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## I. Introduction

In many ways, estate planning has "grown up" quite a lot over the past generation or two. It has established a variety of new tax-efficient transfer techniques, emphasizing income tax savings and not just estate tax minimization.[1] It has attempted to adjust to changes in family structure[2] and changes in reproductive technology.[3] It has embraced plan-

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1 For an example of an income-tax-based planning technique, see generally 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 (2014) (ACTEC Symposium Issue).

2 *See* Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 Harv. J. L. & Gender 269 (2015).

3 *See, e.g.*, Erin J. Hoyle, *Including the Frozen Heir: Expanding the Florida Probate Code to Include Posthumously Conceived Children's Inheritance Rights*, 43 Stetson L. Rev. 325 (2014); Catherine Kim, *Posthumously Conceived Children and their Social Security Benefits Based on State Intestacy Law: How* Astrue v. Capato *Changes Future Social Security Benefits as Technology Advances,* 46 Loy. L.A. L. Rev. 1141 (2013).

ning for a variety of more exotic assets, from pets[4] to digital information.[5]

In other ways, estate planning has failed to mature properly and is out of step with modern reality. One such failure – the focus of this article – is its ignorance of changes in demographic patterns of childbearing and life expectancy and the bearing this should have on the Generation-Skipping Transfer Tax. Simply put, a generation is not what it was a century ago.

Estate and Gift Tax has been at the center of my work life for well over a decade, but it wasn't until the birth of my third child that I gave much thought to the tax definition of what constitutes a generation for Generation-Skipping Transfer Tax purposes. The Generation-Skipping Transfer Tax (GST Tax) applies to certain gratuitous transfers from a donor to an individual who is two or more generations younger than the donor.[6] The stakes are high, with tax rates based upon the highest estate tax rate in effect at the time of the transfer,[7] and the tax being an additional tax layered upon a gift or estate tax.[8] According to the Internal Revenue Code, a person is two generations younger than the donor if certain familial relationships exist or the age difference between the two is at least 37.5 years.[9]

I had my third child two weeks after my 37th birthday, and 20 days after my husband turned 37.5 years old. If the familial rules did not govern my husband's generation – if, for example, he was my boyfriend and not the biological father of the child[10] – he would be considered to be two generations older than our newborn.[11] This is patently ridiculous and out of touch with modern trends in childbearing age and actual generational length.

A primary purpose of the 37.5-year rule is to simulate for non-related parties what truly constitutes a transfer that skips over a generation. At that goal, it fails. As parents of both sexes wait until later in life to bear or adopt children, and as life expectancy increases, what constitutes a "generation" changes over time.[12] It is not static, and it is

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4 *See, e.g.*, Veronica Cerruti, *Unleash Creative Planning Ideas for Clients with Pets*, 42 EST. PLAN. 10 (2015).

5 *See, e.g.*, Jason Mazzone, *Facebook's Afterlife*, 90 N. C. L. REV. 1643 (2012); Naomi Cahn, *Postmortem Life On-Line*, 25 PROB. & PROP. 36 (2011).

6 *See* I.R.C. §§ 2611-13.

7 *See id.* § 2602.

8 *See id.* §§ 2601, 2611.

9 *See id.* § 2651(d)(2).

10 A father is automatically assigned to the generation immediately older than the son or daughter. *See id.* § 2651(b).

11 *See id.* § 2651(d)(2).

12 *See infra* Part III.

not the same as it was in 1976 when the Generation-Skipping Transfer Tax was established. The purpose of this article is to propose a solution to the disconnection between the 37.5-year-rule and actual generational length. As will be discussed in more detail, the proposal revolves around using demographic data to measure generational length and periodically updating the definition based upon that data – in effect, indexing the length of a generation for "inflation."

Having begun with an introduction, Part II of the article gives an overview of the GST tax and its history. Part III notes sociological changes relevant to generational length such as childbearing age and life expectancy. Part IV notes the effective use of inflation indices throughout the Code to use as a model for generation inflation. Part V formally proposes an inflation index for generational length for GST tax purposes. Part VI concludes the article.

## II. THE GENERATION-SKIPPING TRANSFER TAX

While taxes on transfers of property at death have their roots in antiquity, Congress added the modern Generation-Skipping Transfer Tax in 1976 to supplement federal estate and gift transfer taxes.[13] The need for a supplemental transfer tax arose as the tax landscape was reshaped by the events of the twentieth century.

The Revenue Act of 1916, enacted by Congress amid World War I in response to reduced trade tariff receipts, is the "direct ancestor" of the modern federal estate and gift taxes.[14] Allowing a $50,000 exemption (plus expenses) and graduated rates from 1% on net estates of up to $50,000 to 10% on net estates over $5,000,000,[15] the structure of the 1916 Act's estate tax would, but for the numbers, look familiar to a practitioner in 2016. In *New York Trust Co. v. Eisner*,[16] the Supreme Court upheld the 1916 estate tax, which had been challenged as "an unconstitutional interference with the rights of the States to regulate descent and distribution, as unequal and as a direct tax not apportioned as the Constitution requires."[17] In an earlier case, *Knowlton v. Moore*, the Court addressed a similar challenge to the constitutionality of a "legacy tax" enacted to raise revenues amid the Spanish-American War, and upheld the legitimacy of such a tax as indirect.[18]

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13 John R. Luckey, *A History of Federal Estate, Gift, and Generation-Skipping Taxes*, CONG. RESEARCH SERV., CRS Rep. No. 95-444 A, at 1 (Aug. 9, 2001), http://research.policyarchive.org/270.pdf.

14 *Id.* at 6.

15 *Id.* at 7.

16 N.Y. Tr. Co. v. Eisner, 256 U.S. 345 (1921).

17 *Id.* at 348.

18 178 U.S. 41, 110 (1900).

As U.S. involvement in World War I deepened, the estate tax rates were increased to 2% on net estates below $50,000 on the low end to 25% on net estates above $10,000,000 on the high end.[19] Rates continued to climb to 40% on estates over $10,000,000 in 1924, and a gift tax that followed the rate schedule of the estate tax and also featured a $50,000 lifetime exclusion (along with an annual exclusion of $500 per donee).[20] Although repealed by the Revenue Act of 1926, the 1924 gift tax was also upheld as a constitutional indirect tax by the Supreme Court in *Bromley v. McCaughn*.[21] Following the 1929 collapse of the stock market and the onset of the Great Depression, Congress reintroduced the gift tax and increased the estate tax rates in the Revenue Act of 1932 to raise revenues and finance the New Deal.[22] World War II further increased the demand for tax revenues, and estate tax rates climbed to over 70% on estates over $50,000,000 (with gift tax rates set at three-quarters of the estate tax rates).[23] After the Second World War, the Cold War between the U.S. and the Soviet Union and other conflicts continued to drive government spending; high estate and gift tax rates persisted, and estate planners looked to alternative means to transfer wealth between generations.

