

**CONSTITUTIONAL CHALLENGES TO STATE TAXATION
OF NON-GRANTOR TRUSTS**
CHARLES E. MCWILLIAMS, JR.

Abstract: This paper explores the construction and use of incomplete gift non-grantor trusts by taxpayers who wish to avoid state taxation of trust income, particularly in jurisdictions with high marginal tax rates. These trusts typically originate from states with low or no income tax and are structured such that the trust creator is not considered to be the grantor for Federal income tax purposes. After developing an understanding of how these trusts are created and function at the Federal level, I will sample state law developed to attack these planning mechanisms and ultimately develop (through synthesis and expansion of existing precedent) theories for Constitutional challenges to these overreaching state laws. Though this paper should not be viewed as a how-to guide for developing incomplete gift non-grantor trusts, I will focus on best practices for new trusts, in addition to bolstering Constitutional defenses for existing trusts.

PART I – INTRODUCTION TO INCOMPLETE NON-GRANTOR TRUSTS

While most sophisticated estate planning attorneys have at least conversational familiarity with the use of incomplete non-grantor trusts (hereinafter an “ING”), these planning tools are often less familiar to state and local tax advisors. In that light, the first part of this paper will focus on the traditional tax and non-tax reasons to use an ING, followed by a discussion of some of the most popular forms on INGs. After developing a thorough understanding of how INGs work – and serve to benefit clients – in a practical context, we will explore (in Part II) in more detail the legal structure of a typical ING, the Federal and state laws that support their use, and the vulnerabilities that certain states attack. Thereafter, we will shift our attention to

attacking these same state laws on Constitutional grounds and restructuring ING's to counter these possibly overreaching laws.

At its most basic level, an ING of any variety is nothing more than a trust agreement that does not constitute a completed gift for estate and gift tax purposes, but is a separate entity for income tax purposes. These trusts may be revocable or irrevocable, and the trust assets are typically considered part of the grantor's taxable estate at death.¹ The principal rationale for making an incomplete gift – as opposed to a completed gift for estate tax purposes – is almost purely mathematical, and will be discussed in more detail later.²

There are two principle motivations for the use of ING's – tax laws and asset protection laws – and in some instances these two motivations converge to create an excellent planning opportunity. The tax foundation for ING's originated from the creativity of attorneys dealing with Delaware law; thus, the acronym “DING” was coined to refer to a Delaware Incomplete Non-Grantor Trust. Likewise, “NING's” were developed to refer to Nevada Incomplete Gift Non-Grantor Trusts. Though an ING could exist in any state, the income tax benefit would only be obtained by an ING having its situs in a state which does not tax the income of a non-grantor trust. At last count, there were seven such states, with a few qualifications to that figure as identified in Richard W. Nenno's recent 50-state complication of grantor trust laws.³ To further complicate matters, some states have restructured their trust income taxation laws to either decouple from the Federal tax treatment of grantor and non-grantor trusts, or have otherwise adopted countermeasures to specifically attack these planning techniques.⁴

Ultimately, the goal is to structure an ING such that the trust income is generated in a state which does not tax it, and thus reduce the marginal tax rate of the individual who establishes the trust. These arrangements are sometimes anecdotally referred to as a “personal

tax inversion” and more easily meet their objectives for grantors in states with a higher marginal tax rate.⁵ California, for instance, has a 13.3% marginal income tax rate in 2015 for incomes in excess of \$1 million.⁶ Thus, a client who lives in California will pay nearly \$133,000 more in taxes per year than an identical client who lives in Florida, which has no state income tax.⁷ This tax savings must, however, be balanced against a potential increase in Federal taxes which may result for some clients who are not in the maximum marginal tax bracket of 39.6% since a non-grantor trust is treated as a separate taxpayer for Federal tax purposes.⁸ These trusts also have a separate rate schedule which imposes the maximum marginal tax rate at a taxable income of only \$12,300 per year.⁹

By way of example, assume we have two single, unrelated California taxpayers – John and Jane. Both taxpayers have earned income of \$1 million per year, and additional earnings from an investment portfolio that generates interest and dividends of \$500,000 per year. The only difference between them is that John has not engaged in any sophisticated planning, while Jane has setup an ING based in Nevada, with a Nevada trustee, and no beneficiaries who are California residents. A side-by-side comparison of the tax implications for each taxpayer and the ING, below, reveals significant differences in the amount of taxes paid by these two otherwise identical clients.

	John	Jane	ING
Earned Income	1,000,000	1,000,000	
Interest/Dividends	500,000		500,000
Adjusted Gross Income	1,500,000	1,000,000	500,000
Less: State Taxes Paid (CA)	(176,095)	(109,595)	0
Less: Misc. Exemptions	(25,000)	(25,000)	0
Federal Taxable Income	\$1,298,905	\$865,405	\$500,000
Federal Tax Due	\$471,412	\$299,746	\$196,329
State Tax Due	\$176,095	\$109,595	
Total Taxes Paid	\$647,507	\$605,671	
Difference (Savings)		(\$41,837)	
Effective Tax Rate:	43.17%	40.38%	

As you can see, Jane's use of the ING to avoid California taxes on a portion of her income has managed to save \$41,837 and reduced her effective tax rate by 2.79% despite increasing the total Federal tax bill by \$24,663. This planning tool becomes more effective as the amount of assets held by the ING grow, and when one imagines a client selling a shopping mall or a particularly valuable tract of investment property that may be worth tens of millions of dollars using this strategy, the savings can be significant.¹⁰

The scale of transactions required to make an ING particularly attractive are the primary motivator for the use of an incomplete transfer for estate and gift tax purposes. For 2015, a single individual has an estate and gift tax exemption equivalent of \$5.43 million – a married couple gets twice this amount – and at that level the savings from an ING, while significant, do not often engender great enthusiasm from a client who can already afford to give up \$5-10 million of assets to fund a trust.¹¹

Despite the strong tax motives for the use of INGs, there are also persuasive non-tax motives. For instance, approximately sixteen states permit the creation of domestic asset

protection trusts.¹² These trusts are generally irrevocable trusts with an independent trustee who has discretion to make distributions to the trust settlor and other parties – often with the approval of a distribution committee – but neither the trustee nor the committee are required to make any distributions.¹³ The benefit of a domestic asset protection trust (“DAPT”) is that it permits the insulation of trust assets from claims made by the settlor’s creditors. Though the extent to which the assets are protected varies significantly from state to state, Nevada is often thought to provide the most comprehensive protection since it does not provide any exemptions for claims made for spousal support, child support, pursuant to a divorce, or by tort creditors, though the Uniform Fraudulent Transfer Act does apply.¹⁴

