NOTE

HYPERLOCAL GIFT ECONOMIES UNDER THE *DUBERSTEIN* GIFT STANDARD

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Hyperlocal gift economies, such as those moderated by the "Buy Nothing Project," have become increasingly popular in the United States and abroad within the last decade. Explicitly banning the buying, selling, trading, or bartering of goods and services, hyperlocal gift economies instead encourage local community members to give to each other out of their own abundance and without any expectation of return or obligation—in short, to give and receive gifts. But while members of these groups regard these transactions as gifts, it is unclear if the Internal Revenue Service would agree. The Internal Revenue Code's definition of "gift" in I.R.C. § 102, as interpreted by Commissioner v. Duberstein, *stipulates that a transfer of goods or services qualifies as a gift only if it is made with "detached and disinterested generosity" and "out of affection, respect, admiration, charity or like impulses." Later applications of the* Duberstein *standard, such as the holding in* Olk v. United States *that a "toke" to a dealer in a casino is not a gift, make clear that courts are willing to give great weight to the surrounding context of a transaction in determining the intent of the giver. And if a tip to a dealer cannot be the product of "detached and disinterested generosity" due to the surrounding context of the giving (the gift is to a dealer, a person from whom one has or hopes to hear news of great self-interest), one might also conclude that giving to a group from which one reasonably expects to receive disqualifies the giving from being a "gift," and that transfers within a hyperlocal gift economy are therefore not gifts per se. This Note disagrees with that conclusion. A thorough review of relevant caselaw and tax policy principles leads me to argue that, so long as participants*

* J.D. Candidate, Notre Dame Law School, 2025. Many thanks to Professor Michael Kirsch for sparking my interest in tax law and for his insight and guidance on this topic; to the members of the *Notre Dame Law Review* for their generous expenditure of time, skill, and care in editing this piece; and to my family, for their unflagging support of my endeavors. This piece is dedicated to my wife, Morgan Munsen, whose commitment to living an ethical life inspired this work, and to my father, Randal Munsen, who taught me to love education and to see study as a form of prayer. Ad Majorem Dei Gloriam.

abide by the guidelines established by the Buy Nothing Project (or comparable guidelines established by a similar group), transactions in hyperlocal gift economies do not and should not fall outside of the Duberstein *standard.*

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INTRODUCTION

In 2013, Liesl Clark and Rebecca Rockefeller founded the "Buy Nothing Project," a hyperlocal network of "circular gift economies" in Bainbridge Island, Washington.[1] Inspired by the example of villagers on the Tibet-Nepal border who redistributed scarce resources based on need,[2] and aimed at reducing the high amount of consumer waste generated by U.S. households,[3] the Project's concept was simple: connect individuals who would otherwise throw out unwanted or unneeded goods—including food, toys, gardening supplies, leisure equipment, dishware, or anything else one can think of—with their neighbors who wanted or needed those same goods.[4] In doing so, one could simultaneously eliminate consumer waste, promote individual well-being, and bolster community resiliency.[5] This was a worthy and noble concept, but to bring this concept to life, the Project needed to solve two problems.

First, there are normally prohibitively high transaction costs to (1) discovering who needs items, (2) discovering who has items, and (3) connecting these parties on the granular level of each particular item, even at a hyperlocal level. While these high costs could theoretically be overcome by extremely tight-knit hyperlocal communities, the existence of such communities today seems to be the exception rather than the norm. The Buy Nothing Project's solution to this problem (perhaps inspired by what may have harmed local community ties in the first place) was to leverage digital fora such as Facebook: on these digital platforms, all the information needed to make these connections could be shared and accessed at the initiative of each member and at their own convenience.[6] This manner of establishing connections made participation in the Project possible for a vastly increased number of people, even if these people didn't yet know their neighbors.[7]

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1 Taylor Telford, *Buy Nothing Groups Offer an Antidote to Waste and Isolation, with a World of Free Stuff*, WASH. POST (Dec. 10, 2021, 5:34 PM), https://www.washingtonpost.com/business/2021/12/10/buy-nothing-gift-economy/ [https://perma.cc/2PCW-UHKE].

2 Ronald D. White, *What Supply Chain Mess? For Buy Nothing Devotees, It's Not a Problem*, L.A. TIMES (Nov. 22, 2021, 5:00 AM PT), https://www.latimes.com/business/story/2021-11-22/buy-nothing-groups-dont-have-supply-chain-holiday-shopping-problems [https://perma.cc/7BNH-YDDC].

3 *See* Veronica Dagher, *An Antidote to Inflation? 'Buy Nothing' Groups Gain Popularity*, WALL ST. J. (Nov. 18, 2021, 5:30 AM ET), https://www.wsj.com/articles/an-antidote-to-inflation-buy-nothing-groups-gain-popularity-11637231402 [https://perma.cc/73K5-AMZD].

4 *See* Telford, *supra* note 1.

5 *See id.*

6 *See id.*

7 *See* White, *supra* note 2.

Once these individuals were connected, however, another problem arose. The Project wanted individuals to redistribute what they already had, and to do so freely—it did not want to create an alternative or exclusive marketplace for local neighborhoods.[8] To avoid this outcome and stay true to its mission, the Project established a set of rules. In a "Buy Nothing" group, there would be "[n]o buying. No selling. No trading. No bartering."[9] Instead, when a group member had a particular item to give away, they were to access the group's digital page and post that they had a "gift" and wait for another member to claim the item. On the other hand, when members wanted or needed a particular item, they were to simply post an "ask" for that particular item on the group's message board and wait for a fellow member to share from their abundance.[10] Crucially, whether giving in response to an ask or on their own initiative, members were required to give freely from their own abundance and without any obligation or expectation of return—maintaining the character of *gifting* rather than buying, selling, bartering, or trading.[11]

With these parameters put in place, the Project began in earnest—and it would be an understatement to say that its model proved popular. Today, merely a decade after its founding, the Buy Nothing Project boasts over eleven million members participating in 245,000 communities in the United States and across the world—more than double the amount of members recorded only two years ago.[12] And while the original ecological and antiwaste missions of the Buy Nothing Project have remained at its heart, it has also grown to address other needs, such as material scarcity and even loneliness.[13] Indeed, the Buy Nothing Project's hyperlocal-gift-economy model was particularly attractive during the COVID-19 pandemic: the increased material vulnerability and unprecedented social isolation suffered by many were met by hyperlocal gift communities, which provided both emergency goods and a sense of intimate, personal connection.[14] Given the hyperlocal gift

8 *See* Telford, *supra* note 1.

9 White, *supra* note 2.

10 *See* Ronda Kaysen, *Inside the World of Buy Nothing, Where Dryer Lint Is a Hot Commodity*, N.Y. TIMES (Oct. 22, 2021), https://www.nytimes.com/2021/10/22/realestate/buy-nothing-facebook-group.html [https://perma.cc/KK7K-PYY8].

11 *Id.*

12 BUYNOTHING, https://buynothingproject.org [https://perma.cc/V9U7-R9R4]; Emma Beddington, *'A Banana, Concrete—Those Are Good Gifts': The Recycling Group Turning Strangers into Friends*, GUARDIAN (Jan. 13, 2022, 1:00 AM EST), https://www.theguardian.com/lifeandstyle/2022/jan/13/a-banana-concrete-those-are-good-gifts-recycling-group-turning-strangers-into-friends [https://perma.cc/5PWJ-9KMT] (noting that Buy Nothing groups had more than five million members in 2022).

13 *See* Telford, *supra* note 1.

