STEP-UP IN BASIS: POLICY PERSPECTIVES ON A LONGSTANDING TAX LOOPHOLE

By Bridget J. Crawford,[*] Crystal Lichtenberger,[**] Kaitlin Maguire[***] & Gigi McQuillan[****]

ABSTRACT

This essay offers three different and conflicting perspectives on the income tax step-up in basis for property acquired from a decedent under I.R.C. § 1014. Arguments in favor of repealing this longstanding tax loophole include increased revenue, elimination of the tax preference for income from capital versus labor, and minimizing tax considerations on economic investment decisions. Arguments against repeal include political infeasibility, administrative convenience, and incentives for middle-class investment. These divergent perspectives are concrete examples of robust tax policy analysis guided by simultaneous commitments to multiple principles. Those commitments include familiar ones like efficiency and administrability, but also equity and the real-world, human consequences of tax rules.

TABLE OF CONTENTS

ABSTRACT 54

I. INTRODUCTION (BRIDGET J. CRAWFORD).......................... 55

II. RETAIN STEP-UP IN BASIS FOR EASE OF ADMINISTRATION AND BECAUSE OF RELIANCE (CRYSTAL LICHTENBERGER) . 59

III. REPEALING STEP-UP IN BASIS WOULD HURT THE MIDDLE CLASS AND BUSINESSES (KAITLIN MAGUIRE) 60

---

[*] University Distinguished Professor of Law, Elisabeth Haub School of Law at Pace University. B.A., Yale University (1991); J.D., University of Pennsylvania Law School (1996); Ph.D., Griffith University (2013).

[**] B.A., Montclair State University (2021); J.D. anticipated (2024), Elisabeth Haub School of Law at Pace University.

[***] B.A., Quinnipiac University (2021); J.D. anticipated (2024), Elisabeth Haub School of Law at Pace University.

[****] B.A., Columbia University (2019); J.D. anticipated (2024), Elisabeth Haub School of Law at Pace University.

IV. STEP-UP IN BASIS IMPROPERLY BENEFITS CAPITAL, REDUCES TAX REVENUE, AND DISTORTS INVESTMENT DECISIONS (GIGI MCQUILLAN) 64

V. CONCLUSION (BRIDGET J. CRAWFORD) 67

I. INTRODUCTION *(Bridget J. Crawford)*

Dying with low basis assets is an excellent estate planning strategy. Under Section 1014 of the Internal Revenue Code ("IRC"), the basis of property in the hands of a person who acquires property from a decedent is the fair market value of the property at the date of the decedent's death or as of the alternate valuation date, which is six months after the decedent's date of death.[1] Practically speaking, this means that built-in capital gains are "forgiven" at a decedent's death and escape the tax system entirely.[2] The assets are "stepped up" in basis.[3] In contrast, generally speaking, in the case of property acquired by a lifetime gift, the donee takes the donor's basis.[4] This is what tax lawyers call "carry-over" basis.[5]

In teaching the basic Federal Income Taxation class, I typically explain the concept to students this way: assume that Grandma Gertrude is committed to transferring to Grandson Gary either Stock A, which she bought fifty years ago for one dollar and is now worth $100, or Stock B, which she bought last year for $75 and is now worth $100. Grandma intends to make a lifetime gift to Gary of one of the stocks and retain the other until her death, when she will devise that stock to Gary. Assume, however unrealistically, that the fair market value of both Stock A and Stock B at the time of Grandma's lifetime gift or her death will be $100.[6] Assume further that Gary will immediately sell any stock he acquires from

---

[1] I.R.C. § 1014; I.R.C. § 2032 (providing the alternate valuation date).

[2] *See* I.R.C. § 1014; *see also* MERTENS L. OF FED. INCOME TAX'N § 21:52 (2023) ("Property acquired by bequest, devise or inheritance from a decedent receives a basis equal to the fair market value of the property at the date of the decedent's death.").

[3] *See generally* Jonathan G. Blattmachr & Madeline J. Rivlin, *Searching for Basis in Estate Planning: Less Tax for Heirs*, 41 EST. PLAN. 3, 3 (2014).

[4] I.R.C. § 1015(a) ("If the property was acquired by gift . . . the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if such basis . . . is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss the basis shall be such fair market value.").

[5] *See* Blattmachr & Rivlin, *supra* note 3, at 3.

[6] For this hypothetical to work, temporarily put aside the concept of the time value of money. For an explanation of the concept of the time value of money, *see* Michael R. Laisné, *The Benefits of Tax Deferral or: How I Learned to Stop Worrying and Love Deferral*, 40 OHIO N.U. L. REV. 559, 566-70 (2014).

