

OPPORTUNISM ZONES

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ABSTRACT

In 2017, Congress adopted the Opportunity Zone, a powerful place-based economic development tool, as part of a major tax reform. Place-based economic development tools and strategies provide incentives to re-attract jobs and capital to areas where jobs and capital have fled. Investors in state-designated Opportunity Zone districts benefit from their mechanics: they are able to (1) defer capital gains on qualified investments; (2) step-up tax basis on invested funds; and (3) permanently avoid tax on investment appreciation. Proponents of the Opportunity Zone argued that these tax incentives will serve as an efficient way to direct investment dollars to poor areas. However, critics point out that such government interventions are stricken by corruption, abuse, and waste.

This Article analyzes and critiques the Opportunity Zone. It argues that, when compared to other place-based economic development tools, the Opportunity Zone is an extremely troublesome approach. I hone my analysis on three key dimensions: use, transparency, and participation. Focusing on those dimensions, I argue that the Opportunity Zone may well harm the very areas and individuals that they are supposed to benefit. When considering their potential to increase wealth and income inequality in particular, there is ample reason to be skeptical of the benefits of the Opportunity Zone.

Place-based approaches to economic development as such are not necessarily to blame. Rather, it is the Opportunity Zone itself, with its propensity to benefit investors and existing landowners at the expense of others, that needs reform. Accordingly, I explore proposals to restructure the Opportunity Zone. These proposals would limit the uses of invested

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funds, improve transparency to assess meaningful outcomes, and involve stakeholder groups through participation.

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I. INTRODUCTION

The Tax Cuts and Jobs Act of 2017¹ included a potentially lucrative, yet scantily discussed, new economic development tool. The “Opportunity Zone” program allows investors to allocate dollars to qualifying fund projects to defer and in some cases avoid paying tax on capital gains from investment activities.² Unsurprisingly, the Administration has touted the tool,³ claiming that \$100 billion would pour into impoverished census tracts.⁴ A year after the law’s passage, reports of overwhelming investor interest appeared to support this bold claim.⁵ Nearly two years after the enactment of the law, however, investments in Opportunity Zones have been far more modest

¹ Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (as codified in scattered sections of the I.R.C.).

² I.R.C. § 1400Z-2 (2018). For reporting on how investors are using the Opportunity Zone, see, for example, Jesse Drucker & Eric Lipton, *How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich*, N.Y. TIMES (Aug. 31 2019), <https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html> [<https://perma.cc/H3WE-WL4B>].

³ The White House, Remarks by President Trump in the State of the Union Address (Feb. 4, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-3> [<https://perma.cc/YCG9-P79F>] (“Jobs and investments are pouring into 9,000 previously neglected neighborhoods, thanks to opportunity zones . . .”).

⁴ See, e.g., Julia Manchester, *Mnuchin Predicts \$100B in Cap Investment from New Opportunity Zones*, HILL (D.C.) (Sept. 28, 2018), <https://thehill.com/hilltv/rising/408980-mnuchin-predicts-100b-in-cap-investment-from-new-opportunity-zones> [<https://perma.cc/5BTG-XA9C>] (quoting Treasury Secretary Mnuchin as saying “I think there’s going to be over \$100 billion dollars in private capital that will be invested in opportunity zones . . .”).

⁵ One investment fund reported raising as much money for its certified Opportunity Fund in seventeen hours as it did in its eleven-year history. Alex Nitkin, *Origin Opportunity Fund Raises \$105M in 17 Hours, Citing “Insane Amount Of Demand,”* REAL DEAL (Nov. 20, 2018, 1:30 PM), <https://therealdeal.com/chicago/2018/11/20/origin-opportunity-fund-raises-105m-in-17-hours-citing-insane-amount-of-demand/> [<https://perma.cc/R73M-DEHC>]; see also Diane Lupke, *Opportunity Zones: A Different Zone Opportunity*, 24 J. MULTISTATE TAX & INCENTIVES 24, 44 (2019) (“Early evidence suggests [that the Opportunity Zone has] potential to bring new money to the table not heretofore invested in distressed communities is already being realized.”).

than anticipated.⁶ Even these modest investments have not had the robust impact that proponents had promised.⁷

Place-based economic development strategies like the Opportunity Zone are not new.⁸ In fact, place-based economic development strategies emerged in the 1980s and 1990s as a market-based approach to solving complex social and economic issues. The mechanics of these strategies can vary, but most adopt a tax incentive policy-based approach.⁹

⁶ See Ruth Simon & Peter Grant, *Opportunity-Zone Funds Are Off to a Slow Start, Lagging Behind Heady Expectations*, WALL ST. J. (Oct. 22, 2019, 7:00 AM ET), <https://www.wsj.com/articles/opportunity-zone-funds-are-off-to-a-slow-start-lagging-behind-heady-expectations-11571742002> [<https://perma.cc/M5PP-867V>]. As of September 2020, there was \$12.05 billion in equity raised from voluntarily-reporting qualified opportunity funds. Opportunity Zones Resource Center, *Novogradac Opportunity Funds Listings Totals*, NOVOGRADAC, <https://www.novogradac.com/resource-centers/opportunity-zone-resource-center/opportunity-funds-listing> [<https://perma.cc/3N79-TMY6>].

⁷ See Simon and Grant *supra* note 6.

