1968

The Constitutional Problem of Taxing Gifts as Income

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All students of the income tax must, I am sure, feel a debt of gratitude to Professors Klein[1] and Del Cotto[2] for their researches into the antecedents of and justifications for the gift exclusion;[3] and one would, I suppose, have to be at least one sort of fool to rush in over ground so well-trodden by the angels.[4] My excuse for any appearance of foolishness in resurrecting Klein's enigma is two-fold. While Klein and Del Cotto are in agreement that the gift exclusion should be neutralized if not abolished, two different justifications therefor are put forward, one by Klein, which Del Cotto endorses, and a second by Del Cotto independently. Klein's case against the gift exclusion rests essentially on a rejection of "ordinary language" as the appropriate criterion for determining either the meaning of the word "income" in section 61(a) or the meaning of the word "gift" in section 102(a); and Del Cotto's thesis is that an income tax on the recipient of a gift would be indirect, thereby avoiding the problems of meaning raised by the sixteenth amendment. Since I believe Klein's proposal reflects an important misconception and Del Cotto's thesis is, subject to an important proviso, correct, it may further the cause and avoid confusion if I give my reasons for these beliefs.

Professor Klein's case against the gift exclusion of section 102(a) consists, partly in his own words, of the following points:

> 1. The bulk of the cases involves payments by employers . . . to employees or their widows, where the payment had not been bargained for and the employer was in no sense legally obligated to make the payment. . . . The courts could have defined the term "gift" to exclude payments motivated by an employment relationship. In fact, however, the courts have treated the question of gifts *vel non* as one that turns principally on the "intention" of the payor.[5]

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1. Klein, *An Enigma in the Federal Income Tax: The Meaning of the Word "Gift,"* 48 MINN. L. REV. 215 (1963).

2. Del Cotto, *The Trust Annuity as Income: The Constitutional Problem of Taxing Gifts and Bequests as Income*, 23 TAX. L. REV. 231 (1968).

3. INT. REV. CODE of 1954, § 102(a).

4. *See also* R. MAGILL, TAXABLE INCOME (rev. ed. 1945) which foreshadows much of what Klein and Del Cotto have to say.

5. Klein, *supra* note 1, at 217-18.

2. As a matter of common parlance a distinction exists between the terms "gift" and "income;" therefore, to treat gifts as income requires a rather broad definition of the term "income" for tax purposes . . . .[6]
3. [Ordinary meaning] is determined by the dominant mental image evoked in the mind of the average man when [the word "gift"] is used. . . .[7] [T]o determine the colloquial meaning of the statutory language . . . the question in each case would then be whether the transfer in question corresponded with the commonly held image of a gift.[8]
4. To insist that gifts cannot be taxed as income because they are not described as income in common parlance is to insist on precision of language at the expense of sound tax policy. In this instance precision of language may properly be sacrificed to permit a statement of the issue in terms of whether income should be defined to include gifts and inheritances.[9]

Finally, Professor Klein concludes[10] that section 102(a) makes little sense because: (a) it can be justified only in terms of social purpose, but no apparent social purpose is evident in a blanket exclusion of gifts from gross income; and (b) the legislative history fails to reveal any legislative purpose for the exclusion; it is neither the product of any reasoned legislative choice nor does it reflect any legitimate objective of tax policy.

It should be noted that Professor Klein is not just echoing Dean Griswold's plea for "new guidelines."[11] Indeed, his approach to ordinary meaning would mean that none could be forthcoming. Rather, he advocates a judicial interpretation of the Code whereby section 102(a) would be interpreted as narrowly as possible so as not to apply to transfers made in a business context, and section 61(a) would be given as broad an application as required to complement the narrowing of section 102(a).

Although his theory of ordinary meaning given in point three above may seem excessively psychological in the nineteenth century tradition, and would no doubt raise shrieks from contemporary philosophers of the ordinary language bent, we can, for present purposes, let it pass. What does matter is that while Professor Klein has, so to speak, managed to get the lid screwed on the jar, he has succeeded in getting it screwed on incorrectly. In fact, gifts with business overtones should be

6. *Id.* at 224.
7. *Id.* at 219.
8. *Id.* at 261.
9. *Id.* at 224.
10. *Id.* at 260-63.
11. *See* Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold, The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 88-91 (1960).

included in section 61(a) and excluded from section 102(a) not by dint of judicial legerdemain but simply because Congress and the Constitution require that ordinary meaning be the controlling factor. In order to explain the significance of ordinary meaning in the interpretation of sections 61(a) and 102(a) it will be necessary to enlarge upon the point Professor Lowndes has stressed,[12] and which Professor Del Cotto endorses.[13] That is, in levying an income tax Congress is not limited to whatever it is that constitutes income within the meaning of the word "incomes" in the sixteenth amendment.