Prior to the introduction of the GST in 1976, the federal estate tax captured transfers of property from decedents to others—but not transfers of property interests from someone other than the decedent to another, even though the decedent benefitted from the use and enjoyment of that property interest during her lifetime.[24] Meanwhile, the federal gift tax captured inter vivos transfers. The prototypical device developed by estate planners in response to these tax considerations was a trust for the benefit of the grantor's child for life with the remainder passing to the grantor's grandchildren upon the death of the child.[25] By the late 1960s, the Treasury Department and Congress had begun to seriously examine the use of these trusts and their effect on the tax base and equity of opportunity in wealth disposition across different income levels.[26] In 1976, the House Ways and Means Committee began considering an Estate and Gift Tax Reform Bill, and its GST provisions would

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19 Luckey, *supra* note 13, at 7-8.

20 *Id.* at 8.

21 280 U.S. 124, 138 (1929).

22 *See* Luckey, *supra* note 13, at 9.

23 *Id.* at 10.

24 *See* Joseph M. Dodge, *Generation-Skipping Transfers After the Tax Reform Act of 1976*, 125 U. PA. L. REV. 1265, 1265 (1977).

25 *Id.*

26 *Id.* at 1267-68 nn.15-20 and accompanying text.

subsequently be incorporated, with modifications, into the Tax Reform Act of 1976.[27]

The 1976 Act dramatically restructured the federal estate and gift tax landscape, unifying the estate and gift tax credits and replacing the date-of-death basis rule with a carryover basis rule.[28] Identifying the termination of the life interest of intervening beneficiaries as a taxable event (the death of the grantor's child in the prototypical generation-skipping trust example), the 1976 Act imposed the equivalent estate and gift tax rates "which would have been applicable had the property had been transferred outright by the donor and then by the first beneficiary"[29] to the second level of beneficiaries (i.e., the grantor's grandchildren—putting them on equal footing with their generational cohorts whose parents and grandparents both did pay the estate tax).[30] The sweeping changes introduced by the 1976 Act prompted significant pushback. Congress was forced to pass another Revenue Act in 1978 to make technical and substantive changes to the 1976 Act's estate and gift tax provisions, and even to include changes to the estate and gift taxes in unrelated bills like the Crude Oil Windfall Profits Tax Act of 1980.[31] The Trust and Estates Section of the American Bar Association submitted over two dozen proposals for legislative changes specifically related to the GST.[32] Many of these proposals sought to better define the terms used in the statute and to clarify the application of the law, such as how the law would operate in the context of blended families or in concert with the Uniform Gifts to Minors Act.[33] Despite changes in 1981 to simplify estate and gift tax rules and dramatically reduce the top estate, gift, and GST rates (from 70% to 50% on transfers over $2,500,000),[34] by 1982 members of the American Bar Association and the U.S. Senate

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27 *Id.* at 1268-69 n.21. The Reform Bill, H.R. 14844, proposed GST provisions which very loosely resembled the American Banking Association's proposal to the Ways and Means Committee regarding such a transfer tax. *Id.*

28 Luckey, *supra* note 13, at 12. The imposition of the carryover basis rule would subsequently be suspended until 1980 and, in 1980, repealed retroactively to the effective date of the 1976 Act. *Id.* at 14-15.

29 *Id.* at 14.

30 *See* Dodge, *supra* note 24, at 1267.

31 *See* Luckey, *supra* note 13, at 14-15.

32 Joseph Kartiganer et al., *Report of Committee on Tax Legislation and Regulations: Generation-Skipping Transfers*, 15 REAL PROP. PROB. & TR. J. 703, 703-06 (1980).

33 *Id.*

34 Luckey, *supra* note 13, at 15-16. This Act also provided for substantial changes to the marital deduction, allowing unlimited tax-free transfers between spouses after Dec. 31, 1981. *Id.* at 16.

were pressuring for total repeal of the GST.[35] Reportedly, since the GST's introduction in 1976, "the Treasury [had] barely been able to carry out the provisions of the law because of the controversy over it."[36] The debate over the complexity of the GST rules continued to evolve, and by mid-1984 the Senate had voted to repeal the GST altogether—the House of Representatives, however, viewed the GST as a victory in the "hard and long struggle to improve the fundamental equity of the Federal transfer tax system" and refused its outright repeal.[37] The perspective of practitioners in trust and estate law began to shift as well, and both the Treasury and the American Law Institute put forward draft legislation to revise—and retain—the GST.[38] Both bills included provisions to cover "direct skips" where a donor transfers wealth directly to a grandchild.[39] Unlike the process leading up to the 1976 Act,[40] the lead-up to the Tax Reform Act of 1986 generated significant input on the GST from the estate planning bar, the Treasury, and other sources.[41]

By 1986, Congress had resolved to reshape the GST to simplify administration and make sure the GST, gift tax, and estate tax all raised revenue "in a manner that has as nearly as possible a uniform effect."[42] To accomplish this, Congress expanded the GST in the 1986 Act to include direct generation-skipping transfers (such as those directly from a grandparent to a grandchild).[43] To create this additional taxable event, Congress defined a direct skip as "a transfer subject to estate or gift taxes of an interest in property to a skip person," and defined a skip person as "a person assigned to a generation which is two or more gen-

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35 Robert Whitman, Letter to the Editor, *Loophold in the Making for the Most Affluent*, N.Y. TIMES, Apr. 30, 1982, at A30 (arguing that the repeal was a "blatant attempt to favor those who can best afford to pay their taxes.").

36 Jonathan Fuerbringer, *Senate Committee Backs Tax Changes*, N.Y. TIMES, Mar. 14, 1984, at D22.

37 Malcolm A. Moore, *Estate and Gift Tax Committee Report: Generation Skipping Tax*, 10 PROB. NOTES 106, 106 (1984) (quoting House Ways and Means Committee Chairman Rostenkowski's July 2, 1984 press release).

38 *See Generation-Skipping Transfer Tax: Hearing on H.R. 6260 and H.R. 6261 Before the H. Comm. on Ways & Means*, 98th Cong. (1984).

39 *Id.* at 8.

40 *See* Dodge, *supra* note 24, at 1269 n. 21 (describing the "hasty fashion" in which the GST was "rushed through Congress").

41 *See, e.g.*, *Generation-Skipping Transfer Tax: Hearing on H.R. 6260 and H.R. 6261*, *supra* note 38 (compiling over 400 pages of testimony from the Treasury, ALI, American Bankers Association, American Bar Association, American College of Probate Counsel (now ACTEC), the American Institute of Certified Public Accountants, various state bar associations, and proponents of GST alternatives).

42 STAFF OF J. COMM. ON TAXATION, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 1263 (Comm. Print 1987) [hereinafter GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986].