Since DAPTs are a creature of state law, it is imperative that the state’s tax laws also align with the Federal statutes related to grantor trusts and completed transfers in order to develop a DAPT that is also an ING. Virginia law, for instance, does not provide sufficient congruity to allow for an effective DAPT/ING combination since it imposes tax upon any non-grantor trust (i) created by the will of a resident, (ii) created during the lifetime of a resident, (iii) administered in the state, or (iv) administered by a resident trustee.¹⁵ The second factor above (creation during the lifetime of a resident) is particularly restrictive since Virginia attempts to tax a “trust created by or consisting of property of a person domiciled in the Commonwealth” even to the extent the property is located in another jurisdiction and administered in that jurisdiction by a non-resident trustee for the benefit of non-resident beneficiaries.¹⁶ Though these restrictions could prevent a Virginia resident from establishing an effective DAPT/ING while domiciled in the state, Virginia does appear to provide more flexibility after the death or relocation of the beneficiary than some other states. For instance, in PD 93-189 the Virginia Tax Commissioner held that a non-grantor trust created by a Virginia resident and funded with assets in Florida that

were administered by a Washington, D.C. based trustee for beneficiaries in California, Maryland and Washington did not – following the death of the settlor – retain sufficient nexus with the Commonwealth to qualify as a resident trust subject to income taxation.¹⁷ Virginia has also found insufficient nexus for taxation in Rulings such as PD 02-101 (June 24, 2002), PD 07-164 (October 10, 2007) and PD 13-18 (February 5, 2013), which generally addressed the situation in which a single trustee or distribution committee member without sole authority to act on behalf of the trust was a Virginia domiciliary.

Alternatively, high-tax states such as New York and California have been implementing additional statutes in hopes of cracking down on the so-called “abusive” use of non-grantor trusts.¹⁸ New York, for instance, has adopted statutes which permit an exemption from taxation only for trusts where (i) no trustee is a NY resident, (ii) no NY property is owned by the trust, and (iii) the trust has no income associated with NY property.¹⁹ These trusts constitute a so-called New York exempt resident trust.²⁰ The state has also sought to attack ING’s by way of its non-resident trust rules which have been decoupled from the Federal tax provisions²¹ to require all non-grantor trusts created by a NY resident (regardless of current domicile) to report all its income as if it were earned within the state.²² It is this type of attack that presents an opportunity for Constitutional challenges in an arena where there is significant existing Federal law on the matter, both statutory and precedential.

PART II – ING STRUCTURE AND SUPPORTING FEDERAL LAW

Before delving into the various Constitutional issues that are ripe for challenges it is important to expand one’s knowledge of exactly how ING’s function under the Internal Revenue Code (“IRC”). As previously noted, ING’s are typically structured as an incomplete gift solely

for mathematical reasons, as the size of the gift required to fund an efficient ING will generally be larger than a married couple's unified credit equivalent of \$10.86 million.²³ Since the initial transfer to the trust constitutes an incomplete gift for federal estate and gift tax purposes, the trust corpus will be taxed in the settlor's estate at the time of his or her death. This treatment is generally accomplished by incorporating some right or power identified in IRC §§2031-2046 into the trust. These provisions, together with §§2511-2519 (the Gift Tax rules), have the effect of causing inclusion in the grantor's gross estate at death and avoiding a completed gift at the initial funding of the trust.²⁴ Generally, when a gift is incomplete for estate tax purposes, the trust settlor will retain sufficient control for the trust income to be taxed to him as the grantor, and thus the trick is to develop a trust that relies on the inconsistencies between the estate and gift tax rules, and those of the income tax rules, to trigger estate inclusion but not income taxation.

The IRS has evaluated these maneuvers in numerous Private Letter Rulings. One of the earlier Rulings on this issue addressed the following fact pattern:²⁵

- (1) The Settlor established an irrevocable trust. The Settlor's domicile was in State 1, but the Trust was governed by the laws of State 2.
- (2) The Trust beneficiaries were the Settlor, his wife, his descendants, his parents and his siblings.
- (3) Distributions of principal and/or income could be made to any beneficiary with the unanimous consent of the Distribution Committee, or the Settlor and any one member of the Distribution Committee.
- (4) The Distribution Committee was composed only of trust beneficiaries, excluding the Settlor and his wife.

(5) An independent trustee managed the Trust, but had no control over the timing or amount of distributions.

(6) The Settlor retained only a limited testamentary power of appointment pursuant to which he could appoint the remaining trust assets (at his death) to anyone except himself, his estate, his creditors or the creditors of his estate.

By structuring the trust in this manner, the IRS concluded that (i) the Settlor would not be treated as the owner of the assets for income tax purposes,²⁶ (ii) the initial funding of the trust did not constitute a completed gift,²⁷ and (iii) a transfer of property from the trust back to the Settlor would not trigger a taxable gift.²⁸ With respect to the estate and gift tax rules, the trust drafter provided the Settlor with sufficient power to “name new beneficiaries or to change the interests of the beneficiaries as between themselves” in a non-fiduciary capacity – and not limited by an ascertainable standard – in violation of Treasury Regulation §25.2511-2(c).²⁹ Importantly, this is the only means by which the drafter triggered estate inclusion, as any additional reserved rights would likely prevent the trust from constituting a non-grantor trust for income tax purposes.