By virtue of Article I, Congress has plenary power to lay taxes; virtually anything can be reached by Article I provided that excise taxes are uniform and direct takes are apportioned. Hence, a direct tax on a source of income would be unconstitutional under Article I if unapportioned. The narrow function of the sixteenth amendment is therefore to allow Congress to tax incomes regardless of source and without the necessity of apportionment if the tax is direct; it does not dilute the plenary power under Article I. Professor Lowndes has concluded from this that the federal income tax might be applied constitutionally to a gain which is not income within the meaning of the word "incomes" in the sixteenth amendment;[14] Congress derives its power from Article I, not from the sixteenth amendment.

It is clear, I think, that Congress has the power under Article I to tax anything, except perhaps interest on state and municipal bonds,[15] as long as any direct tax is apportioned; that if the impact of a tax on "incomes," as that term is used in the sixteenth amendment, is direct there is no need for apportionment; and that section 61(a) is an exercise of the Article I power. To the extent that the meaning of the word "income"

12. Lowndes, *Current Conceptions of Taxable Income*, 25 OHIO ST. L.J. 151 (1964).

13. Del Cotto, *supra* note 2.

14. Lowndes, *supra* note 12, at 161. To illustrate his point, Professor Lowndes states that a statute regulating prices might provide that over-ceiling prices for goods sold shall not be deductible for income tax purposes, so that the gross proceeds of those sales, rather than the gross profit, would be included in gross income. *Id.* at 161-62. This is a somewhat questionable illustration, for it seems to be a case of the income tax being used nonfiscally as a penalty and not as a tax at all. A better example would be to suppose Congress had amended § 61(a) so that the gross proceeds of certain sales were to be included in gross income. *See* note 33 *infra*, and accompanying text.

15. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, *modified*, 158 U.S. 601 (1895).

in section 61(a) coincides with that of "incomes" in the sixteenth amendment[16] there is no apportionment problem; but if the meaning of the word "income" in section 61(a) is extended beyond that of "incomes" in the sixteenth amendment, the problem of apportionment under Article I arises if the impact of the tax as extended is direct. No apportionment problem can arise, however, from an extension of the section 61(a) coverage beyond that of the sixteenth amendment if the tax as extended is indirect. In other words, if the impact of the tax imposed by virtue of section 61(a) is direct then the section 61(a) meaning is limited to the sixteenth amendment meaning unless the tax is apportioned; but if the impact of section 61(a) is indirect then the sixteenth amendment is irrelevant because the section 61(a) meaning is not then limited to that of the sixteenth amendment and there is no apportionment problem.

The information we have concerning the meaning of the word "incomes" in the sixteenth amendment points to its ordinary language usage;[17] indeed it is difficult to see how it could point elsewhere when we recall that we are dealing with a self-assessing system of income taxation. In *Eisner v. Macomber*, the Supreme Court stated:

> . . . we require only a clear definition of the term "income," as used in common speech, in order to determine its meaning in the [sixteenth] Amendment. . . . After examining dictionaries in common use . . . we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 . . . "Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets. . . .[18]

Since *Macomber*, the Supreme Court has decided several cases,[19] culminating with *Commissioner v. Glenshaw Glass Company*,[20] which are generally considered to have both repudiated the

16. There seems to be no more than a stylistic difference between the use of the word "income" in § 61(a) and "incomes" in the sixteenth amendment. *See* notes 18 and 22 *infra*, and accompanying text.

17. *See, e.g.*, Merchants' Loan & Trust Co. v. Smietanka, 255 U.S. 509, 519 (1921); Eisner v. Macomber, 252 U.S. 189, 206-07 (1920); Lynch v. Hornby, 247 U.S. 339, 343-44 (1918); United States v. Oregon-Washington R.R. & Navigation Co., 251 F. 211, 212 (1918).