⁸ See *infra* Part II (describing “place-based” economic development tools leading up to and including the Opportunity Zone). A neoliberal belief in “free enterprise” as a goal unto itself has characterized place-based economic development policy since its inception in the 1980s. See TIMOTHY P.R. WEAVER, *BLAZING THE NEOLIBERAL TRAIL: URBAN POLITICAL DEVELOPMENT IN THE UNITED STATES AND THE UNITED KINGDOM* 25-27 (2016) (previewing the political shifts that led to bipartisan support in the United States for state enterprise zone laws).

⁹ Michelle D. Laysner has created a useful typology of place-based investment tax incentives. See Michelle D. Laysner, *A Typology of Place-Based Investment Tax Incentives*, 25 WASH. & LEE J. C.R. & SOC. JUST. 403, 411-42 (2019). Research supports the assertion that using the tax code to further a policy goal—developing poor neighborhoods—is more politically palatable because such tax incentives obscure the size of government spending. See, e.g., Jason Fichtner & Jacob Feldman, *When Are Tax Expenditures Really Spending? A Look at Tax Expenditures and Lessons from the Tax Reform Act of 1986*, at 4 (Mercatus Ctr. at George Mason Univ., Working Paper No. 11-45, 2011), https://www.mercatus.org/system/files/Tax_expenditures_FichtnerFeldman_WP1145_0.pdf [<https://perma.cc/A4FX-B484>]; Lauren Lambie-Hanson, *Addressing the Prevalence of Real Estate Investments in the New Markets Tax Credit Program* 7 (Fed. Reserve Bank of S.F. Cmty. Dev. Inv. Ctr., Working Paper 2008-04, 2008), <https://www.frbsf.org/community-development/files/wp08-041.pdf> [<https://perma.cc/E4YG-APKB>]. Yet, at this moment of awareness about income inequality resulting from law and policy decisions promoting racial segregation, there are good reasons to be skeptical of the benefits of the place-based tax incentives. The Tax Foundation reports that place-based incentive programs (1) redistribute wealth, as opposed to generating new economic activity, (2) subsidize development

Opportunity Zones are the most recent, and most hands-off, form of federal intervention into the economies of disadvantaged communities. Supporters of the Opportunity Zone suggest that these communities lack access to capital.¹⁰ They also suggest that investors, when presented with tax advantages, will deliver that missing capital.¹¹ Based on this logic, some lawmakers are arguing for doubling-down on Opportunity Zones as a response to the economic decline caused by the COVID-19 pandemic.¹²

However, as this Article argues, the success or failure of place-based economic development strategies depends not just on improving places, but also improving the lives of people living in those places.¹³ Essentially, Opportunity Zones allow investors who sell a preexisting asset to place the proceeds of the sale into a new investment in a qualifying fund.¹⁴ In exchange for this new qualifying fund investment, the investor receives favorable tax deferral on the gains

that would have occurred anyways, and (3) displace low-income residents by increasing property values and attracting wealthier, higher-skilled workers. SCOTT EASTMAN & NICOLE KAEDING TAX FOUND., FISCAL FACT NO. 630, OPPORTUNITY ZONES: WHAT WE KNOW AND WHAT WE DON'T (2019) <https://files.taxfoundation.org/20190107155914/Opportunity-Zones-What-We-Know-and-What-We-Don%E2%80%99t-FF-630.pdf> [<https://perma.cc/78BK-E5RS>].

¹⁰ See *infra* Section II.D; see also *Can Opportunity Zones Address Concerns in the Small Business Economy?: Hearing Before the H. Comm. on Small Bus.*, 116th Cong. 8 (2019) [hereinafter *Opportunity Zones Hearings*] (statement of Aaron Seybert, Managing Director of Social Investments, Krege Foundation) (discussing how most Opportunity Zone fund managers have focused on real estate).

¹¹ Indeed, the broadly-stated goal of the Opportunity Zone, a program lobbied for by tech billionaire Sean Parker, is to bring capital to urban and rural areas that need it. See, e.g., Steven Bertoni, *An Unlikely Group of Billionaires and Politicians Has Created the Most Unbelievable Tax Break Ever*, FORBES (July 18, 2018, 6:00 AM EDT), <https://www.forbes.com/sites/forbesdigitalcovers/2018/07/17/an-unlikely-group-of-billionaires-and-politicians-has-created-the-most-unbelievable-tax-break-ever/#f818a7b14855> [<https://perma.cc/GP8L-7MND>] (discussing how a belief in bringing capital to poor communities, and a \$1 million bet with billionaire Peter Thiel, motivated Parker to push for the Opportunity Zone program).

¹² See COVID-19-Impacted Small Business Opportunity Zone Act, H.R. 6529, 116th Cong. (2020).

¹³ See *infra* Section II.A (discussing the framework of “community economic development”).

¹⁴ See I.R.C. § 1400Z-2(a) (2018).

from the sale of the asset.¹⁵ As a result, investors are rewarded financially for selling one asset and moving capital into a qualifying fund in a designated low-income community. But while this policy mechanism may benefit investors, it is in no way guaranteed to benefit individuals living in low-income communities.

Consider two different examples of how the Opportunity Zone incentive could work for investors and communities. First, a best-case scenario: Suppose that, in 1978, a Kansas-based contractor created a business specializing in metal construction used for aircraft hangers, commercial buildings, and concrete slab foundations.¹⁶ Suppose further that, in 2019, the owner retired and sold the business to a purchaser for \$10 million in cash. This puts the seller into the highest federal income tax bracket, currently 37%. Also, the sales price would be subject to federal capital gains tax of 20%, racking up a tax bill of \$2 million.¹⁷

The seller, hoping to avoid the \$2 million capital gains tax, invested the full \$10 million into a Qualified Opportunity Fund. The Fund, in turn, invested the \$10 million into renovating a currently vacant building in a designated neighborhood in Topeka to house a health clinic and commercial kitchen incubator on the ground floor, as well as apartments for mixed-income families above. As long as the building is not sold for ten years, and all other formal requirements are met, assuming the building appreciates at 12% a year,¹⁸ the seller

¹⁵ *Id.* § 1400Z-2(a)-(c), (e).