In evaluating the income tax implications of the trust, the IRS thoroughly analyzed each of Sections 671-678, but ultimately focused their attention on §674. This Code section generally provides that:

...the grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.³⁰

This section further provides that §674(a) does not apply to a power exercisable only by will (thus the Settlor’s testamentary power of appointment) provided the settlor/grantor cannot require the accumulation of income without the consent of an adverse party.³¹ Thus, the

groundwork for a testamentary limited power of appointment was laid to establish an ING, and this framework has been supported by numerous later Private Letter Rulings.³²

This framework is also supported by long-standing judicial precedent. Most notably, in *Estate of Sanford v. Commissioner*, the U.S. Supreme Court held that a transfer in trust in which the settlor retains the right “either to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries other than himself is incomplete, and becomes complete...only on relinquishment of the power at death.”³³ Since a completed transfer results only upon the death of the grantor (or upon earlier relinquishment by other means) the assets are to be included in the grantor’s gross estate.³⁴ Though this ruling is based on the Code as it existed in 1939, the basic concepts remain the same and the case retains its precedential value today as reflected by the IRS’ reference to the same in PLR 201310002 (March 8, 2013).³⁵

Though the treatment of INGs at the Federal level now appears relatively clear, their treatment at the state level is anything but clear since the states lack significant uniformity in the treatment of INGs, and their treatment of trusts in general.³⁶ Though the Multistate Tax Commission has made various proposals related to unifying the taxation of trusts at the state level, little has been accomplished with respect to the income taxation of non-grantor trusts.³⁷ From a practical standpoint, it is relatively easy to see why INGs can lead to multistate tax complications. Consider, for example, a trust formed pursuant to Nevada law which has a California settlor, owns intangible assets held by a limited liability company in Florida, a REIT based in New York and a securities portfolio administered by a Washington, D.C. advisor. To further complicate matters, the domicile of the beneficiaries – who often are also members of the Distribution Committee – is relevant in some jurisdictions even if they are not presently receiving payments of distributable net income. Based on this example, there would be at least

five states that have some degree of contact with the trust, and thus the issue arises of whether there are sufficient minimum contacts with each state for them to impose taxes on all or some portion of the income.³⁸ Of course, these complications are further compounded by our typical East-coast “snowbirds” that may have dubious residency in Virginia, Florida, South Carolina, or any number of coastal states that may afford them an alternate domicile for tax purposes. Fortunately, many states have resolved a portion of this conflict by tying the taxation of income from intangible assets to the state of domicile.³⁹

Alternatively, the taxation of earned income generally presents fewer disputes, as there is a clear Constitutional policy of taxing income at its source.⁴⁰ Likewise, hard assets such as rental real estate, investment real estate and income from tangible personal property typically present few complications, and thus the focus of multistate taxation for most INGs relates to more amorphous investments such as mutual funds or diversified securities portfolios.⁴¹ Thus, in order to reduce multi-state tax exposure it is important for the trust, trustees, beneficiaries and grantor/settlor to reduce, or at least minimize, their contact with states that aggressively assert their taxing jurisdiction.

PART III – A CONSTITUTIONAL ANALYSIS OF ING TAXATION BY THE STATES

Though the various states are free to design tax systems which collect revenue from their constituents, the lack of uniformity among their approaches can create both opportunities and problems, as noted by the Multistate Tax Commission.⁴² The states generally follow one of ten different approaches, as outlined below:⁴³

1. No State Income Tax (no exceptions). Obviously the simplest approach, and residents in Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming have no practical use for ING's.
2. No Tax...but only if no resident trustee and no administration in the state. This rule generally applies in Arizona, Colorado, Hawaii, Indiana, Iowa, Kansas, Kentucky, Mississippi, Montana, New Mexico, New Jersey, Oregon, South Carolina, and Utah.
3. No Tax...same as above, but must also not use the state law as governing law. Louisiana.⁴⁴
4. No Tax...if no administration in the state and no real or tangible personal property in the state. Idaho.
5. No Tax...as long as a beneficiary is not a resident. These states include Delaware, Georgia, New Hampshire, North Carolina, Rhode Island, and Tennessee; and this is where the analysis begins to get more complicated since a determination of the beneficiaries is now required and the states have different rules on who constitutes a beneficiary (must it be a vested interest, or is a contingent beneficiary sufficient) and what contacts are required to qualify as a resident.
6. No Tax...same as above, but there must not be a resident trustee or administration in the state. Surprisingly, these states include North Dakota and California.⁴⁵
7. No Tax...as long as the settlor was not a domiciliary when the trust became irrevocable and no beneficiary is a domiciliary during the current tax year. Alabama, Missouri and Ohio are the only states that appear to follow this rule.
8. Tax...unless the settlor was not a domiciliary at the time the trust became irrevocable or when additional property was contributed to the trust. These states include Arkansas,

Connecticut, District of Columbia, Maine, Massachusetts, Minnesota, Nebraska, Oklahoma, Vermont, Virginia,⁴⁶ West Virginia, and Wisconsin. This rule is quite harsh and has been challenged on Due Process and Commerce Clause grounds (sometimes successfully), with those rulings being discussed in more detail later.

9. Tax...only when the settlor is a resident during the current year. Maryland is the only state that follows this rule.⁴⁷
10. Tax...New York taxes every ING as a grantor trust even though it is a non-grantor trust for Federal tax purposes and its statutes were developed specifically for purposes of attacking DING and NING trusts.⁴⁸ New York has also implemented a “throwback rule” to tax distributions in the future by a non-grantor accumulation trust.

The states comprising groups 1-7, above, are likely relatively safe, from the perspective of a Constitutional challenge. The states in categories 8-10, however, are more prone to challenges since they tend to attack INGs regardless of when they were created, where the settlor resided at the time of creation, where the settlor resides now, or – in the case of NY – just because it is an ING.

This analysis of potential Constitutional challenges to INGs somewhat logically begins with a review of what challenges have, thus far, been successful. Thereafter, we will explore Constitutional grounds for challenging the statutes of states comprising categories 8-10 above; including counter-arguments that will likely be presented by the states. This will be followed by a discussion of how one might structure an ING that passes muster even in some of these more restrictive states.