18. 252 U.S. 189, 206-07 (1920).

19. James v. United States, 366 U.S. 213 (1961); Commissioner v. Lobue, 351 U.S. 243 (1956); Rutkin v. United States, 343 U.S. 130 (1952); Helvering v. Bruun, 309 U.S. 461 (1940); United States v. Kirby Lumber Co., 284 U.S. 1 (1931).

20. 348 U.S. 426 (1955); *accord*, General Am. Investors Co. v. Commissioner, 348 U.S. 434 (1955).

suggestion in *Macomber* that no other definition of income would do[21] and to have "broadened" the concept of taxable income. This broadening process could be regarded either as a rejection of the *Macomber* definition as the embodiment of the ordinary meaning of the word "incomes" in the sixteenth amendment or as an extension of section 61(a) beyond the sixteenth amendment concept of "incomes;" it does not appear to be a rejection of ordinary meaning itself as the appropriate criterion of meaning for the sixteenth amendment. But while it is unclear from the Court's opinions exactly what is meant, it is noteworthy that Congress has stated in no uncertain terms that section 61(a) does not go beyond the sixteenth amendment:

> [Section 61(a)] corresponds to section 22(a) of the 1939 Code. . . . Section 61(a) is as broad in scope as section 22(a). Section 61(a) provides that gross income includes "all income from whatever source derived." This definition is based upon the sixteenth amendment and the word 'income' is used as in section 22(a) in its constitutional sense.[22]

It has been suggested[23] that this Congressional statement reflects the influence of the Court's frequent and unfortunate repetition of the idea that Congress in enacting section 22(a) of the 1939 Code intended to reach all income taxable under the sixteenth amendment,[24] any implication that the power to tax income both derives from and is limited by the sixteenth amendment being presumably false.[25] In any event, if the Congressional statement is to be taken at face value, and the Court seems disposed so to take it,[26] then the meaning of the word "income" in section 61(a) is to be determined by the meaning of the word "incomes" in the sixteenth amendment; and if the latter in turn is to be understood in its ordinary sense then the meaning of the word "income" in section 61(a) must be limited, by reason of the manifested legislative intent, to its ordinary meaning.[27]

The judicial repudiation of the *Macomber* definition of the

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21. 252 U.S. at 207.

22. S. REP. No. 1622, 83d Cong., 2d Sess. 168 (1955).

23. *The Supreme Court, 1954 Term*, 69 HARV. L. REV. 119, 196-97 n.470 (1955).

24. *See* General Am. Investors Co. v. Commissioner, 348 U.S. 434 (1955); Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955); Rutkin v. United States, 343 U.S. 130 (1952).

25. Language suggesting the implication can be found in Eisner v. Macomber, 252 U.S. 189, 203 (1920): "[C]ongress intended in [the 1913 Act] to exert its power to the extent permitted by the [sixteenth] Amendment."

26. *See* cases cited notes 19 and 24 *supra*.

27. *See* note 16 *supra*.

word "incomes" in the sixteenth amendment, coupled with the emphasis placed on the congressional restriction of section 61(a) within the bounds of the sixteenth amendment,[28] suggests at most that the Court now believes it was mistaken as to what constitutes the ordinary language meaning of the word "incomes" in the sixteenth amendment; it does not mean that the Court has now decided that ordinary language itself is not the proper criterion for determining the meaning of the word "incomes" in the sixteenth amendment. Moreover, as long as Congress insists that section 61(a) goes no further than the sixteenth amendment meaning of the word "incomes," any judicial or administrative attempt to extend section 61(a) beyond that limit would be improper. The difficulty in determining just what the Court has been doing here could lead one to suspect that it has rather craftily put itself in the position of being able, if it so wishes, to stretch the sixteenth amendment concept of "incomes" beyond the bounds of ordinary meaning without having to acknowledge that it is doing so. At the same time it could honor the congressional statement of intent by limiting section 61(a) to the (expanded) meaning of the word "incomes" in the sixteenth amendment. It cannot be said, however, that the Court has yet gone that far; the broadening of the *Macomber* concept of taxable income to cover cancellation of indebtedness,[29] illegal gains[30] and windfalls[31] can still be accommodated within the ordinary language concept of "incomes." And while this broader ordinary language concept of income will, I believe, quite readily embrace gifts "with business overtones,"[32] it will not extend to gifts *simpliciter*; the fact that the Supreme Court has tied the sixteenth amendment to ordinary meaning and Congress, in turn, has tied section 61(a) to the sixteenth amendment, effectively bars enlarging the tax base to cover gifts generally.

