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## Tax Benefits, Higher Education and Race: A Gift Tax Proposal for Direct Tuition Payments

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**TAX BENEFITS, HIGHER EDUCATION, AND RACE:  
A GIFT TAX PROPOSAL FOR DIRECT TUITION PAYMENTS**

Bridget J. Crawford\* & Wendy C. Gerzog\*\*

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## I. INTRODUCTION

Higher education is extremely expensive. There are a variety of tax rules designed to make it (somewhat) more affordable. The tax benefits for higher education come in a variety of forms: credits, deductions, and exclusions.<sup>1</sup> Some of these tax items reduce income tax liability; others reduce gift tax liability (which in turn may decrease estate tax liability). Determining one's eligibility for different educational tax benefits can be a complex and confusing task.<sup>2</sup> For the most part, the highly detailed rules that apply in determining a taxpayer's eligibility for one particular benefit do not apply to other benefits. For example, a taxpayer who is eligible for a refundable education tax credit may be ineligible for a non-refundable education tax credit under the same Internal Revenue Code provision; a taxpayer who is eligible for a deduction due to a particular tuition payment under one Code section may not be eligible for a similar income exclusion on college savings under another Code section; and so on.<sup>3</sup>

For those who value higher education, it seems difficult to argue that Congress should not provide tax benefits to students. After all, college graduates tend to have higher average incomes and better health than the general population.<sup>4</sup> Societies with more college graduates typically have

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1. See, e.g., *infra* Part III (discussing selected income and wealth transfer tax benefits for higher education).

2. See, e.g., JOE VALENTI, DAVID BERGERON & ELIZABETH BAYLOR, CTR. FOR AM. PROGRESS, HARNESING THE TAX CODE TO PROMOTE COLLEGE AFFORDABILITY 4 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/05/HigherEdTaxBens-brief1.pdf> [<https://perma.cc/7NBX-7NE8>] (“[S]tudents’ and parents’ current tax choices—such as the availability of two different tax credits and a deduction for expenses while in school, each with their own eligibility criteria—needlessly confuse families and complicate the tax system.”).

3. See, e.g., *infra* Section III.A (discussing income tax limitations on taxpayers eligible for certain credits, deductions, and exclusions).

4. See Philip Oreopoulos & Uros Petronijevic, *Making College Worth It: A Review of the Returns to Higher Education*, FUTURE CHILDREN, Spring 2013, at 41, 45–46, 55 (providing data on average annual earnings in 2010 by occupation and education and showing that those with bachelor’s degrees earn more than those with high school degrees). Higher education “is associated with higher labor market earnings across all major occupation sectors[,]” in addition to other economic benefits. *Id.* at 47 fig.2; see also ANTHONY P. CARNEVALE, STEPHEN J. ROSE & BAN CHEAH, CTR. ON EDUC. & THE WORKFORCE, GEORGETOWN UNIV., THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS 3–4 (2011), <https://files.eric.ed.gov/fulltext/ED524299.pdf> [<https://perma.cc/T2QV-K8AT>] (“Bachelor’s degree holders earn 31 percent more than workers with an Associate’s degree and 74 percent more than those with just a high school diploma.”); DIANE WHITMORE SCHANZENBACH, LAUREN BAUER & AUDREY BREITWIESER, THE HAMILTON PROJECT, EIGHT ECONOMIC FACTS ON HIGHER EDUCATION, at i (2017), [https://www.brookings.edu/wp-content/uploads/2017/04/thp\\_20170426\\_eight\\_economic\\_facts\\_higher\\_education.pdf](https://www.brookings.edu/wp-content/uploads/2017/04/thp_20170426_eight_economic_facts_higher_education.pdf) [<https://perma.cc/S3CV-3HBB>] (“Higher education provides extensive benefits to students, including higher wages, better health, and a lower likelihood of

lower levels of poverty<sup>5</sup> and increased rates of civic engagement.<sup>6</sup> Higher education benefits both individuals and society.<sup>7</sup> Indeed, there is a good case to be made for additional tax benefits to address higher education student debt.<sup>8</sup>

In evaluating tax expenditures for higher education, or indeed any tax law, it is important to understand how the law impacts particular groups or classifications of taxpayers. Standard economic and legal analyses typically invoke efficiency, equity, and administrability as the primary criteria for evaluating any tax rule.<sup>9</sup> “Equity,” according to the conventional

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requiring disability payments.”). In addition to economic benefits, “Americans with a college education report they are happier, healthier and enjoying a higher quality of life than respondents with a high school education or less.” Michael T. Nietzel, *New Evidence for the Broad Benefits of Higher Education*, FORBES (June 17, 2019, 6:40 AM), <https://www.forbes.com/sites/michaelnietzel/2019/06/17/new-evidence-for-the-broad-benefits-of-higher-education/> [https://perma.cc/E8AE-ATAK] (relying on data from the 2018 General Social Survey); see also NAT’L CTR. FOR HEALTH STAT., U.S. DEP’T OF HEALTH & HUM. SERVS., HEALTH, UNITED STATES, 2011, at 30 fig.25, 37 fig.32 (2011), <https://www.cdc.gov/nchs/data/hus/11.pdf> [https://perma.cc/52FC-ZHRY] (showing lower rates of obesity in families where the head of household has a bachelor’s degree or higher and finding that those with a bachelor’s degree also have greater life expectancies).

5. See, e.g., WALTER W. MCMAHON, *HIGHER LEARNING, GREATER GOOD: THE PRIVATE AND SOCIAL BENEFITS OF HIGHER EDUCATION* 18–19 (2009) (“The social benefits [of higher education] include contributions beyond income by higher education to the operation of civic institutions essential to democracy, human rights, and political stability, as well as contributions to the operation of the criminal justice system, to crime reduction, to poverty reduction, to environmental sustainability, and to the creation and dissemination of new knowledge.”).

6. See, e.g., Andrew J. Perrin & Alanna Gillis, *How College Makes Citizens: Higher Education Experiences and Political Engagement*, SOCIUS, Jan.–Dec. 2019, at 1, 1 (noting the positive correlation between political participation and higher education); D. Sunshine Hillygus, *The Missing Link: Exploring the Relationship Between Higher Education and Political Engagement*, 27 POL. BEHAV. 25, 26 (2005) (explaining the increased political engagement by college graduates as a function of “the verbal skills students bring to college and the curriculum studied while there”).

7. See, e.g., SANDY BAUM & KATHLEEN PAYEA, COLL. BD., *EDUCATION PAYS 2004: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY* 10, 23–24 (rev. ed. 2005), <https://research.collegeboard.org/pdf/education-pays-2004-full-report.pdf> [https://perma.cc/KTZ4-DWEC] (detailing societal benefits based on postsecondary education, such as higher income tax payments and increased rates, for example, of voting and blood donation).

8. See Bridget J. Crawford, Shamik Trivedi & Kimberly Bliss, *Educational Tax Benefits: More Please*, 129 TAX NOTES 1323, 1323 (2010) (arguing that “[t]he government can and should do more to ease the debt burden associated with higher education”).

9. These principles derive generally from the work of eighteenth-century economist Adam Smith. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 825–27 (R.H. Campbell et al. eds., Clarendon Press 1976) (1776) (presenting the “four maxims” of taxation: the revenue function of taxes, the equity imperative for tax laws, the convenience to administer and pay under any tax system, and the requirement that tax systems refrain from undue interference with economic markets). In teaching an introductory taxation

understanding, is the notion that income-equivalent taxpayers should be taxed similarly.<sup>10</sup> In contrast, for critical tax scholars, a more expansive approach to “equity” drives the inquiry.<sup>11</sup> Critical tax theorists ask how tax laws impact taxpayers differently along the lines of race, gender, class, disability, sexuality, and a variety of other identity axes.<sup>12</sup> Questions of race took on greater urgency for many Americans in the summer of 2020, after a white police officer killed George Floyd, an unarmed Black man, by kneeling for nine minutes and twenty-nine seconds on Floyd’s neck; video shot by a bystander was widely distributed on social media and in the press.<sup>13</sup> With massive public demonstrations in the weeks following Floyd’s death,<sup>14</sup> race became salient in a new way for many whites.<sup>15</sup> Critical tax scholarship can illuminate how tax laws are deeply implicated in racial inequalities and fail to operate in race-neutral ways.

Primarily, critical tax analysis relies on official data published by the Internal Revenue Service (IRS). For example, because some tax benefits are

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course, Professor Anthony Infanti explains the goals in more contemporary terms: “[W]e should strive for a tax system that (1) minimizes interference with economic decisionmaking, (2) is fair, and (3) is easy to administer and comply with . . . balancing [] important policy considerations that have a real, everyday impact on all of our lives.” Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1192 (2008).

10. See, e.g., Louis Kaplow, *A Note on Horizontal Equity*, 1 FLA. TAX REV. 191, 191 (1992). Not all scholars agree, however, that horizontal equity should be a driving principle of tax policy. See, e.g., Jeffrey H. Kahn, *The Mirage of Equivalence and the Ethereal Principles of Parallelism and Horizontal Equity*, 57 HASTINGS L.J. 645, 652 (2005) (“[M]any persons do give weight to horizontal equity, and even those who do not frown on unequal treatment of the same item.”).

11. See Anthony C. Infanti & Bridget J. Crawford, *Introduction to CRITICAL TAX THEORY: AN INTRODUCTION*, at xxi (Anthony C. Infanti & Bridget J. Crawford eds., 2009) (“When viewed as a whole, it becomes clear that all critical tax scholarship shares one or more of the following goals: (1) to uncover bias in the tax laws; (2) to explore and expose how the tax laws both reflect and construct social meaning; and (3) to educate nontax scholars and lawyers about the interconnectedness of taxation, social justice, and progressive political movements.”).

12. See *id.* at xxii.

13. Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds – Not the Infamous 8:46*, CNN (Mar. 30, 2021, 6:27 AM), <https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html> [<https://perma.cc/TRD8-KNVV>]; *What We Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/article/george-floyd.html> [<https://perma.cc/48KG-SMY6>].

14. See, e.g., Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://nyti.ms/2ZqRyOU> [<https://perma.cc/9PVN-ZWFW>] (reporting that demonstrations in the weeks after Floyd’s death drew between 15 million and 26 million people in the United States, making this “the largest movement in the country’s history”).

15. See, e.g., Amy Harmon & Audra D.S. Burch, *White Americans Say They Are Waking Up to Racism. What Will It Add Up To?*, N.Y. TIMES (June 24, 2020), <https://nyti.ms/2YoV25f> [<https://perma.cc/3LF4-FRJF>] (“It is as though the ability of white people to collectively ignore the everyday experience of black people has been short-circuited, at least for now.”).

contingent on age or disability, it is possible for researchers to ascertain easily the number of taxpayers who claim certain benefits.<sup>16</sup> To a limited extent, data about gender exist as well, but in the income tax context, the data are largely limited to wage-based information.<sup>17</sup> The IRS reports some gift and estate tax data by gender.<sup>18</sup> Because income, gift, and estate tax returns do not ask about the taxpayer's gender, though, the agency must match tax data with social security data for gender-based reporting.<sup>19</sup> The IRS does not collect information about race or ethnicity, and the agency maintains an official "colorblind" approach to reporting all tax data.<sup>20</sup> Thus, race and ethnicity are uniquely difficult to research by reference to the IRS's information.

Without official tax data compiled on the basis of race, researchers have turned to other sources to reveal an enormous racial economic inequality in

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16. See, e.g., I.R.C. § 22(a)–(b), (c)(2)(A)(ii) (providing a credit of up to \$7,500 for spouses filing jointly who both qualify by either attaining the age of sixty-five or retiring on disability and being permanently and totally disabled); INTERNAL REVENUE SERV., PUB. 1304, STATISTICS OF INCOME: INDIVIDUAL INCOME TAX RETURNS COMPLETE REPORT 2018, at 52 tbl.1.3 (rev. Sept. 2020), <https://www.irs.gov/pub/irs-pdf/p1304.pdf> [<https://perma.cc/C3Z5-XAVC>] (estimating over 56,000 returns claiming credits for the elderly or disabled in the aggregate amount of approximately \$4.8 million).