43 *Id.* at 1263.

erations below the generation assignment of the transferor," which included trusts if all the interests in the trust are held (or will be held, such as upon termination) by a skip person.[44] The 1986 Act also brought within the scope of the GST generation-skipping transfers resulting from a disclaimer, generation-skipping trust income distributions, and generation-skipping transfers to more than one younger generation (as where income is paid to grantor's child for life, then to grantor's grandchild for life, with the remainder passing to grantor's *great*-grandchild).[45] Additionally, the 1986 Act expanded the GST's generation assignment rules to include more remote relations such as a grantor's spouse's aunts, uncles, and cousins.[46] Finally, the 1986 Act replaced the graduated GST based on the estate tax rates with a flat rate set at the maximum estate and gift tax rate[47] and provided for an exemption to allow (at that time) $1,000,000 to pass from a transferor to skip persons GST-free.[48] While intended to simplify and add uniformity to the GST, the additional provisions were viewed by estate planners both as new challenges as well as new opportunities.[49]

By 2001, the tides had shifted once again, and calls for repeal of the estate tax and GST were answered in the Economic Growth and Tax Relief Reconciliation Act of 2001 (the "EGTRRA"), which began the phase-out of both taxes over the period from 2002 to 2009.[50] Some commentators at the time viewed the changes ushered in by the EGTRRA as "useful," such as the expansion of the GST exemption's automatic allocation, but already questioned what lasting impact would occur as a result of the GST's expected repeal for the year 2010 and subsequent

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44 Michael D. Mulligan & Scot. W. Boulton, *New Generation-Skipping Tax: Higher Rates, Broadened Scope, New Exemptions*, 14 EST. PLAN. 10, 10 (1987).

45 *See* GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, *supra* note 42, at 1264.

46 *Id.* at 1260. Under the prior law, "generations were determined along family lines where possible" and are otherwise determined (i.e., in cases of persons not related by marriage, lineal descent, or adoption) using this formula: "Individuals not more than 12 ½ years younger than the grantor were treated as members of the grantor's generation; individuals not more than 12 ½ years younger than the grantor, but not more than 37 ½ years younger, were considered members of his or her children's generation, and so forth." *Id.* at 1261. "Similar rules are applied every 25 years," and an individual is considered to be "a member of the youngest such generation" if they could be assigned to more than one. *See* Mulligan & Boulton, *supra* note 44, at 18. Where Congress originally came up with 25 years to define a generation remains elusive.

47 Luckey, *supra* note 13, at 19.

48 *See* GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, *supra* note 42, at 1264.

49 *See* Mulligan & Boulton, *supra* note 44, at 18.

50 *See* Luckey, *supra* note 13, at 26.

restoration to 2001 levels in the year 2011.[51] At "virtually the last minute," Congress passed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "TRA"),[52] which solved some of the thornier problems posed by the 2010 situation by reinstating the GST for transactions in 2010,[53] increasing the GST exemption to $5,000,000 as of January 1, 2010, and making the GST applicable rate for 2010 effectively zero.[54] The American Taxpayer Relief Act of 2012 (the "ATRA") subsequently made permanent the changes to the GST wrought by the EGTRRA and the 2010 Act, tying the GST tax rate and exemption amount to the estate tax maximum rate and exemption amount,[55] providing considerable stability for estate planners in the wake of several years of substantial uncertainty. Dramatic changes to the GST tax – aside from the residual chatter of the complete repeal of all transfer taxes – does not appear to be a current legislative priority. The GST tax is likely to stay just as it is, absent dramatic provocation for change.

## III. Sociological Changes in Generational Structure

The structure of the GST tax, however, does not exist in a vacuum. Instead, it exists within the context of American society, where demographic shifts in how late in life individuals marry, give birth, and die substantially affects what a legitimate definition of a "generation" is.

### A. Increasing Childbearing Age

The age at which parents have children has changed over time. The trend toward delayed parenthood began in the 1970s and became common in many countries by the end of the 1990s.[56] The average age at which women in the most developed countries bear children is over 30.[57] Delayed parenthood has become an increasing phenomenon due

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51 Carol A. Harrington et al., *Generation-Skipping Transfer Tax Planning After the 2001 Act: Mostly Good News*, 95 J. Tax'n 143, 143-144 (Sept. 2001).

52 Jonathan G. Blattmachr et al., *Estate Planning After the 2010 Tax Relief Act: Big Changes, But Still No Certainty,* 114 J. Tax'n 68, 68 (Feb. 2011).

53 *Id.* at 72-73.

54 David Westfall & George P. Mair, Estate Planning Law & Taxation ¶ 20.01 (4th ed. 2001).

55 *Id.*

56 Tomáš Sobotka, *Shifting Parenthood to Advanced Reproductive Ages: Trends, Causes and Consequences*, *in* A Young Generation Under Pressure? 129-30 (J. C. Tremmel ed. 2010).

57 *Id.* at 130-31. The average age of women at the birth of their first child is lower than the overall average, however, due to high rates of teenage pregnancy and high rates of pregnancy among lower-educated women and minority women (citing McLanahan 2004; Mathews & Hamilton 2002).

to "social, economic, cultural, and lifestyle" changes among couples since the 1970s.[58] The three main reasons that couples choose to delay parenthood are educational opportunities, career goals, and financial stability.[59]

Delayed parenthood was first facilitated by the increased spread and use of contraceptives, which began in the 1960s.[60] Effective contraceptive methods, such as birth control pills and intrauterine devices, have allowed couples to postpone having children.[61] The legalization of abortion has also enabled women to avoid unwanted births.[62]

In addition to advances in contraception, delayed parenthood can be attributed to couples' personal and economic goals.[63] Many women choose to delay starting a family in exchange for greater educational opportunities.[64] Such opportunities for women have increased since the mid-twentieth century, and can be considered "the most important factor" contributing to delayed parenthood and accounts for about half of the noted increase in the age of women at their first birth.[65] One study indicated that "each additional year of schooling results in a delay of about three quarters of a year in age at first birth."[66] Because the demands of school arguably do not complement the tasks of motherhood, many women choose to finish school before starting a family.[67] Since the 1970s, the percentage of women completing at least four full years of college has about tripled.[68]

With higher education comes additional opportunities for employment, which also serve to delay parenthood.[69] Women in the workplace are more common in recent decades than in earlier eras, encouraging women to focus on employment in addition to starting a family.[70] The majority of adult women waiting until they are older to have children

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58 *Id.* at 131.

59 M. E. Betsy Garrison et al., *Delayed Parenthood: An Exploratory Study of Family Functioning*, 46 FAM. REL. 281, 281 (1997) (citations omitted).

60 Sobotka, *supra* note 56, at 129, 132; Jane Riblett Wilkie, *The Trend Toward Delayed Parenthood*, 43 J. MARRIAGE & FAM., 583, 584 (1981) (citing Taffel, 1977).

61 Wilkie, *supra* note 60, at 584.

62 *Id*.

63 *Id*.

64 *Id*.

65 Sobotka, *supra* note 56, at 131 (citing Beets et al. 2001).

66 Wilkie, *supra* note 60, at 584 (citing Rindfuss et al.1980).

67 Sobotka, *supra* note 56, at 131 (citing Blossfeld & Huinink 1991).

68 T. J. Mathews & Brady E. Hamilton, *Mean Age of Mother, 1970-2000*, DEP'T OF HEALTH & HUM. SERVS.,51 NAT'L VITAL STATS. REPS. 1 at 4 (Dec. 11, 2002), http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_01.pdf.