This is not to say, however, that Congress could not expressly extend section 61(a) beyond the meaning of the sixteenth amendment word "incomes," as used in the ordinary language sense. Suppose, for instance, Congress extended section 61(a) by adding 61(a)(16) covering the costs of certain goods sold or, alternatively, the gross proceeds of certain sales. This would be

28. *See* notes 19 and 24 *supra*.
29. United States v. Kirby Lumber Co., 284 U.S. 1 (1931).
30. James v. United States, 366 U.S. 213 (1961); Rutkin v. United States, 343 U.S. 130 (1952).
31. General Am. Investors Co. v. Commissioner, 348 U.S. 434 (1955); Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).
32. Commissioner v. Duberstein, 363 U.S. 278, 285 (1960).

a valid exercise of the Article I power even though recoupment of capital does not come within the ordinary language meaning of the word "incomes" in the sixteenth amendment;[33] and unless the impact of the section 61(a)(16) tax on the costs of the specified sales were direct there would be no problem of apportionment under Article I.[34] The recoupment of capital doctrine therefore applies to section 61(a) on constitutional grounds only so far as its coverage coincides with what constitutes "incomes" in the ordinary language sense of that term as used in the sixteenth amendment. Congress need concern itself with the meaning of the word "incomes" in the sixteenth amendment only when it wishes to amend section 61(a) in a way that will have a direct impact.

I have suggested elsewhere[35] that, for theoretical purposes at least, it is sometimes helpful to think of the notion of income in set-theoretical terms which disclose three distinct but related ideas:

(1) gains taxable under Article I (hereafter "G");

(2) realized gains within the doctrine of *Eisner v. Macomber*[36] and *Helvering v. Bruun*[37] hereafter "R"); and

(3) realized gains taxable as income under section 61(a) (hereafter "I").

R is a subset of G and I is a subset of R. In the Case of G, the

33. Doyle v. Mitchell Bros., 247 U.S. 179 (1917) would seem to be authority for this proposition even though it dealt with the 1909 Corporation Tax Act. *See* Merchants' Loan & Trust Co. v. Smietanka, 255 U.S. 509, 519 (1921); Eisner v. Macomber, 252 U.S. 189, 205 (1921).

34. It foes not follow, simply because a tax on the gross receipts of a certain industry was held in Spreckels Sugar Refining Co. v. McClain, 192 U.S. 397 (1904) to be an excise not requiring apportionment, that extending § 61(a) by § 61(a)(16) to cover the costs of certain sales would automatically convert 61(a) into an excise tax so that apportionment and the sixteenth amendment would no longer be relevant; although, of course, if § 61(a)(16) were to be regarded by virtue of *Spreckels* as an excise tax then the sixteenth amendment would be irrelevant so far as § 61(a)(16) was concerned.

35. Mullock, *Current Conceptions of Taxable Income—A Comment*, 26 OHIO ST. L.J. 43 (1965).

36. 252 U.S. 189 (1919).

37. 309 U.S. 461 (1940). The doctrine of realization refers to what Professor Lowndes has called the economic objectivity of taxable income, Lowndes, *supra* note 12, at 171-82, and which denotes an event or transaction measurably changing the taxpayer's economic position in a way that can be routinely handled by officials: it rests, as the Supreme Court has pointed out, on administrative convenience, Helvering v. Horst, 311 U.S. 112, 116 (1940); Mullock, *supra* note 35, at 46. I am no longer sure that Professor Lowndes is correct when he concludes from this that it is not a constitutional doctrine.

only limits on membership would seem to be those dictated by political expediency; and to determine whether a member of G should be admitted into R we have recourse to the doctrine of realization. So far as I is concerned, admission into R carries with it simultaneous admission into I *unless* there are good reasons, having nothing to do with the problem of realization, for excluding the realized gain from I. As with most, if not all, legal concepts the notion of income has its defeasible aspects: all realized gains are income *unless* . . . .[38] We have income only if we have realized gain; if we do not have realized gain we cannot have an item of income. Thus, gain and realization are *necessary* for an item of income *per* section 61(a). However, because of the "unless" factors there are realized gains which are not taxable as income; thus gain and realization by themselves are not sufficient to define the word "income" in section 61(a). Failure to recognize this inevitably leads one to ask, "Is this . . . income?" in cases which more properly pose the "unless" question, "Why exclude this realized gain from gross income?" The latter question calls for reasons and justifications having nothing to do with the problem of realization.