¹⁶ The facts of this hypothetical are adapted from a business sale listing in Texas posted on a digital business purchase and sale platform. See *Texas Metal Building Manufacturer*, BIZQUEST, <https://www.bizquest.com/business-for-sale/texas-metal-building-manufacturer/BW1671958/?q=YTE9NTAwMDAwMSZsdHlwZT00MCZvPTEmYTI9OTk5OTk5OTk5&psn=14> [<https://perma.cc/8PH8-S42J>].

¹⁷ See I.R.C. § 1 (2018). In Kansas, capital gains are taxed as regular income at a top rate of 5.7%. See KAN. STAT. § 79-3276(a) (2020); *id.* § 79-32,110.

¹⁸ This is not the most ambitious return for real estate investments; one digital investing platform in commercial real estate advertises an 18%-plus historical return on its investments. See CADRE, <https://www.cadre.com> [<https://perma.cc/AHD3-LB7U>] (stating on its homepage historical returns). Of course, the average return for various classes of investment-grade commercial real estate has varied over time. See Jeff Fisher, Data, Research & Education Consultant, Nat'l Council of Real Est. Inv. Fiduciaries (NCREIF), & Doug Poutasse, Exec. Vice President, Head of Strategy & Research, Bentall Kennedy, First Quarter

will receive over \$9.66 million in present value from permanently excluding capital gains, deferring capital gains, and depreciation.¹⁹ This additional 9.65% per-year return generated by tax benefits is on top of returns earned through rent, and the increased price of the building and underlying land.²⁰

In a city like Topeka, which is so hungry for new residents that it are willing to pay, among providing other advantages, up to \$15,000 to people who relocate there,²¹ a residential or commercial development, such as the one described above, can result in a significant economic impact. For example, a redeveloped or new building might increase property prices in a neighborhood.²² The effects of the COVID-19 pandemic on property prices notwithstanding, one pre-COVID-19 study of Opportunity Zone designated neighborhoods showed a 13.5% price increase for properties that could be redeveloped and a 9.6% price increase for vacant development sites.²³ A redeveloped or new building can lead to construction jobs, as well as

2019 NCREIF Indices Review (May 9, 2019), <https://www.ncreif.org/globalassets/public-site/webinar--education-page-images/webinars/webinar-slides-1q-2019-v-3.pdf> [<https://perma.cc/UPG5-KLV2>].

¹⁹ \$318,000 in value from permanently excluding \$1 million in capital gains, \$726,332 in value from deferring taxes on remaining \$9 million capital gain, \$4.5 million in value from a \$10 million bonus in depreciation, and \$4.1 million in avoided tax value from permanently excluding taxes from Qualified Opportunity Zone gains. Bernhard Capital Partners, Financial Model (on file with the author).

²⁰ This hypothetical “best-case scenario” assumes that the seller’s investment is eligible for all four of the Opportunity Zone tax benefits: permanent exclusion of a portion of taxes on capital gains, deferral of taxes on remaining capital gains, bonus depreciation, and permanent exclusion of taxes on Qualified Opportunity Fund gains. *See generally* I.R.C. § 1400Z (2018).

²¹ *See* GREATER TOPEKA PARTNERSHIP, <https://choosetopeka.com/apply> [<https://perma.cc/RD38-8E74>] (inviting prospective relocators to apply for Topeka’s program that pays new residents who stay at least one year up to \$15,000 in conjunction with employers who hire those workers).

²² *Cf.* Zhenguo Lin, Eric Rosenblatt & Vincent W. Yao, *Spillover Effects of Foreclosures on Neighborhood Property Values*, 38 J. REAL ESTATE FIN. & ECON. 387, 390-92 (2009) (asserting—and later testing—the potential impact of neighborhood-area foreclosures on the price of homes in those neighborhoods that were not subject to foreclosure proceedings).

²³ Alan Sage, Mike Langen & Alex Van de Minne, *Where is the Opportunity in Opportunity Zones? Early Indicators of the Opportunity Zone Program’s Impact on Commercial Property Prices 2* (last revised Oct. 15, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3385502> [<https://perma.cc/PKH2-SMMV>].

new customers for surrounding businesses.²⁴ In this example, the vision of Opportunity Zone economic development appears rosy. The neighborhood gains a new health clinic, space for small business support, and affordable housing. The local government collects new property tax revenue. And the investor has the chance to increase their wealth through market-based risk.²⁵ Everybody wins.

Now consider a different example. Suppose a real estate development company owns a number of parking lots in the central business district in Portland, Oregon. Despite the fact that Portland's economy is booming, all of Portland's downtown area was designated as a Qualified Opportunity Zone under Section 1400Z-1 of the Internal Revenue Code during the 2018 designation process.²⁶ Although the real-estate development company was already likely to continue development prior the Opportunity Zone program, it now plans a number of new projects in several downtown Qualified Opportunity Zones, including a \$206 million tower with ground floor retail, six floors of offices, and 200 luxury apartments.²⁷ To fund these projects, the development company solicits investments from Qualified Opportunity Funds. Using the same financial model discussed above, the

²⁴ Some argue that job growth in distressed areas is particularly beneficial because, among other things, "the local workers who get jobs will value the jobs more relative to their opportunity costs." Timothy Bartik, *Should Place-Based Jobs Policies Be Used to Help Distressed Communities?* 16 (Upjohn Inst., Working Paper 19-308, 2019), https://research.upjohn.org/cgi/viewcontent.cgi?article=1326&context=up_workingpapers [<https://perma.cc/G7YB-728Q>].