17. See, e.g., INTERNAL REVENUE SERV., DATA ON SALARIES AND WAGES AND BUSINESS INCOME, BY GENDER, TAX YEAR 2009, at tbl.1 (2012), <https://www.irs.gov/pub/irs-soi/09in01gender.pdf> [<https://perma.cc/YM8X-2PN3>] (reporting differences in income between men and women); EMMANUEL SAEZ, STATISTICS OF INCOME TABULATIONS: HIGH INCOMES, GENDER, AGE, EARNINGS SPLIT, AND NON-FILERS 4 (2016), <https://www.irs.gov/pub/irs-soi/16rpsaeztabulations.pdf> [<https://perma.cc/V7KV-JD5D>] (reporting wage income based on gender).

18. See, e.g., INTERNAL REVENUE SERV., PUB. 5368, STATISTICS OF INCOME, 2017 GIFTS (2019), <https://www.irs.gov/pub/irs-pdf/p5368.pdf> [<https://perma.cc/JG4X-43PS>] (reporting the amount of gifts given by gender, transfer method, and tax status); Martha Britton Eller, *Charitable Bequests: Evidence from Federal Estate Tax Returns*, STAT. INCOME BULL., Spring 2001, at 174, 178 fig.F (showing charitable bequests by sex of the donor).

19. See Form 706: *United States Estate (and Generation-Skipping Transfer) Tax Return*, INTERNAL REVENUE SERV. (rev. Aug. 2019), <https://www.irs.gov/pub/irs-pdf/f706.pdf> [<https://perma.cc/2LT4-Z3CK>]; Form 709: *United States Gift (and Generation-Skipping Transfer) Tax Return*, INTERNAL REVENUE SERV. (2020), [https://www.irs.gov/pub/irs-access/f709\\_accessible.pdf](https://www.irs.gov/pub/irs-access/f709_accessible.pdf) [<https://perma.cc/D83D-W6LD>].

20. See, e.g., Form 1040: *U.S. Individual Income Tax Return*, INTERNAL REVENUE SERV. (2020), <https://www.irs.gov/pub/irs-pdf/f1040.pdf> [<https://perma.cc/R7MP-9Y8X>] (lacking any questions about race or ethnicity of taxpayers). See generally Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 6–37 (2019) (discussing past and current "colorblind" practices of the IRS). As Professor Bearer-Friend demonstrates, scholars make estimates of tax provisions' race-based differential impacts by using data from sources, such as the Current Population Survey, the Survey of Income and Program Participation, and the National Survey of Families and Households. *Id.* at 40–41, 41 tbl.1.

the United States.<sup>21</sup> According to the 2019 Survey of Consumer Finances, for example, median family net worth was \$121,700 for white, non-Hispanics; \$18,200 for Black or African-Americans; \$21,900 for Hispanics or Latinos; and \$68,800 for families of “other” or multiple races.<sup>22</sup> Deeply implicated in racial economic inequality are disparities in education by race. According to data from the U.S. Census Bureau, the percentage of individuals twenty-five and older with a bachelor’s degree or higher is 40.2% among non-Hispanic whites, 26.1% among Blacks, 58.1% among Asians, and 18.8% among Hispanics of any race.<sup>23</sup>

Race and ethnicity have always played a role in the history of education in the United States. For example, many states criminalized teaching both slaves and free “persons of colour” to read or write.<sup>24</sup> The continued exclusion of Blacks from institutions of higher learning even after the enactment of the Thirteenth Amendment in 1865 was the impetus for the establishment of

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21. See, e.g., *Median Usual Weekly Earnings of Full-time Wage and Salary Workers by Race and Hispanic or Latino Ethnicity*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/charts/usual-weekly-earnings/usual-weekly-earnings-over-time-by-race.htm> [<https://perma.cc/7D8D-TPRG>] (reporting data for years 2000 to 2020); Neil Bhutta, Jesse Bricker, Andrew C. Chang, Lisa J. Dettling, Sarena Goodman, Joanne W. Hsu, Kevin B. Moore, Sarah Reber, Alice Henriques Volz & Richard A. Windle, Bd. of Governors of Fed. Rsrv. Sys., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, FED. RSRV. BULL., Sept. 2020, at 1, 11 (relying on the Federal Reserve’s Survey of Consumer Finances to determine wealth inequality by race for years 2016 and 2019); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 app. at 816–17 (drawing on information from the Survey of Income and Program Participation, among other sources); Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 792 (1997) [hereinafter Brown, *Marriage Bonus/Penalty*] (pulling data from the Census Bureau, among other sources); Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755, 757 (2005) [hereinafter Brown, *Tax Treatment of Children*] (drawing on data from the Current Population Survey).

22. Bhutta et al., *supra* note 21, at 38 (explaining that, in the Survey of Consumer Finances, “[t]he ‘other or multiple race’ classification consists of respondents identifying as Asian, American Indian, Alaska Native, Native Hawaiian, Pacific Islander, other race, and all respondents reporting more than one racial identification”). Approximately 80% of the members of this “other or multiple race” surveyed group identified as Asian. See RAY BOSHARA, WILLIAM R. EMMONS & BRYAN J. NOETH, FED. RSRV. BANK OF ST. LOUIS, *THE DEMOGRAPHICS OF WEALTH: HOW AGE, EDUCATION AND RACE SEPARATE THRIVERS FROM STRUGGLERS IN TODAY’S ECONOMY* 5 (2015), <https://www.stlouisfed.org/~media/files/pdfs/hfs/essays/hfs-essay-1-2015-race-ethnicity-and-wealth.pdf> [<https://perma.cc/NTJ4-Q822>].

23. See *Educational Attainment in the United States: 2019*, U.S. CENSUS BUREAU (Jan. 4, 2021), <https://www.census.gov/data/tables/2019/demo/educational-attainment/cps-detailed-tables.html> [<https://perma.cc/T8YT-TYPL>] (choose “Table 3” hyperlink).

24. See, e.g., Marvin H. Lett, Grutter, Gratz, and *Affirmative Action: Why No Original Thought?*, 1 STAN. J. C.R. & C.L. 417, 432–37 (2005) (summarizing antebellum laws in North Carolina and Louisiana along with the continued denial of education to Blacks after passage of Thirteenth Amendment).

historically Black colleges and universities.<sup>25</sup> Although the U.S. Supreme Court declared racial segregation in public schools unconstitutional in *Brown v. Board of Education* in 1954,<sup>26</sup> the University of Mississippi did not enroll its first Black student until 1962.<sup>27</sup> Also well into the twentieth century, many private colleges, including Ivy League schools, imposed informal or formal quotas on the number of Jewish students they enrolled.<sup>28</sup> Now in the twenty-first century, some groups argue that elite colleges impose illegal quotas on the number of Asian-American students they admit.<sup>29</sup> On the other side of the college admissions spectrum, at many schools, legacy applicants—who are

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25. See, e.g., *Historically Black Colleges and Universities and Higher Education Desegregation*, U.S. DEP'T OF EDUC. (Mar. 1991), <https://www2.ed.gov/about/offices/list/ocr/docs/hq9511.html> [<https://perma.cc/KG4P-HVRL>] (“Prior to the time of [the] establishment [of historically Black colleges and universities (HBCUs)], and for many years afterwards, [B]lack students were generally denied admission to traditionally white institutions. As a result, HBCUs became the principle [sic] means for providing postsecondary education to black Americans.”). Historically Black colleges and universities are statutorily defined as “any historically Black college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans, and that is accredited by a nationally recognized accrediting agency or association determined by the Secretary [of Education].” 20 U.S.C. § 1061(2).

26. 347 U.S. 483, 495 (1954) (holding that “[s]eparate educational facilities are inherently unequal”).

27. See *Meredith v. Fair*, 305 F.2d 343, 360–61 (5th Cir. 1962) (requiring the University of Mississippi to admit its first Black student). See generally Denny Chin & Kathy Hirata Chin, *Constance Baker Motley, James Meredith, and the University of Mississippi*, 117 COLUM. L. REV. 1741 (2017) (examining in detail the case by the NAACP’s Legal Defense and Education Fund on behalf of James Meredith, which resulted in the University of Mississippi’s desegregation).

28. See, e.g., Stephen Steinberg, *How Jewish Quotas Began*, COMMENT. MAG. (Sept. 1, 1971), <https://www.commentarymagazine.com/articles/how-jewish-quotas-began/> [<https://perma.cc/HNS4-YM7F>] (describing the history of quotas for Jewish students at several schools, with a particular focus on Harvard University).

29. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 197 (D. Mass. 2019) (finding Harvard did not use impermissible fixed quotas to discriminate against Asian-American students). This holding was recently affirmed. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 203–04 (1st Cir. 2020). The Department of Justice dropped a Trump-era challenge to Yale University’s admission policies as allegedly discriminatory against both Asian-American and white applicants. See, e.g., Scott Jaschik, *Justice Department Sues Yale Over Admissions*, INSIDE HIGHER ED (Oct. 12, 2020, 3:00 AM), <https://www.insidehighered.com/admissions/article/2020/10/12/justice-department-sues-yale-over-admissions> [<https://perma.cc/9HWR-PM64>] (“Yale’s policies favor Black and Latinx applicants, the suit alleges.”); Anemona Hartocollis, *Justice Department Drops Suit Claiming Yale Discriminated in Admissions*, N.Y. TIMES (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/us/yale-admissions-affirmative-action.html?smid=url-share> [<https://perma.cc/2Z3X-UTDN>] (“The Justice Department on Wednesday withdrew a lawsuit against Yale University that charged it with discriminating against Asian-American and white applicants, reversing a key element of the Trump administration’s efforts to undermine race-based college admissions.”).



children of alumni—receive admission preferences.<sup>30</sup> At most schools, the pool of legacy applicants is disproportionately white compared to the general application pool at the same school.<sup>31</sup> This is because most schools' alumni bases are largely white; over time, the legacy pool may (or may not) come to reflect the demographics of a school's more recent graduating classes.<sup>32</sup> In these many ways, issues of race and higher education have always been intertwined.

This Article combines three topics—taxes, higher education, and race—to evaluate the tax system's role in exacerbating racial inequalities. Part II frames the discussion with a brief overview of the economics of higher education: how much it costs, how much debt the average student incurs to afford it, and how that debt burden varies by race. Part III describes the major income and wealth transfer tax benefits for higher education, including I.R.C. § 2503(e)'s exclusion of direct tuition payments from gift tax. Part IV demonstrates how this gift tax exclusion disproportionately benefits white families already more likely to avail themselves of other generous tax benefits for higher education while also noting that the exclusion is inconsistent with the overall purpose of wealth transfer taxes. Additionally, Part IV argues that I.R.C. § 2503(e)(2)(A)'s exclusion is inequitable and should be repealed because it exacerbates the racial wealth gap and creates lifetime benefits for the donee while diminishing the donor's tax base. Part V evaluates opportunities for future research at the intersection of race and tax benefits for

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30. See Steve D. Shadowen, Sozi P. Tulante & Shara L. Alpern, *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51, 129 (2009) (finding that 102 out of the top 150 schools, as ranked by U.S. News in 2007, maintained a legacy preference for applicants). The "value" of legacy status can depend on the school. See, e.g., *id.* at 58 (comparing the admission rate for legacy applicants at the University of Virginia with a midwestern land-grant university); The Crimson Staff, *A Losing Legacy*, THE HARV. CRIMSON (May 28, 2015), <https://www.thecrimson.com/article/2015/5/28/staff-losing-legacy-admissions/> [<https://perma.cc/78BY-KLHF>] (reporting that students with at least one parent who attended Harvard College are nearly three times as likely to be admitted to Harvard). Schools that have ended their legacy preferences in recent years include Johns Hopkins University; the Massachusetts Institute of Technology; California Institute of Technology; and the University of California, Berkeley. See Jill Robbins, *Major Universities Ending Legacy Admissions*, VOA: LEARNING ENG. (Jan. 21, 2020), <https://learningenglish.voanews.com/a/major-universities-ending-legacy-admissions/5249873.html> [<https://perma.cc/NRN2-3KKR>].

31. See, e.g., Ginger O'Donnell, *Challenging Legacy Admissions*, INSIGHT INTO DIVERSITY (June 27, 2018), <https://www.insightintodiversity.com/challenging-legacy-admissions> [<https://perma.cc/VUY8-ZD8N>] ("[U]nderrepresented minorities comprise 12.5 percent of applicants to elite colleges and universities but only 6.7 percent of legacy applicants.").

32. See, e.g., Cameron Howell & Sarah E. Turner, *Legacies in Black and White: The Racial Composition of the Legacy Pool*, 45 RSCH. HIGHER EDUC. 325, 343 (2004) (using the University of Virginia as a case study to predict that it takes approximately twenty-five years for a school's pool of legacy applicants to reflect the demographics of graduating classes).

higher education and beyond. Part VI concludes with a call for an expanded definition of “fairness” when evaluating the tax system.