14 *See id.*

economy's ability to speak to a wide variety of timely needs and goals, it is no wonder that its most famous incarnation, the Buy Nothing Project, continues to enjoy such blowout success.[15]

However, an unaddressed thorn might soon mar the rosy picture painted above. Hyperlocal gift economies are founded upon a key premise: transactions which occur between members of such groups are *gifts*—that is, transfers of property on which tax need not be paid by the recipient.[16] But oddly—and in spite of the hyperlocal gift economy's wild proliferation—no scrutiny has been directed towards this claim, though it is by no means a clear or foregone conclusion that these transactions *are* technically "gifts." As any student of the law of federal income taxation quickly learns, a transaction is not a "gift" just because the parties involved—here, millions of hyperlocal-gift-economy members—believe it to be so or declare it to be so by fiat.[17] These transactions must qualify as gifts under the Internal Revenue Code—and it is conceivable that the Internal Revenue Service would take a hard look at these groups, disagree with the label of "gift," and demand that taxpayers include these "gifts" in their gross income.

But on what grounds would the Internal Revenue Service believe these transactions to fall outside the definition of "gift" under the Internal Revenue Code?[18] It is true that the Code does not itself impose

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15 *See* BUYNOTHING, *supra* note 12.

16 Under I.R.C. § 61 (2018), a taxpayer must include in their gross income "all income from whatever source derived." I.R.C. § 61 (2018). In *Commissioner v. Glenshaw Glass Co.*, the Supreme Court understood this language to be Congress's attempt to invoke the full extent of its taxing powers, and thus interpreted "all income from whatever source derived" to mean any "accession[] to wealth." 348 U.S. 426, 429, 431 (1955). As a result, the general rule is that any receipt of property must be included in one's income (and therefore taxed) at its fair market value (FMV) unless another rule provides otherwise. *See* I.R.C. § 61. The question here is whether taxpayers engaging in hyperlocal-gift-economy transfers can avoid taxation of property received in said transfers by appealing to one such rule, the exclusion of "gifts" from gross income under I.R.C. § 102 (discussed below).

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

18 The scope of this Note is limited to examining the *income tax* definition of "gifts" and the *income tax* consequences on the recipients of said "gifts." Though I recognizes that "gifts" are differently defined in the gift tax context (in that gift tax "gifts" do not necessarily require donative intent, Treas. Reg. § 25.2511-1(g)(1) (1997)), and that there might be gift tax consequences if the value of a hyperlocal-gift-economy transaction is large enough (the threshold in 2024 is one or multiple gifts to a single person summing to $18,000, see *IRS Provides Tax Inflation Adjustments for Tax Year 2024*, IRS (Nov. 9, 2023), https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2024 [https://perma.cc/U89L-UKG2]), it is almost unimaginable that this threshold would be met within the factual circumstances of a hyperlocal gift economy. Therefore, an exclusive focus on understanding hyperlocal-gift-economy transfers as "gifts" within the *income tax* context is warranted.

a strict standard for what qualifies as a gift.[19] But subsequent judicial interpreters—most notably the Supreme Court in *Commissioner v. Duberstein*—have clarified that a provision of goods or services only qualifies as a gift if is made with "detached and disinterested generosity," and "out of affection, respect, admiration, charity or like impulses."[20] And one must therefore ask: can making gifts to others in a group from which one might not only reasonably expect to gain, but which one might have joined *for the sake of gain*, be validly characterized as "disinterested" or "detached"? It is easy to imagine a Revenue agent's skepticism towards this scenario.

It is the goal of this Note to assuage such skepticism and alleviate the fears of those heavily invested in hyperlocal gift economies such as the Buy Nothing Project. In my view, transactions made within hyperlocal gift economies, specifically those with the same or similar rules to those of the Buy Nothing Project, are correctly characterized as gifts. This is true regardless of the fact that one might join a hyperlocal gift economy to enjoy the benefits of gifting as a recipient, or of the strong likelihood that the hyperlocal-gift-economy structure increases the frequency of gift giving amidst a close-knit group of individuals to the point that individuals might have close relationships and a history of back and forth giving. I specifically argue that the "gifts" given in hyperlocal gift economies satisfy the requirements to be nontaxable gifts for purposes of the income tax for two reasons. First, these transactions remain *independent* of each other; that is, there is no instance in which a gift is given in compensation for present, past, or future gain, received either individually or in the aggregate. Of course, if such compensation were to be found, it would be a per se violation of the spirit and regulations of the Buy Nothing Project (or comparable hyperlocal gift economy) and individuals engaging in such transactions would likely be (and ought to be) disciplined by said group and taxed by the federal government. But this would not prove hyperlocal-gift-economy transactions are *not gifts*; it would only prove that gifts are the rule and rogue exchanges prove said rule by contrast. Second, the factual *context* of the hyperlocal gift economy militates toward finding the intent of the giver in a hyperlocal gift economy to be grounded in a charitable impulse, and "self-interested" only to the extent that any philanthropist possesses an interest in seeing another individual or their wider community flourish—which, as caselaw reveals, would still qualify as a gift. Even if the giver expects that, at some point, they will

19 I.R.C. § 102(a) (2018) ("Gross income does not include the value of property acquired by *gift*, bequest, devise, or inheritance.") (emphasis added). The Internal Revenue Code offers no further definition.

20 363 U.S. 278, 285 (1960) (first quoting Comm'r v. LoBue, 351 U.S. 243, 246 (1956); then quoting Robertson v. United States, 343 U.S. 711, 714 (1952)).

receive a gift from their participation in the group, the level of "self-interest" when giving a gift is likely still low enough, when combined with the charitable nature of the organization, to qualify as a "gift" under the Internal Revenue Code.

This Note will proceed in three Parts. In Part I, I will set forth the boundaries of what kinds of transactions do and do not qualify as gifts under the *Duberstein* gift standard. To do so, I will trace the relevant caselaw, of which *Commissioner v. Duberstein* plays a dominant role, with lower courts offering only elaborations on the standard established in *Duberstein.* In Part II, I will draw out the tax policy principles animating the federal income tax's exclusion of gifts in gross income. The high point of this work is Part III, where I will apply both the legal understanding of what qualifies as a "gift" and the tax policy principles informing this understanding to the case of transfers within a hyperlocal gift economy, with discussion centering upon a hypothetical Buy Nothing Project group (given this organization's status as the most well-known example of the model) for the sake of a focused and relatively concrete analysis. This analysis will illustrate how this admirable, innovative, and growing form of community-based gift giving neither evades proper taxation nor poses a threat to the underlying policies of the *Duberstein* gift standard, but instead facilitates true gift giving in accord with the policy preferences animating the gift exclusion. Finally, I will offer a brief Conclusion, wherein I will succinctly restate the points I have made supporting, from the view of both law and policy, the exclusion of hyperlocal-gift-economy transactions from income taxation. Throughout this Note, I will also highlight the many benefits of hyperlocal gift economies rendering them organizations worthy of both legislative protection and significant community participation.