If we take Congress at its word—that it is using the term "income" in section 61(a) in the sixteenth amendment ordinary language sense—then, as long as this remains the case, one "unless" ground for excluding from I a gain fitting in G which is realized, and therefore a member of R, would be that it did not come within the ordinary language sense of the word "incomes" in the sixteenth amendment. Certainly, a "gift," in the ordinary language sense, does not fit "income," in the ordinary language sense, any more than does recoupment of capital; thus even without section 102(a), gifts in the ordinary sense could not constitutionally be brought within section 61(a). It follows that section 102(a) is no more than declaratory of the law absent section 102(a). But even though Congress has limited section 61(a) to the sixteenth amendment ordinary language sense of income, it does not follow that the Constitution requires Congress so to limit section 61(a); as we have already noted, it could extend section 61(a) expressly beyond the sixteenth amendment ordinary language concept of income by the exercise of its Article I power.

Professor Klein, it will be recalled, would have the courts

38. *See* Austin, *A Plea for Excuses*, in PHILOSOPHICAL PAPERS 123 (Urmson & Warnock eds. 1961); Hart, *The Ascription of Responsibility and Rights*, in LANGUAGE AND LOGIC 145 (1st Ser. Flew ed. 1951).

interpret section 102(a) as narrowly and section 61(a) as broadly as need be, so that gifts with business overtones would be excluded from section 102(a) and included in section 61(a). Such a proposal, we can now see, is misconceived simply because gifts made in a business context are properly excludible from section 102(a) and includible in section 61(a) by virtue of the ordinary meanings of the words "gift" and "income" respectively. The reliance on ordinary meaning is required not, as Klein seems to think, by a mere desire for "precision of language," but because Congress has tied section 61(a) to the sixteenth amendment and the Supreme Court has tied the sixteenth amendment and section 102(a) to ordinary meaning. So far as gifts *simpliciter* are concerned, if they are to be subjected to an income tax, it will be necessary for Congress both to repeal section 102(a)—for as matters stand it is merely declaratory—and expressly extend section 61(a) beyond the sixteenth amendment. The problem would then be whether the extension of section 61(a) to cover gifts as ordinarily understood would result in a tax which was direct rather than indirect. For if it would be unconstitutional to include a gift in the gross income of the recipient because the resulting unapportioned tax would be direct, and if apportionment is generally unfeasible, there would be little point in extending section 61(a) to cover gifts at all. Two courses, therefore, are open to those who would, in effect, abolish the gift exclusion of section 102(a): they must show either that the word "incomes" in the sixteenth amendment is used in some sense other than that of ordinary language, or that an income tax on the recipient of a gift would be indirect for purposes of Article I. Since the first alternative is unlikely to be realized, we may now turn our attention to the second.

Suppose that Congress has, as it well may, cut section 61(a) free from the ordinary language ties of the sixteenth amendment; that it has repudiated the statement set out above, and has extended section 61(a) to cover gifts *simpliciter* and repealed section 102(a). It would then be necessary to determine whether the extended area of section 61(a) would result in a tax which was direct rather than indirect. Professor Del Cotto argues that an income tax on the recipient of a gift would be indirect for purposes of Article I, and thus in no need of apportionment *"even though the receipt were not income."*[39] The latter italicized point overlooks, of course, the fact that in addition to re-

39. Del Cotto, *supra* note 2, at 254. This view was also subscribed to by Professor Lowndes, *supra* note 12, at 160 n.42.

pealing section 102(a), for example, Congress would have to sever the ordinary language ties of section 61(a). But since we are making the assumption for him, we can confine ourselves to his contention that the indirectness of an income tax on gifts may be established on the basis of "closely related authority in the areas of estate, gift and inheritance taxation which is persuasive on this issue."[40] The argument, taken from the court's opinion in *Simmons v. United States*,[41] is as follows:

1. The estate,[42] gift[43] and inheritance[44] tax law distinguishes between
   (a) a tax on property imposed solely by reason of its ownership, which is direct, and
   (b) a tax upon the exercise of some, but not all, of the rights adhering to ownership, such as use or transfer of property, which is indirect and therefore not subject to the requirement of apportionment.
2. A tax upon the donor of an *inter vivos* gift is indirect, being merely a tax upon the exercise by the donor of the right to transfer the property.[45]
3. If a tax on giving property is indirect, so is a tax on receiving it, regardless of source.[46]
4. An income tax on the recipient of a gift is a tax upon the receipt of property rather than upon the ownership of property, and therefore is indirect.