## II. HIGHER EDUCATION COSTS

### A. Tuition and Fees

According to data provided by College Board, the average cost of college tuition at public four-year universities during the 2019–2020 academic year was \$10,486 for in-state students and \$15,873 for out-of-state students.<sup>33</sup> At private schools, the average tuition was \$36,880 for the same period.<sup>34</sup> These are tuition prices only; the figures do not include the cost of room, board, transportation, or other fees. These costs average \$11,510 for a public four-year institution and \$12,610 for a private four-year institution.<sup>35</sup> At elite institutions, the figures can be even higher: for the 2019–2020 academic year, tuition at Yale University was \$55,500, with room and board adding an additional \$16,600 to the bill.<sup>36</sup> Tuition at Harvard University for the same period was \$47,730; room and board cost \$17,682.<sup>37</sup>

Admittedly, at both public and private institutions, not all students pay full “sticker price” for their education. At Yale, more than 50% of undergraduates receive need-based aid with an average scholarship of approximately \$52,800.<sup>38</sup> At Harvard, approximately 55% of all students receive need-based scholarship aid with an average award of \$53,000.<sup>39</sup> Across the United States, “[a]t private, nonprofit four-year colleges . . . 89 percent of students receive some form of financial aid, meaning that almost no one is paying full price.”<sup>40</sup> The average gift-aid package is approximately \$9,520 (exclusive of wages from work-study programs).<sup>41</sup> Even so, many

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33. Liz Knueven, *The Average College Tuition Keeps Rising, and It's Just the Start of College Costs*, BUS. INSIDER (July 14, 2020, 5:21 PM), <https://www.businessinsider.com/personal-finance/average-college-tuition#annual-average-tuition-at-public-4-year-colleges-and-universities> [https://perma.cc/HR4V-EJZK] (basing estimates on data from College Board).

34. *Id.*

35. *See id.*

36. Abigail Johnson Hess, *It Costs Almost \$76,000 a Year to Go to Yale—But Here's How Much Students Actually Pay*, CNBC: MAKE IT (Apr. 20, 2019, 10:00 AM), <https://www.cnbc.com/2019/04/18/it-costs-75925-to-go-to-yaleheres-how-much-students-actually-pay.html> [https://perma.cc/3T4D-ZN23].

37. *Id.*

38. *Id.*

39. *Id.*

40. Paul Tough, *What College Admissions Offices Really Want*, N.Y. TIMES MAG. (Sept. 10, 2019), <https://nyti.ms/2wF5H0e> [https://perma.cc/2LRP-5MKC].

41. Knueven, *supra* note 33 (providing aid figures for 2018–2019 academic year).

students and families substantially borrow to fund higher education expenses.<sup>42</sup>

### *B. Student Debt and Loan Repayment*

Students and families who do not receive scholarships or grants to fully cover the cost of college attendance typically work and take out loans to finance their futures.<sup>43</sup> In 2019, an estimated 62% of seniors graduating from public and nonprofit colleges had some student debt; the average student had \$28,950 in loans.<sup>44</sup> However, that debt is not distributed equally among all students. Black students graduating with bachelor's degrees are more likely to have debt (and to have more of it) than their white, Hispanic/Latinx, or Asian counterparts.<sup>45</sup> Eighty-five percent of all Black students had student loan debt, compared to 69% of whites, 66% of Hispanic/Latinxs, and 45% of Asians.<sup>46</sup> The average Black graduate had \$34,000 in debt, an amount greater than the average student debt of graduates who are white (\$30,100), Hispanic/Latinx (\$25,450), or Asian (\$25,450).<sup>47</sup>

Upon graduation, there are discernible racial differences in employment outcomes as well. In 2019, the overall unemployment rate for all college graduates was 5.1% with rates that varied by race: 7.7% for Asian American/Pacific Islanders, 6.8% for Blacks, 6.4% for Hispanics, and 4.2% for whites.<sup>48</sup> For those who were employed, average hourly wages also differed by race: \$22.97 for Asian American/Pacific Islanders, \$20.57 for whites, \$19.39 for Hispanics, and \$18.07 for Blacks.<sup>49</sup> These wage gaps can

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42. *See id.* ("About 58% of all [bachelor's] degree recipients in 2018 graduated with some student loan debt, with the average borrower owing \$29,000.").

43. *See* J. OLIVER SCHAK, NANCY WONG, ANA FUNG & LINDSAY AHLMAN, THE INST. FOR COLL. ACCESS & SUCCESS, STUDENT DEBT AND THE CLASS OF 2019, at 28 (2020) [hereinafter TICAS, 2019 STUDENT DEBT], <https://ticas.org/wp-content/uploads/2020/10/class-of-2019.pdf> [<https://perma.cc/V89Z-9C9A>].

44. *Id.* at 5.

45. *See* THE INST. FOR COLL. ACCESS & SUCCESS, QUICK FACTS ABOUT STUDENT DEBT (2019), [https://ticas.org/files/pub\\_files/qf\\_about\\_student\\_debt.pdf](https://ticas.org/files/pub_files/qf_about_student_debt.pdf) [<https://perma.cc/2DB5-5CZ8>] [hereinafter TICAS, 2019 QUICK FACTS].

46. *See id.* (providing statistics for the class of 2016).

47. *See id.* The Brookings Institute has found that four years after graduation, Black graduates have almost twice as much debt as white graduates. *See* Judith Scott-Clayton & Jing Li, *Black-White Disparity in Student Loan Debt More Than Triples After Graduation*, BROOKINGS INST., Oct. 20, 2016, at 1, 2–3. Researchers attribute the debt gap to differences in additional borrowing for graduate school and loan interest rates. *See id.* at 4.

48. *See* ELISE GOULD, ZANE MOKHIBER & JULIA WOLFE, ECON. POL'Y INST., CLASS OF 2019: COLLEGE EDITION 12, 14 fig.F (2019), <https://www.epi.org/publication/class-of-2019-college-edition/> [<https://perma.cc/4TS4-DGH2>] (showing unemployment rates for college graduates ages twenty-one to twenty-four by gender and race/ethnicity).

49. *See id.* at 19 fig.I.

be explained in part by occupational segregation,<sup>50</sup> but discrimination likely plays a role as well.<sup>51</sup>

Given that Black college graduates have the highest average debt load,<sup>52</sup> the highest rates of unemployment,<sup>53</sup> and the lowest average wages,<sup>54</sup> it is unsurprising they have the greatest difficulty repaying student loans. For graduates of four-year colleges, the default rate on student loans is relatively low—around 5%.<sup>55</sup> However, in the year following graduation, many borrowers miss payments or apply for deferments or forbearances on loans because of financial difficulty in making loan payments.<sup>56</sup> Among 2016 graduates for example, 40% of Black borrowers missed payments or sought a deferment or forbearance based on low earnings, compared to 29% of Hispanic/Latinx borrowers, 22% of white borrowers, and 19% of Asian borrowers.<sup>57</sup> Ultimately, Black borrowers face greater financial challenges than any other group in repaying student loans.<sup>58</sup>

Another major factor contributing to Black students' increased indebtedness and difficulty repaying loans is that they are less likely to have family wealth on which to rely for college payment in the first place or to assist with loan repayment after graduation. In addition to disparities in median family net worth,<sup>59</sup> there are striking differences in mean family net

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50. See, e.g., Kim A. Weedon, *Occupational Segregation*, PATHWAYS MAG., Special Edition 2019, at 33, 35 (attributing 39% of the \$2.40 per hour wage gap between white and Black millennials to occupational segregation and 39%–45% in the case of the Hispanic-white wage gap; Asian millennials earn about \$1.46 more per hour than white workers with approximately half of the wage gap attributable to occupational segregation); ANTHONY P. CARNEVALE, MEGAN L. FASULES, ANDREA PORTER & JENNIFER LANDIS-SANTOS, CTR. ON EDUC. & THE WORKFORCE, GEORGETOWN UNIV., *AFRICAN AMERICANS: COLLEGE MAJORS AND EARNINGS 4–5* (2016), [https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/AfricanAmericanMajors\\_2016\\_web.pdf](https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/AfricanAmericanMajors_2016_web.pdf) [https://perma.cc/4BM4-6V8A] (suggesting that the lack of Black representation in high-paying jobs impacts Black students' choice of major career opportunities).

51. See, e.g., Tomaz Cajner, Tyler Radler, David Ratner & Ivan Vidangos, *Racial Gaps in Labor Market Outcomes in the Last Four Decades and Over the Business Cycle* 23 (Fed. Rsrv. Bd., Working Paper No. 2017-071, 2017) (discussing race-based labor market discrimination).

52. TICAS, 2019 QUICK FACTS, *supra* note 45.

53. See GOULD ET AL., *supra* note 48, at 14 fig.F.

54. See Weedon, *supra* note 50.

55. See, e.g., VERONICA GONZALEZ, LINDSAY AHLMAN & ANA FUNG, THE INST. FOR COLL. ACCESS & SUCCESS, *STUDENT DEBT AND THE CLASS OF 2018*, at 9 (2019), <https://ticas.org/wp-content/uploads/2019/09/classof2018.pdf> [https://perma.cc/LW9B-U6X8] (providing loan default figures for undergraduates beginning college in the 2003–2004 academic year).

56. See TICAS, 2019 STUDENT DEBT, *supra* note 43, at 13.

57. *Id.* at 12.

58. See *id.*

59. See Bhutta et al., *supra* note 21, at 11 tbl.2 (providing median net household worth by race).

worth.<sup>60</sup> For white non-Hispanics, mean family net worth is \$983,400.<sup>61</sup> For Hispanic or Latinx families, that figure is \$165,500; for Blacks, it is \$142,500; for families of “other” or multiple races, it is \$657,200.<sup>62</sup> Simply put, Black families are poorer than other families by traditional economic measures.<sup>63</sup>

For all students, lack of family financial resources undoubtedly impacts their likelihood of attending undergraduate, graduate, or professional school. Although some poor and middle-class families can take advantage of certain tax benefits for higher education, which are discussed in the next Part, the greatest tax benefits are reserved for the wealthiest, who are also more likely to attend (and graduate from) college in the first place.<sup>64</sup> Furthermore, students from wealthy families are more likely to attend an elite college and enjoy easier pathways to well-paying jobs.<sup>65</sup>

Mainly, the gift tax exemption for direct tuition payments allows the donee to avoid incurring any debt while obtaining many years of schooling. Unlike debt-ridden students who are burdened by the need to repay hefty loans, tuition-gifted donees are already on their way to accumulating wealth at graduation.<sup>66</sup> In sum, tax benefits for higher education disproportionately accrue to those who can already afford it.

### III. TAX BENEFITS FOR HIGHER EDUCATION

#### A. Overview of Income Tax Benefits

Some of the most well-known federal tax benefits include the American Opportunity Tax Credit and Lifetime Learning Credit;<sup>67</sup> a limited deduction

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60. See *id.*

61. See *id.*

62. See *id.*

63. The ability of families to contribute to the educational costs of their children differ by race. Whereas 58% of Black young adults report an average of \$4,200 family contribution to college educational expenses, 72% of white young adults report an average family contribution of \$12,000 to the same expenses. Fenaba R. Addo, *Parents' Wealth Helps Explain Racial Disparities in Student Loan Debt*, FED. RES. BANK OF ST. LOUIS (Mar. 29, 2018), <https://www.stlouisfed.org/publications/in-the-balance/2018/parents-wealth-helps-explain-racial-disparities-in-student-loan-debt> [perma.cc/LRE5-PGRW].

64. INST. OF EDUC. SCIS., NAT'L CTR. FOR EDUC. STAT., *THE CONDITION OF EDUCATION 2019*, at 5 fig.4 (2019), [https://nces.ed.gov/programs/coe/indicator\\_tbe.asp](https://nces.ed.gov/programs/coe/indicator_tbe.asp) [https://perma.cc/PS97-BAGB] (showing that students from the highest quintile of socioeconomic status are more likely than other students to enroll at four-year private or public institutions).

65. See *id.* at 6 fig.5 (showing that 37% of students in the highest quintile of socioeconomic status enrolled in highly selective four-year institutions, compared to 7% of students in the lowest quintile).