I. "GIFTS" IN THE INTERNAL REVENUE CODE: SECTION 102 AND THE *DUBERSTEIN* STANDARD

The definition of "gift" for income tax purposes is a product of both legislative and judicial construction. While section 102(a) of the Internal Revenue Code provides that "[g]ross income does not include the value of property acquired by gift, bequest, devise, or inheritance,"[21] the statute utterly fails to give any meaningful content to the word "gift." This absence is so striking as to only reasonably be a product of congressional intention. That is to say, instead of offering its own definition, one can reasonably infer from Congress's silence that Congress intended for the judicial branch to produce its own workable definition. And indeed, the federal courts rose to this challenge, their

21 I.R.C. § 102(a) (2018).

efforts reaching a climactic peak when the Supreme Court clearly established its controlling definition of "gift" in *Commissioner v. Duberstein.*[22]

In *Duberstein*, the president of Duberstein Iron & Metal Company (who shared the company's name) had provided Berman, the president of Mohawk Metal Corporation, with names of potential customers for Mohawk Metal's products.[23] The referrals were successful, and, wishing to express gratitude for Duberstein's help, Berman decided to send Duberstein a gift.[24] Naturally, his company sent Duberstein a Cadillac.[25] Duberstein already owned a Cadillac (indeed, a Cadillac and an Oldsmobile) and tried to refuse the gift, claiming that he was owed nothing for his help, but Berman's insistence proved fierce; Duberstein eventually relented and accepted the Cadillac.[26] When Duberstein treated the Cadillac as a gift by failing to report its value as income, the Commissioner of the Internal Revenue Service asserted a deficiency against him.[27] Their disagreement reached the Supreme Court, which, relying upon and consolidating various understandings of "gift" developed in previous cases,[28] ultimately sided with the Commissioner.[29] In explaining why the Cadillac should have been included, the Court announced the controlling definition of a gift today: a gift proceeds from a "detached and disinterested generosity . . . out of affection, respect, admiration, charity or like impulses."[30] The Court also noted that this determination was at bottom a question of fact which must be addressed on a case-by-case basis, with the most critical factor being the transferor's intention.[31] Applying this test to the case at bar, the Supreme Court affirmed the Tax Court's finding that Berman was clearly intending to compensate Duberstein for his help in

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

23 *Id.* at 280.

24 *Id.*

25 *Id.*

26 *Id.* at 280–81. Note that this presentation of the facts represents the facts as presented by Duberstein to the Court; readers are invited to consider if a *begrudging* acceptance of a Cadillac is a likely disposition. In any case, we shall take these facts as stated by the Court and refrain from further inference.

27 *Id.* at 281.

28 These include, as *Duberstein* itself notes, *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716 (1929), *Commissioner v. LoBue*, 351 U.S. 243 (1956), *Bogardus v. Commissioner*, 302 U.S. 34 (1937), and *Robertson v. United States*, 343 U.S. 711 (1952). *Duberstein*, 363 U.S. at 285–86.

29 *Duberstein*, 363 U.S. at 291.

30 *Id.* at 285 (first quoting *LoBue*, 351 U.S. at 246; then quoting *Robertson*, 343 U.S. at 714). It is notable that the Court explicitly rejected the Commissioner's preferred definition of "gift" ("Gifts should be defined as transfers of property made for personal as distinguished from business reasons."). *Id.* at 284 & n.6.

31 *Id.* at 285–86, 290.

procuring customers—and that the Cadillac was therefore not given to Duberstein out of a sense of "detached and disinterested generosity"; that is, it was not a gift. [32]

The Supreme Court quickly affirmed its new definition of "gift" in its very next case, *United States v. Kaiser*.[33] In that case, the Local 833 of the United Automobile, Aircraft, and Agricultural Implement Workers of America, CIO (UAW) called a strike against the Kohler Company in Wisconsin.[34] The Union's common practice during strikes was to offer financial assistance to strikers in need.[35] Importantly, this assistance was available even if the striker did not belong to the Union, and there was no requirement or even encouragement from the Union to continue to strike once the assistance had been given.[36] One such non-Union striker, Allen Kaiser, received $565.54 in financial assistance from the Union.[37] When he did not report the assistance to the IRS as income, the IRS asserted a deficiency plus a $108 penalty—which Kaiser paid before suing for a refund in federal district court.[38]

At trial, the jury found that the Union's financial assistance was a gift.[39] However, the trial judge disagreed, finding that the assistance was *not* a gift as a matter of law.[40] The Seventh Circuit overruled the trial court on appeal, holding that the jury's determination that the assistance was a gift had "rational support in the evidence" and therefore was not outside the jury's province as a trier of fact.[41] The Seventh Circuit's position was subsequently affirmed by the Supreme Court, which similarly held that the jury acted within its competence in concluding the assistance was a gift.[42] In its opinion, the Court "stress[ed] the basically factual nature" of determining "gift" status under *Duberstein*'s standard and proceeded to list a number of factual circumstances that could be considered under this standard.[43] These included

> the form and amount of the assistance and the conditions of personal need, of lack of other sources of income, compensation, or public assistance, and of dependency status, which surrounded the program under which it was rendered, that while the assistance was

32 *Id.* at 291–92.

33 United States v. Kaiser, 363 U.S. 299, 303 (1960).

34 *Id.* at 300.

35 *Id.*

36 *Id.* at 300–01.

37 *Id.* at 300, 302.

38 *Id.* at 302.

39 *Id.*

40 *Id.*

41 *Id.* 302–03.

42 *Id.* at 303.

43 *Id.* at 304.

> furnished only to strikers, it was not a recompense for striking. . . . the very general language of the Union's constitution . . . [and] the nature of the Union as an entity.[44]

After weighing these factors, the Court concluded that the jury could have reasonably found "the assistance [did not] proceed[] from any constraint of moral or legal obligation, of a nature that would preclude it from being a gift."[45] To put it another way, the jury could have concluded that the assistance "proceeded primarily from generosity or charity, rather than from the incentive of anticipated economic benefit."[46] The Court then explicitly denied that the existence of a shared interest between parties renders a transaction per se not a gift: "We can hardly say that, as a matter of law, the fact that these transfers were made to one having a sympathetic interest with the giver prevents them from being a gift."[47]

In short, *Duberstein* established, and *Kaiser* confirmed, that under the Internal Revenue Code a transfer is a "gift" only if it is made with "detached and disinterested generosity"—and that whether or not this is the case depends primarily upon a factual inquiry.[48] With that, the Supreme Court ceased to provide further guidance on the general standard for determining what qualifies as a "gift" under section 102. The lower federal courts, however, have since elaborated on the *Duberstein* standard themselves. An important example is *Olk v. United States*.[49]

In *Olk*, a Las Vegas craps dealer sued for a refund of income tax on "tokes"—a term which captured both (1) money that gamblers would directly give to dealers and (2) successful bets gamblers would make on their dealers' behalf.[50] Finding that there was "[n]o obligation on the part of the patron . . . to give to a dealer," that between ninety and ninety-five percent of gamblers did not give tokes to dealers, and that "dealers perform no service for patrons which a patron would normally find compensable," the District Court of Nevada concluded as a matter of fact that "[t]he tokes are given to dealers as a result of impulsive generosity or superstition on the part of players, and not as a form of compensation for services."[51] Therefore, the tokes were "the

44 *Id.*

45 *Id.*; *see also* Comm'r v. Duberstein, 363 U.S. 278, 285 (1960) ("[T]he mere absence of a legal or moral obligation . . . does not establish that [a payment] is a gift.") (citing Old Colony Tr. Co. v. Comm'r, 279 U.S. 716, 730 (1929)).

46 *Kaiser*, 363 U.S. at 304.

47 *Id.*

48 *Duberstein*, 363 U.S. at 285; *see Kaiser*, 363 U.S. at 303.

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

50 *Id.* at 876–77.