69 Wilkie, *supra* note 60, at 584.

70 *Id*. at 583.

currently work full time.[71] Working outside the home for a long period of time has become "an expected and essential part" of many women's lives.[72] The increase in opportunities for women outside the home has resulted in diminished fertility and smaller families among working women compared to women remaining within the home.[73] Since the 1970s, the number of women working outside the home has increased by about 39%.[74]

Couples who desire higher education and increased employment opportunities also seek financial stability, and will often wait to have children until they feel they can afford to support a family.[75] Having a child early on in a woman's career can result in an opportunity cost, as a mother will have to balance both work and child, resulting in potential lost income and promotions at work—the so-called "motherhood penalty."[76] A woman who waits to have children until she finds herself well-settled in her career has the advantage of reducing any potential motherhood penalty she may encounter.[77] Women who postpone parenthood in order to work "may be anticipating and realizing greater compatibility of work and later childrearing through first gaining higher levels of education, more highly skilled careers, and more seniority in the workplace."[78] Less affluent couples also may choose to postpone childbirth due to an unstable economy and risks of unemployment.[79]

Statistics from the Centers for Disease Control and Prevention reflect this trend. While the average age of women at the time of their first childbirth was 21.4 in 1970, the average age rose to 24.9 by the year 2000.[80] By the year 2012, the average age of a woman at the time of her first birth rose to 25.8 years of age.[81]

The rate of fertility (defined as the number of live births that occur to a woman) in the United States has remained stable in the last decade

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71 Joyce C. Abma & Gladys M. Martinez, *Childlessness Among Older Women in the United States: Trends and Profiles*, 68 J. MARRIAGE & FAM. 1045, 1050-52 (2006).

72 Sobotka, *supra* note 56, at 132 (citing Goldin 2006).

73 Wilkie, *supra* note 60, at 584 (citing J. C. Cramer 1980; Waite & Stolzenberg 1976).

74 Mathews & Hamilton, *supra* note 68, at 4.

75 Wilkie, *supra* note 60, at 586-87.

76 Sobotka, *supra* note 56, at 132 (citing Joshi 2002; Miller 2008).

77 *Id.*

78 Abma & Martinez, *supra* note 71, at 1054 (citing Martin 2000).

79 Sobotka, *supra* note 56, at 131 (citing Mills & Blossfeld 2005; Adsera 2005).

80 Mathews & Hamilton, *supra* note 68, at 2.

81 Joyce A. Martin et al., *Births: Final Data for 2012*, DEP'T OF HEALTH & HUM. SERVS., 62 NAT'L VITAL STATS. REPS. 9 at 2 (Dec. 30, 2013), http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_09.pdf.

at about 2.1 children per woman who has given birth.[82] Mothers in the United States between the ages of 40 and 44 have on average about 2.1 children, thus supporting the idea that most women in the United States have two or three children, and indicating that the average woman's last birth will be her second or third child.[83] On average, men are slightly older than women when they reach parenthood. While 85% of women have had at least one birth by the time they turn 40 years old, only 76% of men have had at least one child by the time they turn 40 years old.[84]

As of the year 2000, the average age of a woman giving birth to her second child was about 27; the average age of a woman giving birth to her third child in the year 2000 was about 29.[85] In the year 2011, the largest group of non-Hispanic women giving birth to their second child was aged between 24 and 29 years, with the largest group of non-Hispanic women giving birth to their third child being aged between 30 and 34 years.[86] In the year 2012, however, the largest group of non-Hispanic women giving birth to their second or third child was aged between 30 and 34 years.[87] This data indicates that women having their last child are, on average, aged between 24 and 34 years. One source, however, indicates that the average age at which a woman has her last child is 41 years.[88] In any case, it appears that the age at which mothers are having children – and therefore generational length – is increasing.

Not only is popular media recognizing a movement toward older parenting,[89] but data collected by the National Vital Statistics System

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82 Gladys Martinez et al., *Fertility of Men and Women Aged 15-44 Years in the United States: National Survey of Family Growth, 2006-2010*, DEP'T OF HEALTH & HUM. SERVS., 51 NAT'L HEALTH STATS. REPS. 1 at 1(Apr. 12, 2012), www.cdc.gov/nchs/data/nhsr/nhsr051.pdf.

83 *See id.* at 5.

84 *See id.* at 7.

85 *See* Mathews & Hamilton, *supra* note 68, at 2.

86 *See* Joyce A. Martin et al., *Births: Final Data for 2011*, DEP'T OF HEALTH & HUM. SERVS., 62 NAT'L VITAL STATS. REPS. 1 at 27 tbl. 6 (June 28, 2013), http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_01.pdf.

87 *See id.* at 9.

88 *See Extending the Biological Clock: Becoming a Mother Later in Life,* SEATTLE REPROD. MED. (2015), http://seattlefertility.com/the-impact-of-age-on-female-fertility (last visited May 11, 2016); Christie Aschwanden, *Fertility 101*, WEBMD (Jan. 31, 2009), http://www.webmd.com/baby/features/fertility-101 (last visited May 11, 2016).

89 Judith Shulevitz, *How Older Parenthood Will Upend American Society: The Scary Consequences of the Grayest Generation*, NEW REPUBLIC (Dec. 6, 2012), https://newrepublic.com/article/110861/how-older-parenthood-will-upend-american-society (observes the delay in parenthood in the United States and discusses the negative effects of the trend) (last visited May 11, 2016); Peg Tyre, *A New Generation Gap: Late life Parents Face Unique Challenges as well as Unexpected Pleasures*, NEWSWEEK, Jan. 19, 2004, at 68.

has also recognized this trend.[90] The birth rate since 1970 has experienced a decrease in women under 30 and an increase in women over 30.[91] This change has been attributed to a trend in older parenting.[92] The CDC also specifically noted that "[c]ollege [e]ducated women were also more likely to have a first birth at age 30 or over (36%) than women with lower levels of education (3.5%– 10.7%)."[93] This is noteworthy in that this relationship between education, income, and the age of parents may also correlate to those individuals that are likely to incur GST tax liability.

B. Trends in Generational Length and Life Expectancy

The United States Life Tables for 2009, part of the national Vital Statistics Reports and published by the CDC, show that the average child born in 2009 had a life expectancy of 78.5 years.[94] The CDC records show that as a person ages, his or her life expectancy becomes longer.[95] For example, people aged 35 years in 2009 could expect, on average, to live for another 45.1 years.[96] People aged 40 years in 2009 could expect, on average, to live for another 40.4 years.[97] Thus, while newborns have a life expectancy of 78.5 years, 35 year olds have a life expectancy of 80.1 years, and 40 year olds have a life expectancy of 80.4 years.[98] Furthermore, life expectancy for newborns has increased slightly with the passage of time; in 2011, the life expectancy for newborns was estimated to be 78.7 years, as compared to 78.5 in 2009, 74.8 in 1986 (the time of the second version of the GST), and 72.8 in 1976 (when the GST was introduced).[99]

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90 "Given trends over the last decades toward later childbearing, particularly among women with higher education, parity of older first-time mothers would ideally be examined within education and income groups." Martinez et al., *supra* note 82, at 6.

91 Martin et al., *supra* note 86, at 22 tbl. 4; Brady E. Hamilton et al., *Births: Preliminary Data for 2012*, DEP'T HEALTH & HUM. SERVS., 62 NAT'L VITAL STAT. REP. 3 at 3-5, 13 tbl. 5 (Sep. 6, 2013), http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_03.pdf.