A. How the “Aggressive” States Have Lost.

Some states, such as Michigan, Illinois and Pennsylvania have had their trust income tax laws challenged – successfully – on Constitutional grounds. The first of these cases was *Blue v. Dept't of Treasury*, which was a 1990 case based on a now defunct Michigan statute.⁴⁹ As of late 2014 this invalidated statute had not yet been replaced. The subject statute defined a resident trust “as one created by a person domiciled in Michigan at the time the trust becomes irrevocable... [and subjected the trust to taxation from] receiving, earning or otherwise acquiring income from any source whatsoever.”⁵⁰ The relevant facts of the case identified Laura C. Perry, a Michigan resident in 1961, as the settlor of a revocable living trust. However, Ms. Perry died just a year later and the trust became irrevocable. The income beneficiary of the trust was Ms. Perry’s daughter, who had been a Florida resident since 1978 and all trust assets were located in Florida, with the exception of a single parcel of real estate (non-income producing) which was located in Michigan.⁵¹ Though the income of the trust was accumulated from 1982-87 the Trustee was required to file Michigan tax returns and pay taxes based on the net income of the trust.⁵² Thereafter, the plaintiff/Trustee brought an action to recover those tax payments on the basis that such taxation violated the plaintiff’s equal protection and due process rights by taxing both activities and assets outside the scope of the state’s jurisdiction.⁵³ The plaintiff also argued that such tax posed a threat of double taxation and imposed an impermissible burden on interstate commerce.⁵⁴ The trial court, citing *Safe Deposit & Trust Co v. Virginia*, agreed the tax was a violation of the plaintiff’s due process rights.⁵⁵ On appeal, the Tax Commissioner argued the former residency of the settlor and the current operation of the trust within the state (recall, there was a single non-income producing property) provided sufficient nexus between the taxation of the trust and benefits afforded the trust.⁵⁶

The Michigan Court of Appeals disagreed with the Tax Commissioner. In articulating their disagreement, the Court focused on precedent established in Missouri and New York. The Missouri Supreme Court in *In re Swift*, for instance, held:⁵⁷

An income tax is justified only when contemporary benefits and protections are provided the subject property or entity during the relevant taxing period. In determining whether this state has a sufficient nexus to support the imposition of an income tax on trust income, we consider six points of contact: (1) the domicile of the settlor, (2) the state in which the trust is created, (3) the location of the trust property, (4) the domicile of the beneficiaries, (5) the domicile of the trustees, and (6) the location of the administration of the trust. For purposes of supporting an income tax, the first two of these factors require the ongoing protection or benefits of state law only to the extent that one or more of the other four factors is present.

The Missouri Court also reasoned that the state “provided no present benefits or protections to the subject trust, beneficiaries, trustees or property,” and thus the state did not have sufficient nexus to impose an income tax.⁵⁸ The New York courts addressed a similar, though not identical, issue in *Mercantile-Safe Deposit & Trust Co v. Murphy*, which involved the state’s attempt to immediately tax trust income on the basis that the discretionary beneficiaries resided in the state.⁵⁹ Ultimately, the N.Y. Court of appeals concluded the “imposition of a tax in the State in which the beneficiaries of the trust reside, on securities in the possession of the trustee in another state, to the control or possession of which the beneficiaries have no present right, is a violation of the Fourteenth Amendment.”⁶⁰ Relying on these New York and Missouri precedents, the Michigan court analogized the state’s taxation of the Perry trust to a clearly impermissible “hypothetical statute authorizing that any person born in Michigan to resident parents is deemed a resident and taxable as such, no matter where they reside or earn their income.”⁶¹

Another favorable (and more recent) Due Process Clause ruling came from Illinois in 2013.⁶² The facts of that case identify multiple irrevocable trusts created by the settlor (an

Illinois resident) in 1961 which were, after a series a transfers to successor trusts, ultimately decanted to a new trust established under Texas law and administered in that state.⁶³ By 2006 this Texas trust had no assets in Illinois, no trustees in the state, and no beneficiaries in the state, and thus in April 2007 the trustees filed an Illinois non-resident tax return reporting an income tax liability of zero.⁶⁴ The Tax Department countered with an assessment of \$2,729 which equaled the tax due on 100% of the trust income in 2006, and this suit followed.⁶⁵

Like *Blue*, the Court focused primarily on the Due Process Clause analysis; however, since this case was decided following *Quill* (discussed in detail later), the Court had the benefit of the Supreme Court's recent analysis of the Due Process Clause in relation to a non-grantor trust.⁶⁶ The *Linn* Court therefor focused on the requirements that there must be (1) some minimum connection between the "state and the person, property, or transaction it seeks to tax," and (2) "the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State."⁶⁷ In support of such minimum connections the State argued that the trust owed its existence to the State of Illinois and that the State provided "a panoply of legal benefits and opportunities" to the trust.⁶⁸

Interestingly, both the plaintiff and defendant cited *Chase Manhattan Bank v. Gavin* in their arguments to support different propositions.⁶⁹ The State, of course, focused on the conclusion in *Gavin*, which was that trust income was taxable in Connecticut. However, the State seemingly glossed over the analysis of why there was no Due Process Clause violation in *Gavin*, which was due to the fact that the trust was both established under Connecticut law and had a resident non-contingent beneficiary at the time.⁷⁰ The *Gavin* court further rationalized this result by noting that "the United State Supreme Court had held a state may tax the undistributed income of a trust based on the presence of the trustee in the state because it gave the trustee the

protection and benefits of its laws, which are the same benefits and protections provided a resident, non-contingent beneficiary.”⁷¹ This result also appears consistent with *McCulloch v. Franchise Tax Board*, a 1964 case from California in which the State Supreme Court did not find a Due Process Clause violation where the State taxed only the “undistributed income of an out-of-state testamentary trust based solely on the California residence of the trust's beneficiary.”⁷²

The critical difference between *Gavin* and *Linn*, however, was that the *Gavin* trust had a non-contingent resident beneficiary; whereas the *Linn* trust had neither a contingent nor non-contingent beneficiary in Illinois at the time.⁷³ Notably, the trust in *Linn* “had nothing in and sought nothing from Illinois” – to the contrary, the trustees wanted nothing to do with the state and took significant affirmative actions to domesticate the trust in Texas.⁷⁴ In light of the foregoing, the Court concluded there was insufficient nexus with Illinois for the state to impose income taxes. Unfortunately, the Court felt the State’s violation of the Due Process Clause, in and of itself, was sufficient to conclude its opinion, and thus the Court did not address the Plaintiff’s Commerce Clause arguments.⁷⁵

Fortunately, Pennsylvania was kind enough to address state taxation of non-grantor trusts in the Commerce Clause context in very close succession to *Linn*.⁷⁶ *McNeil* presented a situation where two *inter vivos* trusts were located in, administered in, and governed by the State of Delaware during the relevant tax period – namely, the 2007 calendar year – and had no Pennsylvania source income during the period.⁷⁷ Nonetheless, Pennsylvania imposed state income tax because the trust settlor, Robert L. McNeil, Jr., resided in Pennsylvania at the time those trusts were established in 1959, and two of the contingent trust beneficiaries happened to be state residents in 2007.⁷⁸