51 *Id.* at 877 (quoting Olk v. United States, 388 F. Supp. 1108, 1114, (D. Nev. 1975)).

result of *detached and disinterested generosity* on the part of a small number of patrons"—that is, gifts under the *Duberstein* standard.[52] The Ninth Circuit, however, reversed. While it accepted that the dominant motive of the gamblers was "impulsive generosity or superstition," it thought the context surrounding the transaction—here casino gambling—was a critical factor in determining whether the act was one of "detached and disinterested generosity."[53] Indeed, in the court's opinion, the gambling context rendered the act the *opposite* of "detached and disinterested"; it was in essence a "[t]ribute to the gods of fortune which it is hoped will be returned bounteously soon."[54] Therefore, a toke given in this context "can only be described as an 'involved and intensely interested' act."[55]

Surprisingly, the court's analysis did not end there. It also briefly considered how the recipient of the gift, here the dealer, understood the gift. Given "[t]he regularity of the flow [of tokes], the equal division of the receipts, and the daily amount received," the court reasoned, "a dealer acting reasonably would come to regard such receipts as a form of compensation for his services" and thus as "a receipt indistinguishable . . . from wages."[56] Perhaps sensing that these comments focusing on the recipient's, rather than the giver's, mental state placed the court on shifty ground, the court was quick to mention that "[t]he manner in which a dealer may regard tokes is, of course, not the touchstone for determining whether the receipt is excludable from gross income," yet it was compelled to mention it as "a reasonable and relevant inference well-grounded in the findings of fact."[57] It then forcefully concluded that the tokes, like tips, were taxable income, not gifts.[58]

There are two lessons to be drawn from *Olk*. First, *Olk* re-emphasizes that determinations under *Duberstein*'s "detached and disinterested generosity" standard are heavily fact-dependent by illustrating the breadth of facts one can consider. Here, the court proceeded to answer not only the basic questions of (1) whether the giver possessed a moral or legal obligation to give (here, no) and (2) whether the recipient was performing services for patrons which a patron would normally find compensable (also no), but also (3) whether the *context* of the giving shed light on whether the gift was "detached and disinterested" (in a casino, yes), and even (4) whether a reasonable person in

52 *Id.* (emphasis added) (quoting *Olk*, 388 F. Supp. at 1114).

53 *Id.* at 879.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

the recipient's position would treat the gift as such (no). Even if we disagree with the court's answers to these questions, it is significant that it felt free to consider them in determining the likelihood of the presence of "detached and disinterested generosity."

The second lesson from *Olk* is potentially more challenging: judging from the court's scrutiny, the "detached and disinterested" standard appears to be quite a high bar. Here, the Ninth Circuit felt the need to go beyond the initial inquiries performed by the district court (whether a legal or moral obligation to give exists and whether services for which compensation would normally be given were performed) to determine if the tokes were given, in some sense, for the gambler's own sake—which the court did believe to be the case.[59] Therefore, "detached and disinterested" in this context seems to mean at least more than not required legally or morally or not in repayment for services in substance if not form. Indeed, it seems to mean either a strict or very high level of absence of self-interest, or perhaps—even more difficult to achieve—a strict or very high level of absence of interest combined with a positive interest in the recipient. While the tokes of the gamblers would fail to be gifts under either standard, as they do in *Olk*, a bigger question looms—what then *could* qualify as a gift?

Enter *Goodwin v. United States*.[60] In that case, the pastor of a church in Des Moines was regularly given "special occasion gifts" voluntarily collected from his congregation and separate from his salary.[61] The court noted a number of details about the gifts: they were "substantial compared to [the pastor's] annual salary," "made by the congregation as a whole, rather than by individual Church members," "gathered by congregation leaders in a routinized, highly structured program," and "regularly-scheduled."[62] From the perspective of transferor intent, such "[r]egular, sizable payments made by persons to whom the taxpayer provides services are customarily regarded as a form of compensation"; therefore, the court concluded, the payments "may . . . be treated as taxable income."[63] In coming to this conclusion, however, the court was careful to recognize that the "detached and disinterested" standard cannot be taken too strictly—for otherwise no

59 *See id.* ("'Impulsive generosity or superstition on the part of the players' we accept as the dominant motive. In the context of gambling in casinos open to the public such a motive is quite understandable. However, our understanding also requires us to acknowledge that payments so motivated are not acts of 'detached or disinterested generosity.' Quite the opposite is true. Tribute to the gods of fortune which it is hoped will be returned bounteously soon can only be described as an 'involved and intensely interested' act.").

60 Goodwin v. United States, 67 F.3d 149 (8th Cir. 1995).

61 *Id.* at 150.

62 *Id.* at 152.

63 *Id.* at 152–53.

gift could be given in a "detached and disinterested" way.[64] In a footnote emphasizing that the *Duberstein* standard is an "objective, no-talisman approach to evaluating transferor intent,"[65] the court said the following:

> Many courts . . . give talismanic weight to a phrase used more casually in the *Duberstein* opinion—that a transfer to be a gift must be the product of "detached and disinterested generosity." *It is the rare donor who is completely "detached and disinterested." To decide close cases using this phrase requires careful analysis of what detached and disinterested means in different contexts.*[66]

Two points are worth drawing from this passage. First, the standard cannot reasonably be that there is *no* self-interest, as "[i]t is the rare donor who is completely 'detached and disinterested.'"[67] The implication of this phrase is not that only the rare donor gets to count their transfer as a gift; rather, it is that the bar is not so high, and that some version of self-interest is not necessarily disqualifying.[68] Second, *Goodwin* points out that even the phrase "detached and disinterested" is heavily context dependent, and therefore the "detached and disinterested" standard must be examined in each particular instance in which it is applied—an endeavor which is *in addition to* and seemingly *conceptually separate from* the inquiry into whether the facts of a particular case satisfy that standard. This might explain the higher degree of scrutiny applied to the facts in *Olk*: generosity and casinos generally do not mix, and rebuffing the natural presumption of self-interest in giving money to dealers requires a greater degree of countervailing evidence.

To summarize: the lower federal courts, as represented by *Olk* and *Goodwin*, continue to emphasize the fact-heavy inquiry of the *Duberstein* "detached and disinterested generosity" standard in regard to both the scope of the facts that can be considered under that standard and even to the application of the standard in each case. This likely explains

64 *Id.* at 152.

65 *Id.*

66 *Id.* at 152 n.3 (emphasis added) (quoting Comm'r v. Duberstein, 363 U.S. 278, 285 (1960)).

67 *Id.*

68 *See* Douglas A. Kahn & Jeffrey H. Kahn, *"Gifts, Gafts, and Gefts"—The Income Tax Definition and Treatment of Private and Charitable "Gifts" and a Principled Policy Justification for the Exclusion of Gifts from Income*, 78 NOTRE DAME L. REV. 441, 476–83 (2003); *id.* at 478 ("One possible construction [of the 'detached and disinterested generosity' standard] is that the terms are to be applied strictly so that a transferor can have no motives of a selfish or self-serving nature. That construction cannot be correct, because . . . there would be virtually no transfers that qualify as gifts, and Congress surely did not intend the statutory exclusion for gifts to have no meaningful consequence[s]. . . . If that were not true, only saints could make gifts, and probably few even of them.").

why the "detached and disinterested" standard seemed so high in *Olk*, given the casino context. Furthermore, *some* amount of self-interest is not disqualifying under the "detached and disinterested generosity" standard.

While further examples of the *Duberstein* standard and its progeny can be mustered, this is sufficient to provide a fair perspective on the current state of the law. Therefore, let us turn from our examination of the law and now ask why, from a policy perspective, gifts ought—or ought not—to remain excluded from taxation at all.

II. TAX POLICY PRINCIPLES UNDERLYING THE EXCLUSION OF "GIFTS" FROM GROSS INCOME

Behind the implementation of any particular provision of the tax code stands a policy which Congress wishes to promote. Often, in choosing to structure a provision in one way to support a specific policy, other policy objectives are set aside or even compromised. It is therefore an essential part of the legislative task to decide which policy objective(s), among several good and reasonable options, a particular provision is going to primarily serve. Section 102's exclusion of gifts from gross income is no exception to this universal principle.