92 "Delayed childbearing in the United States is evident in the 3.6-year increase in the average age at the first birth between 1970 and 2006." T.J. Mathews & Brady E. Hamilton, *Delayed Childbearing: More Women Are Having Their First Child Later in Life*, DEP'T HEALTH & HUM. SERVS., NCHS DATA BRIEF NO. 21, at 6, (Aug. 2009), citations omitted), http://www.cdc.gov/nchs/data/databriefs/db21.pdf.

93 Martinez et al., *supra* note 82, at 6.

94 Elizabeth Arias, *United States Life Tables, 2009*, DEP'T HEALTH & HUM. SERVS., 62 NAT'L VITAL STATS. REPS. 7 at 3 tbl. A (Jan. 6, 2014), http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_07.pdf.

95 *Id.*

96 *Id.*

97 *Id*.

98 *Id*.

99 Arialdi M. Miniño, *Death in the United States, 2011*, DEP'T HEALTH & HUM. SERVS., NCHS DATA BRIEF NO. 115, at 1, (Mar. 2013); Manning Feinlieb et al., *Vital*

Over the twentieth century, life expectancy has increased and mortality rates have lowered due to "the intricate interplay of advances in income, salubrity, nutrition, education, sanitation, and medicine."[100] Specifically, developments such as "[a]ccess to primary medical care for the general population, improved healthcare provided to mothers and babies, availability of immunizations, improvements in motor vehicle safety, clean water supply and waste removal, safer and more nutritious foods, [and] the rapid rate of growth in the general standard of living" have expanded life expectancy in the twentieth century.[101] In the first half of the twentieth century, life expectancy increased in large part due to reduced childhood deaths.[102] In the latter half of the twentieth century, life expectancy increased as a result of "improvements in survival after age 65."[103] In the United States, the average life expectancy for a woman in 1900 was about 51.1, compared with about 71.7 in 1950 and about 79.0 in 1990.[104] The average life expectancy for a man in the United States was about 48.3 in 1900, about 66.0 in 1950, and about 72.1 in 1990.[105] These numbers show that women typically live longer than men. This trend has occurred at similar rates internationally among developed countries.[106]

Longer life expectancies and lowered mortality rates can also be attributed to publicizing and increasing educational efforts about activities or situations that may pose health risks.[107] For example, far fewer people smoke cigarettes today than people did in the first half of the twentieth century as a result of education and advertising, laws requiring certain labels on tobacco products, and restricting smoking to certain areas in public.[108] Additionally, the creation of federal programs, such

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*Statistics of the United States, 1986*, DEP'T HEALTH & HUM. SERVS. (Oct. 1988), http://www.cdc.gov/nchs/data/lifetables/life86_2acc.pdf; Dorothy Price et al., *Vital Statistics of the United States, 1976*, U.S. DEP'T HEALTH, EDUC., & WELFARE (1978), http://www.cdc.gov/nchs/data/lifetables/life76.pdf.

100 Jim Oeppen & James W. Vaupel, *Broken Limits to Life Expectancy*, 296 SCI.1029, 1029 (May 10, 2002).

101 Felicitie C. Bell & Michael L. Miller, *Life Tables for the United States Social Security Area 1900-2100*, SOC. SEC. ADMIN., at 10-11, https://www.ssa.gov/oact/NOTES/pdf_studies/study120.pdf. (Aug. 2005).

102 *See* Oeppen & Vaupel, *supra* note 100, at 1029.

103 *Id.*

104 *Id.*

105 *Id.* Andrew Noymer & Michel Garenne, *The 1918 Influenza Epidemic's Effects on Sex Differentials in Mortality in the United States*, 26 POPUL. DEV REV. 565, 569 (2000), http://demog.berkeley.edu/~andrew/1918/PDR_1918_flu.pdf.

106 *See* Oeppen & Vaupel, *supra* note 100, at 1029.

107 Ellen R. Meara et al., *The Gap Gets Bigger: Changes in Mortality and Life Expectancy, by Education, 1981-2000*, 27 HEALTH AFF. 350, 356-57 (Mar. 2008), http://content.healthaffairs.org/content/27/2/350.long.

108 *Id.* at 357-58.

as Medicaid, has assisted lower socioeconomic groups with access to healthcare.[109]

While changes in life expectancy and mortality rates have occurred over the twentieth century, such changes have not affected all people equally. Highly educated groups in the United States have experienced the largest advances in life expectancy and lowered mortality rates.[110] This can be attributed in part to increased awareness within this group of health dangers, such as smoking and obesity.[111] One study found that people with higher educational levels were less likely than less-educated people to smoke or become obese, thus resulting in a longer life expectancy among highly-educated people.[112]

While some scientists hypothesize that society is reaching the limits of aging, others point out that over the last century, humans have aged beyond what scientists previously thought possible and continue to do so, albeit in small increments.[113] Future expansion in life expectancy and lowered mortality rates will be affected by the following:

> [d]evelopment and application of new diagnostic, surgical and life sustaining techniques; [p]resence of environmental pollutants; [i]mprovements in exercise and nutrition; [i]ncidence of violence; [i]solation and treatment of causes of disease; [e]mergence of new forms of disease; [p]revalence of cigarette smoking; [m]isuse of drugs (including alcohol); [e]xtent to which people assume responsibility for their own health; [e]ducation regarding health; [c]hanges in our conception of the value of life; and [a]bility and willingness of our society to pay for the development of new treatments and technologies, and to provide these to the population as a whole.[114]

Because the Generation-Skipping Transfer Tax presumes a generation 25 years apart, calculations looking at the actual survival time between such individuals is illuminating. The following comparisons look at life expectancy gaps between those 80 and 55, 70 and 45, and 60 and 35.

Statistics for those aged 80 and 55: According to the current IRS mortality tables, 49,181 per 100,000 persons are likely to die at age 80, thus making the mortality rate for 80-year-olds about 49.2%.[115] The

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109 *Id.* at 358.
110 *Id.* at 356.
111 *Id.*
112 *Id.*
113 *See* Oeppen & Vaupel, *supra* note 100, at 1031.
114 Bell & Miller, *supra* note 101, at 7.
115 *Actuarial Tables*, INTERNAL REVENUE SERV., at tbl. 2000CM (Apr. 24, 2014), http://www.irs.gov/Retirement-Plans/Actuarial-Tables [hereinafter *Actuarial Tables*].

same data indicate that 8,789 per 100,000 persons are likely to die at age 55, thus indicating a mortality rate for 55-year-olds of about 8.8%.[116] In 2009, an average person 80 years of age had a life expectancy of 89.1 years, with 9.1 years left to live.[117] An average person 55 years of age had a life expectancy of 82.1 years, with 27.1 years left to live.[118] Therefore, an average 80-year-old and an average 55-year-old in 2009 had a gap of 18 years between their anticipated deaths.[119]