Grandma, and he will sell the stock for its then fair market value of $100. All things being equal, from a federal income tax perspective, if the overall goal is to minimize any gain recognized by Gary on his subsequent sale of the stock, which of Stock A or Stock B should Grandma transfer during her lifetime, and which should she transfer at death? For the beginning tax student, the answer is not obvious. Gary will sell for $100 in either case.

Allowing that this is a simplified hypothetical (because, in the real world, one cannot say with confidence when Grandma will die and what the fair market value of the stock will be at the time of her death), students soon learn Gary would prefer to acquire Stock B during lifetime and Stock A upon Grandma's death. Why? Because Gary would take a basis of $75 in Stock B transferred by gift; he then would sell the stock for its fair market value of $100, recognizing a gain of $25.[7] When he subsequently acquires Stock A from Grandma as a beneficiary under her will, he would take $100 as his basis in Stock A. Gary would then sell the stock for its fair market value of $100, recognizing no gain.[8] The aggregate gain recognized on these two transfers is $25. In contrast, if Gary had instead received Stock A during Grandma's lifetime and Stock B at Grandma's death, he would take a basis of $1 in Stock A and recognize a gain of $99 when he sold it.[9] When he subsequently receives Stock B at Grandma's death, Gary would take a basis of $100; when he sells it for $100, he recognizes no gain.[10] To illustrate:

	Lifetime Gift	Testamentary Transfer	Total Gain
Scenario 1	Stock A AR* (100) – AB** (1) = 99 gain	Stock B AR (100) – AB (100) = 0 gain	99
Scenario 2	Stock B AR (100) – AB (75) = 25 gain	Stock A AR (100) – AB (100) = 0 gain	25

* "AR" is shorthand for "amount realized"
** "AB" is shorthand for "adjusted basis"

---

[7] *See* I.R.C. § 1001 (explaining determination and recognition of gain or loss); I.R.C. § 1015 (explaining basis of property acquired by gifts and transfers in trust).
[8] *See* I.R.C. § 1001; *see also* I.R.C. § 1014 (explaining basis of property acquired at death).
[9] *See generally* Blattmachr & Rivlin, *supra* note 3, at 3-4.
[10] *See generally* Laisné, *supra* note 6, at 566-70.

Scenario 2, involving the lifetime transfer of the high basis stock and the testamentary transfer of the low basis stock, results in the lowest aggregate gain (and lowest tax bill) for Gary.

Although step-up in basis has been part of the tax code since 1921—just five years after the enactment of the federal estate tax in 1916—it has long been controversial.[11] The original purpose of that statute was to eliminate the "double taxation" that would result if the same property were subject to estate tax (when it was included in a decedent's gross estate) and then triggered income tax on the built-in gain when a beneficiary sold inherited property.[12] There have been two notable (yet failed) experiments in the last fifty years that have sought to replace the step-up in basis rule with carry-over basis instead. The first attempt, part of the Tax Reform Act of 1976,[13] was met with such fierce opposition that its implementation was delayed until 1978 and then repealed retroactively in 1980.[14] The second attempt came in 2001 when, during a one-year temporary repeal of the estate tax, the law permitted a step-up for only $1.3 million in assets passing to any beneficiary plus $3 million for property passing to a surviving spouse.[15] The remaining assets took carry-over basis.[16]

Like Presidents Clinton and Obama before him,[17] President Biden has called for a repeal of the step-up in basis rule for large

---

[11] *See* Revenue Act of 1921, Pub. L. No. 67-98, § 202(a)(3), 42 Stat. 227, 229 (step-up in basis rule) and Revenue Act of 1916, Pub. L. No. 64-271, §§ 201-212, 39 Stat. 756, 777-80 (enactment of the first federal estate tax; currently enacted version is I.RC. §§ 2001-2210); *see also* Richard L. Kaplan, *When the Stepped-Up Basis of Inherited Property is No More*, 47 AM. COLL. TR. & EST. COUNS. L.J. 77, 77 (2021) (predicting that "perhaps now is the moment when it will meet its demise for many – but not all – American taxpayers").

[12] *See* Kaplan, *supra* note 11, at 80 (describing legislative history of the step-up in basis).

[13] Tax Reform Act of 1976, Pub. L. No. 94-455, § 2005(a)(2), 90 Stat. 1520, 1872-77; *see generally* Thomas J. McGrath & Jonathan G. Blattmachr, Carryover Basis Under the 1976 Tax Reform Act: A Working Guide, with Forms, to Estate Administration iii (1977).