66. See *infra* Section III.B (discussing wealth transfer tax benefits).

67. See I.R.C. § 25A(b) (American Opportunity Tax Credit); § 25A(c) (Lifetime Learning Credit).

for interest on education loans;<sup>68</sup> an exclusion from gross income for gain on contributions to an education individual retirement account (more commonly known as a Coverdell education savings account);<sup>69</sup> and an exclusion for gain on contributions to qualified tuition programs (more commonly known as 529 plans) as well as the principal—the amounts initially invested—if used for certain educational expenses.<sup>70</sup> Each of these tax benefits has varying income limits, maximums, and particular rules; navigating them can be quite complex.<sup>71</sup> When families are able to avail themselves of tax benefits for higher education, the savings are real. For the 2018 tax year, the number of tax returns filed claiming educational tax benefits (with some eligible for more one benefit) was in the millions: approximately 7.4 million claimed the American Opportunity Tax Credit,<sup>72</sup> 8.7 million claimed the Lifetime Learning Credit,<sup>73</sup> and 12.4 million claimed the deduction for interest on student loans.<sup>74</sup>

Based on official government statistics, it is difficult to know how many taxpayers report (tax-free) income from Coverdell education savings accounts.<sup>75</sup> According to industry reports, in 2018, the aggregate assets under management in Coverdell accounts were approximately \$26 billion.<sup>76</sup> In comparison, in June of 2020, there were an estimated 14.6 million separate 529 accounts with approximately \$373.5 billion in assets under

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68. See § 221. This section permits a deduction for interest paid during the taxable year on any qualified education loan in an amount up to \$2,500 for taxpayers with modified adjusted gross income of \$70,000 or less. See Rev. Proc. 2019-44, 2019-47 I.R.B. 1099.

69. See § 530.

70. See § 529(a)–(b).

71. Compare § 25A(b)(1), (d)(1) (limiting the American Opportunity Tax Credit to a maximum of \$2,500 per student with a phase-out for single taxpayers with modified adjusted gross income over \$80,000 or \$160,000 for married taxpayers filing a joint return), with § 25A(c)(1), (d)(2), (h)(2) (limiting the Lifetime Learning Credit to \$2,000 per taxpayer with a phase-out for single taxpayers with modified adjusted gross income of \$59,000, or \$138,000 for married taxpayers filing a joint return).

72. See INTERNAL REVENUE SERV., *supra* note 16, at 218 tbl.3.3 (estimating that 7,382,500 returns claim American Opportunity Tax Credits in the aggregate amount of \$6,393,866).

73. See *id.* at 215 tbl.3.3 (estimating that 8,700,169 returns claim nonrefundable education credits in the aggregate amount of \$8,930,906).

74. See *id.* at 64 tbl.1.4 (estimating that 12,425,040 returns claim student loan interest deduction in the aggregate amount of \$13,434,708).

75. For tax return purposes, income from Coverdell education savings accounts is included on the same line as income from prizes, awards, jury duty fees, and other items. See *id.* at 292 (describing the “other net income or net loss” reported by taxpayers on Form 1040 as including income from Coverdell education savings accounts).

76. Brian Boswell, *Should We Terminate the Coverdell Education Savings Account?*, FORBES (Jan. 8, 2020, 8:00 AM), <https://www.forbes.com/sites/brianboswell/2020/01/08/should-we-terminate-the-coverdell-education-savings-account> [https://perma.cc/FT69-JMWU].

management.<sup>77</sup> Because 529 plans have no annual contribution or income limitations on taxpayers who may establish them, 529 plans dwarf Coverdell accounts' importance in the college savings landscape.<sup>78</sup> All of these and other income tax benefits for higher education<sup>79</sup> can work in tandem with estate and gift tax rules, as discussed in the next Section.

At the same time, many tax credits for higher education are nonrefundable and fail to assist students and families with low taxable income.<sup>80</sup> Likewise, for families with little or no discretionary income, 529 and similar savings plans are beyond reach.<sup>81</sup>

### *B. Overview of Wealth Transfer Tax Benefits*

The purpose of the gift tax is firstly to protect the estate tax by allowing the decedent to make lifetime gifts that deplete the decedent's potential estate and secondly to protect the income tax by dividing a large estate.<sup>82</sup> Any benefit provision that ignores or "excludes" a transfer of property from gift tax undermines the decedent's transfer tax base.

For example, if tuition for one grandchild is \$50,000 and a donor grandmother has five grandchildren, her transfer tax base can be depleted to

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77. See 529 Plan Data, COLL. SAV. PLANS NETWORK (June 30, 2020), <https://www.collegesavings.org/wp-content/uploads/2020/08/529-Plan-Data-June-2020.pdf> [<https://perma.cc/4435-3PYN>].

78. There is greater flexibility in how Coverdell education savings accounts can be invested compared to 529 plans, but the cap on annual Coverdell contributions has never been indexed for inflation. See, e.g., Boswell, *supra* note 76 (arguing that, because of the greater versatility of 529 plans, "now may be a good time to discontinue the venerable Coverdell Education Savings Account entirely").

79. For other higher-education tax benefits, see I.R.C. § 72(t)(2)(E); § 135; § 62(a)(18); § 222. Scholarships, fellowships, and tuition reductions are beyond the scope of this Article. See § 117 (qualified scholarships); § 127 (employer-provided education expenses); § 162(a) (business deductions for employment-related expenses); see also Treas. Reg. § 1.162-5 (specifying that certain education expenditures made by an individual are deductible as ordinary and necessary business expenses).

80. Phyllis C. Smith, *The Elusive Cap and Gown: The Impact of Tax Policy on Access to Higher Education for Low-Income Individuals and Families*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 181, 186, 211 (2008) (calling for existing credits to be made fully refundable for qualifying low-income students).

81. See *id.* at 216, 219–20 (encouraging direct need-based grants for low-income students).

82. Roswell Magill, *The Federal Gift Tax*, 40 COLUM. L. REV. 773, 773 (1940) (summarizing the legislative reasoning "(1) that a gift tax is a necessary corollary to an estate tax, to prevent what is termed the 'evasion' of the estate tax through *inter vivos* gifts; and (2) that a gift tax is a necessary corollary to an income tax, to prevent the loss of surtax revenue through the splitting of large estates"); see also JOSEPH M. DODGE, WENDY C. GERZOG & BRIDGET J. CRAWFORD, *FEDERAL TAXES ON GRATUITOUS TRANSFERS: LAW AND PLANNING* 35 (2011).

the extent of \$250,000 per year. If the donor pays that same tuition for each grandchild's private school from kindergarten through twelfth grade and then for four years of college, she can reduce her estate tax estate by a total of \$4.25 million under current law. With additional law school or medical school tuition added to that sum, this is real money, as they say—a significant reduction in the grandmother's transfer tax base.<sup>83</sup>

Under current law, an estate tax return is required for a decedent who died in 2017 with combined gross assets and prior taxable gifts exceeding \$5.49 million.<sup>84</sup> The Tax Cuts and Jobs Act (TCJA)<sup>85</sup> more than doubled that amount temporarily for decedents dying in years 2018 through 2025—when the 2017 legislation will sunset and the gift and estate tax exemption will return to the pre-TCJA lower exemption levels with adjustments for inflation.<sup>86</sup> In 2021, the wealth transfer tax exemption is \$11.7 million.<sup>87</sup>

Given that mean household wealth in the United States is \$748,800 and median household wealth is \$121,700,<sup>88</sup> most individuals never have to worry about wealth transfer taxes (i.e., federal gift, estate, or generation-skipping transfer taxes). For the wealthiest Americans, though, wealth transfer taxes are important practical considerations with real consequences. For transfers in excess of the exemption threshold, gift and estate tax rates can climb as high as 40%.<sup>89</sup> Thus, many lawyers and other advisors have full-time careers counseling wealthy individuals about how to make tax-advantaged—and even tax-free—transfers to family members.

Two important gift tax carve-outs under I.R.C. § 2503 allow wealthy individuals to make tax-free lifetime transfers that, over time, can both reduce the size of their taxable estate and substantially enrich younger generation family members or other individuals. First are annual exclusion gifts under

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83. The actual tax savings would be more than the above amounts as the grandmother would, without the current exclusion, also be taxed under the generation-skipping transfer tax. See I.R.C. § 2642.

84. See *Estate Tax*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax> [<https://perma.cc/Y67D-95WD>]. Wealth transfer taxes are irrelevant for most Americans. For example, in the 2021 taxable year, unmarried individuals can transfer up to \$11.7 million in combined lifetime and deathtime gifts without paying any federal gift or estate tax, and that tax-free amount is \$23.4 million for a married couple. See Rev. Proc. 2020-45, 2020-46 I.R.B. 1016. Tax exemptions, however, may change under the Biden Administration. Ashlea Ebeling, *IRS Announces Higher Estate and Gift Tax Limits for 2021*, FORBES (Oct. 26, 2020, 10:22 PM), <https://www.forbes.com/sites/ashlaebeling/2020/10/26/irs-announces-higher-estate-and-gift-tax-limits-for-2021> [<https://perma.cc/XQ2E-Z3LQ>]. For a discussion of President Biden's tax proposals, see *infra* Section IV.C.3.

85. Tax Cuts and Jobs Act, Pub. L. No. 115–97, 131 Stat. 2054 (2017).

86. *Id.* § 11061(a).

87. See Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

88. Bhutta et al., *supra* note 21, at 10 (providing median net household worth by race).

89. See I.R.C. § 2001(c) (estate tax rate schedule); § 2502(a) (gift tax calculated by reference to estate tax).



I.R.C. § 2503(b).<sup>90</sup> Separate and apart from the current \$11.7 million exemption amount available to every taxpayer, each individual can make an unlimited number of annual transfers of up to \$15,000 per donee.<sup>91</sup> For married couples who agree to gift-split, these annual exclusion gifts can be up to \$30,000 per beneficiary per year.<sup>92</sup> There is no limit on the number of annual exclusion gifts that a taxpayer can make to multiple donees in any one year, nor is there a cap on the number of years that a taxpayer may do so.<sup>93</sup>

To be sure, a single annual exclusion gift is unlikely to reduce a large estate meaningfully enough to escape the estate tax at death. But if a taxpayer makes a series of annual exclusion gifts to many donees over a period of years (such as by making transfers outright or in certain trusts for the benefit of children and grandchildren), the donor can shift a substantial amount of tax-free wealth to intended beneficiaries and reduce the size of the gross estate for estate tax purposes. Annual exclusion gifts are powerful estate planning tools in this regard.<sup>94</sup>

The second notable carve out under I.R.C. § 2503 is the gift tax exclusion for “qualified transfers,” which are defined as amounts paid on behalf of an individual as tuition to certain educational organizations or to any person who provides medical care (as defined in § 213(d)) with respect to an individual.<sup>95</sup> Practically speaking, this means that a grandmother, for example, can pay tuition costs for all of her grandchildren from primary through graduate school without any of the transfers being treated as taxable gifts.<sup>96</sup> When a

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90. I.R.C. § 2503(b)(1)–(2) (providing an exemption amount of \$10,000, which is indexed for inflation). From 1942 through 1981, the annual exclusion was \$3,000. In 1982, the amount of the yearly exclusion increased to \$10,000 because of what Congress saw as the “substantial increases in price levels” over those years. STAFF OF J. COMM. ON TAX’N, 97TH CONG., GEN. EXPLANATION OF THE ECON. RECOVERY TAX ACT OF 1981, at 273 (Comm. Print 1981); Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, § 441(a), 95 Stat. 172, 319. In 2021, the annual exclusion amount is \$15,000. *See* Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

91. *See* Rev. Proc. 2020-45, 2020-46 I.R.B. 1016.

92. For gift-splitting rules, *see* I.R.C. § 2513.

93. *See* Bridget J. Crawford, *Reform the Gift Tax Annual Exclusion to Raise Revenue*, 132 TAX NOTES 443, 443 (2011).

94. *But see id.* at 446 (proposing limits to annual exclusion gifts to outright transfers and those transfers that will be included in the beneficiary’s gross estate).

95. § 2503(e). These transfers can also shield taxpayers from the generation-skipping transfer tax (GSTT). § 2642(c)(3)(B). Section 2642(c)(1) provides that a direct skip, which is a nontaxable gift, has an inclusion ratio of zero (and thus no GSTT).