In other words, the exclusion of gifts from income is not the only conceivable or reasonable way to structure our tax code. As we shall see, excluding gifts does serve *a* policy goal; but the question is whether that policy goal is legitimate, or whether it should override or take precedence over other legitimate policy goals.[69] Indeed, one might argue that the exclusion of gifts from gross income fails to promote more foundational tax policy principles and should therefore be abolished.[70] According to this perspective—though counterintuitive to Americans used to the gift exclusion—the gift exclusion is a distorting

69 *See id.* at 444 ("[T]he exclusion of gifts from income furthers one important tax policy and contravenes another, and the decision to exclude gifts is based on the making of a choice between those two conflicting tax principles."). For an example, see *id.* at 455 ("[A]n employee is not taxed on the receipt of certain fringe benefits . . . . Although the employee does consume those benefits, and so the failure to tax them violates the tax principles of horizontal and vertical equity, the competing principles (in the view of Congress) outweigh those considerations, or Congress concluded that there are societal and economic benefits of greater importance than income equity to excluding those items from the employee's income.").

70 Some would even disagree with the idea that there is a principled policy reason to exclude gifts from income taxation to begin with. *See id.* at 443 ("A number of commentators have decried [the gift] exclusion and, contending that there is no principled justification for it, have urged that donees be required to include gifts in their income.").

and unjustified aberration over the alternative: simply including gifts as one more form of income in a tax return.[71]

What is the basis for this critique, and is it a fair critique? The answer lies in one of the foundational benchmarks used to evaluate tax codes: the Haig-Simons definition of income.[72] Under the Haig-Simons formulation, income is calculated as one's consumption plus one's change in wealth.[73] Calculation and taxation of income under the Haig-Simons definition (or more accurately, calculation of income as a cipher for consumption plus change in wealth)[74] theoretically allows tax authorities to more accurately tax individuals in accord with their power to consume[75]—arguably the quality which should matter most in assessing an individual's tax burden. Conversely, allowing individuals to exclude genuine accessions to wealth, including gifts, distorts this attempt at accuracy.[76] Hence, the policy goal of taxing individuals at a rate which reflects a fair share of the tax burden is in theory supported by hewing as close to the Haig-Simons model as possible. This policy preference can be summarized as *accuracy*.

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71 *See* William A. Klein, *An Enigma in the Federal Income Tax: The Meaning of the Word "Gift,"* 48 MINN. L. REV. 215, 224 (1963) ("[T]here is simply no good tax policy reason for excluding gifts, or inheritances, from the income-tax base and . . . consequently the term 'income' must, for tax purposes, be construed to include gifts."). *See also* Kahn & Kahn, *supra* note 68, at 458 ("Simons contended that the accumulation of wealth should be taxed regardless of how the wealth was obtained. . . . Simons based his view of how gifts should be treated primarily on his conclusion that the underlying principles of an income tax system provide no basis for excluding gifts from income.").

72 *See* Kahn & Kahn, *supra* note 68, at 457 ("The Haig-Simons definition is regarded as an expression of an ideal to which the tax system should aspire. It is an expression of good tax policy to which tax rules should conform unless a competing consideration outweighs the virtues of maintaining that policy. Tax reformers often use that definition as a standard against which tax provisions should be measured.").

73 *See* HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50 (1938) (Personal income is "the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question. In other words, it is merely the result obtained by adding consumption during the period to 'wealth' at the end of the period and then subtracting 'wealth' at the beginning.").

74 *See* Kahn & Kahn, *supra* note 68, at 453 ("[T]he 'income' of an individual can be viewed as a surrogate for consumption—measuring the value of the individual's current consumption plus the present value of the future consumption that can be obtained by the use of the accumulated wealth.").

75 *See id.* at 452 ("This formulation (the so-called 'Haig-Simons definition') is aimed at measuring an individual's ability to bear a portion of the cost of government on the premise that the cost should be borne by members of the public in proportion to their means to do so.").

76 *See id.* at 458 ("Simons stated, 'The income tax is not a tax upon income but a tax upon persons according to their respective incomes; and . . . the objective of policy must be fairness among persons, not fairness among kinds of receipts. . . .'" (omissions in original) (quoting SIMONS, *supra* note 73, at 128)).

But of course, there are other policy considerations to consider which might override the need for an accurate accounting of one's consumption through income. For example, it is the case today that taxpayers generally do not need to include in their income the appreciation of property which has not been disposed of (and thus realized) in some fashion.[77] Though it comes at the cost of accuracy, we recognize that it is acceptable to wait until the property has been disposed of, essentially deferring the tax on gain from appreciation until that gain is practically used or received by the owner. If we did not, individuals would have to continuously offer estimates and valuations of their property, and then pay taxes on those amounts, when (1) they have not yet received the benefit of the appreciation (that is, because no sale has occurred, they theoretically do not have cash to pay a tax on the increased value) and (2) it would be resource-intensive to determine those values, when waiting until disposition of the property occurs would naturally provide the needed market value to determine gain. In short, requiring this level of accuracy at every moment does serve one policy goal, but it causes immense damage to another policy concern: *administrability*.

Similarly, while *accuracy* is a policy goal of the tax code generally, the exclusion of gifts from gross income intends to serve policies beyond accuracy. First, the exclusion of gifts from gross income incentivizes gift giving (though perhaps it is better to say it does not *disincentivize* gifts).[78] Though we may be losing some accuracy and thus allowing some who would pay more of the tax burden to pay less and some who ought to pay less to pay more, we think the loss in accuracy is a worthwhile tradeoff for a society in which individuals can give gifts without pausing to consider the tax consequences of doing so. In other words, we accept the loss in accuracy for a more charitable society. Another way to conceive of this trade-off is to place gift giving side by side with redistribution through taxation. The tax code, in

77 *See* I.R.C. § 61(a) (2018) ("Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: . . . (3) Gains derived from *dealings* in property" (emphasis added)); I.R.C. § 1001(a) (2018) ("The gain from *the sale or other disposition of property* shall be the excess of the amount realized . . . ." (emphasis added)).

78 See generally the discussion of double taxation in Kahn & Kahn, *supra* note 68, at 459–66; *id.* at 460 ("[O]nce a taxpayer has paid income tax, the taxpayer should be permitted to employ that income in any way the taxpayer desires without thereby incurring any additional income tax. If a taxpayer transfers previously taxed income to someone else as a gift, can the taxpayer be deemed to have consumed it by making that gift? If the gift does not constitute consumption by the taxpayer, and if the gift is treated as taxable income to the donee, then there would be two sets of income taxation on a single consumption—i.e., the only consumption that would take place would be the consumption that occurs when the donee uses the donated property.").

excluding gifts from gross income, currently privileges gift giving over redistribution through taxation. Consider that the hypothetical rational actor under a tax code without a gift exclusion would likely feel that the person they are intending to help is receiving less of a gift than they otherwise would have (as the receiver must pay tax on that gift), rendering the gift giver less likely to give said gift. In clearing up obstacles to gift giving, people will be more willing to give directly instead of holding onto the money they have, which would eventually be taxed and hypothetically redistributed to the potential donee in some indirect manner (better streets, better social services).

If the money is (again, hypothetically) going to redound to the benefit of the individual through either taxation or a direct gift, why might a gift be preferable? Perhaps the government sees value in putting the choice of who to support and how much they should be supported into the hands of the individual taxpayers. By *not* taxing charitably given amounts which it might otherwise, the government is essentially saying, "This won't be taxed as long as it is given to another out of detached and disinterested generosity, because your locally-informed sense of charity will generate better results for our overall national community than the normal, top-down system." In other words, one can think of the government as agreeing to a tax expenditure: knowing that revenue will be lost for a greater purpose (and therefore "expending" tax revenue by not claiming it). Here, that greater purpose is the self-direction of money given out of a charitable impulse.

While excluding gifts might incentivize gift giving in the ways described above, there is a clear counterargument which must be considered: the exclusion of gifts from gross income necessarily violates the policy principle of *horizontal equity*. Horizontal equity counsels that similarly-situated citizens ought to be treated similarly—that advantages should not be given to one class of citizens over another because of any non-income-related reason.[79] But when gifts are excluded from income, this is necessarily the case.