[14] *See* Revenue Act of 1978, Pub. L. No. 95-600, §§ 515(3)-(4), 92 Stat. 2763, 2884 (delaying implementation of carry-over basis); *see also* Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 401(a), 94 Stat. 229, 299 (repealing the carry-over basis rule retroactive to the original enactment date in 1976).

[15] *See* I.R.C. §§ 1022(a)-(c) (2006) (repealed 2010).

[16] *See id.*

[17] *See* Rick Wartzman, *Clinton Suggestion of Possible Capital Gains Tax Upon Death Stirs Ire Among Powerful Interests*, WALL ST. J., Jan. 5, 1993, at A16 (detailing failed push by Clinton administration to repeal stepped-up basis); John D. McKinnon, *Obama Aims to Raise Taxes on Inheritances*, WALL ST. J. (Jan. 26, 2015, 2:29 PM), https://www.wsj.com/articles/obama-targets-major-

estates.[18] If repeal were successful, depending on the precise details of any rule enacted in its place, then some or all assets in an ultra-wealthy person's estate likely would be subject to estate tax. Any beneficiary of that property would take carry-over basis, resulting in larger gains on the subsequent sale of appreciated property, as compared to a scenario in which the beneficiary received stepped-up basis.

Given the high federal estate tax exemption in 2024 of $13,610,000 for an individual and $27,220,000 for a married couple,[19] it is not immediately obvious that those who would experience so-called "double taxation" would garner much sympathy. The fact is that the vast majority of Americans will never be subject to estate tax; for that reason, the original rationale for IRC § 1014—avoiding "double taxation"—no longer retains any wide-spread vitality.[20] Furthermore, the Congressional Joint Committee on Taxation estimates that the step-up in basis rule will cost the federal government almost $300 billion in lost revenue over the tax years 2022 through 2026.[21] For that reason, there is a strong revenue-based argument for repeal of the step-up in basis rule.[22]

On the other hand, it is not clear that there is enough political momentum for such a change. The rhetoric around taxes is highly charged; the majority of Americans are against the "death tax" and likely would oppose any change that would increase the tax burden

---

loophole-in-income-tax-code-1422300573 [https://perma.cc/LL3N-NH32] (detailing the Obama administration's proposal to repeal stepped-up basis).

[18] *See* GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2022 REVENUE PROPOSALS, U.S. DEP'T OF THE TREASURY 61 (May 2021), https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf [https://perma.cc/5DLR-W7YF]; *see also* Darla Mercado, *Biden's Bid to Tax Inherited Assets Could Be a Documentation Nightmare for Wealthy Heir*s, CNBC (May 27, 2021, 1:12 PM), https://www.cnbc.com/2021/05/27/bidens-bid-to-overhaul-taxes-on-inheritances-could-bring-new-problems.html [https://perma.cc/F7ZG-HRRX].

[19] *See* Rev. Proc. 2023-34, 2023-48 I.R.B. 1287.

[20] *See generally* Laisné, *supra* note 6, at 566-70 (explaining the concept of the time value of money); *see also Tax Policy Center's Briefing Book: Key Elements of the U.S. Tax System*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax [https://perma.cc/J5YQ-SFNB] (last visited Feb. 3, 2024) (estimating that the estates of only 0.15% of all decedents filed an estate tax return for the tax year 2019 and only 0.07% of decedents owed any estate tax in that year).

[21] *See* Staff of Jt. Comm. on Tax'n, Estimates of Federal Tax Expenditures for Fiscal Years 2022-2026, JCX-22-22, 37 (Comm. Print 2022).

[22] *See id.*

shouldered by their beneficiaries.[23] Furthermore, step-up in basis has been part of the tax code for almost 100 years.[24] In that light, a repeal of IRC § 1014 would represent a massive departure from a well-established rule.

Mindful of the debates on both sides, students in the Tax Policy seminar at Haub School of Law at Pace University took on the challenge during the Fall 2023 semester to reflect on whether IRC § 1014's step-up in basis rule for property acquired from a decedent should be repealed. They grappled with scholarly legal and economic commentaries on the issue,[25] and then prepared their own reflections on who would be helped and hurt by such a change and how, theoretically, one might go about evaluating whether implementing carry-over basis would be a "good" or "bad" policy. I am proud of the students' work; their reflections are certain to generate further thought. Three student essays, each taking a different perspective, follow below.