Statistics for those aged 70 and 45: The IRS mortality tables indicate that 25,206 per 100,000 persons aged 70 will die at that age, thus rendering a mortality rate of about 25.5%.[120] About 4,732 per 100,000 persons aged 45 will die at that age, indicating a mortality rate for 45 year olds of about 4.7%.[121] In 2009, an average person 70 years of age had a life expectancy of 85.5 years, with 15.5 years left to live.[122] An average person 45 years of age had a life expectancy of 80.8 years, with 35.8 years left to live.[123] Therefore, an average 70 year old and an average 45 year old in 2009 had a gap of 20.3 years between their anticipated deaths.[124]

Statistics for those aged 60 and 35: The IRS mortality tables show that 12,405 per 100,000 60-year-olds will die at age 60, resulting in a mortality rate of 12.4%.[125] About 2,801 per 100,000 35-year-olds will die at age 35, resulting in a mortality rate of 2.8%.[126] In 2009, an average person 60 years of age had a life expectancy of 83.0 years, with 23.0 years left to live.[127] An average person 35 years of age had a life expectancy of 80.1 years, with 45.1 years left to live.[128] Therefore, an average 60-year-old and an average 35-year-old in 2009 had a gap of 22.1 years expected left to live.[129]

This information shows that the mortality gap among older individuals is shorter, while the gap between younger individuals is longer.[130] It also illustrates that the tax code rule defining a generation as two individuals born 25 years apart may frequently result in taxing estates

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116 *Id.*
117 Arias, *supra* note 94, at 3, tbl. A.
118 *Id.*
119 *Id.*
120 *Actuarial Tables*, *supra* note 115, at tbl. 2000CM.
121 *Id.*
122 Arias, *supra* note 94, at 3, tbl. A.
123 *Id.*
124 *Id.*
125 *Actuarial Tables*, *supra* note 115, at tbl. 2000CM.
126 *Id.*
127 Arias, *supra* note 94, at 3, tbl. A.
128 *Id.*
129 *Id.*
130 *Id.*

*more often than every 25 years* – certainly more often than every "generation" where true gaps between parent and child may be 35-40 years.

Overall, the combined effect of increasing childbearing age and later mortality is too important to ignore. The current rule deeming a generation to last 25 years for GST tax purposes is not supportable by modern demographic evidence and ought to be more closely tethered to reality. Fortunately, the Tax Code has responded to changes in numbers over time before and already includes a model that presents an elegant solution to finding a number that is a moving target.

## IV. Inflation Indices

The concepts of taxation and inflation aren't new,[131] but their prevalence in U.S. tax policy is relatively recent.[132] Federal law has indexed for inflation certain Social Security benefits and military pensions since 1969.[133] The Employee Retirement Income Security Act of 1974 introduced inflation indexing of dollar amount limitations tied to qualified retirement plans, and the Economic Recovery Tax Act of 1981 expanded the use of inflation indexing to broader aspects of the tax code.[134] Since then, additional provisions for inflation indexing have been made throughout the tax code,[135] though many areas remain unindexed and are the subject of no small debate on the matter.[136] Key historical factors, particularly in the 1970s, drove the original notion of indexing the tax code for inflation.

The U.S. experienced unprecedented economic growth and egalitarian prosperity from roughly 1950 to 1970,[137] and during that period the economy grew at about 4% per year and inflation remained around

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131 Michael F. Bryan, *On the Origin and Evolution of the Word* Inflation, Fed. Reserve Bank of Cleveland, Econ. Commentary (Oct. 15, 1997) (describing the co-evolution of concepts of inflation with economics and American historical developments). A digital version of this piece is available for download at https://www.clevelandfed.org/en/newsroom-and-events/publications/economic-commentary/economic-commentary-archives/1997-economic-commentaries/ec-19971015-on-the-origin-and-evolution-of-the-word-inflation.aspx (last visited May 11, 2016).

132 *See* Richard J. Kovach, *Technical and Policy Standards for Inflation Adjustments Under the Internal Revenue Code*, 33 Okla. City U. L. Rev. 603, 605 (2008).

133 The 1982-83 Fed. Tax Comm. of the Am. Accounting Ass'n., *Indexing the Tax Law to Adjust for Inflation*, 62 Taxes 125, 126 (Feb. 1984) [hereinafter *Tax Comm.*].

134 Kovach, *supra* note 132, at 605.

135 *Id.*

136 *See, e.g.*, *id.* at 611-19.

137 Sameer Dossani, *Chomsky: Understanding the Crisis—Markets, the State and Hypocrisy*, Foreign Pol'y in Focus (Feb. 9, 2009), http://fpif.org/chomsky_understanding_the_crisis_markets_the_state_and_hypocrisy/ (last visited May 11, 2016).

2%,[138] excepting some occasional spikes.[139] By the late 1960s, however, U.S. spending on the Vietnam War and the Cold War along with the government's deteriorating foreign trading position strained the federal government's ability to meet its obligations under the Bretton Woods agreement to keep the price of gold at $35 per ounce.[140] In 1971, President Nixon ended the convertibility of U.S. dollars to gold, dismantling the system of fixed exchange rates established at the end of World War II.[141] While Nixon hoped to prevent the overvaluing of the dollar and promote U.S. exports,[142] his move exposed the dollar to increasing speculative market pressure that drove the value of the dollar lower and lower.[143] By 1974, inflation skyrocketed to 11%[144] and would continue to peak into the double-digits until the early 1980s.[145] Flipping the relationship between growth of the economy and growth of the money supply maintained during the early 1960s, the money supply grew around 7% per year from 1975-1979, while the economy grew 3.5%.[146]

By 1977, inflation had become "a fact of life,"[147] and by 1978, a Roper poll indicated that "60% of all American taxpayers favor[ed] indexation of the personal income tax."[148] The demand for indexing the income tax grew from the dual tax phenomena observed when price

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138 Gordon Williams, *Inflation Gets Back to Normal*, N.Y. TIMES, Jan. 6, 1985, http://www.nytimes.com/1985/01/06/business/inflation-gets-back-to-normal.html?pagewanted=all.

139 *See* William A. Kelley, Jr., *Indexing for Inflation*, 31 TAX LAW. 17, 17 (1977) (for example, the inflation rate spiked to 6.8% in 1951 during the Korean War).

140 *See Milestones: 1969-1976: Nixon and the End of the Bretton Woods System, 1971-1973*, U.S. DEPT. OF STATE: OFFICE OF THE HISTORIAN (Oct. 31, 2013), https://history.state.gov/milestones/1969-1976/nixon-shock [hereinafter *Nixon Shock*].

141 *Id.*

142 The prevalent economic belief of the day held that moderate inflation would promote full employment, boosting the economy: Economists today view the simplistic Phillips Curve-based macroeconomics of Nixon's day as short-sighted and instead prefer to focus on price stability as a means to promote economic growth. *See* William Poole & David C. Wheelock, *Stable Prices, Stable Economy: Keeping Inflation in Check Must Be No. 1 Goal of Monetary Policymakers*, THE REG'L ECONOMIST (Jan. 2008), https://www.stlouisfed.org/publications/regional-economist/january-2008/stable-prices-stable-economy-keeping-inflation-in-check-must-be-no-1-goal-of-monetary-policymakers (last visited May 11, 2016).