96. Note that the grandmother’s payment must be made directly to the educational institution; it cannot pass through the grandchild’s hands first. *See* Treas. Reg. § 25.2503-6(b)(2) (as amended in 2020). Payments for books, supplies, dormitory fees, board, and similar expenses are not direct tuition expenses and, therefore, would be treated as taxable gifts but could be covered by the annual exclusion under I.R.C. § 2503(a). Further note that the tax-free treatment of direct tuition payments under I.R.C. § 2503(e)(2)(A) is not limited to institutions of higher

grandmother pays many years' worth of private, college, and graduate or professional school expenses for all of her grandchildren and others, this benefit likely results in a large, unwarranted reduction in the grandmother's transfer tax base. The grandmother could also pay for any of her grandchildren's medical expenses that are not covered by insurance or otherwise, such as paying orthodontists' bills directly.<sup>97</sup>

These direct payments of educational or medical expenses benefit not only the donor's grandchildren but also the donor's children, as parents of the donee students (for educational expenses) or patients (for medical expenses) no longer need to pay out of pocket. Combined with annual exclusion gifts, the hypothetical grandmother can both substantially increase the wealth of younger generations and reduce the size of her own taxable estate. For taxpayers in a position to make regular direct payments of tuition or other qualified expenses, these payments can be an important part of their estate plan.<sup>98</sup>

### C. *Tax Expenditures for Education*

With each tax benefit for higher education, the government forgoes a certain amount of tax revenue. During the 2020 fiscal year, the estimated total income tax expenditures for education were approximately \$32.7 billion, with large expenditures in the form of tax credits and deductions for postsecondary education expenses (\$16.4 billion).<sup>99</sup> Deductions for student loan interest (\$1.9 billion), Coverdell education savings accounts (\$40 million), and 529 plans (\$2.2 billion) were sizeable expenditures as well.<sup>100</sup>

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education. Under § 170(b)(1)(A)(ii), almost any nonprofit educational organization with a regular faculty, curriculum, and enrolled body of students is an eligible recipient of a "qualified transfer" for purposes of the statute. Direct tuition payments made to a foreign university can meet the definition of a qualified transfer. *See* Treas. Reg. § 25.2503-6(c) (example 1).

97. As with direct payments of tuition to educational institutions, payments of medical expenses made directly to the individual rendering medical care are qualified transfers, but reimbursements to the patient are not. *See* Treas. Reg. § 25.2503-6(c) (examples 3 and 4).

98. *See, e.g.,* DODGE ET AL., *supra* note 82, at 78–79 (discussing direct payments for education or medical expenses under I.R.C. § 2503(e)); *see also* I.R.S. Priv. Ltr. Rul. 110328-05 (Jan. 13, 2006) (treating taxpayer's substantial direct prepayments of tuition as excluded from the gift tax under I.R.C. § 2503(e)). Note, however, written determinations are not precedent. I.R.C. § 6110(k)(3).

99. *See Projected Income Tax Expenditure Budget*, TAX POL'Y CTR. (Feb. 4, 2020), <https://www.taxpolicycenter.org/statistics/projected-income-tax-expenditure-budget> [<https://perma.cc/NL4J-ATAM>] (aggregating all education expenditures, including exclusion of interest on student-loan bonds, credits for zone academy bonds, and exclusion of employer-provided education assistance, among other items). *But cf.* INTERNAL REVENUE SERV., *supra* note 16, at tbl.1.4.

100. *See Projected Income Tax Expenditure Budget*, *supra* note 99.

For annual exclusion gifts or direct payments of educational or medical expenses, it is difficult to estimate the revenue cost with precision. For gifts made during the calendar year 2009, for example, over 211,000 returns were filed, showing total annual exclusion gifts of almost \$9 billion.<sup>101</sup> Most of these gifts probably represent a deduction from larger gifts made to the same beneficiaries that year.<sup>102</sup> IRS data likely underrepresents the number and amount of gifts under I.R.C. § 2503(b) because many taxpayers do not file a gift tax return if they make only annual exclusion gifts.<sup>103</sup> The primary exception would be for stand-alone annual exclusion gifts of assets other than cash or marketable securities if the taxpayer wants to start the statute of limitations.<sup>104</sup> In that case, the taxpayer must adequately disclose the transfer on the gift tax return.<sup>105</sup>

In any event, there is absolutely no available tax data on direct payments of educational or medical expenses under I.R.C. § 2503(e). Again, because these transfers are not subject to the gift tax, most taxpayers do not see any reason to include them on a gift tax return. Furthermore, because qualified transfers under I.R.C. § 2503(e) are almost certainly made in cash, there is no valuation concern that might prompt taxpayers to file a gift tax return.<sup>106</sup> For these reasons, the total tax expenditures associated with I.R.C. § 2503(e) are impossible to estimate. As a practical matter, taxpayers must have a certain level of income or wealth to make annual exclusion gifts or qualified transfers. In the absence of tax data, one cannot accurately know the demographics of taxpayers in this category, but strong inferential evidence suggests they tend to be almost exclusively white.<sup>107</sup>

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101. See Melissa J. Belvedere, *2009 Gifts*, STAT. INCOME BULL., Spring 2012, at 142, 146 tbl.1.

102. See *id.* at 142 (explaining that aggregate gift tax liability reported by the IRS considers adjustments for the annual exclusion).

103. See Justin Ransome & Frances Schafer, *Back to the Basics: Common Gift Tax Return Mistakes*, TAX ADVISER (July 1, 2020), <https://www.thetaxadviser.com/issues/2010/jul/ransom-e-july2010.html> [<https://perma.cc/Y5CD-9Q75>].

104. See I.R.C. § 6501(c)(9) (codifying an exception for stand-alone annual exclusion gifts).

105. § 6501(f)(2) (requiring adequate disclosure); see Treas. Reg. § 301.6501(c)-1(f)(2) (defining adequate disclosure).

106. See *supra* notes 95–98 and accompanying text.

107. See *infra* Part IV.

#### IV. A PROPOSAL TO ELIMINATE TAX BENEFITS FOR DIRECT PAYMENTS OF COLLEGE TUITION

##### A. *The Racial Wealth Gap*

A staggering wealth gap exists between the rich and poor in the United States. In 2020, according to the Federal Reserve, the wealthiest 1% of all households held more than 30% of the nation's wealth.<sup>108</sup> Expanding the figure to the top 10% of all households, that group accounted for 69% of all wealth.<sup>109</sup> The bottom 50% of the population, in contrast, owned a mere 1.9% of all household wealth.<sup>110</sup> The United States has not always been such an economically divided nation. In the late 1970s, the top 1% held approximately 22% of all household wealth, and the percentage has been steadily rising ever since.<sup>111</sup>

It is important to understand economic inequality not only in terms of families generically but also with respect to other identity characteristics, such as race. The average white family is seven times wealthier than the average Black family and five times wealthier than the average Hispanic/Latinx family.<sup>112</sup> Of the upper 50% of households by wealth, the percentages of families vary by race: 59% of white families fall into the top 50%, compared to 51% of Asian families, 25% of Hispanic/Latinx families, and 23% of Black families.<sup>113</sup> Wealth inequality between Black and white households in particular has gotten significantly worse—not better—since the pre-Civil

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108. See *Distribution of Household Wealth in the U.S. Since 1989*, FED. RSRV., <https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/#quarter:0;series:Net%20worth;demographic:networth;population:1,3,5,7;units:levels;range:2005.2,2020.2> [https://perma.cc/TB5Y-MQ8Q] [hereinafter FED. RSRV., *Wealth*]; Tommy Beer, *Top 1% of U.S. Households Hold 15 Times More Than Bottom 50% Combined*, FORBES (Oct. 8, 2020, 5:15 PM), <https://www.forbes.com/sites/tommybeer/2020/10/08/top-1-of-us-households-hold-15-times-more-wealth-than-bottom-50-combined> [https://perma.cc/2WBJ-QBMQ].

109. See FED. RSRV., *Wealth*, *supra* note 108 (showing that, for the second quarter of 2020, the top 1% held 30.8% of wealth and the top 90–99% held 38.4% of wealth); CHERYL R. COOPER, CONG. RSCH. SERV., R45813, AN OVERVIEW OF CONSUMER FINANCE AND POLICY ISSUES 3 (2021).

110. See FED. RSRV., *Wealth*, *supra* note 108; Beer, *supra* note 108.

111. See EMMANUEL SAEZ & GABRIEL ZUCMAN, *THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY* 97–98 (2019) (including figure 5.3, which graphically compares wealth shares of the top 1% and bottom 90% between the years 1910 and 2020).

112. Serena Lei, *Nine Charts About Wealth Inequality in America*, URB. INST. (Oct. 5, 2017), <https://apps.urban.org/features/wealth-inequality-charts> [https://perma.cc/QL3L-GE95] (“Despite some fluctuations over the past five decades, this disparity [in 2016] is as high or higher than it was in 1963.”).

113. See BOSHARA ET AL., *supra* note 22, at 6 tbl.1 (providing figures for median family net worth by racial group).

Rights era.<sup>114</sup> The aggregate share of household wealth held by Black families is so low that the wealthiest 100 individuals on the Forbes 400 list collectively have as much wealth as all Black families in the entire country.<sup>115</sup> The wealthiest 186 people on that same list have as much wealth as all Hispanic/Latinx families combined.<sup>116</sup>

Broadening the discussion beyond the wealthiest few on a small list, of all households in the United States with a net worth of at least \$2 million, the vast majority (76%) are white.<sup>117</sup> Asian and Black/African-Americans represent 8% of these households each, with Hispanic/Latinx families representing 7% and “other” races representing 1%.<sup>118</sup> Along the Black/white axis, white families possess an estimated 85% of the nation’s wealth, with Blacks owning only 4.1%.<sup>119</sup>

By any measure, then, white families overrepresent those who are most likely to take advantage of tax benefits for higher education, such as 529 plans,<sup>120</sup> annual exclusion gifts,<sup>121</sup> and direct tuition payments.<sup>122</sup> Tax benefits for higher education should be better calibrated to assist those with greatest need. Although a complete analysis of all higher education tax benefits is beyond the scope of this Article, the next Section proposes eliminating one particular benefit that is available to taxpayers who need it least: the exclusion from gift tax under I.R.C. § 2503(e)(2)(A) for direct tuition payments.

### *B. Dismantling Racial Privilege by Repealing I.R.C. § 2503(e)(2)(A)*

Taking seriously the notion that tax laws are part of the political choices that represent a collective national “self,” as Professor Anthony Infanti has

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114. Moritz Kuhn, Moritz Schularick & Ulrike I. Steins, *Income and Wealth Inequality in America, 1949–2016*, 128 J. POL. ECON. 3469, 3472 (“Income disparities today are as big as they were in the pre-civil rights era. In 2016, black household income is still only half of the income of white households. The racial wealth gap is even wider and is still as large as it was in the 1950s and 1960s. The median black household persistently has less than 15% of the wealth of the median white household.”).

115. DEDRICK ASANTE-MUHAMMED, CHUCK COLLINS, JOSH HOXIE & EMANUEL NIEVES, CFED & INST. FOR POL’Y STUD., *THE EVER-GROWING GAP 5* (2016), <https://ipsdc.org/report-ever-growing-gap/> [<https://perma.cc/EV4N-PCHS>].

116. *Id.*

117. *Distribution of U.S. Millionaires by Race/Ethnicity, As of 2013*, STATISTA (Mar. 31, 2013), <https://www.statista.com/statistics/300528/us-millionaires-race-ethnicity/> [<https://perma.cc/V9TY-FRHJ>] (defining “millionaire” somewhat counterintuitively as those having a household net worth of \$2 million or more).

118. *Id.*

119. Beer, *supra* note 108.

120. *See supra* Section III.A.

121. *See supra* Section III.B.

122. *See supra* Section III.B.

explained,<sup>123</sup> the function and impact of I.R.C. § 2503(e)(2)(A) merit further examination. In practical terms, this provision allows taxpayers with enough income or wealth (or both) to make unlimited tax-free gifts of preparatory, college, or graduate school tuition if they pay the educational institution directly (as opposed to writing a check to a grandchild, for example, who then writes a check to the school).<sup>124</sup> The taxpayers in this financial category are overwhelmingly white.<sup>125</sup> So are the students who are most likely to be legacy college applicants,<sup>126</sup> employed after graduation,<sup>127</sup> and recipients of an inheritance from their families.<sup>128</sup> In other words, I.R.C. § 2503(e)(2)(A) should be understood as part of a system that contributes to and sustains white financial well-being to the near total (but not complete) exclusion of other races. When one understands the tax system to be deeply implicated in the racial wealth gap and views tax-free direct tuition payments as inconsistent with the policies of wealth transfer taxes,<sup>129</sup> then any serious effort to narrow that gap should include the repeal of I.R.C. § 2503(e)(2)(A).