II. RETAIN STEP-UP IN BASIS FOR EASE OF ADMINISTRATION AND BECAUSE OF RELIANCE *(Crystal Lichtenberger)*

Assigning basis by reference to the fair market value of an asset as of the decedent's date of death, as opposed to the original owner's adjusted basis, is administratively convenient and lowers the beneficiary's overall tax burden. There is always a risk that the value of the property could decline, though; thus, it is possible that IRC § 1014 could mean that the beneficiary ends up with a low basis. Generally speaking, however, the historic increase in property

---

[23] *See generally* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2006) (detailing the bipartisan support for estate tax reform in 2001, despite the fact that very few Americans will be subject to the estate tax); *see also* Mark Abadi, *Republicans Say "Death Tax" While Democrats Say "Estate Tax"—and There's a Reason Why*, BUS. INSIDER (Oct. 19, 2017, 3:33 PM), https://www.businessinsider.com/death-tax-or-estate-tax-2017-10 [https://perma.cc/MV75-AHPX] (reporting the results of an April 2017 poll conducted by Ipsos/NPR that found "66% of Americans oppose the estate tax while 78% . . . opposed the death tax," despite the fact that there is no federal "death tax").

[24] *See* George F. Bearup, *Stepped-up Basis: A Short History and Why Its Back in the News*, GREENLEAF TR. (Mar. 8, 2022), https://greenleaftrust.com/missives/stepped-up-basis-a-short-history-and-why-its-back-in-the-news/ [https://perma.cc/F5RY-698M].

[25] *See* Leonard E. Burman & Joel Slemrod, Taxes in America: What Everyone Needs to Know (2d ed. 2020); Emmanuel Saez & Gabriel Zucman, The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay (2019).

values over time mean that IRC § 1014's step-up in basis rule is a benefit to most beneficiaries.[26]

Eliminating IRC § 1014's step-up in basis rule for property acquired from a decedent has the potential to harm some and help others. The government would be helped by the change in this tax law as it would generate a greater amount of taxable capital gains when the assets eventually are sold.[27] On a larger, but likely not too noticeable scale, this change could potentially be beneficial for certain individuals in the United States if the government used the additional tax revenue for the direct benefit of citizens. On the other hand, beneficiaries inheriting appreciated property would undoubtedly cry foul, as they would experience higher gains on the sale of inherited property. Depending on the financial position of the beneficiary, this could be problematic. Just because the testamentary transferor was wealthy does not mean that the beneficiary is. The beneficiary may or may not have liquid assets that would allow them to pay higher taxes on the sale of property in which they take carry-over basis. Arguably, this could discourage investment by the senior generation family member in appreciable property because of the possibility that a beneficiary might face a large tax bill.

In order to determine whether repeal of step-up in basis would be a "good" or "bad" change within the law, quantifying the potential tax revenue is important. That being said, there may be different ways that the government could generate revenue. The longstanding nature of the tax benefit for beneficiaries is an argument against its elimination.

III. REPEALING STEP-UP IN BASIS WOULD HURT THE MIDDLE CLASS AND BUSINESSES *(Kaitlin Maguire)*

The regulations under IRC § 1014 embrace a principle of "uniform basis."[28] That is, the basis of property acquired from a decedent is "uniform in the hands of every person having possession or enjoyment of the property at any time under the will or other instrument or under the laws of descent and distribution."[29]

---

[26] *See Average Sales Price of Houses Sold for the United States*, FED. RSRV. BANK OF ST. LOUIS ECON. RSCH. (Jan. 25, 2024), https://fred.stlouisfed.org/series/ASPUS [https://perma.cc/RB4R-GD9T].
[27] *See* Huaqun Li, *Analysis of the Economic, Revenue, and Distributional Effects of Repealing Step-Up in Basis*, TAX FOUND. (Feb. 24, 2020), https://taxfoundation.org/blog/repealing-step-up-in-basis-analysis/ [https://perma.cc/F2XK-T48S].
[28] *See* Treas. Reg. § 1.1014–4(a)(1) (2017).
[29] *See id.*

Practically speaking, this means that whether property passes under a will or through intestate succession, the beneficiary, heir, legatee, or devisee will take "stepped-up" basis in property acquired from a decedent.[30] A stepped-up basis reduces the capital gains a beneficiary otherwise might face upon the sale of an asset following the decedent's death.[31] From a policy perspective, the elimination of IRC § 1014 would have a disproportionate impact on the upper-middle and upper class because they are most likely to own appreciated assets at death.[32]