Consider two young persons who both receive $30,000 in income for a single year. The only difference between them is that the first young person worked at a local grocer to receive the $30,000, while the other received the $30,000 as a gift from his/her wealthy parents. In this example, both young persons are similarly situated in receiving $30,000 in income; but the source of the $30,000 is different. In excluding gifts from gross income, they are being treated quite

79 *See id.* at 455 ("The term 'horizontal and vertical equity' refers to the principles that persons with the same amount of income should pay the same amount of income tax [horizontal equity], and that persons with disparate amounts of income should pay different amounts of tax that correlate to the difference in their incomes [vertical equity].").

differently for a non-income-related reason: the source of the money. To many, this would seem to be an unfair result: why allow the child of the wealthy parents to be treated favorably as compared to the other child simply because he was born to wealthy parents who have the power to give such gifts? Indeed, this is a powerful counterargument to the gift exclusion. But, while its full force is felt when considering the systematic consequences of the exclusion of gifts from income, it is somewhat blunted when applied to the facts of a hyperlocal gift economy (to which we will turn momentarily).

In any case, there is at least one other theory supporting the exclusion of gifts from income: the preservation of *vicarious enjoyment.* Under this theory, Congress generally wishes to allow taxpayers to decide how to consume the goods they purchase. But if Congress taxed gifts, Congress would be placing a disincentive on a particular use of a good: namely, the giving of that good as a gift. But what if this individual purchased the gift for the sole purpose of giving it to another? In that situation, the individual sought not the good itself, but the *vicarious enjoyment* of giving said good to another person so that *the other person* might enjoy it.[80] Taxing the gift, then, would amount to a double tax—first when purchased by the donor, and second when received by the donee. The enjoyment of the donee for which the individual originally consumed the gift would be damaged, thus discouraging gift giving on the part of the donor (and perhaps making the gift less welcome on the part of the donee, depending on the form and amount of the gift), and an illogical double tax would be imposed.

Though it is not explained for *which* policy reason gifts are excluded from income taxation, it remains true that they have been excluded for over a century,[81] and thus Congress surely means to

80 *See id.* at 466 ("The question then is whether the income tax system should permit a taxpayer to use the full amount of income on which he has paid income tax to enjoy vicariously a consumption by a loved one, or whether the system should permit a full amount of consumption only by the taxpayer himself. While either solution is possible, to allow the taxpayer to enjoy vicariously another's consumption is consistent with the tax policy of taxing accumulated income on the assumption that someone, not necessarily the taxpayer, will use the accumulated funds to pay for a consumption at some future date."); *see also* Jeffrey Kahn, *GoTaxMe: Crowdfunding and Gifts*, 22 FLA. TAX REV. 180, 189 (2018) ("The exclusion of gifts rests on the view that a taxpayer should be allowed to optimize his or her utility of consumption by having the vicarious pleasure of having it consumed by someone else. A taxpayer may obtain greater utility from having someone else consume the accumulated wealth than he or she would obtain from consuming it for his or her own personal consumption. The exclusion insures that there is a single income tax for a single consumption."). *But see id.* at 190 ("Of course, all this is based on the assumption that the gift itself is not considered consumption.").

81 *See* Kahn & Kahn, *supra* note 68, at 443 ("[E]xcluding gifts from a donee's income . . . has been part of the income tax law since the modern income tax was adopted in 1913."); Richard Schmalbeck, *Gifts and the Income Tax—An Enduring Puzzle*, 73 LAW &

promote one or many of (or something like) these policies. The task left for us, then, is to determine if any or all of these policies would support dubbing the transfers within a hyperlocal gift economy "gifts" under *Duberstein.*

III. APPLYING THE *DUBERSTEIN* STANDARD TO A HYPERLOCAL GIFT ECONOMY (BUY NOTHING GROUP)

Now we turn to the meat of this Note: the application of the law and policy to the facts of a hyperlocal gift economy. In this Part, I intend to demonstrate why counting "gift" transfers made within a hyperlocal gift economy as such is consonant with current caselaw and the underlying policy considerations which animate them.

A. The Law

The controlling case on what qualifies as a "gift" for purposes of the income tax is *Commissioner v. Duberstein.*[82] The test formulated in that case, as drawn from the previous decisions on which it relied, is the following: a transfer of property counts as a gift if it is made with "'detached and disinterested generosity,' [and] 'out of affection, respect, admiration, charity or like impulses.'"[83] The determination is, at bottom, a question of fact which must be addressed on a case-by-case basis.[84] The most critical factor in determining this question of fact—but not the only factor—is the transferor's intention.[85] While not controlling outside of their jurisdictions, *Olk v. United States* and *Goodwin v. United States* both emphasize that the factual context surrounding the giving matters significantly—a wide panoply of facts may be considered and may even affect how strictly one applies the language of "detached and disinterested."[86] In any case, "detached and disinterested" cannot reasonably mean "no self-interest."

CONTEMP. PROBS. 63, 77 (2010) ("Because it has been part of the tax rules since the beginning of the modern tax system in 1913, and because Congress did not offer explanations of its reasoning in this case (as was true of many of the basic tax rules), little is known definitively about the reasons for adoption of the background tax rules denying donors deductions for their gratuitous transfers, but also allowing exclusions for donees.").

82 Comm'r v. Duberstein, 363 U.S. 278 (1960); *see supra* notes 22–68 and accompanying text (discussing this case and those affirming and drawing upon it).

83 *Id.* at 285 (first quoting Comm'r v. LoBue, 351 U.S. 243, 246 (1956); and then quoting Robertson v. United States, 343 U.S. 711, 714 (1952).

84 *Id.* at 287.

85 *Id.* at 285–86.

86 *See* Goodwin v. United States, 67 F.3d 149 (8th Cir. 1995); Olk v. United States, 536 F.2d 876 (9th Cir. 1976).

It is clear the Buy Nothing Project is trying to ensure transfers within its groups qualify for the legal definition of "gift."[87] The Buy Nothing Project website says all the right things: "We do not buy, sell, trade, barter, or otherwise exchange money for items or services."[88] The guidelines section of the website elaborates with the following disclaimer:

> Trading, bartering, buying or selling is counter to the Buy Nothing Project mission. *Keep in mind that all gifts must be freely given without any expectation of reward or another gift in return.* There is no limit to giving or receiving in the app. Participants may offer and request as much as they'd like, as often as they'd like. *No one is under any obligation to give or receive*, but everyone may ask as they choose, and give as they choose.[89]

Two aspects of this disclaimer are worth noting. First, there is no quota of participation. There is no amount that one must give to receive, or a point at which an individual is seen as a drain on the community and should be ushered out. Indeed, the guidelines are explicit that "[p]articipants may offer and request as much as they'd like, as often as they'd like."[90] Second, the disclaimer emphasizes that "all gifts must be freely given without any expectation of reward or another gift in return."[91] This statement seems targeted towards those who might look askance at these groups and suspect that participants are engaging in undercover bargaining. As long as this premise remains true, the argument goes, then the status of the transfer as gift is certain: the giver would not intend or expect to be compensated in any way for the gift.

But of course, just because one says all the right things does not make them true, and just because the Buy Nothing Project abstractly contextualizes the transfers which occur in these groups as "gifts" in conformity with the legal definition does not mean they actually qualify as gifts. There are other factors to consider which are not explicitly addressed. Sure, one might not intend or expect reward from any

87 *See Community Guidelines*, BUYNOTHING, https://buynothingproject.org/guidelines [https://perma.cc/TFF8-LRCW] [hereinafter *Community Guidelines*]. While gifts made to the Buy Nothing Project itself (or more accurately to its fiscal sponsor, Angels for Angels) are tax-deductible, *see Donations for the Buy Nothing Project*, BUYNOTHING, https://buynothingproject.org/donate [https://perma.cc/P2VP-UY94], gifts made *within* a Buy Nothing group are not tax-deductible, *see Make a Direct Contribution to the Buy Nothing Project*, BUYNOTHING, https://buynothingproject.org/contribute [https://perma.cc/K7WW-SY7H].