Eliminating this particular tax benefit has positive economic and symbolic value in anti-racist advocacy; however, compared to a drastic reduction in the gift and estate tax exemption, the financial impact is small. Furthermore, wealthy individuals likely would not feel much of a “pinch” in their pocketbooks if I.R.C. § 2503(e)(2)(A) was repealed.<sup>130</sup> These taxpayers could still make annual exclusion gifts of \$15,000 to intended beneficiaries who can then use the money to pay educational expenses.<sup>131</sup> Donor-taxpayers could also generously fund 529 plans without being taxed on interest when

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123. See ANTHONY C. INFANTI, OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES 1 (2018).

124. See *supra* notes 95–97 and accompanying text.

125. See *supra* Section IV.A.

126. See *supra* notes 31–32 and accompanying text.

127. See *supra* note 48 and accompanying text.

128. See Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESRV.: FEDS NOTES (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finance-20200928.htm> [<https://perma.cc/Y56E-V79D>] (reporting in Table 2 that 29.9% of all white families actually received an inheritance compared to 10.1% of Black families, 7.2% of Hispanic/Latinx families, and 17.8% of “other” families and further reporting that 17.1% of whites, compared with 6% of Blacks, 4.2% of Hispanic/Latinx families, and 14.7% of “others,” expect to receive an inheritance). The size of the median expected inheritance also differs by race: \$195,500 for whites; \$100,000 for Blacks; \$150,000 for Hispanic/Latinx families; and \$100,000 for “others.” *Id.*

129. See discussion *infra* Section IV.C.

130. Cf. IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 9 (2019) (describing the general concept of anti-racism as more than the absence of racism).

131. See *supra* Section III.B (discussing annual exclusion).

those funds are used for educational purposes.<sup>132</sup> To the extent that annual exclusion gifts or 529 plan proceeds are not enough for these purposes, taxpayers could always use some of their wealth transfer tax exemption.<sup>133</sup> And for generous taxpayers who have already given away their full exemption amount, there remains the possibility of making taxable gifts.<sup>134</sup>

Even after the repeal of I.R.C. § 2503(e)(2)(A), there are still other ways for wealthy taxpayers to assist intended beneficiaries with education expenses. However, they cannot avail themselves of that particular and potentially large tax benefit for direct tuition payments. Ultimately, the gift tax exclusion for direct tuition payments is unnecessary and mainly serves a white wealth preservation function.<sup>135</sup> Furthermore, tax-free treatment for direct tuition payments unfairly advantages transfers that are typically subject to wealth transfer taxes and that otherwise undermine the transfer tax base.<sup>136</sup>

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132. See *supra* note 70 and accompanying text. The aggregate amount that can be held in 529 plans for a particular beneficiary varies by state and ranges from approximately \$235,000 to \$529,000. Kathryn Flynn, *How Much Can You Contribute to a 529 Plan in 2020?*, SAVINGFORCOLLEGE.COM (Aug. 16, 2020), <https://www.savingforcollege.com/article/how-much-can-you-contribute-to-a-529-plan> [https://perma.cc/W2WX-3KRE]. Distributions are tax-free if they are used to pay a “qualified higher education expenses,” defined as “tuition, fees, books, supplies, and equipment required for the enrollment or attendance of a designated beneficiary at an eligible educational institution, among other items.” I.R.C. § 529(a), (b)(1), (e)(3).

133. See *supra* Section III.B (describing the wealth transfer tax exemption).

134. See § 2501 (imposing a tax on gifts); § 2502(a) (providing gift tax rates by reference to I.R.C. § 2001). Making *inter vivos* taxable gifts still provides a tax advantage. Those transfers are computed on a tax exclusive basis; that is, the transfer tax imposed on those gifts is not itself subject to a transfer tax like an estate or income tax, which are both tax inclusive. See, e.g., DODGE ET AL., *supra* note 82, at 38.

135. In a separate context, Professors Daniel Hemel and Kyle Rozema have suggested that repeal of tax benefits for high-income taxpayers may, in fact, further benefit those taxpayers. Daniel Hemel & Kyle Rozema, *Inequality and the Mortgage Interest Deduction*, 70 TAX L. REV. 667, 678–89 (2017). It is unclear whether the same would be true in the case of a repeal of I.R.C. § 2503(e)(2)(A). Cf. *id.* at 702 (finding that the distributional consequences of a state and local tax deduction repeal critically depend on the details of the tax reform that repeal is used to finance).

136. See *supra* Section IV.C.

*C. Section 2503(e)(2)(A) Inappropriately Advantages Capital-Like Expenditures*

*1. Congressional Intent in 1981*

Although annual exclusions have existed since the federal gift tax was enacted in 1924,<sup>137</sup> the exclusion for direct payments of educational and medical expenses was not made part of the Code until 1981.<sup>138</sup> In enacting I.R.C. § 2503(e), Congress indicated the new provision had a different purpose than the gift tax annual exclusion.<sup>139</sup> Whereas I.R.C. § 2503(b)(1) eliminated the need to account for multiple small transfers, such as birthday and holiday presents, Congress intended I.R.C. § 2503(e) to assist taxpayers who otherwise might be unaware that their transfers were technically taxable gifts under the law at the time.<sup>140</sup>

Professor Kerry Ryan hypothesizes that Congress's decision to add a new exclusion for direct tuition and medical payments—as opposed to merely expanding the annual exclusion—is attributable to the size and irregularity of educational and medical expenses.<sup>141</sup> She also notes in hindsight that, as a factual matter, because educational and medical expenses have risen more steeply than general inflation adjustments for the annual exclusion, the annual exclusion benefit by itself would not have been able to fully cover those costs today (particularly at private educational institutions).<sup>142</sup> These rationales for

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137. See Revenue Act of 1932, ch. 209, §§ 501–531, 47 Stat. 169, 245–59 (1932) (current version at I.R.C. §§ 2501–2524 (describing gift tax generally)). For the annual exclusion, see *id.* § 504(b), 47 Stat. at 247.

138. See Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, § 441(b), 95 Stat. 172, 319 (showing that the exclusion for direct payments of educational and medical expenses was not made part of the Internal Revenue Code until 1981).

139. See H.R. REP. NO. 97-201, at 193 (1981) (noting concern that “payments of tuition made on behalf of children . . . and medical expenses on behalf of the elderly” were technically gifts under the current law). The Treasury Department incorporated this perspective into the regulations. See Treas. Reg. § 25.2503-6(a)–(b) (1984) (describing the exclusion for qualified transfers for educational or medical expenses as “available in addition to the \$10,000 annual gift tax exclusion” and available “to any person who provides medical care,” as defined in section 213(d), with respect to that individual). This regulation also highlights the legislative intent to provide broad application of this benefit: the exclusion “is permitted without regard to the relationship between the donor and the donee.” § 25.2503-6(a).

140. See H.R. REP. NO. 97-201, at 193 (“The committee believes such payments should be exempt from gift taxes without regard to the amount paid for such purposes.”).

141. Kerry A. Ryan, *Human Capital and Transfer Taxation*, 62 OKLA. L. REV. 223, 240–41 (2010).

142. *Id.* at 241 (“[E]ven if Congress had raised the level of the annual exclusion in 1981 to capture most of these [tuition and medical] transfers, general inflation adjustments thereafter would not have kept up with annual increases in these costs. Average annual increase in college tuition and medical expenses have outpaced inflation since the early 1980s.”).



the addition of I.R.C. § 2503(e) in 1981 actually bolster the case for its repeal now.

## 2. *Size and Nature of Gifts Under I.R.C. § 2503(e)*

The gift tax exclusion for direct payments of educational and medical expenses originated with a 1969 proposal from the American Law Institute (ALI) to exempt from taxation three categories of transfers: (1) a transfer that does not result in a member of the transferor's household or a child of the transferor under the age of twenty-one "acquiring property which will retain significant value after the passage of one year from the date of such expenditure;" (2) a transfer for "current educational, medical or dental costs of any person;" and (3) a transfer for "reasonable" expenditures for "costs of food, clothing and maintenance . . . of any person in fact dependent on the transferor."<sup>143</sup> In other words, under the ALI proposal, for consumption-type expenses, the identity of the transferee (as the transferor's household member or dependent) was relevant. Also, these expenses were subject to some financial standard (either "insignificant" or "reasonable").

As enacted in 1981, however, the statute provides an expansive and open-ended transfer tax benefit: the identity of the donee does not matter; the donor can use this exclusion for an unlimited number of donees; there is no cap on total cumulative amounts paid as tuition; and there is no restriction on the total number of years the donor can use and benefit from this exclusion.<sup>144</sup> Congress adopted this variation of the ALI's second recommendation (ignoring the other two ALI recommendations), limiting the gift tax exclusion to amounts paid directly on behalf of an individual as tuition to certain educational organizations (or to medical providers, although I.R.C. § 2503(e)(2)(B) is beyond the scope of this discussion).<sup>145</sup>

Practically speaking, the ALI's proposal that consumption-type transfers should be tax-free makes sense. The gift tax's original purpose was to serve as a backstop to the estate tax (although, arguably, it has done so weakly at many points in history).<sup>146</sup> In the case of transfers without significant estate-

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143. AM. L. INST., *FEDERAL ESTATE AND GIFT TAXATION: RECOMMENDATIONS OF THE AMERICAN LAW INSTITUTE AND REPORTERS' STUDIES* 5-6 (1969).

144. *See* Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, § 441(b), 95 Stat. 172, 319.

145. *See id.*; I.R.C. § 2503(e)(2)(B) (permitting a gift tax exclusion for direct payments to providers of medical care as defined in I.R.C. § 213(d)).

146. *See* H.R. REP. NO. 72-708, at 8 (1932); S. REP. NO. 72-665, at 11 (1932); *Smith v. Shaughnessy*, 318 U.S. 176, 179 (1943) ("[T]he gift tax serves to supplement the estate tax."); *Ryan*, *supra* note 141, at 241. *But see* Wendy C. Gerzog, *Contingencies and the Gift Tax*, 93 TAX NOTES 977, 985 (2001) (re-examining the purpose of the gift tax considering a potential repeal of the estate tax).

depleting effects, there is little concern that taxpayers are attempting to shrink their taxable estates to avoid estate taxation. But given the cost of higher education, gifts in the form of direct tuition payments can have an estate-depleting impact—and potentially a sizeable one—and thus, logically, should be subject to the gift tax.<sup>147</sup> Indeed, it is precisely because of the size of these payments that gift taxation is appropriate.<sup>148</sup>

The proposition that direct tuition payments differ from other consumption-like transfers proposed for tax-free treatment under the ALI proposal is supported by reference to the income tax treatment of similar expenditures.<sup>149</sup> In the income tax context, investments in human capital, such as building one's professional reputation<sup>150</sup> or acquiring general education,<sup>151</sup> are typically treated as non-deductible personal expenses.<sup>152</sup> It is factually true that higher education enhances an individual's employment, health, and other prospects.<sup>153</sup> In the case of students who attend elite colleges, there also may be additional social and networking benefits that are not available to students at less selective schools.<sup>154</sup> Thus, in a practical sense, tuition payments

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147. See, e.g., Joseph M. Dodge, *Replacing the Estate Tax with a Reimagined Accessions Tax*, 60 HASTINGS L.J. 997, 1052 (2009) (explaining the general concept that estate-depleting transfers tend to be subject to wealth transfer tax whereas transfers, such as those for full and adequate consideration, do not have that effect and thus escape taxation). Again, it may be appropriate to consider repeal of the tax-free treatment for direct payments to a medical care provider under I.R.C. § 2503(e)(2)(B), but that is outside the scope of this discussion.

148. Cf. *supra* note 141 and accompanying text.

149. See *supra* note 143 and accompanying text (describing the categories of expenses in the ALI's proposal).

150. E.g., *Welch v. Helvering*, 290 U.S. 111, 114–16 (1933) (disallowing deduction for the taxpayer's payments intended to build his own business reputation after his previous employer declared bankruptcy and left several creditors unpaid). For a critique of the differing income tax treatment for businesses versus individuals, see Mary Louise Fellows & Lily Kahng, *Costly Mistakes: Undertaxed Business Owners and Overtaxed Workers*, 81 GEO. WASH. L. REV. 329, 331 (2013) (arguing that some business expenditures are classified as investments when they are in fact consumption and that some expenditures by workers are treated as consumption when they are in fact investments).