To analyze who would be hurt by eliminating IRC § 1014, one must first understand to whom IRC § 1014 applies. The provision applies to any person who receives stocks, bonds, real estate, and other similar assets from a decedent.[33] In other words, IRC § 1014's step-up in basis rule predominately benefits those beneficiaries inheriting from a decedent who had appreciated assets. IRC § 1014 presents an opportunity for tax-aware estate planning and income shifting. Consider the example of a married household with two public school teachers who both receive W-2s. Assume that Jane and Jerry each earn $110,000 per year. Technically speaking, according to economists Emmanuel Saez and Gabriel Zucman, this couple is classified as "upper-middle" class, a group that has an average income of $220,000.[34]

Compare Jane and Jerry, though, to the couple's next-door neighbors, who have a combined total income of $1 million per year, also within the range of upper-middle class. Although both couples are upper-middle class, according to Saez and Zucman, it is likely that the couple with $1 million in combined income can accumulate appreciable assets at a rate that Jane and Jerry cannot.[35] Thus, while both couples are able to benefit from IRC § 1014, the lion's share of the benefit goes to the wealthier neighbors.[36] Furthermore, consider

---

[30] *See id.*; *see also* I.R.C. § 1014.
[31] *See* Blattmachr & Rivlin, *supra* note 3, at 3.
[32] *See* SAEZ & ZUCMAN, *supra* note 25, at 97-98 (providing that the wealthiest 1% of households owned 36% of the wealth in 2013, and referencing the Survey of Consumer Finances to explain how top income households can save at high rates, which pushes wealth concentration up, thereby increasing wealth inequality and leading to capital income concentration).
[33] *See generally* I.R.C. § 1014.
[34] *See* SAEZ & ZUCMAN, *supra* note 25, at 5 (providing a breakdown of the income pyramid, including the upper-middle class with an average income of $220,000 and the rich with an average income of $1.5 million).
[35] *See id.* (providing examples of how the upper-middle class can accumulate wealth, including pensions and healthcare).
[36] *See id.* (estimating that the upper-middle class averages $220,000 of yearly income while the rich averages $1.5 million per year).

the possibility that the tax expenditure that directly supports the upper middle class has the potential to benefit the working and middle classes—representing 90% of the population of the United States[37]—too.[38] Moreover, with increased revenue, the government will have additional funds to allocate towards economic security programs and create tax incentives like deductions or credits.[39]

The middle class will likely be relieved of economic burdens, such as growing housing costs.[40] Such expenditure could improve the ability of middle-class folks to accumulate capital assets at a faster pace.[41] For instance, greater revenue will likely be result from a carry-over basis as beneficiaries will no longer inherit the decedent's basis. In other words, a larger capital gain is realized, placing more revenue in the government's hands.

With § 1014's elimination, the beneficiaries of shareholders of smaller business entities might be especially disadvantaged. While many large multinational corporations can and do "shift" their income to tax havens like Ireland where financial reporting is not transparent, the same might not be said for smaller business entities such as family-owned businesses.[42] Given the tax burdens faced by small family-owned businesses,[43] there is an argument that beneficiaries of small business owners deserve a tax "break." If one understands small businesses as tax-disadvantaged for keeping their income in the United States, then one small benefit that the government can give would be a stepped-up basis at death under § 1014.

---

[37] *See id.*

[38] *See* Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* (Nat'l Bureau of Econ. Rsch., Working Paper 20625, 2014) (available at https://gabriel-zucman.eu/files/SaezZucman2014.pdf [https://perma.cc/3YKN-5U73]) (providing that the middle class owns the same share of wealth as it did over 70 years ago).

[39] *See Policy Basics: Where Do Our Federal Tax Dollars Go?*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/policy-basics-where-do-our-federal-tax-dollars-go [https://perma.cc/L2DB-ZRQJ] (last visited Feb. 9, 2024).

[40] *See* Tara Seigel Bernard & Karl Russell, *The Middle-Class Crunch: A Look at 4 Family Budgets*, N.Y. TIMES (Oct. 3, 2019) (reporting that the middle class faces struggles like job pressures, seldom yearly raises, and rising costs).

[41] *See, e.g.*, *id.*

[42] *See* Thomas Wright & Gabriel Zucman, *The Exorbitant Tax Privilege* 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24983, 2018).

[43] William Dunkelberg, *Impact of Taxes on Small Business*, FORBES (Oct. 6, 2021, 3:06 PM), https://www.forbes.com/sites/williamdunkelberg/2021/10/06/impact-of-taxes-on-small-business/? [https://perma.cc/5HUE-3NAC].