In 2007, the Tax Department's regulations related to the taxation of trust income, as based on §302(a) of the Tax Code, explained that:

The single controlling factor in determining if a trust is a resident trust for purposes of this article shall be whether the decedent, the person creating the trust or the person transferring the property was a resident individual or person at the time of death, creation of the trust or the transfer of the property. The residence of the fiduciary and the beneficiaries of the trust shall be immaterial. A resident trust shall be one of the following: (i) A trust created by the will of an individual who at the time of his death was a resident individual, (ii) A trust created by a person who at the time of the creation was a resident.⁷⁹

The Trustee, Wilmington Trust Company, filed returns in 2007 reflecting a tax due of zero, and the Department of Taxation promptly issues assessments in the amount of \$232,164 and \$276,263 for the two trusts. The Trustee then filed an appeal with the State Board of Finance and Revenue which declined to entertain the Constitutional claims and simply held the assessment was proper. An appeal to the Commonwealth Court of Pennsylvania followed, and the Trustee again argued that the statute violated the Commerce Clause.

The Trustee's Commerce Clause arguments were broadly based on the Dormant Commerce Clause and *Complete Auto Transit*.⁸⁰ In *Complete Auto Transit* the Supreme Court established a four prong test for determining whether a state tax potentially violates the Commerce Clause.⁸¹ The four prongs of this test are:⁸²

- (1) Whether the taxpayer has a substantial nexus to the taxing jurisdiction;
- (2) Whether the tax is fairly apportioned;
- (3) Whether the tax is fairly related to the benefits conferred by the jurisdiction; and
- (4) Whether the tax impermissibly discriminates against interstate commerce.

If the tax fails any single test, it may be in violation of the Commerce Clause,⁸³ and the Court ultimately held the Pennsylvania tax failed 3 of the 4 prongs. In analyzing the Commerce Clause issue, they looked first at the substantial nexus requirement.⁸⁴

Though it involved a sales and use tax matter, the analysis set forth in *Quill* remains “the standard for establishing the substantial nexus prong of the Complete Auto test — physical presence within the taxing state.”⁸⁵ Though the Tax Department argued the initial presence of the settlor, and the continued presence of discretionary beneficiaries, in the state was sufficient to satisfy the nexus test, the Court reasoned that the beneficiary’s possible future benefit from the trust was insufficient to tax the trust now.⁸⁶ Likewise, the trust settlor chose to have the trust governed by the law of another state, chose a trustee in another state, and did not reserve to himself any continuing control over the trust property.⁸⁷ These factors, among others, provided the Court with sufficient basis to determine there was no substantial nexus between the state and the trust in 2007.⁸⁸

The Trustees also attacked the Pennsylvania tax on the basis that it failed the second prong of the Dormant Commerce Clause test established in *Complete Auto*; that is, the fair apportionment requirement. This failure resulted because the state sought to tax all income of the trust regardless of the extent to which the trust engaged in any activity within the state.⁸⁹ To satisfy the fair apportionment prong of the test, a tax must be both internally and externally consistent.⁹⁰ With regard to internal consistency, the tax must be structured so as to avoid double taxation;⁹¹ whereas external consistency relies on an analysis of whether the state is taxing only that portion of the revenue from the intrastate activity.⁹² Ultimately, there must be some “rational relationship between the income attributed to the [s]tate and the intrastate values’ of the business being taxed.”⁹³ In this instance, “notwithstanding the lack of Pennsylvania income, assets, or presence, the Department sought to impose the [state income tax] on all of the Trusts’ income,” and thus the Court determined there was no rational relationship between the non-existent Pennsylvania activity and the taxes imposed.⁹⁴

Finally, the Court considered whether the taxes were fairly related (third prong) to the services provided by the state, and whether the “taxpayer benefits directly or indirectly from the state’s protections, opportunities, and services.”⁹⁵ These benefits provided by the state typically include “access to the state's economic markets, the benefits and protections of the state's courts, laws and law enforcement; use of the state's roadways and bridges; and police and fire protection, the benefit of a trained work force, and the advantages of a civilized society.”⁹⁶ In this instance, considering the trust had no presence whatsoever in the state, the state could not logically confer any benefits on the trust in the form of access to “Pennsylvania's roadways, bridges, police, fire protection, economic markets, access to its trained workforce, courts, and laws,” or otherwise.⁹⁷ The Court further reasoned that though the contingent beneficiaries (as Pennsylvania residents) certainly receive some benefits from the state, they were not taxpayers in the case and would certainly be taxed on any distributions received from the trusts, which would, in turn, be fairly related to benefits they received from the state.⁹⁸

B. 50 State Review – What Works and What Doesn’t.

As previously noted on pages 13-15, the state taxation of non-grantor trusts can be broadly categorized into ten different groups. The states included in groups 1 through 7 are on fairly solid ground, as they either do not tax non-grantor trusts at all, or seek to ensure the trust is taxed only when (i) it employs state law, (ii) it has a resident trustee or is administered in the state, (iii) it owns property in the state, (iv) it has a resident non-contingent beneficiary, or (v) the trust settlor was a domiciliary when the trust was created and a beneficiary is a domiciliary. Arguably, each of these requirements would – or at least could – create a substantial nexus with the state by way of affording the trust or its beneficiary’s material benefits.