The logic behind step (1) may no doubt escape those not attuned to the niceties of judicial "reasoning," and one might be forgiven for the naive thought that a tax upon some specific part of the "bundle of rights" of ownership would be just as direct as a tax upon the more slippery notion of ownership *in toto*. Certainly, it would make little sense to argue that a blow which breaks every bone in a body is direct but one that breaks only a finger is indirect. But the Supreme Court has spoken and it must now be conceded as settled that a transfer tax, at least, is indirect. Moreover, in settling the nature of these transfer taxes, the Court was engaged in interpreting Article I as well as the respective estate, gift and inheritance

40. Del Cotto, *supra* note 2, at 254.
41. 308 F.2d 160, 166-67 (4th Cir. 1962).
42. New York Trust Co. v. Eisner, 256 U.S. 345 (1921).
43. Bromley v. McCaughn, 280 U.S. 124 (1929).
44. Knowlton v. Moore, 178 U.S. 41 (1900).
45. Bromley v. McCaughn, 280 U.S. 124 (1929).
46. Fernandez v. Wiener, 326 U.S. 340, 352-55, 361-62 (1945).

tax statutes: It was laying down criteria for distinguishing between a direct and an indirect tax. In other words, though it arose out of cases involving the estate, gift and inheritance taxes, the rule embodying the criteria must be regarded as a constitutional rule to be applied whenever the direct-indirect classification of a tax, by whatever name, is in issue for purposes of Article I.

So far as step (3) is concerned it may be doubted, again on logical grounds, that it follows from steps (1) and (2). While we may agree that giving is one of the attributes of ownership, it is not so clear that the same can be said of receiving. One second before a gift is made the donor, as owner, has the right to make the gift; but at that point in time the prospective donee is not the owner of the subject matter of the gift and so does not have a right to receive it based on ownership. Once more, however, we must defer to the "higher learning"—no distinction may be drawn between giving and receiving. Hence with step (3) well settled, nothing stands in the way of step (4): an income tax on the recipient of a gift would be indirect and thus free from the requirement of apportionment.

Three conclusions may now be drawn:

1. If Congress extends section 61(a) to cover gifts [and repeals section 102(a)] but reiterates the statement quoted earlier limiting section 61(a) to the sixteenth amendment concept of "incomes," then the extension will have to be brought within that constitutional concept. That will be difficult, if not impossible, if the Supreme Court continues to rule that the word "incomes" in the sixteenth amendment is to be given its ordinary language meaning. The weakness of Professor Klein's case against the gift exclusion lies in his failure to appreciate the significance of ordinary meaning.[47]
2. If Congress extends section 61(a) to cover gifts [and repeals section 102(a)] and expressly or by implication repudiates the statement quoted earlier limiting section 61(a) to the sixteenth amendment concept of "incomes," then the sixteenth amendment will no longer be relevant and the resulting tax

47. The Fourth Circuit in *Simmons* supports Klein, but again only at the cost of ignoring the constitutional significance of ordinary meaning. 308 F.2d 160, 167-68. The fact that *Glenshaw Glass* makes it clear that consideration need not have been given for an item in order for it to be classed as taxable income, does not entail that a gift is income to the recipient; yet Professor Lowndes asserts that "the *Glenshaw* case makes it clear that there is no constitutional prohibition against taxing gifts as income." Lowndes, *supra* note 12, at 170.

will be constitutional under Article I without apportionment because its impact will be indirect. The weakness in Professor Del Cotto's proposal is his failure to see the need for the foregoing "if" clause.

3. As matters now stand, with section 61(a) tied to the sixteenth amendment ordinary language concept of "incomes," gifts made in a business context can, and gifts *simpliciter* cannot be fitted into section 61(a).