A counter-intuitive argument in favor of retaining § 1014 is that the upper-middle class may rely more heavily on receiving stepped-up basis than the wealthiest taxpayers do. For instance, Jane and Jerry, the schoolteacher couple, may have a smaller financial portfolio compared to their next-door neighbors, insofar as their wealth is held mostly in their family home and retirement accounts. In contrast, the wealthier neighbors may have more varied assets, including foreign properties and trusts that are in low-tax or no-tax environments.[44] Indeed, the upper-class couple may already benefit from the lower rate of taxation on gains that result from the sale of capital assets.[45] To be sure, a top 1% individual may have a larger capital gain or loss on paper, but any particular gain or loss may have a larger impact on the lifestyle of an upper-middle class couple.

A revenue model built by the Tax Foundation suggests otherwise, though. According to that tax calculator, repeal of the step-up in basis rule would most heavily impact the top 1% of all taxpayers (the "1%").[46] While the data indicates a large aggregate tax for the 1%, this is simply because of their larger basket of appreciated assets. In other words, the increase in tax liability would not hurt the 1% as much as it would hurt Jane and Jerry. Of course, professionals and self-employed individuals of all income levels can benefit from organizing their activities through a corporation or LLC. The income of business entities is typically subject to lower tax rates compared to a W-2 salaried employee.[47] Thus, while the upper-middle class would be hurt by a repeal of § 1014, so would anyone other than a salaried employee with no savings.

A prime argument against elimination of § 1014's step-up in basis rule is the general prohibition on double-taxation.[48] That is,

---

[44] *See* Niels Johannesen et al., *The Offshore World According to FATCA: New Evidence on the Foreign Wealth of U.S. Households* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31055, 2023) (providing that 30% of foreign reported assets belong to households within the top 1%).

[45] *Tax Policy Center's Briefing Book: Key Elements of the U.S. Tax System*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-effect-lower-tax-rate-capital-gains [https://perma.cc/T5GK-5NV7] (last visited Feb. 3, 2024).

[46] *See* Li, *supra* note 27 (explaining that those in the top 1% percent would experience a negative effect more so than those in the top twenty, and greater, percentages).

[47] *See* SAEZ & ZUCMAN, *supra* note 25, at 107 (providing that lawyers, doctors, architects, and self-employees intentionally choose to operate as corporations, while salaried employees cannot do so).

[48] *See* Est. of Backemeyer v. Comm'r of Internal Revenue, 147 T.C. 526, 544 (2016) ("the provision for and maintenance of a stepped-up basis under section 1014 is a deliberate legislative choice by Congress to prevent double taxation").

without IRC § 1014, an appreciated asset held by a wealthy individual may be subjected to both estate tax and income tax on gains when the beneficiary subsequently sells inherited property. Importantly, the basic estate tax exemption amount in 2024 is over $13 million.[49] But if double-taxation is generally prohibited, it should be prohibited for all taxpayers.

The strongest argument in favor of replacing IRC § 1014 with a carry-over basis rule is that the government would likely receive increased revenue. It is possible, but not certain, that repealing IRC § 1014 could have the practical effect of instituting a minimum effective income tax rate (as opposed to the practically zero rate of taxation currently imposed on the 1%).[50] Considering that projections estimate that a 25% minimum tax rate would generate an extra $100 billion in revenue, the abolishment of IRC § 1014 likely would have an even greater return, absent other statistics, and would significantly increase revenue.[51] In particular, multinational corporations' revenue would be taxed in countries with higher tax rates in this scenario, preventing at least some income shifting.[52] At the same time, international tax lawyers will likely find avenues to avoid the United States' carry-over basis rules. On balance, eliminating IRC § 1014 would increase tax revenue, but it would hurt people who are upper class and even upper-middle class.

IV. STEP-UP IN BASIS IMPROPERLY BENEFITS CAPITAL, REDUCES TAX REVENUE, AND DISTORTS INVESTMENT DECISIONS *(Gigi McQuillan)*

From a tax policy perspective, providing a step-up in basis at death for appreciated assets is inefficient, exacerbates inequality between classes, contributes to market inefficiency, and comes at the cost of forgone tax revenue.