151. E.g., *Sharon v. Comm'r*, 66 T.C. 515, 525 (1976) (denying the taxpayer's claimed deductions for college and law school tuition expenses on the grounds that these "provided him with a general education which will be beneficial to him in a wide variety of ways"), *aff'd*, 591 F.2d 1273 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979).

152. See Loretta Collins Argrett, *Tax Treatment of Higher Education Expenditures: An Unfair Investment Disincentive*, 41 SYRACUSE L. REV. 621, 622 (1990) (critiquing the income tax treatment of most educational expenditures as non-deductible personal expenses).

153. See *supra* note 4 and accompanying text.

154. See, e.g., Stacy Dale & Alan B. Krueger, *Estimating the Effects of College Characteristics over the Career Using Administrative Earnings Data*, 49 J. HUM. RES. 323, 325–26, 350 (2014) (finding that, for most students, the "return" on investment in a selective college is "generally indistinguishable from zero," with the two exceptions being for "racial and ethnic minorities (black and Hispanic students) and for students whose parents have relatively

generate benefits that redound to the prolonged future benefit of donees under I.R.C. § 2503(e)(2)(A). These transfers may be immediately “consumed” in one sense, insofar as a bill is immediately paid, but the donee’s benefits are lifelong. For the transfer of an asset that creates substantial wealth for the donee while depleting the donor’s estate, it is appropriate to impose a gift tax.<sup>155</sup>

### 3. *The Dramatic Increase in Wealth Transfer Tax Exemption Since 1981*

The dramatic increase in the wealth transfer exemption since 1981 is another reason that the repeal of tax-free treatment for direct tuition payments is appropriate. In 1981—the year § 2503(e) was enacted—the estate and gift tax exemption could shield transfers with a lifetime and deathtime aggregate value of \$175,625.<sup>156</sup> In 2021, that equates to approximately \$500,000.<sup>157</sup> But due to increases under several successive presidential administrations, and most notably under the TCJA, today’s wealth transfer tax exemption shields \$11.7 million in assets per person.<sup>158</sup> President Biden’s tax plan proposes lowering the wealth transfer tax exemptions to 2009 levels (when the estate tax exemption was \$3.5 million and the gift tax exemption was \$1 million),

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little education,” defined as fewer than sixteen years of formal schooling); Kevin Carey, *How Much Does Getting into an Elite College Actually Matter?*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/upshot/elite-colleges-actual-value.html> [<https://perma.cc/A29D-F84G>] (arguing that attending elite college affords access to “social capital” for those whose parents do not have strong academic credentials and for certain Black and Hispanic/Latinx students).

155. Indeed, in a different context, it is the transfer of an asset with substantial future value for minimal (or no) gift tax that informs the basis for many commentators’ objections to grantor retained annuity trusts. *See, e.g.*, Wendy C. Gerzog, *Toward a Reality-Based Estate Tax*, 57 B.C. L. REV. 1037, 1052–53 (2016) (explaining some valuation distortion techniques that erode that taxpayers’ transfer tax base).

156. *See* Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, STAT. INCOME BULL., Summer 2007, at 118, 122–23 (showing estate tax exemptions and tax rates from 1916 to 2007 and explaining inflation adjustments introduced in 1976).

157. *Compare* US INFLATION CALCULATOR, <https://www.usinflationcalculator.com> [<https://perma.cc/D9WT-KSGQ>] (enter “1981” into the “if in” box; then enter “175000” into in the “I purchased an item for \$” box; then enter “2021” into the “then in” box; then click “calculate”) (showing that an item purchased for \$175,000 in 1981 would cost \$506,352.59 in 2021, accounting only for inflation), *with* MEASURINGWORTH, <https://www.measuringworth.com/calculators/uscompare/> [<https://perma.cc/Q3LS-KYRZ>] (enter “1981” into “initial year” box; then enter “\$175000” into “initial amount” box; then enter “2021” into “desired year” box; then click “calculate”; then scroll down to view “real wage or real wealth” metric) (providing a wealth comparison of \$175,000 in 1981 to \$492,000 in “real wage or real wealth” in 2019).

158. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017); *see also supra* note 84 (providing exemption amounts for 2021).

but that change is not certain to occur.<sup>159</sup> It is difficult to predict what changes, if any, Congress will enact to the wealth transfer tax laws. Under any system where more than 99.5% of all decedents pay no wealth transfer tax at all, the wealth transfer exemption should be understood as a primary feature of a system that allows one generation to pass economic privilege to the next.<sup>160</sup>

The increase in the wealth transfer tax exemption,<sup>161</sup> along with the widening wealth gap,<sup>162</sup> has reduced the percentage of the population that will ever owe any gift or estate tax. In 2009, when the lifetime gift tax exemption was \$1 million, fewer than 10,000 people owed any gift tax.<sup>163</sup> For decedents dying in 2009, when the estate tax exemption was \$3.5 million, only 0.23% of decedents owed any estate tax.<sup>164</sup> In 2018 (the first year after the combined wealth transfer tax exemption jumped from \$5.5 million to more than \$11 million),<sup>165</sup> fewer than 2,200 donors owed any gift tax, and only 0.19% of decedents owed any estate tax.<sup>166</sup> Given the increased wealth transfer tax

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159. See GARRETT WATSON, HUAQUN LI & TAYLOR LAJOIE, TAX FOUND., DETAILS AND ANALYSIS OF DEMOCRATIC PRESIDENTIAL NOMINEE BIDEN'S TAX PROPOSALS, OCTOBER 2020 UPDATE 2, 4 (2020); Kay Bell, 2009–2010 *Estate and Gift Tax Amounts*, BANKRATE (Jan. 5, 2010), <https://www.bankrate.com/finance/money-guides/2008-2009-estate-and-gift-tax-amounts-1.aspx> [<https://perma.cc/C7V5-MVZ2>].

160. See *Tax Policy Center's Briefing Book: Key Elements of the U.S. Tax System*, TAX POL'Y CTR. (May 2020), <https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax> [<https://perma.cc/J5YQ-SFNB>] (estimating that, for 2019, estate tax returns were filed for about 0.15% of all decedents and that only 0.07% of decedents owed any tax).

161. See *supra* notes 156–158 and accompanying text.

162. See *supra* Section IV.A.

163. Belvedere, *supra* note 101, at 142 (reporting 9,645 taxable returns out of 223,093 gift tax returns filed). As a percentage of the entire population, this is significantly less than 0.0001% of all Americans. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 8, (2010), <https://www2.census.gov/library/publications/2010/compendia/statab/130ed/tables/pop.pdf> [<https://perma.cc/P7VR-B5N2>] (reporting population in 2009 as 307,439,000).

164. See *SOI Tax Stats - Estate Tax Year of Death Tables*, IRS (July 2, 2020), <https://www.irs.gov/statistics/soi-tax-stats-estate-tax-year-of-death-tables> [<https://perma.cc/Y78N-TJ4K>] (follow “2009” hyperlink under “Table 1: Estate Tax Returns, Year of Death, Values for Tax Purposes by Tax Status and Size of Gross Estate”) (reporting 5,668 taxable returns out of 12,940 estate tax returns filed); KENNETH D. KOCHANKEK, JIAQUAN XU, SHERRY L MURPHY, ARIALDI M. MINIÑO & HSIANG-CHING KUNG, NAT'L VITAL STAT. SYS., DEATHS: FINAL DATA FOR 2009, at 1 (2011), [https://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60\\_03.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_03.pdf) [<https://perma.cc/P6QD-EQVQJ>].

165. *Estate Tax*, *supra* note 84.

166. See *SOI Tax Stats - Total Gifts of Donor, Total Gifts, Deductions, Credits, and Net Gift Tax*, IRS (Oct. 8, 2020), <https://www.irs.gov/statistics/soi-tax-stats-total-gifts-of-donor-total-gifts-deductions-credits-and-net-gift-tax> [<https://perma.cc/Z6JG-M78R>] (follow “2018” hyperlink under “Statistical Tables”). For gifts made in the year 2018, significantly less than 0.0001% of the population filed a gift return in 2018. See 2018 *National and State Population Estimates*, U.S. CENSUS BUREAU (Dec. 19, 2018), <https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html> [<https://perma.cc/5X8B-XYRA>] (follow “NST-EST2018-02: Table 2. Cumulative Estimates of Resident Population Change for the United

exemption and decreased number of individuals who owe wealth transfer taxes, one must ask whether there is any continued vitality to the concerns that motivated Congress in 1981—namely, the likelihood that “innocent” payments of items, such as educational and medical expenses, were subject to the gift tax.<sup>167</sup>

#### 4. *Modern Technology Can Assist in Taxpayer Compliance*

Apart from increases in the wealth transfer tax exemption between 1981 and today, the concerns that motivated the enactment of I.R.C. § 2503(e) are no longer relevant.<sup>168</sup> With dramatic improvements in technology,<sup>169</sup> there should be no practical concern that the repeal of I.R.C. § 2503(e)(2)(A) would result in taxpayers being unaware that tuition payments trigger a taxable gift (to which they could apply their exemption). A university that receives a direct payment of tuition from a grandparent, for example, could issue a form similar

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States, Regions, States, and Puerto Rico and Region and State Rankings: April 1, 2010 to July 1, 2018” hyperlink) (estimating an annual population of 327,167,434 in 2018); JIAQUAN XU, SHERRY L. MURPHY, KENNETH D. KOCHANECK & ELIZABETH ARIAS, NAT’L CTR. FOR HEALTH STAT., MORTALITY IN THE UNITED STATES, 2018, at 5 (2020), <https://www.cdc.gov/nchs/data/databriefs/db355-h.pdf> [<https://perma.cc/C6TE-N2QF>] (reporting 2,839,205 resident deaths in the United States in 2018).

167. See H.R. REP. NO. 97-201, pt. IV, at 193 (1981). On the other hand, those numbers indicate how much revenue could be produced by adopting a much lower and more equitable exemption level that more accurately correlates with the current wealth of the top 10% of taxpayers who make gifts or testamentary transfers. If Congress also repealed valuation distortion techniques and made some other changes to the transfer tax system, that action would go a long way to reduce our immensely high level of wealth disparities. See Joseph M. Dodge, *Three Whacks at Wealth Transfer Tax Reform: Retained-Interest Transfers, Generation-Skipping Trusts, and FLP Valuation Discounts*, 57 B.C. L. REV. 999, 1000 (2016); Gerzog, *supra* note 155, at 1037.

168. H.R. REP. NO. 97-201, pt. IV, at 193.

169. Compare Reuben Fischer-Baum, *What ‘Tech World’ Did You Grow Up In?*, WASH. POST (Nov. 26, 2017), <https://www.washingtonpost.com/graphics/2017/entertainment/tech-generations/> [<https://perma.cc/LF77-2PJS>] (reporting that 8% of all U.S. households had a personal computer in 1984), with Table 702.60. *Number and Percentage of Households with Computer and Internet Access, by State: 2016*, NAT’L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/digest/d17/tables/dt17\\_702.60.asp](https://nces.ed.gov/programs/digest/d17/tables/dt17_702.60.asp) [<https://perma.cc/9L9V-SNE-XJ>] (estimating that 89.3% of all U.S. households had a computer in 2016). See also Nick Routley, *How the Computing Power in a Smartphone Compares to Supercomputers Past and Present*, BUS. INSIDER (Nov. 6, 2017, 7:08 PM), <https://www.businessinsider.com/infographic-how-computing-power-has-changed-over-time-2017-11> [<https://perma.cc/49GR-6B2R>] (showing the one trillion-fold increase in computing power from 1956 to 2015 and noting that the computer behind the first moon landing in 1969 had as much power as two Nintendo game consoles); Patrick McCarthy, *Infographic: The Growth of Computer Processing Power*, OFFGRID (May 2, 2017), <https://www.offgridweb.com/preparation/infographic-the-growth-of-computer-processing-power/> [<https://perma.cc/S89K-2XTP>] (showing a pattern of computer power doubling every two years from 1971–2011).

to the Form 1099-Q that taxpayers receive in the year of distribution from a 529 plan or Coverdell education savings account.<sup>170</sup> Furthermore, tax preparation programs, which are used by almost all professional tax preparers and most individual filers (including via the IRS's Free File Program),<sup>171</sup> could be modified to ask whether the taxpayer made any tuition payments on behalf of an individual other than the taxpayer's minor child. If the taxpayer's answer is affirmative, the program could generate a gift tax return in addition to an income tax return. Alternately, the IRS could add a simple rider to the Form 1040 that would allow taxpayers to file a gift tax return for tuition payments along with their income tax return.