143 *See* Nixon Shock, *supra* note 140. Prof. Chomsky describes the breakdown of the Bretton Woods system as "probably *the* major international event since 1945," propelling the financialization of the economy and shaping where finance capital moved—away from manufacturing and into speculation. Dossani, *supra* note 137.

144 Kelley, *supra* note 139, at 17.

145 *See Tax Comm.*, *supra* note 133, at 125.

146 Williams, *supra* note 138.

147 Kelley, *supra* note 139, at 17.

148 Larry Kreiser & James W. Minnery, *1979—The Year for Indexing the Personal Income Tax*, 57 TAXES 301, 301 (May 1979).

levels rise: first, "inflation causes taxable income to increase more rapidly than total income because of the decreasing value to the taxpayer of flat allowances such as personal exemptions and the zero bracket amount; and second, "[a]n increase in taxable income causes more income to be taxed in higher tax brackets at a higher marginal rate."[149] Taxpayers in the 1970s were hit with the double-whammy of declining real incomes and increasing tax burdens.[150] Taxpayers in the 1970s were also subject to severe inflation distortions in capital asset transactions.[151] By the end of the 1970s, the federal government increasingly relied upon indexing for inflation to protect benefits, pensions, and wages from erosion.[152] The tax code would soon receive similar treatment.

Initially, the legislative solution to rising inflation was to enact piecemeal tax reductions,[153] at times overcompensating for the amount of actual inflation affecting the economy.[154] These piecemeal reductions also had the effect of unevenly distributing tax relief across tax brackets relative to the proportional impact of inflation on tax liabilities—generally, Congress gave relief to lower-income taxpayers, higher-income taxpayers were less affected to begin with, and middle-income taxpayers were left with the greatest burden.[155] Eventually, Congress came to recognize three principal effects of inflation on the rate structure of the income tax: (1) "that taxpayers may pay a larger share of their incomes to the federal government unless tax rates are cut periodically through formal legislation," (2) "that [inflation] changes the distribution of the tax burden among taxpayers in different income groups," and (3) "that [inflation] makes the tax code less able to distinguish, for tax purposes, among persons with similar incomes but different economic or personal circumstances" such as when a taxpayer has more

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149 *Id.* at 301-02.

150 "A family of four with an income of $10,000 in 1968 would need an income of $18,470 in 1978 to keep pace with inflation. Because of this increase in *nominal* income, however, the family's marginal tax bracket would have increased from 19% to 25%." *Id.* at 302.

151 For example, unimproved real estate purchased in 1950 for $20,000 and sold in 1974 for $50,000 resulted in $30,000 taxable gain to the taxpayer, but if the basis in the property were to have been adjusted for inflation, the actual gain in purchasing power to the taxpayer resulting from the sale would have been only $6,600. Kelley, *supra* note 139, at 18-19.

152 *See* Kreiser & Minnery, *supra* note 148, at 302-03.

153 *Tax Comm.*, *supra* note 133, at 127 (noting Congress' response to rapid inflation through "so-called income tax cuts in 1969, 1971, 1975, 1976, 1977, 1978, and 1981").

154 Kelley, *supra* note 139, at 19. In 1974 and 1975, Congress reduced taxes enough to cover 12% inflation. *Id.*

155 *See id.*; *see also* Kreiser & Minnery, *supra* note 148, at 302.

dependents.[156] Congress finally incorporated provisions for indexing the individual income tax in the Economic Recovery Tax Act of 1981[157] (the "ERTA"), albeit in a limited form.[158] The ERTA scheduled the tax code for partial indexation beginning in 1985.[159] Some questions, like what measure of inflation to use, still persist.[160]

Although Congressional studies had identified each of the dozens of fixed dollar amounts in the tax code,[161] the ERTA adjustments for inflation only covered the "tax rate brackets, the zero bracket amount, and personal and dependency exemptions."[162] Some of the same arguments in favor of indexing identified by Congress in 1980—holding steady the shares of personal incomes collected in income taxes and the distribution of that tax burden, along with government accountability—persisted after passage of the ERTA, particularly among academics and practitioners who called for the further or complete indexation of the tax code.[163]

In 1984, the Treasury Department proposed (among numerous other reforms) to comprehensively index the tax code for inflation, urging Congress to go beyond the indexation provided for by the ERTA for both individuals and businesses through rate structure and tax base adjustments.[164] While Congress's response, the Tax Reform Act of 1986, did extend indexing to the earned income tax credit and to the then-reintroduced standard deduction, Congress did not pursue total indexation.[165] Scholars and commentators since then have continued to call

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156 Hyman Sanders & Joshua Greene, *Indexing the Individual Income Tax for Inflation*, CONGRESSIONAL BUDGET OFFICE, at 5-7, https://www.cbo.gov/sites/default/files/96th-congress-1979-1980/reports/80doc26.pdf (1980), [hereinafter CBO STUDY].

157 Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981).

158 *See generally* Aharon Yoran & Charles P. Shimer, *Adjusting Taxes for Inflation: The Impact of the Economic Recovery Tax Act*, 23 B.C. L. REV. 1257 (1982) (examining how the ERTA as enacted in1981 failed to fully offset the effects of inflation on the individual taxpayer and proposing amendments to improve the ERTA's effectiveness).

159 *Id.* at 1257.

160 For example, using a lower inflation index could reduce Social Security expenditures by billions annually (or increase income tax receipts). *See* Josh Zumbrun, *Who Really Benefits from Social Security's Cost-of-Living Index? Depends How Long You Live*, WALL ST. J. ECON. BLOG (Sept. 11, 2014, 1:00 PM), http://on.wsj.com/1lYdqeh.

161 CBO STUDY, *supra* note 156, at Appendix A.

162 *Tax Comm.*, *supra* note 133, at 134.

163 *Compare* CBO STUDY, *supra* note 156, at 25-27, *with Tax Comm.*, *supra* note 133, at 127-128. These sources also indicate that some of the same arguments against indexing, related to legislative flexibility and economic impact, persisted after enactment among proponents of indexation's repeal.

164 *See* John T. Plecnik, *Abolish the Inflation Tax on the Poor & Middle Class*, 29 QUINNIPIAC L. REV. 925, 956-58 (2011).

165 *Id.* at 957.

for broadened application of indexing the tax code, particularly with regard to tax base elements.[166]

Since 1986, dozens of Internal Revenue Code provisions have been indexed for inflation.[167] In the 1990s, Congress brought the estate and gift taxation regimes within the indexation framework,[168] applying an inflation adjustment to the annual exclusion amount from taxable gifts[169] and increasing the unified credit over a period of years that approximated its adjustment for inflation from 1988 levels.[170] The increases to the lifetime estate tax exemption were accelerated under the EGTRRA and subsequent legislation, "over[shooting] the inflation-adjusted levels by increasingly large margins."[171] At the end of 2010, Congress passed the TRA, which temporarily extended the provisions of the EGTRRA, including the $5 million estate, gift, and Generation-Skipping Transfer Tax exemption amount, indexed for inflation from 2010 beginning in 2012.[172] The TRA extension of the indexed exemption amount was made permanent by the ATRA.[173] One key provision of estate taxation which remains unindexed is the marital deduction for bequests to a surviving spouse:[174] "assets inherited from the deceased spouse by the surviving spouse may continue to increase in value without shelter of the appreciation from estate taxation at the death of the surviving spouse,"[175] although some protection against increased taxation may be afforded by appropriate planning[176] or by relying on the surviving spouse's estate tax exemption, provided it remains adjusted for inflation, to keep pace with the appreciation of the deceased spouse's bequeathed assets.