IRC § 1014 has the effect of artificially removing gain from the tax system, thus reducing government revenue.[53] In the case of ownership of shares of a corporation, the step-up in basis rules allow massive gains to pass to beneficiaries, tax-free, solely because the

---

[49] Rev. Proc. 2023-34, 2023-48 I.R.B. 1287.
[50] SAEZ & ZUCMAN, *supra* note 25, at 116 (arguing that countries should police their multi-national corporations to prevent tax avoidance).
[51] *Id.* at 117.
[52] *Id.* (stating "if such a remedial tax had been in place in 2016, U.S. companies would have booked fewer earnings in Bermuda and more in high-tax countries . . .").
[53] *See* I.R.C. § 1014.

original owner of the share passed away before selling it.[54] This is illogical because the death of the original owner does not impact the underlying valuation of the share, except in instances where the decedent occupies an influential role within the corporation.[55] Moreover, the "timeliness" of the original owner's death is inexplicably incentivized. Beneficiaries of decedents who die when the market is thriving are rewarded with higher basis than beneficiaries of decedents who pass away when the market is in a downturn.

The current income tax laws subject labor income to a higher tax rate than investment income.[56] Labor is taxed on a progressive tax structure through tax rates of ten to thirty-seven percent.[57] In contrast, capital gains on assets held longer than one year are subject to taxation at rates of zero to twenty percent.[58] At first glance, one may be tempted to argue that capital gains are derived from income already subject to labor taxation, but this is simply untrue. Taxation of capital gains is simply taxation of the profits derived from an investment; it is not taxation of the entire amount invested.[59] Moreover, capital losses are permitted, to an extent, to offset the amount of capital gains ultimately subject to taxation.[60] In light of this tax structure, allowing investors to receive an additional benefit in the form of stepped-up basis becomes redundant.

---

[54] Will Kenton, *Step-Up in Basis: Definition, How it Works for Inherited Property*, INVESTOPEDIA (Sept. 27, 2023), https://www.investopedia.com/terms/s/stepupinbasis.asp#toc-what-is-a-step-up-in-basis [https://perma.cc/U8HT-SAWV].

[55] *See, e.g.*, Timothy J. Quigley & Robert J. Campbell, Shareholder Perceptions of the Changing Impact of CEOs: Market Reactions to Unexpected CEO Deaths, 1950 – 2009, 38 STRATEGIC MGMT. J. 939, 947 (2017).

[56] *See* Christopher Ingraham, *For the First Time, Workers are Paying a Higher Tax Rate than Investors and Owners*, WASH. POST (Oct. 16, 2019, 6:00 AM), https://www.washingtonpost.com/business/2019/10/16/us-now-taxes-wages-higher-rate-than-capital-fueling-income-inequality-study-finds/ [https://perma.cc/RH3M-832E] (finding that "in 2018, labor income was taxed at a higher rate than capital income for the first time in modern U.S. history," and attributing this shift to the 2017 Tax Cuts and Jobs Act).

[57] *Federal Income Tax Rates and Brackets,* IRS (Feb. 7, 2024, 1:35 PM), https://www.irs.gov/filing/federal-income-tax-rates-and-brackets [https://perma.cc/3GKQ-8YKX].

[58] *Topic No. 409, Capital Gains and Losses*, IRS, https://www.irs.gov/taxtopics/tc409 [https://perma.cc/YD7G-VXK7] (last updated Jan. 30, 2024).

[59] I.R.C. § 1014(a)(1); Carol Warley et al., *Tax Issues that Arise When a Shareholder or Partner Dies*, THE TAX ADVISOR (Mar. 1, 2022), https://www.thetaxadviser.com/issues/2022/mar/tax-issues-shareholder-partner-dies.html [https://perma.cc/D5PM-MDS2].

[60] I.R.C. § 1211.

Individuals who derive most of their income from labor are subject to high income tax rates.[61] With respect to income distribution, the ratio of labor income to capital income decreases as wealth increases.[62] Americans in the bottom 90% of wealth derive 85% of their pre-tax income from labor, while the top 1% derives less than half of their pre-tax income from labor.[63]

Compounding inequality, individuals in the lower segment of income distribution are less likely to reap the benefits associated with the step-up in basis rule. Instead, the benefits primarily accrue to the top 20%.[64] To benefit from the step-up in basis, one must be the beneficiary of a decedent with appreciated assets to devise or bequeath. Beneficiaries of penniless decedents receive a § 1014 benefit in the amount equal to their inheritance—zero. The same principle applies in the instance of an individual liquidating assets. The individual who benefits from generational wealth may elect to sell inherited stock with a stepped-up basis, while reserving purchased stock with a lower basis for bequest to their own beneficiaries. In contrast, the individual who has inherited nothing is faced with only one option for liquidation — to sell stock that they themselves have purchased in the past without the possible benefit of step-up in basis. Therefore, the latter individual is subject to capital gains taxation on a larger gain.