²⁵ This example assumes a certain level of local-resident benefit from such a redevelopment. However, the specific amount of benefit and the process through which such projects are approved is not analyzed with any specificity.

²⁶ The Portland designation was the result of community fears of gentrification. See *infra* Section IV.B.2. Although, in this instance, community involvement excluded neighborhoods that may have benefitted from designation, greater participation is needed so long as it is linked with more use restrictions and transparency obligations to avoid this type of waste.

²⁷ This account is adapted from an article detailing the high-end residential development spawned by Portland's Opportunity Zone designation. See Noah Buhayar & Lauren Leatherby, *Welcome to Tax Breaklandia*, BLOOMBERG BUSINESSWEEK, <https://www.bloomberg.com/graphics/2019-portland-opportunity-zones> [<https://perma.cc/T8HJ-2WXXV>] (describing the role of Opportunity Zone incentives in constructing the "finest for-rent product" in Portland's core business district). Amenities in some such residential development included a yoga studio, roof deck, and cantilevered swimming pool on the eighth floor. *Id.*

\$206 million project would be eligible for up to \$198.8 million in Opportunity Zone subsidies.²⁸

The Topeka example appears reasonable—a health clinic, kitchen incubator for small businesses, and affordable housing are important real estate uses. Oftentimes, such developments do not occur in the marketplace. But the luxury high-rise example in Portland, on the other hand, exemplifies the extractive nature of the Opportunity Zone. An apartment complex that would have been built by market forces alone enjoys an almost 100% subsidy with little in additional public benefit derived from the subsidy. Further, the Portland subsidy is not only a waste of public resources; it may cause serious harms to residents of the affected neighborhoods.²⁹ Gentrification and displacement of long-time residents is a likely collateral consequence to Opportunity Zone investments in certain neighborhoods.³⁰ In fact, new businesses and real estate developments created as a result of Opportunity Zones even harm small, local family businesses—the very ones which the tool was enacted to aid.³¹ And the disconnect between in-

²⁸ Figures are based on a possible 96.5% additional return, using a best-case scenario where the project qualifies for all of the incentives offered under the Opportunity Zone.

²⁹ Capital injected into a community is not synonymous with capital allocated for the benefit of the general public: for investors, the Opportunity Zone may be just another tax-reduction vehicle.

³⁰ Data about gentrification caused by Opportunity Zones has yet to be collected. However, one report analyzing data from the mid-2010s found that “[a]lmost 69% of the neighborhoods identified as gentrifying in the 2013-2017 data were either within or adjacent to an [Opportunity Zone].” Jason Richardson, Bruce Mitchell & Jad Eblebi, *Gentrification and Disinvestment 2020: Do Opportunity Zones Benefit or Gentrify Low-Income Neighborhoods*, NAT’L COMMUNITY REINVESTMENT COALITION 12 (2020), https://nrcr.org/gentrification20/?mc_cid=2badb6e936&mc_eid=4ceb39fa13 [<https://perma.cc/FB9C-MQRW>].

³¹ As a result, it is not surprising that observers are concerned about the Opportunity Zone benefiting luxury apartment developers, especially if those projects would be built regardless of the subsidy. *See, e.g.*, Sophie Quinton, *Luxury Apartments Get the Tax Breaks Meant to Boost Low-Income Areas*, PEW TRUSTS (Sept. 25, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2019/09/25/luxury-apartments-get-the-tax-breaks-meant-to-boost-low-income-areas> [<https://perma.cc/663X-PD4G>]; *cf.* Nitkin, *supra* note 5 (noting that a fund in Chicago would have been interested in the projects regardless of the Opportunity Zone incentives).

vestors seeking tax benefits and residents seeking better neighborhoods is exacerbated by the lack of a requirement that Opportunity Zone projects create tangible economic benefits to the community.³²

In the Portland example, the program—and the capture-oriented development as illustrated by the Portland case is more effectively described as an *Opportunism Zone*. Developments occurring in Opportunism Zones often lack tangible economic benefits needed to improve the lives of those living in poverty.³³ Rather, such strategies frequently involve the fleecing of public coffers by investor-opportunists, creating wealth for themselves at the expense of the individuals, families, small business owners in low-income neighborhoods. Opportunism Zones are ugly—marring the potential for hope embodied in community-focused, place-based economic development strategies.

Opportunity Zones depart from other place-based economic development laws in novel, yet troubling ways. I identify and analyze three pillars of place-based economic development: use, transparency, and participation. The first pillar, *use*, focuses on whether a policy promotes businesses and projects that are actually useful to community residents. When Opportunity Zones are viewed from a use perspective, they demonstrate an alarming lack of project specificity and control that may negatively impact the designated neighborhoods. Analysis along the second pillar, *transparency*, reveals how the minimal reporting requirements make it difficult to determine what benefits, if any, Opportunity Zone investments are having. A focus on the third pillar, *participation*, demonstrates the total absence of public or governmental involvement in deciding which projects are funded in what neighborhoods. Together, these three aspects present a method of critiquing the Opportunity Zone that aligns with the views advanced by proponents of “community economic development,” a

³² The details of the Opportunity Zone reveal distributional inequalities as federal tax subsidies flow primarily to investors and current landowners. Benefits to residents of low-income areas are likely to be indirect, and many multiples less lucrative.