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166 *See, e.g.*, Reed Shuldiner, *Indexing the Tax Code*, 48 TAX L. REV. 537 (1993) (examining indexation of debt and capital assets).

167 Kovach, *supra* note 132, at 605.

168 Peter T. Kirkwood, *Estate, Gift, and Trust Tax Changes Made by Taxpayer Relief Act of 1997*, 71 FLA. B.J. 49, 49-50 (Dec. 1997).

169 *Id. See* I.R.C. § 2503(b)(2).

170 *See* Nonna A. Noto, *Indexing the Estate Tax Exemption for Inflation*, CONG. RESEARCH SERV., CRS Rep. No. 33501, at 6 (2006), http://crs.wikileaks-press.org/RL33501.pdf.

171 *See id.* at 5-6.

172 Steve R. Akers, *Estate Planning Effects and Strategies Under the 'Tax Relief . . . Act of 2010'*, at 6, https://www.naepc.org/journal/issue07p.pdf (2011). *See* I.R.C. §§ 2010(c)(3)(B), 2505(a), & 2631(c).

173 Robert E. Ward, *Planning Opportunities in the American Taxpayer Relief Act of 2012*, 27 PRAC. TAX LAW. 47, 48 (2013).

174 I.R.C. § 2056.

175 Ward, *supra* note 173, at 53-54.

176 *Id.* at 54 (describing how a bypass trust or other device to leverage unused GST exemption can help).

In addition to estate and gift tax provisions, the ATRA included an extension of increases to the exemption to the alternative minimum tax (the "AMT"), and indexed the exemption for inflation.[177] The AMT had notoriously subjected "an ever greater number of middle-class taxpayers" to higher effective tax rates as incomes rose past fixed statutory thresholds that weren't adjusted for inflation.[178] The ATRA also restored limitations on the personal exemption and itemized deductions for higher-income taxpayers, indexing the income thresholds over which taxpayers trigger a graduated reduction in those deductions.[179] This treatment is in line with that of other eligibility limitations that are indexed for inflation, such as the retirement savings deduction[180] and the Roth IRA,[181] which in turn helps keep such provisions "consistently available to . . . taxpayers who earn an amount of real income that is within the statutory limitation."[182]

Inflation has remained low for many years now, and the economy has exhibited significant price stability despite shocks as extreme as terrorist attacks and the subprime lending crisis.[183] Economists expect inflation to remain low for the rest of the decade.[184] Due to the political unpalatability of tax increases, the federal government may slow its embrace of indexation or change its measure of inflation in order to quietly phase out credits and raise revenues in the face of its on-going spending obligations.

## V. Proposing an Inflation-Index for Generations

Just as the value of money does not remain constant over time, neither does the length of a generation. Changes in society relating to not only increasing choices to delay parenthood but medical technology enabling parents to make that choice means that the gap between generations is lengthening. Out of fairness, unrelated parties ought to be as-

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177 *Id.* at 56.

178 Jim Chen, *The Price of Macroeconomic Imprecision: How Should the Law Measure Inflation?*, 54 Hastings L.J. 1375, 1387-88 (2003).

179 Ward, *supra* note 173, at 51.

180 *See* I.R.C. § 219(g)(8).

181 *See* I.R.C. § 408A(c)(3)(D).

182 Kovach, *supra* note 132, at 605-06.

183 Poole & Wheelock, *supra* note 142.

184 Narayana Kocherlakota, President, Fed. Reserve Bank of Minneapolis, Remarks at Town Hall Forum, Carroll College (Sept. 4, 2014), https://www.minneapolisfed.org/news-and-events/presidents-speeches/opening-remarks-20140904 (last visited May 11, 2016) (warning that sustained low inflation risks underutilizing American workers).

signed to generations that approximate those of familial relationships.[185] A static rule dictating that a donor 37.5 years older than his intended beneficiary should be treated as a grandparent for GST tax purposes is no longer realistic and was perhaps never fair.

A better approach than the current rule is to use data to inform numbers used in the Code. Just as the Treasury looks to outside data to calculate the rate of inflation and adjust numbers annually, it ought to look to changes in demographic data to adjust those numbers periodically. Unfortunately, since the reference to generational length is in the Code itself, the Code must first itself be modified to allow for such adjustments. A potential amendment to the Code could allow section 2651(d)[186] to provide as follows:

> (d) Persons who are not lineal descendants — An individual who is not assigned to a generation by any of the foregoing provisions of this section shall be assigned to a generation on the basis of the date of such individual's birth with –
>
> (1) an individual born not more than half a generation after the date of the transferor assigned to the transferor's generation;
>
> (2) an individual born more than half a generation after but not more than 1.5 generations after the date of the birth of the transferor assigned to the first generation younger than the transferor; and
>
> (3) similar rules for a new generation; with
>
> (4) the term "generation" defined in regulations to this Code section to be promulgated by the Treasury, and to be periodically updated based upon sociographic data on generational length.

Adjustments could be based on data from multiple sources, but one possibility is the Centers for Disease Control and Prevention. Data from that agency shows that the average age at first birth for a mother has risen 4.4 years between 1970[187] and 2012.[188] Statistics on birth of later children ought also to be considered as well as data on the age of

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185 On the difficulty of defining "family" for tax purposes, see generally Tessa R. Davis, *Mapping the Families of the Internal Revenue Code*, 22 VA. J. SOC. POL'Y & L. 179 (2015).

186 The current I.R.C. provision assigns an individual born not more than 12.5 years after the transferor to the same generation as the transferor, an individual born more than 12.5 years but not more than 37.5 years after the transferor to the first generation younger than the transferor, and uses a similar model for assessing more remote generations every 25 years. I.R.C. § 2651(d)(1)-(3).

187 Mathews & Hamilton, *supra* note 68, at 1.

188 Martin et al., *supra* note 86, at 9.

fathers. At a minimum, it seems reasonable to conclude that the true demographic length of a generation has expanded roughly half a decade since the establishment of the generational length under the GST tax.

## VI. Conclusion

The only constant in life is change.[189] When Congress ignores dramatic demographic change and fails to update the Internal Revenue Code to reflect it, we are imposing a static document onto a transitioning society. It is fully within the capability of Congress and Treasury to adapt to numerical shifts, and indices to reflect evolving figures already abound in the Code. It is time to recognize the potential for the use of sociological data to make numerical references in the Code more fair, accurate, and responsive to change. By enacting a generation-inflation index, Congress can create a more modern and honest system for assessing taxes against unrelated donors. Perhaps in the next few decades, estate planning will truly grow up.

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189 Or as Plato puts it, "Heraclitus, I believe, says that all things pass and nothing stays, and comparing existing things to the flow of a river, he says you could not step twice into the same river." Daniel W. Graham, *Heraclitus*, http://plato.stanford.edu/entries/heraclitus/ (last visited May 11, 2016).