Conversely, the states that fall into groups 8-10 may present statutes that are ripe for attack. The groups 8 states, for instance, will assess taxing jurisdiction over a non-grantor trust unless the settlor was not a domiciliary at the time the trust became irrevocable or when additional property was contributed to the trust. Like *McNeil*, one has to wonder why creating an irrevocable *inter vivos* trust in Virginia, for instance, would subject the income therefrom to taxation in the Commonwealth – potentially many years in the future, after the settlor has retired to Florida – when the settlor establishes the trust under Nevada law, retains no general power of appointment over the trust assets, funds the trust with securities unrelated to the Commonwealth, and no beneficiaries are domiciled in Virginia. The sole group 9 state, Maryland, would appear to encounter a similar problem; though perhaps to a less pronounced extent since they at least retain personal jurisdiction over the settlor.⁹⁹

New York, on the other hand, though free to craft tax statutes that conflict with those of other states, and which are de-coupled from those of the Internal Revenue Code, may have got it right in one respect, but failed miserably in another.¹⁰⁰ On the “right” side of things, New York did impose a “throwback tax” which applies to accumulated trust distributions when made to a New York beneficiary.¹⁰¹ This tax is similar to the manner in which the IRS imposes a tax on foreign trusts which distribute accumulated income to a U.S. beneficiary, and the state essentially imposes tax in the year the income is distributed just as if the money was earned during that year. This throwback tax would appear to withstand scrutiny imposed by the four-prong Dormant Commerce Clause test since (1) the taxpayer/beneficiary would have a nexus with NY – they would be a resident/domiciliary, (2) the tax would be fairly apportioned since the full amount distributed would be taxed in NY, as that is where the beneficiary is domiciled, (3) the tax would be related to benefits conferred upon the beneficiary by the state, and (4) there does not appear to

be any impermissible burden on interstate commerce. Though this throwback rule in itself appears acceptable, or at least not in violation of the Constitution, the broader changes to grantor trust rules in New York may be problematic. New York's outright elimination of non-grantor trust status for all but a small number of New York Exempt Resident Trusts suffers from the same flaws as the Virginia, Pennsylvania, Maryland, Illinois and Michigan statutes discussed at length above.

PART IV – CONCLUSION

The progeny of cases analyzing the Dormant Commerce Clause and Due Process Clause establish a convenient framework for evaluating state statutes related to the taxation of non-grantor trusts. While there certainly is no bright-line test, the four-pronged Dormant Commerce Clause test established by *Complete Auto Transit* has proven invaluable for analyzing these cases. Undoubtedly, the analysis of non-grantor trusts in this context will continue, if not expand significantly, over the next decade as states like Nevada, Alaska, Delaware and South Dakota vie for the title of the jurisdiction with the most favorable trust statutes in hopes of significantly expanding the scope of their trust administration and investment management businesses. This is ultimately an area where crafty estate planning and SALT attorneys can coordinate and use interstate tax arbitrage to favor prosperous clients, and Constitutional lawyers can continue to battle the occasionally overreaching statutes implemented by high-tax jurisdictions. However, by thoroughly analyzing what has and has not worked over the last three decades or so, state legislatures should be able to craft laws that appropriately tax those individuals and entities that derive a material benefit from the state while not proving unduly burdensome for those that only have a tangential relationship with the state.

¹ Note that an ING could also be adapted to create a non-grantor trust with a completed gift for estate and gift tax purposes. Though this is not the norm, a completed gift may be beneficial in some instances, such as when the grantor has significant remaining estate tax exemption.

² Scott Swartz, *DINGs, DAPTs, and Tax Planning With Self-Settled Trusts*, THE TAX ADVISER, August 1, 2014.

³ Richard W. Neno, *Bases of State Income Taxation of Nongrantor Trusts*, Wilmington Trust (June 4, 2013), as published by the American College of Trust and Estate Counsel at: http://www.actec.org/public/Documents/Studies/Neno_state_nongrantor_tax_survey_06_04_13.pdf

⁴ *Id.* See Neno's chart for information on how the various states tax non-grantor trusts and pay particular attention to the number of states that tax any *inter vivos* trust created by a state resident, and also those states that tax income from a trust with a resident trustee.

⁵ Robert Pagliarini, *Avoid State Income Tax With A Personal Tax Inversion*, FORBES (July 31, 2014), <http://www.forbes.com/sites/robertpagliarini/2014/07/31/avoid-state-income-tax-with-a-personal-tax-inversion/>

⁶ *Supra* note 4, at 2.

⁷ *Id.* at 3.

⁸ The taxpayer will also reduce their Federal deduction for state income taxes paid.

⁹ Comparatively, an individual does not hit the maximum bracket until he or she reaches \$413,200, and a married couple reaches the same bracket at \$464,850. Interestingly, many states are more egalitarian in their approach and apply a relatively flat rate structure. Virginia, for instance, imposes a maximum marginal rate of 5.75%, but that rate is effective when taxable income reaches just \$17,000 per year. Many other states have an entirely flat structure in which all citizens pay the same rate, regardless of their income.

¹⁰ The example set forth above ignores Trustee fees and investment management fees in calculating the tax savings. Those fees often range from 50-125 basis points, depending on the size of the trust and the assets comprising the trust – with the rate declining as the value of assets under management increases.

¹¹ Jane's \$500,000 of portfolio income, for example, would likely require the contribution of assets valued at more than \$5 million to the ING, and that assumes the assets generate a 10% rate of return. Thus, Jane would be using all – or nearly all – of her unified credit against estate taxes to fund this transfer if it were a completed gift. Nonetheless, this form of planning may be advisable since the completed gift non-grantor trust would also push further appreciation of the assets outside Jane's taxable estate (perhaps into a "Dynasty Trust" or other trust that also avoids Generation Skipping Transfer Taxes).

¹² See David G. Shaftel, *ACTEC Comparison of the Domestic Asset Protection Trust Statutes* (April 2014), <http://www.actec.org/public/Documents/Studies/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes-Updated-through-April-2014.pdf>

¹³ *Id.* at 2.

¹⁴ *Id.* at 10-12.

¹⁵ Neno, *supra* note 3, at 11.

¹⁶ Va. Code §58.1-302.

¹⁷ VA Public Document No. 93-189 (August 26, 1993)(Tax Commissioner Ruling).

¹⁸ Lila Disque & William C. Barber, *Formation of Trusts for Asset Protection and Reduction of State Tax Burden*, MULTISTATE TAX COMMISSION (Winter 2014 presentation to the Uniformity

Committee),

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Committee_and_Subcommittees/2014_Winter_Committee_Meetings/Trusts%20-%20Uniformity%20v2.pdf.

¹⁹ NY Statutes, Tax Laws §605(b)(3)(D).

²⁰ Even a New York Exempt Resident Trust that is exempt from taxation in NY is subject to a throwback tax on accumulated trust distributions when previously untaxed income is distributed to a NY beneficiary during future periods. Previously, such distributions would have been exempt from taxation, as the taxable income of a trust is generally calculated based on current distributable net income. *See* Jonathan J. Rikoon, *New York's 2014 Trust Income Tax Changes*, 5 TAX STRINGER 9 (Sept. 2014)(a publication of the NY State Society of CPAs).