³³ In addition, the most productive metropolitan areas in the country are most likely to attract investor dollars since incentives increase the more projects grow in value, which is more likely to occur in areas of greater growth. For a discussion of the concentration of productive economic activity in cities and metropolitan regions, see generally Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537 (2019).

view of economic development strategies that aims to improve the lives of the people living in places that lag economically.³⁴

This novel, tripartite Use-Transparency-Participation framework is valuable in a number of ways. Place-based economic development strategies are usually classified by regulators on the basis of the intended uses of the programs; for example, the Low-Income Housing Tax Credit is limited solely to affordable housing creation.³⁵ By focusing in on such restrictions, we can see the underlying goals and objectives behind particular place-based economic strategies. Transparency, with respect to how decisions are made and the data that those decisions generate, is vital in determining the success or failure of a particular tool. The participation frame offers insight into stakeholder engagement. The New Markets Tax Credit, for instance, requires projects to be financed through business entities certified by the U.S. Treasury as having a primary mission to serve and be accountable to low-income communities.³⁶ Community Development Block Grants, on the other hand, are distributed through the involvement of state and municipal governments with local resident engagement.³⁷ More than any previous place-based economic development tool, Opportunity Zones lack restrictions based use, transparency, and participation.³⁸

But the Use-Transparency-Participation framework also reveals that a number of the flaws marring Opportunity Zones are potentially avoidable.³⁹ Some of these flaws mirror other place-based economic development strategies, while others are new and different. A “community economic development” approach is in contrast to a

³⁴ For a useful discussion of community economic development, see, for example, Scott L. Cummings, *Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001). A fourth dimension of critique, which is presently subsumed within my transparency analysis of zone designation, is that several zones that have received designation are not, and were not, actually distressed. Such zones could receive the bulk of investment dollars flowing to zones. For the purposes of this research, I will treat designation issues as a component of transparency. Though, I note here that future research could add such designation as an independent aspect for analysis.

³⁵ See *infra* Section II.C.2.

³⁶ *Id.*

³⁷ See *infra* Section II.B.

³⁸ See *infra* Section III.

³⁹ See *Opportunity Zones Hearings*, *supra* note 10, at 2 (statement of Rep. Andy Kim, Chairman, H. Subcomm. on Econ. Growth) (stating, with respect to the Opportunity Zone, that “investors, fund managers, and real estate developers benefit but there does not seem to be much benefit to the broader community”).

narrower economic view, which may view both the Topeka and Portland examples as equally successful by considering investment and economic growth as the sole end of development.

This Article proceeds as follows. Part II analyzes the evolution of governmental efforts to intervene in the economies of specific, disadvantaged places. Tax is the primary field where such laws are adopted, with immigration law, through the employer-based fifth preference, added an additional place-based economic development tool in the 1990s. Over the course of the last century, such interventions have transitioned from a top-down, government-led approach, to a hands-off, market-based approach. The Opportunity Zone represents the culmination of this development as the most extreme market-based approach yet.

Part III analyzes the Opportunism Zone through the Use-Transparency-Participation framework; in so doing, it unmaskes the program as a tool to benefit investors and existing landowners.⁴⁰ With respect to the use prong, Opportunism Zones *might* justify some amount of public expense if those resources increased funding toward public goods, such as affordable housing units,⁴¹ or community-based infrastructure.⁴² By failing to consider those public places which benefit residents but offer minimal value to investors, however, the law ignores the use value that real property has to residents.⁴³ As such,

⁴⁰ See *infra* Section II.D.

⁴¹ See, e.g., *Opportunity Zone Investments Create Affordable Homes, Support Community Revitalization*, ECON. INNOVATION GROUP (Nov. 20, 2019), <https://eig.org/news/opportunity-zone-investments-create-affordable-homes-support-community-revitalization-2> [<https://perma.cc/ZB2G-ZSQ2>]. The work of Lee Ann Fennell highlights the challenges and pitfalls of crafting a policy response to address the “lumpiness” of legal housing opinions. See. LEE ANN FENNEL, LUMPS AND SLICING 162-71 (2019).

⁴² For one proposal to support community-based infrastructure, see Michelle D. Layser, *How Place-Based Tax Incentives Can Reduce Geographic Inequality*, TAX L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516469 [<https://perma.cc/3UWB-YHVD>].

⁴³ Many theorists have take two concepts of value in economics as central: exchange value and use value. See, e.g., David I. Stern, *Use Value, Exchange Value, and Resource Scarcity*, 27 ENERGY POL’Y 469, 469-70, 472-73 (1999) (defining the two concepts and discussing their relation to scarcity). Sociologist Harvey has discussed the relationship between use value and place. See, e.g. Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309, 328 (1976); cf. *id.* at 310 (“[T]he very essence of a locality is its operation as a growth machine.”). For a discussion of the tension between owners who see the city

Opportunism Zones place exchange value and use value in tension.⁴⁴ With respect to the transparency prong, Opportunism Zones' lack of transparency creates moments ripe for political pandering.⁴⁵ In particular, when state governors draw zone boundaries, they have the power to favor certain areas over others.⁴⁶ The boundary-drawing process is susceptible to the lobbying efforts of those who stand to benefit from the inclusion of certain neighborhoods.⁴⁷ Further, the total absence of any transparency beyond the minimal disclosures contained in private

through the lens of exchange value and residents who see the city through the lens of use value, see JOHN LOGAN & HARVEY MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 2* (1987) ("The sharpest contrast (and the most important in this book) is between residents, who use place to satisfy essential needs of life, and entrepreneurs, who strive for financial return, ordinarily achieved by intensifying the use to which their property is put.").

