZ5A-KL7Y].

338 Charlie Savage, Emily Cochrane, Stephanie Lai & Alan Rappeport, *Despite Mandate, I.R.S. Delayed Auditing Trump in Office, House Panel Finds*, N.Y. TIMES (Dec. 20, 2022), https://www.nytimes.com/2022/12/20/us/politics/trump-tax-returns-irs-audit.html [https://perma.cc/Z9TQ-DG6U].

339 Blank, *supra* note 329, at 72.

340 *Id.* at 73.

341 *Id.* at 74.

positive signaling effect when candidates for office voluntarily disclose their tax information. This may be a good argument in the context of presidential candidates. It is not a good argument in the context of Supreme Court Justices, based on our learned experience, for three reasons: First, unlike in the context of presidential candidates, there is no tradition for Justices to voluntarily disclose their tax returns. In the absence of such tradition, non-disclosure is not much of a negative signal. Second, there is little for the Justices to gain from voluntary disclosure because they are not elected and their appointments are life appointments. Thus, positive signals to the public offer no real incentive. Third, as the investigative reports discussed in this Article have shown, Justices have proven to be fast and loose with mandatory financial disclosure rules that already exist and that they control. Justices regularly fail to disclose lavish gifts, as they generously interpret—for themselves—the breadth of the exceptions to the disclosure requirements. Not only do Justices not abide by any tradition of voluntary disclosure, but they are also actively fighting the little mandatory disclosure that the law already demands.

Require Annual Audit of Justices' Tax Returns. The IRS has an internal policy to annually audit Presidents and Vice Presidents' tax returns.[342] The IRS has a procedure in place to ensure the independence of the audit personnel from political influence.[343] A similar policy of mandatory audits could be applied to Justices' tax returns.

Applying a similar policy to Justices would not require legislative action. The Department of Treasury can decide, as a matter of enforcement policy, to institute annual audits of all Supreme Court Justices under similar procedures to those applied to presidential returns. However, given the political backlash such a policy may produce, it would be beneficial to achieve such action through an act of Congress.

Mandatory annual audits of Justices' tax returns can achieve many of the benefits discussed above. If Justices know that their return will be looked at each year, this will reduce subjective signaling interpretation, as well as the reciprocity effect. It may force Justices to take more conservative tax positions on their returns and disclose more generously, given the fear of sanction.

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342 I.R.M. § 4.8.4.2.4.

343 Amandeep S. Grewal, *The President's Tax Returns*, 27 GEO. MASON L. REV. 439, 464–65 (2020).

Conclusion

Recent revelations of lavish gifts Justices received from billionaires highlighted the inefficacy of our rules of judicial conduct as applied to Justices. These rules contain large loopholes that allow justices to avoid disclosure, impose little to no consequences if violated, and are interpreted and enforced by the Justices themselves. Any attempt to impose more robust rules of conduct on Justices will surely face a serious constitutional challenge.

Income taxation offers an alternative framework. In its current form, income tax law already requires Justices to report some of the gifts they received and pay income tax on them. Income tax reporting and payment alleviate some of the public administration concerns associated with gift transfers to Justices.

Congress can also amend income tax laws to capture significantly more transfers to Justices. Such reform stands on firm constitutional ground, unlike rules of judicial conduct.

Our income tax laws also offer a potential framework of extended scrutiny and disclosure. Congress could mandate an annual audit of Supreme Court Justices, as well as disclosure of their tax returns. Such reforms will not only address potential undue influence on Justices. They will also be effective in restoring public confidence in the Supreme Court, which is currently at an all-time low.