88 *About*, BUYNOTHING, https://buynothingproject.org/about [https://perma.cc/5498-PQD4].

89 *Community Guidelines*, *supra* note 87 (emphasis added).

90 *Id.*

91 *Id.*

individual transaction; but is there an overall sense of reward from participating in the community which manifests as a gift here and there? Or is the intent to gain from the community to which you have given located a step back from the actual giving of the item—here, in the act of joining the group originally? In other words, perhaps the presence of the intent to gain is found in joining the group, and therefore colors, or taints, all the gifts given.

In the end, these arguments would likely fail to render Buy Nothing transfers outside the definition of "gift." First, as long as participants factually adhere to the Buy Nothing Project's disclaimer, then one need not *ever* give to one's Buy Nothing group; and if that is true, then what one receives cannot be readily contextualized as "compensation." Rather, it is simply the reception of a gift which has been given independent of any other factors, including the gifts the receiver may have given before or will give after. This concept is perhaps best captured by the terms "independent transfer" and "dependent transfer." An independent transfer is made without connection or dependence upon any other transaction, while a dependent transfer is made in view of either a past or future transaction, and thus is compensatory in nature. Here, the Buy Nothing website is careful to ensure transactions made according to their rules fall within the former, independent transfer camp—rendering these transactions more likely to be gifts. Of course, as *Olk* observes, the absence of legal or moral obligation or compensation does not end our analysis—but it is still important to establish this foundational point.[92]

Second, *Olk* and *Goodwin* counsel that one must evaluate whether the intent in the giving is "detached or disinterested generosity" under all the facts and circumstances. In other words, one must consider the greater context in which the gift is made—and so long as our previous analysis is correct,[93] this context affects both the character of the transaction *and* how high the bar is to outweigh a presumption of compensation. In no case, however, will it be the case that *any* amount of self-interest will be disqualifying. As *Goodwin* showed, what attempted gift could withstand such scrutiny?[94]

Turning then to the Buy Nothing context, it is true that one might gain from joining the group. In fact, one might *exclusively* gain by scouring a Buy Nothing page looking for gifts, or by only throwing out "asks." But importantly, the person who receives gifts in a Buy Nothing group knows that those who give do so according to or at least in the context of the Buy Nothing ethos—which is radically distinct from the

92 Olk v. United States, 536 F.2d 876, 878 (9th Cir. 1976).

93 *See supra* notes 48–68 and accompanying text.

94 *See* Goodwin v. United States, 67 F.3d 149, 152 (8th Cir. 1995).

context surrounding a gambler's gift to a dealer in a casino. Unlike the self-interest permeating the walls of any casino and animating the vast majority of those who walk its halls, Buy Nothing participants join their respective groups knowing that the goals of the group include reducing consumer waste and providing for the needs of their community—eminently charitable endeavors. In other words, concern for goals greater than oneself—the well-being of one's community and the earth—are front and center, and the unconditional gifts made in the group reflect and participate in this ethos. Therefore, the charitable rules and ethos of a Buy Nothing group shape the intent of givers, not only helping characterize their gifts as truly "disinterested and detached," but also lowering the presumption of compensation (and therefore the strength of evidence needed to overcome this presumption).

Third, while it is possible to claim that the goals just stated are in a sense self-interested, they are only self-interested in the strictest, most literal sense. As *Goodwin* recognized, such a high bar would mean that almost no gifts would actually qualify as gifts under the Internal Revenue Code.[95] This cannot practically be the actual bar to which gifts must be held. Because the gifts are given primarily to others for goals greater than oneself (reducing waste and supporting the well-being of one's local community), even though there is slight personal satisfaction or benefit derived from one's gift, the requisite and reasonable "detached and disinterested generosity" does appear to be present.

In short, unlike casinos, where people go with dreams of hitting it rich themselves, those who join Buy Nothing groups and give do so because they *wish* to give to others, *especially those who have nothing to give in return.* They might also wish or hope to receive from joining the group, but there is no connection to that and their giving. The difference in intent can be summarized in the following way: unlike a Buy Nothing exchange, the "toke" to the dealer could not and would not have been made but for the winning or possibility of winning, which was in some way facilitated by the dealer. One might ask: if there *was* money available to give the dealer independent of any winnings, and the gambler did *not* win while being served by the dealer, would a reasonable person have given a "toke" to the dealer? The answer is likely no. The whole point is a form of "thank you" to the dealer for the good luck. Of course, it *is* true that an exceedingly generous person might give to the dealer. But (1) this is very unlikely, as dealers aren't normally considered an object of charitable affection (for better or for worse), and (2) the Supreme Court's reasoning in *Duberstein* made clear that the *possibility* that a gift is generous does not a generous gift

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95 *Id.*

make.[96] Recall that in that case, it was *possible* that the Cadillac gifter gave the car to Duberstein out of "disinterested or detached generosity." But the likelihood of this was weighed, and it seemed clear that the far more likely possibility was that it was *not* completely disinterested.[97] The same principle applies in the opposite manner here: while it is *possible* someone might join a Buy Nothing group for primarily selfish motivations, the likelihood of this must be weighed in determining if their gifts made in the group are lacking the requisite "detached and disinterested generosity." Here, the balance would likely be struck in favor of finding these transfers to be gifts.

B. Policy Rationales

Having determined that transactions within a Buy Nothing group satisfy the letter of the standard marked out in *Duberstein*, we must also investigate if they satisfy its spirit—if the potential policy reasons supporting the gift exclusion from income tax would also support the finding that hyperlocal-gift-economy transactions (made according to rules similar to the Buy Nothing Project's own, of course) are gifts. Note that, in making this investigation, we assume that there *are* legitimate reasons for having a gift exclusion, and evaluate only whether hyperlocal-gift-economy transactions do or do not align with the potential policy reasons articulated in the previous Section.

First, excluding gifts from income taxation incentivizes—or at least refrains from disincentivizing—gift giving. If gifts are taxed, the value the giver has actually imparted is theoretically lower than it otherwise might have been, lowering the benefit to the receiver and accordingly disincentivizing the giver's giving of gifts. But refraining from taxation preserves the benefits of the gift to its greatest degree and best preserves the giver's incentive to give. Second, consider how the gift exclusion preserves the "vicarious enjoyment" of the gift-giver.[98] One proffered reason people give gifts is to receive the vicarious enjoyment that comes from knowing someone else is using or enjoying the full or remaining value of their property as a gift. If the gift is taxed, however, this vicarious enjoyment is not only lessened; the

96 *See* Comm'r v. Duberstein, 363 U.S. 278, 285–86 (1960).

97 *See id.* at 291–92.

98 If the language of "vicarious enjoyment" seems too psychological for one's tastes, one can still follow the argument and reach the same conclusion by focusing on the "power" or "effectiveness" of the gift-giver's gift, and how this effectiveness is lowered by taxation of the gift (for one's donation of a $100-value item, when taxed, becomes an $85-value item). The muted value of the gift-giver's gift theoretically disincentivizes future gifts, as they would not be as effective a use of one's money or property as they otherwise would be.

property constituting the gift has been doubly-taxed for a single consumption.