⁴⁴ The theorization and definition of exchange and use value is typically associated with Karl Marx. See, e.g., KARL MARX, *Chapter 1: The Commodity Sections 1, 2, and 4*, in *SELECTED WRITINGS* 243 (Lawrence H. Simon ed., Hackett Publ'g Co. 1994) (theorizing this distinction).

⁴⁵ New York Times reporting has revealed how wealthy individuals close to the Trump Administration have influenced zone boundary selection and are benefitting from Opportunism Zones. See generally Eric Lipton & Jesse Drucker, *Lawmakers Increase Criticism of 'Opportunity Zone' Tax Break*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/business/opportunity-zones-congress-criticism.html?module=inline> [<https://perma.cc/N9HV-NEUL>] (cataloguing how legislators have reacted to various Times revelations). Scholars at the Cato Institute have criticized Opportunity Zones because they create loopholes, market distortions, and incentives to lobby. Chris Edwards, *More Opportunity Zone Cronyism*, CATO INST. (Oct. 28, 2019, 4:45 PM), <https://www.cato.org/blog/more-opportunity-zone-cronyism> [<https://perma.cc/44GY-SFTA>] (using the occasion of a New York Times investigation to collect links to the Cato Institute's criticisms).

⁴⁶ See, e.g. Ofer Eldar & Chelsea Garber, *Does Government Play Favorites? Evidence from Opportunity Zones* 26 (Duke Law Sch., Public Law & Legal Theory Series No. 2020-28, last revised Sept. 2, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463541 [<https://perma.cc/KEV2-KV4V>] (stating that the authors' empirical evidence supports the conclusion that there is "robust evidence" suggesting that, when drawing Opportunity Zone boundaries, governors favored the interests of their "political supporters and investors that contributed to their campaign[s]").

⁴⁷ See, e.g., Eddie Small, *How a Small Stretch of Land on the Far West Became an Opportunity Zone*, REAL DEAL (Sept. 10, 2019, 7:00 AM), <https://therealdeal.com/2019/09/10/how-a-small-stretch-of-land-on-the-far-west-side-became-an-opportunity-zone/> [<https://perma.cc/P7HD-8EP7>] (describing the efforts of a large landlord to secure Opportunity Zone designation for a tract that contained land it sought to develop).

tax forms render claims of success essentially incapable of substantiation.⁴⁸ Finally, Opportunity Zones' high barriers to entry mean that many of those within the affected communities lack a meaningful chance to participate in the program.⁴⁹

In Part IV, I suggest potential fixes in accordance with the Use-Transparency-Participation framework. With respect to use, there have been a variety of promising proposals at the federal,⁵⁰ state,⁵¹ and local⁵² levels that would shift the focus of investments from exchange value to use value. These proposals would better ensure that the targeted communities actually stand to benefit from the investments.⁵³ For the transparency prong, reforms to open up the designation process and enhance annual reporting requirements would mitigate corruption and enable meaningful evaluations of the program's

⁴⁸ Notably, more robust reporting requirements were stripped from the final bill. *Compare* Investing in Opportunity Act, S. 293, 115th Cong. § 2(c) (2017) (establishing periodic reporting requirements), *with* Tax Cuts and Jobs Act, H.R. 1, 115th Cong. § 13823 (as enrolled Dec. 21, 2017) (enacted) (containing no such requirements). There has been a move to reimpose these requirements. *See* S. 1344, 116th Cong. (2019); *see also* Cory Booker, U.S. Sen. for N.J., *Booker, Scott, Hassan, Young Introduce Bipartisan Bill to Strengthen Reporting Requirements for Opportunity Zone Tax Incentive* (May 8, 2019), <https://www.booker.senate.gov/news/press/booker-scott-hassan-young-introduce-bipartisan-bill-to-strengthen-reporting-requirements-for-opportunity-zone-tax-incentive> [<https://perma.cc/E7WF-6R2R>] (announcing the introduction of S. 1344, and claiming that it would restore the “critical safeguards[] which were included in the original Investing in Opportunity Act”).

⁴⁹ *See infra* Section III.C.

⁵⁰ U.S. Senator Ron Wyden of Oregon has proposed the “Opportunity Zone Reporting and Reform Act,” to impose reporting requirements and to restrict zones to exclude high-income areas designated in the initial zone selection, among other reforms. S. 2787, 116th Cong. (2019). This is not the first reform bill suggesting the Opportunity Zone investments be reported. *See* S. 1344. The sentiment of at least one lawmaker is that reform is needed or, in the absence of reform, total elimination is required. Lipton & Drucker, *supra* note 45.

⁵¹ *See, e.g.*, H.R. 4010, 80th Leg. Assemb., Reg. Sess., § 6(1)-(2) (Ore. A-Engrossed Feb. 24, 2020) (calling on the “Legislative Revenue Officer [to] study the operation, benefits, impact, and effectiveness of the federal opportunity zone program in Oregon,” and stipulating that that inquiry be conducted in consultation with various stakeholder groups).