The stepped-up basis rule contributes to market inefficiency when individuals are incentivized to devise or bequeath investments to their beneficiaries. Investors have a tax reason to maintain their investment if the value of the stock has increased since the time of initial purchase.[65] However, by constructively locking in one investment, investors are dissuaded from selling. While the initial investment may well have been a promising option, it is equally plausible that the forgone opportunities to sell and purchase different assets were more favorable.

Support for repealing stepped-up basis (thus rescinding the exacerbation of inequality that results from favoring sellers of inherited stock) has been garnered from both Democrats and Republicans.[66] This has the potential to positively impact market efficiency while resulting in additional tax revenue, as the

---

[61] *See* Ingraham, *supra* note 56.
[62] *See* SAEZ & ZUCMAN, *supra* note 25, at 97.
[63] *Id.*
[64] Li, *supra* note 27.
[65] *See* I.R.C. § 1014.
[66] *Closing the Stepped-Up Basis Loophole*, COMM. FOR A RESPONSIBLE FED. BUDGET (Nov. 10, 2023), https://www.crfb.org/blogs/closing-stepped-basis-loophole [https://perma.cc/LR39-XRNF].

realization of investment gains would no longer be disincentivized. Therefore, elimination of stepped-up basis best serves the interest of equality in tax policy.

V. CONCLUSION *(Bridget J. Crawford)*

These thoughtful perspectives on IRC § 1014 are concrete examples of the ways that a robust tax policy analysis requires a commitment to multiple principles at the same time. These include familiar ones like efficiency, equity, and administrability, but also the real-world human consequences of tax rules.[67] After all, taxpayers are not just mathematical totals; they are people with individual identities and situations that are highly relevant to the way they are treated for tax purposes.[68] In that sense, tax law implicates larger social and political questions that ultimately reveal the values of a particular legal system and society.[69] In the debate over stepped-up basis, one might be guided by several different concerns, such as the widening income and wealth inequality,[70] ease of administration,[71] and the economic consequences of tax rules that favor capital over labor.[72]

As a law professor, what makes Tax Policy a challenging subject to teach and study—and why I encourage my students to work out their ideas orally in class and through writing—is that

---

[67] *See* Anthony C. Infanti, *Tax ~~Equity~~*, 55 BUFF. L. REV. 1191 (2008) (referring to efficiency, equity and administrability as the "triad of tax policy concerns" and detailing the many ways that equity is a prime concern for critical tax scholars in particular).

[68] *See, e.g.*, Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITT. TAX REV. 1 (2005) (examining the estate tax consequences of the determination that one person is or is not a member of the "family" of another).

[69] *See generally* ANTHONY C. INFANTI, OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES 136 (2018) ("[T]he tax laws of different countries send unique messages about what and whom those countries value."); Anthony C. Infanti & Bridget J. Crawford, *Critical Tax Theory: Insights from the U.S. and Opportunities for All*, 51 AUSTL. TAX. REV. 81, 82 (2022) (commenting that "it should be unsurprising that [tax law] provides a portrait of society that reflects lines of dominance and privilege as well as of marginalization, discrimination, and subordination.").

[70] *See, e.g.*, Bridget J. Crawford & Wendy C. Gerzog, *Tax Benefits, Higher Education, and Race: A Gift Tax Proposal for Direct Tuition Payments*, 72 S.C. L. REV. 783, 788, 794, 801-02 (2021) (providing data on income and wealth inequality on the basis of race).

[71] *See* Lichtenberger discussion *supra* Part II.

[72] *See* William G. Gale & Semra Vignaux, *The Difference in How the Wealthy Make Money – and Pay Taxes*, BROOKINGS INST. (Sept. 7, 2023), https://www.brookings.edu/articles/the-difference-in-how-the-wealthy-make-money-and-pay-taxes/ [https://perma.cc/HF4V-HU5R].

perspectives on taxation do not map neatly onto pre-established, traditional political or even legal categories. Only through careful study, consideration, and engagement with others does one's own tax philosophy begin to emerge, ever tempered by the imperative to keep an open mind that views can change based on the context. The students at Haub Law embody these values and show that, as Justice Cardozo famously said, "[l]ife in all its fullness must supply the answer to the riddle" that is the federal tax law.[73] It is my honor to be their teacher, colleague, and now co-author.

---

[73] Welch v. Helvering, 290 U.S. 111, 115 (1933) (interpreting the term "ordinary" in the context of the business expense deduction).