In states where parents are not required to pay their adult child's college costs, a wrinkle could arise at the nexus of college tuition payments and potential gift taxation.<sup>172</sup> In some of these states, a court can order one or both divorced parents to subsidize or cover postsecondary education.<sup>173</sup> Those payments will not be subject to any gift tax.<sup>174</sup> Any tax preparation program can be easily programmed to take this information into account. In other words, after repeal of I.R.C. § 2503(c)(2)(A), improvements made to technology in general and to tax-reporting technology in particular can facilitate awareness and reports of direct tuition payments as taxable gifts.

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170. See *Form 1099-Q: Payments from Qualified Education Programs (Under Sections 529 and 530)*, INTERNAL REVENUE SERV. (rev. Nov. 2019), <https://www.irs.gov/pub/irs-pdf/f1099q.pdf> [<https://perma.cc/HH4R-FS5C>].

171. See Rodney P. Mock & Nancy E. Shurtz, *The TurboTax Defense*, 15 FLA. TAX REV. 443, 456–57 (2014) (reporting that, in 2012, “nearly 100 percent” of paid preparers used tax software and that 90% of all individuals used either a paid preparer or software). See *generally File Your Federal Taxes Online for Free*, IRS, <https://www.irs.gov/filing/free-file-do-your-federal-taxes-for-free> (Feb. 1, 2021) [<https://perma.cc/CB3P-3WSD>] (providing taxpayers a method of filing their tax returns for free).

172. See, e.g., Margaret Ryznar, *Incentivizing Parental Support for College Tuition Through the Tax Code*, 2013 MICH. ST. L. REV. 827, 837 (explaining the “general rule that parents are not required to pay for their students’ college educations” but noting that some states require divorced parents to pay for adult children’s college costs).

173. E.g., IOWA CODE § 598.21(4) (West, Westlaw through 2020 Reg. Sess.) (giving courts the ability during divorce proceedings to set aside a portion of the marital property to create a conservatorship or separate fund “for the support, maintenance, education, and general welfare of the minor children”); *Newburgh v. Arrigo*, 443 A.2d 1031, 1038–39 (N.J. 1982) (listing twelve factors that a court should consider in deciding whether to order a parent to make payments for higher education, including the financial resources of the parent and the aptitude of the child for that education).

174. *Harris v. Comm’r*, 340 U.S. 106, 112–13 (1950) (holding that, when transfers under a marital property settlement agreement are made by divorce court decree, those transfers are not subject to gift tax). Professor Joseph Dodge has observed that “[t]he majority opinion in *Harris* is difficult to fathom, but presumably it covers transfers mandated by law, other than those that satisfy marital inheritance rights, even though not covered by a court decree.” Joseph M. Dodge, *Are Gift Demand Loans of Tangible Property Subject to the Gift Tax?*, 30 VA. TAX REV. 181, 258 n.288 (2010).

## V. TAX BENEFITS AND RACIAL INEQUALITIES

The tax system both reflects and creates values.<sup>175</sup> As Professor Tsilly Dagan has explained it:

[T]he currency of taxation necessarily sorts through attributes and actions and measures and arranges them along the income tax scale . . . . [T]his process of classifying, comparing, and measuring has certain features that challenge and, at times, even reconstruct, the reality it is intended to measure, thereby shaping our identities in a number of ways.<sup>176</sup>

In the context of tax benefits for higher education, the very existence of these benefits makes at least two signals: first, that higher education in the United States is expensive<sup>177</sup> and, second, that education is beneficial for individuals and society.<sup>178</sup> There is a third possible perspective on the “currency” of tax-free tuition payments—one of the most generous of all educational tax benefits. Because of the inferential evidence that these benefits inure to the almost exclusive benefit of educated, white, wealthy individuals, another message of I.R.C. § 2503(e)(2)(A) is that the “deck is stacked” in favor of maintaining those wealthy taxpayers’ social welfare.

To be sure, if one understands the purpose of wealth transfer taxes, at least in part as breaking up concentrations of wealth,<sup>179</sup> then one of the easiest ways to accomplish that purpose is by dramatically lowering the exemption amount.<sup>180</sup> Repealing I.R.C. § 2503(e)(2)(A) alone cannot eliminate or drastically reduce wealth concentration in this country. A wider goal includes enacting wealth transfer tax laws that do not systematically favor one race over another in cases where a particular tax benefit contravenes the underlying tax policy. As this Article has shown, one such case is the gift tax exemption for direct tuition payments, where the overarching goal of wealth transfer taxation is preventing tax-free, estate-depleting transfers.

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175. Kitty Richards, *An Expressive Theory of Tax*, 27 CORNELL J.L. & PUB. POL’Y 301, 303 (2017) (describing tax laws as an expression of a society’s larger social values).

176. Tsilly Dagan, *The Currency of Taxation*, 84 FORDHAM L. REV. 2537, 2537–38 (2016).

177. See *supra* Section II.A.

178. See *supra* notes 4–8 and accompanying text.

179. E.g., Wendy C. Gerzog, *The New Super-Charged PAT (Power of Appointment Trust)*, 48 HOUS. L. REV. 507, 508 (2011) (noting that the wealth dilution goal of wealth transfer taxes is “controversial”); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 851 (2001) (identifying concerns about wealth concentration as one of the justifications for the wealth transfer tax).

180. See *supra* Section IV.C.3 (discussing how the wealth transfer exemption allows economic privilege to pass between generations).

The investigation of tax law through the lens of race is a foundational move of critical tax scholarship.<sup>181</sup> Although there is already a sizable body of analysis at the intersection of race and taxation,<sup>182</sup> many areas of the tax code merit further study. A non-exhaustive list includes familiar topics, such as tax benefits related to homeownership, children, and dependents; the list also includes capital gains, dividends and interest, retirement savings, the income of rental real estate, pass-through businesses, charitable giving, and health care. Analyzing how tax law impacts various taxpayers differently can reveal the extent of the tax system's involvement in exacerbating inequalities and sustaining privileges.<sup>183</sup>

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181. See CRITICAL TAX THEORY: AN INTRODUCTION, *supra* note 11, at 107 (describing the “intersection of race and taxation” as the body of critical tax scholarship that directly challenges “the myth of the ‘neutrality’ of the tax laws”).

182. See, e.g., Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. U. L. REV. 575 (2001); Bearer-Friend, *supra* note 20; David A. Brennen, *Race and Equality Across the Law School Curriculum: The Law of Tax Exemption*, 54 J. LEGAL EDUC. 336 (2014); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007); Brown, *Marriage Bonus/Penalty*, *supra* note 21; Brown, *Tax Treatment of Children*, *supra* note 21; Samuel D. Brunson & David J. Herzig, *A Diachronic Approach to Bob Jones: Religious Tax Exemptions After Obergefell*, 92 IND. L.J. 1175 (2017); Francine J. Lipman, Nicholas A. Mirkay & Palma Joy Strand, *U.S. Tax Systems Need Anti-Racist Restructuring*, 168 TAX NOTES FED. 855 (2020); Leo P. Martinez & Jennifer M. Martinez, *The Internal Revenue Code and Latino Realities: A Critical Perspective*, 22 U. FLA. J.L. & PUB. POL'Y 377 (2011); Moran & Whitford, *supra* note 21; ANDRE L. SMITH, *TAX LAW AND RACIAL ECONOMIC JUSTICE: BLACK TAX* (2015); Smith, *supra* note 80; Chloe Thompson, *Commentary on United States v. Rickert*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS 55 (Bridget J. Crawford & Anthony C. Infanti eds., 2017); Mylinh Uy, *Tax and Race: The Impact on Asian Americans*, 11 ASIAN L.J. 117 (2004); Elaine Waterhouse Wilson, *Commentary on Bob Jones University v. United States*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra*, at 140.

183. E.g., Aravind Boddupalli & Kim Rueben, *Racial Disparities and the Income Tax System*, TAX POL'Y CTR. (Jan. 30, 2020), [https://apps.urban.org/features/race-and-taxes/\[https://perma.cc/M8MF-Y89W\]](https://apps.urban.org/features/race-and-taxes/[https://perma.cc/M8MF-Y89W]) (using Form 1040 to examine “how the federal income tax code interacts with existing racial inequities”). We acknowledge that race is one of many identity axes. See *supra* notes 10–12 and accompanying text. Other identity categories that are particularly relevant for tax law analysis include gender, sexuality, disability, ethnicity, and immigration status. No single identity category can fully account for the complex operation of discrimination. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149 (“Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them.”); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (“I used the concept of intersectionality . . . to illustrate that many of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.”).



## VI. CONCLUSION

The concept of colorblindness has a long, complex, and controversial legal history. For some, the term “colorblind” expresses the idea that laws are wrongful if they constrain individuals from attaining their full potential in education, employment, or other aspects of social and political life on account of their skin color.<sup>184</sup> For others, the term “colorblind” means that laws are wrongful if they permit affirmative action employment preferences for non-whites.<sup>185</sup> Still, others suggest that for the Supreme Court (and presumably other courts) to be “colorblind,” it must adopt an “ideological strategy by which the current Court obscures its active role in sustaining hierarchies of racial power.”<sup>186</sup> This is a corollary of Justice Blackmun’s observation that “[i]n order to get beyond racism, we must first take account of race.”<sup>187</sup> Because Americans hold widely divergent views concerning the utility of talking about race, conversations on these issues remain difficult.<sup>188</sup> In the case of tax policy, coming to some national consensus on what role race should play in the law seems like an impossible goal.<sup>189</sup>

Professor Jeremy Bearer-Friend has critiqued the IRS’s colorblind policy as a “misguided tool” in the effort to prevent policy makers from discriminating on the basis of race.<sup>190</sup> He argues that “colorblind data conceal racial inequalities embedded in our tax code and prevent the remedy of that inequality” in an anti-democratic way.<sup>191</sup> Bearer-Friend stops short of recommending that the IRS collect race-based data, though, out of caution for

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184. *E.g.*, Brief for Appellants at \*5, *Anderson v. Martin*, No. 51 (U.S. Aug. 26, 1963) (arguing that the “Constitution is color blind” in challenging a Louisiana law that required candidates for elective office to be identified by race on all ballots).

185. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (finding that strict scrutiny applies to all racial classifications, including those that provide financial incentives for hiring federal contractors of certain races or ethnicities).

186. Kimberlé Crenshaw et al., *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, xiii, xxviii (Kimberlé Crenshaw et al. eds., 1996).

187. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

188. *See, e.g.*, Tiffani G. Lee, *Courageous Conversations About Race and Racism*, *EXPERIENCE*, Oct.–Nov. 2020, at 4, 4–5 (providing advice to others in the legal profession and acknowledging that “[i]t will be difficult, if not impossible, to discuss issues of race and racism in America if you’re unwilling to be uncomfortable, so don’t be afraid of uncomfortable conversations”).

189. *See, e.g.*, Lawrence Zelenak, *Examining the Internal Revenue Code for Disparate Racial Impacts*, 168 *TAX NOTES FED.* 1807, 1820 (2020) (“The government already collects race-based data on virtually every other important activity of the federal government, and in any event more knowledge is always a good thing. The harder question is what changes in the law, if any, should follow when the data reveal racial disparities.”).

190. Bearer-Friend, *supra* note 20, at 5–6.

191. *Id.* at 37–38.

the agency's own reputation.<sup>192</sup> We agree with his assessment that other tools, including the U.S. Census's Current Population Survey and the Federal Reserve's Survey of Consumer Finances, could make minor modifications to capture more accurate race-based tax information.<sup>193</sup>

For those who embrace a more racially just society, an important goal is broadening the definition of "fairness" that applies in analyzing tax laws. In the case of wealth transfer taxes, this Article argues that a particular tax benefit is inequitable and, thus, should be repealed if (1) it has disparate impacts on the basis of race and (2) its benefit is inconsistent with the overall policy objective of taxing gratuitous transfers that create substantial wealth in the transferee and deplete the transferor's estate. In the case of tax-free transfers under I.R.C. § 2503(e)(2)(A), both of those criteria are met: (1) it disproportionately benefits educated, wealthy whites, and (2) it fails to tax transfers that simultaneously generate a lifetime benefit for the donee and diminish the size of the donor's gross estate.

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192. *See id.* at 60–61.

193. *Id.* at 61.