⁵² For example, the City of Boulder, Colorado created an Opportunity Zone overlay district preventing the demolition of attached dwelling units in the designated census tract 122.03. *See* BOULDER, COLO. MUN. CODE tit. 9, ch. 3 § 9-3-12 (2019).

⁵³ *See infra* Section IV.A.

performance.⁵⁴ For the participation prong, reforms to open up the process to community development entities and local government bodies would ensure that members of the community have a chance to shape and benefit from the investments in their neighborhoods.⁵⁵

This Article contributes to the growing Opportunity Zone literature by arguing that Opportunity Zone incentives are for the benefit of the *opportunists*—the investors, developers, existing landowners, and the consultants and experts advising them—who stand to enjoy a windfall. The political justifications for Opportunity Zone enactment—improving impoverished areas—are merely incidental to the tax benefits posed to wealthy investors by the legislation’s mechanics. Without key reforms that draw from a community-based economic development approach, Opportunism Zones will hurt the individuals and communities they purport to help.

II. GOVERNMENT ECONOMIC DEVELOPMENT INTERVENTIONS IN PLACE

In order to analyze the design of the Opportunity Zone tool,⁵⁶ and make assertions regarding how best to judge its effectiveness, it is important to understand the recent history of government economic development interventions in particular places.⁵⁷ Government devel-

⁵⁴ See *infra* Section IV.B.

⁵⁵ See *infra* Section IV.C.

⁵⁶ In referring to the Opportunity Zone as a “tool” and not a “program” the author adopts the language of Bruce Katz and Jeremy Nowak. Bruce Katz and Jeremy Nowak, *Guiding Principles for Opportunity Zones*, GOVERNANCE PROJECT 4, https://www.thenewlocalism.com/wp-content/uploads/2018/03/Guiding-Principles-for-Opportunity-Zones_TheNewLocalism_March92018.pdf [<https://perma.cc/4JYA-FTA8>] (noting that tax incentives like the Opportunity Zone are but one economic development tool among many).

⁵⁷ Broadly, economists have argued that local governments compete for mobile residents by adjusting tax burdens and services offered in specific locations. See, e.g., Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (“[T]he consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods.”). Relatedly, governments, especially at the local level, intervene in particular locations to spur economic development. See, e.g., Martin E. Gold, *Economic Development Projects: A Perspective*, 19 URB. L. 193, 199-201 (1987) (discussing state and local economic development tools and constraints). Economic development strategies come in many different policy flavors. See, e.g., Peter R. Pitegoff, *Community Development*

opment interventions typically occur on a spectrum of two mechanisms at opposite extremes. On one end of the spectrum are large-scale, government-funded infrastructure or other public spending projects.⁵⁸ New Deal era interventions in the economy were historic in impact and in the creation of the federal administrative state, and also weak with respect to local participation and accountability.⁵⁹

On the other end of the spectrum, government interventions to develop the economy of particular places have, in recent years, shifted to tax incentives or outright tax abatements.⁶⁰ Place-based economic development tax incentives—or tax incentives tied to the development of specific areas—exist in a number of types, and are varied at the state and local level.⁶¹ Such legal tools focus on particular neighborhoods and census tracts with markers like high poverty and high

Finance and Economic Justice, in LEGAL SCHOLARSHIP FOR THE URBAN CORE: FROM THE GROUND UP, 89, 89-107 (Peter Enrich & Rashmi Dyal-Chand, eds., 2019) (providing a historical survey of select economic development policy). Peter Pitegoff contrasts traditional economic development with *community* economic development, the latter treating community stakeholders as partners and agents in economic development. *Id.* at 91-92 (drawing on the work of William Simon to present four core principles of the community economic development movement: “community as beneficiary of economic development,” “community as agent” in economic development activity, “constraint on property rights” through the involvement of charitable entities, and “the imperative of local participation” (quoting and citing WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT 76-78, 113, 143, 168 (2001) (internal quotation marks omitted)). The theory behind the Community Economic Development movement itself is a more recent development, though it has its roots in earlier political movements. *See id.* at 90-96; *cf.* Cummings, *supra* note 34 (honing in on “the ascendan[t] [] market-based CED” as the object of critique).

⁵⁸ *See* Pitegoff, *supra* note 57, at 5 (describing President Franklin D. Roosevelt’s “New Deal” policies as signaling a sea change in rural and urban federal economic development policies).

⁵⁹ *See id.* at 5.

⁶⁰ *See, e.g.*, RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 46-51 (2016) (challenging the notion that subnational governments ought to be setting industrial policy); Edward W. De Barbieri, *Lawmakers as Job Buyers*, 88 FORDHAM L. REV. 15, 18 (2019) (discussing how lawmakers, particularly at the state and local level, compete by allocating tax incentives to influence business location decisions). As large-scale, government-backed, Keynesian-style spending has lost favor, pro-market, neoliberal tax incentives have proliferated in urban economic development policy both in the U.S. and in the U.K. *See* Weaver, *supra* note 8, at 25-27.

⁶¹ *See* Michelle D. Layser, *How Do Place-Based Investment Tax Incentives Target Low-Income Communities? A Multi-State Survey of Enterprise Zone Tax Incentives*

unemployment.⁶² In recent market-based examples, however, wealthy investors are often the primary beneficiaries when the stated purposes of the government's intervention are to benefit the economy of the designated area.⁶³

Opportunity Zones are best understood as the culmination of a multi-decade evolution of place-based economic development strategies and the ideologies underlying such tools. The historical description and analysis presented here reveal a shift in place-based economic development tools toward an embrace of the free market. Opportunity Zones exemplify the worst tendencies of these recent market-based approaches.