Both of these policies seem to apply favorably to the specific case of Buy Nothing gifts. In a typical Buy Nothing transfer, the individual transferring an item wishes for the item to find a new home. The giver desires for the rest of the value to be consumed by another, and that other person's use of it—bound up in the Buy Nothing goal of avoiding waste—is the "compensation" one gets from the gift. But to the extent that these gifts are taxed, (1) the receiver's ability to derive value from the gift, and therefore the giver's incentive to give, are both lessened (as there is less overall benefit for the receiver due to the tax), and (2) the "vicarious enjoyment" of the giver is harmed, as there is a tax imposed for what is merely a different *use* of property: seeking the joy of providing a good for another's use. On the other hand, *excluding* Buy Nothing transactions as gifts fully incentivizes Buy Nothing givers to give and allows them to fully experience the vicarious enjoyment of their giving. These policy reasonings therefore seem to fit nicely within the context of Buy Nothing transfers and counsel their remaining within the definition of "gift."

However, this analysis is somewhat complicated by two factors. First, consider the frequent second-life aspect of the goods given in a Buy Nothing group. A Christmas gift, for example, is (likely) purchased for the sole reason of giving it to another. In doing so, one has purchased a good for the sake of vicarious enjoyment—the donor purchases the item to enjoy the donee's use of the good. But in the case of Buy Nothing gifts, the gifts are almost always purchased with a prior intent to consume them oneself, and it is only when the good has proved no longer useful that it is offered up to others. Thankfully, this distinction makes little difference, as the problem that courts have sought to address in section 102 jurisprudence is that of *compensation* masquerading as gifts. There is therefore no issue when a person gives to another a gift which was partially consumed, but retains some value to be consumed—as long as that partial value is not given as compensation.[99]

The second complication is more serious. If one primary goal of Buy Nothing transfers is the full consumption of the value of items so as to reduce waste, wouldn't the same objective be achieved even if the items were taxed? Theoretically, the practical value of the good

99 Note also the practical effects of drawing the line of gift giving at partial value: second-hand donation organizations such as Goodwill would suffer tremendously under the burden of determining their tax liability for the partial-value items they receive. But those donations clearly seem to qualify as gifts, and we (presumably) don't want to tax organizations who exist for the charitable purpose of rehoming goods—rendering this complication illusory.

received is the same, and would be used just as it would have otherwise; indeed, the tax would affect the *receiving person*, not the *gift itself*. Aside from responding that taxation would still be felt by the individual and known by the giver, both disincentivizing the gift, one can answer by appealing to a second disincentive: the administrative burden of tracking taxation.

Human beings acting in a charitable manner typically don't like to lay burdens on those whom they are trying to help. If one believes that the help one is giving might be more administrative trouble than it is worth for the one who is to receive the gift, they might avoid taking that action. Accordingly, if gift recipients were required to track each gift as a form of income, which would be difficult considering the uncertain value of the used and/or eccentric property often given from one to another in Buy Nothing groups, the giver might be more hesitant to give gifts (and the receiver less likely to wish to receive the gift). This dynamic would not only affect individuals in a Buy Nothing group, but would also impede the very formation of these groups. This in turn would mean society would lose the benefits they bring (reduced consumer waste of resources and increased community resiliency, among others). Therefore, to avoid disincentivizing Buy Nothing gifts and the benefits they bring, policy militates against imposing the administrative burden of a tax on these particular transactions.

Briefly turning to a counterargument, it is of course true that by excluding gifts from taxation, members of hyperlocal gift economies would benefit over similarly-situated citizens who do not participate in hyperlocal gift economies—and that this would only be because they made a choice to belong to a hyperlocal gift economy (a non-income related factor). In other words, it is clear that by excluding gifts, horizontal equity is violated. But horizontal equity is not a be-all, end-all principle. There are circumstances in which it might make sense to violate horizontal equity, as here: we might *want* to encourage citizens to join these kinds of antiwaste, sustainability-minded and community-minded groups for a benefit deemed greater than maximal horizontal equity.[100] Indeed, the benefits these groups bring likely do outweigh the harm done to horizontal equity.

There is one final reason to exclude Buy Nothing transactions from income under the *Duberstein* gift standard. Generally, in not taxing transactions that it could have taxed, the government is saying that it wishes to let that activity continue at the cost of the relinquished revenue—in effect *spending* that relinquished revenue on the activity which is spared taxation. In the context of Buy Nothing groups, this

100 Whether it is the purpose of the tax code to offer such incentives and disincentives outside the scope of horizontal and vertical equity is another matter entirely.

means the government is "spending" its money on the many transactions which Buy Nothing groups facilitate. Why would this not just be an acceptable, but potentially a good thing for the government to do? Couldn't the government simply tax these transactions and achieve the same—or even better—results? Assuming that the Buy Nothing groups and the government share similar goals, the answer to this latter question is, frankly, no.

Government is often a blunt instrument. While Buy Nothing groups have organically discerned a way for individuals to effectively communicate and satisfy their very specific and local needs, an equivalent government program would be effectively impossible to run. The Buy Nothing context is *exactly* the kind of situation in which the centralization common to government programs would not be helpful—the government, even a local government, just couldn't effectively handle the high information costs associated with discerning the particular and local needs of each individual citizen and then matching them with other citizens who could provide for those needs. Indeed, this is exactly the kind of situation in which decentralization and organizations which connect individuals directly thrive. Therefore, by not taxing Buy Nothing groups, the government is making a tax expenditure on a public good which it itself could not provide. As long as the benefits Buy Nothing groups bring to the community remain in the good graces of the local government, it seems to be a net win and good policy for the government to allow them to keep operating tax-free (especially given the administrative difficulty involved in claiming taxes on Buy Nothing group transactions, anyway).

CONCLUSION

The hyperlocal gift economy, such as the preeminent example of the Buy Nothing Project, is a novel form of community resource management based on goodwill, anti-consumerism, and antiwaste values. While the transfers of property made within these groups have the potential to run afoul of the *Duberstein* gift standard of "detached and disinterested generosity," this is only truly the case if participants in these groups do not abide by the rules established by the Buy Nothing Project. When these rules are followed, it would be highly unlikely that a court would find such transfers are not gifts. First, the transfers are never made in return for a service performed by another. Second, the context of the giving makes clear that the intentions are, by and large, altruistic such that they would fit neatly under the phrase "detached and disinterested generosity." Of course, the test requires a factual analysis of the particular transfer or transfers in question, and thus conclusive judgment must be reserved for the concrete circumstances of the transfers. But it seems clear that the vast majority of Buy Nothing

transfers would qualify under this standard. Beyond satisfying the legal definition of "gift," policy concerns also support finding that transfers within these groups are gifts. First, rendering hyperlocal-gift-economy transfers "gifts" may incentivize (or refrain from disincentivizing) charitable gift giving, as the benefits the gift-giver intends for the beneficiary would not be reduced by taxation. Second, and closely related to the first, "gift" status would also allow givers to transfer the remaining value of property they no longer wish to use to another, and thus to vicariously enjoy the remaining value of their item by another's use—without suffering the imposition of double taxation on what is essentially a single consumption. In other words, "gift giving" would not be treated as a disfavored use of property. Third, taxing hyperlocal-gift-economy transfers would spawn significant administrative hurdles, as participants would have to keep track of what they have given and/or received. At that point, the value in joining one of these groups would be diminished by the headache of tracking—and hyperlocal gift economies would suffer, perhaps even receding into the past. Fourth, even though "gift" status would harm horizontal equity (in that similarly-situated citizens would not be treated similarly), the benefits hyperlocal gift economies bring—reducing consumer waste, strengthening community ties, and increasing the well-being of local communities (including through the targeting and satisfying of local needs through hyperlocal interactions rather than top-down, government redistribution of goods)—are desirable policy objectives which would justify the harm caused to horizontal equity. Fifth, and finally, hyperlocal gift economies enable governments to subsidize through tax expenditure the efficient redistribution of goods to be consumed amongst an ultra-local community—a task which would be nigh impossible through the normal levers of government.

In short, both law and policy agree that hyperlocal-gift-economy transfers should be treated as just that: gifts.