²¹ *See* IRC §§671-678.

²² NY Statutes, Tax Laws §612(b)(41).

²³ *See infra* p. 4; Rev. Proc. 2014-61 (Nov. 17, 2014).

²⁴ That is not to say these transfers will be fully taxed though, as valuating discounts will likely be applied to the transfer of fractional interests in property.

²⁵ Private Letter Ruling 200502014 (Jan. 14, 2005).

²⁶ *Id.* at 4.

²⁷ *Id.* at 6. *See also* Estate of Sanford v. Comm'r, 308 U.S. 39 (1939), holding that though a trust was funded in 1919 it was not until 1924 – when the settlor relinquish his right to change the beneficiaries – that the initial transfer to the trust constituted a completed gift.

²⁸ *Id.* at 4-7.

²⁹ The term “violation” is perhaps improperly employed in this context since the drafter achieved the intended result; that is, to create a wholly incomplete transfer in keeping with the provisions of Reg. §§25.2511-2(b) and (c).

³⁰ *Supra* note 25, at 3, referencing §674(a).

³¹ *Id.* at 4, referencing §674(b)(3).

³² *See, e.g.* PLR 200612002 (though this ruling presents essentially the same fact pattern as PLR 200502014 many commentators have confirmed it is based on Delaware law; and more importantly, this PLR is historically significant as the last favorable ruling prior to a six year hiatus in the wake of IR 2007-127, discussed below), 201310002 through -06 (series of PLR's approving INGs established under Nevada law which contain a limited testamentary power of appointment which relies on Reg. §25.2514-3(b)(2) in addition to the more typical 25.2511-2(e) analysis), and 201410001 through -10 (confirming now long-standing ING tax treatment at the Federal level with additional assurances that distributions by the Distribution Committee would not constitute a taxable gift by any Committee member, but distributions to beneficiaries – other than the grantor herself – would be taxable gifts by the grantor). *But see* IR 2007-127 (July 9, 2007) in which the Commissioner requested comments on whether the holdings in Rev. Rul. 76-503 and Rev. Rul. 77-158 (which indicate that because the committee members are replaced if they resign or die, they would be treated as possessing general powers of appointment over the trust corpus) should apply to result in a taxable gift being made by the Distribution Committee members when a payment is made to a beneficiary. This query by the Commissioner most obviously had a chilling impact on the use of INGs, but there appears to have been significant opposition from commenters. *See, e.g.*, the American Bar Association public comment letter dated September 26, 2007 which rebuts the Commissioner's findings, and which can be found at:

http://www.americanbar.org/content/dam/aba/publications/rpte_ereport/2007/october/comments_on_private_letter_rulings.authcheckdam.pdf

³³ 308 U.S. 39, 43-44 (1939). *See also* *Rasquin v. Humphreys*, 308 U.S. 54 (1939)(addressing the same issue and granted certiorari at the same time).

³⁴ *Id.* at 45.

³⁵ *See also*, *Goldstein v. Comm’r*, 37 T.C. 897 (1962) and *Estate of Goelet v. Comm’r*, 51 T.C. 352 (1968), as cited in PLR 201310002, and finally, PLR 201430003 through -07 (July 25, 2014) as perhaps the most recent confirmation that the IRS remains supportive of this position (the trust subject to this “comfort ruling” appears to be based on Nevada law since Delaware law does not presently permit the grantor of a DAPT to be a member of the Distribution Committee or retain a lifetime power of appointment).

³⁶ *See supra* note 3.

³⁷ The MTC has established a Uniformity Committee which includes a Trusts Work Group developed to evaluate issues related to “trust residence; whether DING trusts are being used appropriately; and whether states should consider legislation regarding DING trusts.” For more, see: <http://www.mtc.gov/Uniformity/Project-Teams/Trusts-Work-Group.aspx>

³⁸ Intangible assets, for instance, present unique problems since the Supreme Court has held they have no obvious tax situs; thus, any state that affords some benefit to the owner may have a right to tax the same. *Curry v. McCannless*, 307 U.S. 357, 368-71 (1939).

³⁹ Jeffrey Schoenblum, *Strange Bedfellows: The Federal Constitution, Out-of-State Nongrantor Accumulation Trusts, and the Complete Avoidance of State Income Taxation*, 67 VAND. L. REV. 1945, 1956 (2014).

⁴⁰ *Id.*

⁴¹ *Id.* at 1956-57; citing *Shaffer v. Carter*, 252 U.S. 37, 53 (1920).

⁴² *See supra* note 18.

⁴³ Adapted from the chart provided by Nenno, *infra* note 3 (also attached as *Exhibit A*), and the discussion of Schoenblum, *infra* note 39, at pages 1957-1962.

⁴⁴ *See* La. Rev. Stat. Ann. §47:300.10(3)(b)...because Louisiana just has to be different.

⁴⁵ Avoidance of taxation in CA is surprisingly easy since contingent beneficiaries are not a beneficiary for purposes of Cal. Rev. & Tax §17742(a), and INGs generally only provide discretionary interests in the trust corpus. CA does, however, complicate the issue for beneficiaries who have any level of contact with the state. *See supra* note 39 at 1959-60.

⁴⁶ The VA statute is, sadly, a relatively recent addition, and oddly does not appear to require domicile at the time of creation. Rather, it would appear that an individual who establishes an ING in Delaware, for instance, and later moves to VA would be subject to taxation at the ING level. *See supra* note 39 at 1961, n. 55.

⁴⁷ Md. Tax Code Ann. §10-101(k)(1)(iii). Maryland may (surprisingly) have one of the more rational statutes as they only tax a trust if (i) it is created, or consists of property transferred, by the will of a decedent who was domiciled in the State on the date of the decedent’s death; (ii) the creator or grantor of the trust is a current domiciliary of the State; or (iii) the trust is principally administered in the State.

⁴⁸ N.Y. Tax Law §612(b)(41) provides that:

In the case of a taxpayer who transferred property to an *incomplete gift nongrantor trust*, the income of the trust, less any deductions of the trust, to the extent such income and deductions of such trust would be taken into account in

computing the taxpayer's federal taxable income if such trust in its entirety were treated as a grantor trust for federal tax purposes. For purposes of this paragraph, an "*incomplete gift non-grantor trust*" means a resident trust that meets the following conditions: (i) the trust *does not qualify as a grantor trust under* [§671] *through* [§679] of the Internal Revenue Code, and (2) the grantor's transfer of assets to the trust is treated as an *incomplete gift under* [§2511 of the Internal Revenue Code], *and the regulations thereunder.*

Italics were added for emphasis as to the grantor trust and incomplete gift aspects of this statute, which were emphasized in Part II hereof.

⁴⁹ 462 N.W.2d 762, 185 Mich. App. 406 (Mich. Ct. App. 1990).

⁵⁰ Former MICH. COMP. LAWS 206.18 and 206.51.

⁵¹ *Supra* note 49 at 407-408. The trustee was also a Florida resident (since 1977) and there were six residual beneficiaries (residency unknown) which would not receive the assets until the death of Ms. Perry's daughter.

⁵² *Id.* at 408.

⁵³ *Id.* at 408-409.

⁵⁴ *Id.* The Court did not address this later arguments; rather, it focused on the Due Process issues.

⁵⁵ *Id.* See *Safe Deposit & Trust Co v. Virginia*, 280 US 83; 50 S Ct 59; 74 L Ed 180 (1929). The Due Process Clause referred to in this instance was that of the Fourteenth Amendment, which provides protection against undue deprivation of "life, liberty, or property, without due process of law..." U.S. CONST., amend. XIV, §1.

⁵⁶ *Supra* note 49 at 409.

⁵⁷ 727 SW2d 880, 882 (1987).

⁵⁸ *Supra* note 49 at 410.

⁵⁹ 19 A.D.2d 765; 242 N.Y.S.2d 26 (1963), *aff'd* 15 N.Y.2d 579; 255 N.Y.S.2d 96; 203 N.E.2d 490 (1964).

⁶⁰ *Id.* at 581. See also *supra*, note 49 at 410.

⁶¹ *Supra* note 49 at 411. One might draft parallels between this absurd "hypothetical statute" and the statutes of the group 8 states identified on page 13.

⁶² *Linn v. Dept. of Rev.*, 2 N.E.3d 1203 (Ill. App. Ct. 2013).

⁶³ *Id.* at 1205.

⁶⁴ *Id.* at 1206.

⁶⁵ *Id.*

⁶⁶ *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

⁶⁷ *Supra* note 62, at 1208; *citing* *Quill* at 306.

⁶⁸ *Supra* note 62, at 1208.

⁶⁹ 249 Conn. 172, 733 A.2d 782 (1999)(decided after *Quill*; see *supra*, note 66).

⁷⁰ *Supra* note 69, at 790.

⁷¹ See *Greenough v. Tax Assessors*, 331 U.S. 486, 496 (1947), and *Gavin* at 802.

⁷² 61 Cal.2d 186 (1964). See also *Gavin* at 802. The *McCulloch* Court reasoned that CA law provided some material benefit and protection to the resident beneficiary.

⁷³ *Supra* note 62, at 1209. The Court also appeared to focus on the somewhat anecdotal notation that "an irrevocable *inter vivos* trust does not owe its existence to the laws and courts of the state of the grantor in the same way a testamentary trust does and thus does not have the same permanent tie." *Linn* at 1210.

⁷⁴ *Id.* at 1211.

⁷⁵ *Id.*

⁷⁶ See Robert L. McNeil, Jr. Trust ex rel McNeil v. Commonwealth, 67 A.3d 185 (Pa. Commonw. Ct. 2013)(hereinafter, “McNeil”).

⁷⁷ *Id.* at 188.

⁷⁸ *Id.* Note that the trusts made no distributions to the PA beneficiaries during 2007.

⁷⁹ *Id.* at 190; explaining 72 P.S. §7302(a) and 72 P.S. §7301(s)(2).

⁸⁰ Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). The “dormant” (or negative) Commerce Clause results from an implied constitutional limitation that prevents the states from favoring in-state activity since only the Federal government can regulate interstate activity. See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW – SUBSTANCE AND PROCEDURE §11.5(5th ed. 2013).

⁸¹ *Supra* note 76 at 192.

⁸² *Supra* note 80 at 279.

⁸³ *Id.*

⁸⁴ *Supra* note 76 at 192.

⁸⁵ *Id.* The jurisdiction must have some nexus over both the person and the transaction – personal jurisdiction is insufficient if the transaction is wholly unrelated to the person’s presence in the state.

⁸⁶ *Id.* at 194.

⁸⁷ *Id.* at 194-95.

⁸⁸ *Id.* at 195.

⁸⁹ *Id.*

⁹⁰ Goldberg v. Sweet, 488 U.S. 252, 261-62 (1989).

⁹¹ Philadelphia Eagles Football Club, Inc. v. City of Philadelphia, 573 Pa. 189, 225 (2003).

⁹² See *supra* note 90, at 262.

⁹³ *Supra* note 91 at 226 (quoting Hunt-Wesson, Inc. v. Franchise Tax Board of California, 528 U.S. 458, 464, (2000)).

⁹⁴ *Supra* note 76 at 196-97.

⁹⁵ *Id.* Citing Erieview Cartage, Inc. v. Commonwealth, 654 A.2d 276, 279 (Pa. Cmwlth. 1995).

⁹⁶ See Exxon Corporation v. Wisconsin Department of Revenue, 447 U.S. 207, 228 (1980)(quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 445 (1979)). See also Erieview Cartage, 654 A.2d at 279; Transcontinental Gas Pipe Line Corporation v. Commonwealth, 153 Pa.Cmwlth. 60 (1993).

⁹⁷ *Supra* note 76, at 197.

⁹⁸ *Id.* at 197-98.

⁹⁹ One might well argue that personal jurisdiction over the settlor is irrelevant; and rather, personal jurisdiction over the trust should be the relevant inquiry. See *supra* note 39, at 1987 (quoting Linn, and Sullivan v. Kodsi, 836 N.E.2d 125, 131 (Ill. App. Ct. 2005)).

¹⁰⁰ See, e.g., the Tax Injunction Act, 28 U.S.C. §1341 (2012); and more generally, *supra* note 39, at 1957 for a discussion of federalism and state autonomy. See also Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267, 1294–1305 (2013).

¹⁰¹ NY Statutes, Tax Laws §612(b)(40).