This Part begins with a discussion of justifications for economic development policy and the normative values of a community-based approach that ought to undergird interventions in local economies. Next, the Part addresses large-scale government interventions in the economies of places and the issues presented by such centralized exercise of power and control. Then, it highlights and evaluates tools like the Community Development Block Grant that overcame some of the major issues of the top-down model by decentralizing power. The Part then examines recent programs like the EB-5 immigration regime

(Univ. of Ill. Coll. of Law, Legal Studies Research Paper No. 19-29, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3381243 [<https://perma.cc/VE86-E4RW>] (cataloguing the variation of place-based economic development tax incentives at the state level).

⁶² The federal New Markets Tax Credit program, for instance, allows for tax incentives in areas with at least 20% of individuals at or below the poverty rate. I.R.C. § 45D(e)(1)(A) (2018). Jurisdiction-wide tax incentives not tied to particular areas often focus explicitly on the creation or retention of jobs. *See, e.g.*, TIMOTHY J. BARTIK, W. E. UPJOHN INST. FOR EMP'T RESEARCH, A NEW PANEL DATABASE ON BUSINESS INCENTIVES FOR ECONOMIC DEVELOPMENT OFFERED BY STATE AND LOCAL GOVERNMENTS IN THE UNITED STATES 1 (2017), <https://research.upjohn.org/cgi/viewcontent.cgi?article=1228&context=reports> [<https://perma.cc/AK9M-NBAD>] (discussing job creation tax credits).

⁶³ *See* Drucker & Lipton, *supra* note 2; *see also* Editorial, *The Investor Visa Program Should Be Scrapped*, BLOOMBERG (Mar. 22, 2018), <https://www.bloomberg.com/opinion/articles/2018-03-22/the-eb-5-investor-visa-program-deserves-to-be-scrapped> [<https://perma.cc/G69H-VW6D>] (arguing for immigration based on talent and experience, and even auctioning of green cards instead of the current system of selling visas to wealthy foreign investors in commercial real estate). In addition, such laws typically lack a private right of action to sue to stop benefits extended under programs to develop particular places.

and the Low-Income Housing Tax Credit, which show decentralization has gone too far. Finally, this Part introduces the Opportunity Zone as the most extreme instantiation of the decentralizing principle.

A. Economic Development Policy and Values

A guiding principle underlying economic development is that governmental interventions in the economies of particular places ought to be limited to creating particular real estate that is both necessary and will not otherwise be constructed by market participants. Michelle D. Layser discusses the need for place-based economic development interventions as a response to spatial mismatch, meaning that areas of high unemployment result from a mismatch between low-skilled workers and the dearth of job opportunities available to them.⁶⁴ The challenge in crafting an ideal economic development policy is to take account of market forces at play, their limitations, and areas where market forces are inadequate at achieving economic development.

Economic development strategies should embody certain values, including productivity, transparency, and participation of local residents. Such normative values for place-based economic development strategies align with those articulated in the community economic development movement practice and theory.⁶⁵ With respect to productivity, development activities should fill market gaps by, for example, incentivizing housing creation for low-income individuals in places where there is an insufficient supply of affordable housing. With respect to transparency, being clear about the intended beneficiaries of such program, and what economic benefits they are receiving, is important. With respect to participation, an ability for local residents to offer perspective on their unique needs is necessary. Place-based economic development strategies have not always kept these values in focus.

⁶⁴ See Layser, *supra* note 42 at 15-16.

⁶⁵ For recent explorations of community economic development literature, see Priya Baskaran, Renee Hatcher & Lynnise E. Phillips Pantin, *Building Bridges: Examining Race and Privilege in Community Economic Development*, 28 J. Affordable Housing & Community Dev. L. 203 (2019); Scott L. Cummings et al., *Community Economic Development Is Access to Justice*, 27 J. Affordable Housing & Community Dev. L. 463 (2019); Peter Pitegoff et al., *Community Development Law and Economic Justice—Why Law Matters*, 26 J. Affordable Housing & Community Dev. L. 31 (2017).

B. Large-scale Government Interventions in Place-Based Economic Development

For much of the early twentieth century, economic development policy was characterized by large-scale public investment.⁶⁶ The concentration of wealth in private hands at the start of the 1900s led to massive market-regulatory reforms that shifted power to government.⁶⁷ Scholars like K. Sabeel Rahman have pointed to the Gilded Age and efforts of reformers like Louis Brandeis to hold private corporate power accountable through antitrust, public utility regulation, and the offering of public options, including rural electrification cooperatives.⁶⁸ Through the large-scale government interventions of the New Deal, the federal government used this consolidated power and resources to create economic opportunity.⁶⁹ Notable examples of such large-scale interventions include the Tennessee Valley Authority, which radically transformed underdeveloped rural areas through the construction of a series of dams for electrification, public housing,

⁶⁶ See Pitegoff, *supra* note 57, at 92-93.

⁶⁷ K. Sabeel Rahman, *Challenging the New Curse of Bigness*, AM. PROSPECT (Nov. 29, 2016), <https://prospect.org/economy/challenging-new-curse-bigness/> [<https://perma.cc/Z73Q-T97K>].

⁶⁸ *Id.* Rahman applies lessons learned from the first Gilded Age to regulating the “New Gilded Age.” K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2016).

⁶⁹ President Franklin D. Roosevelt in 1944 outlined a Second Bill of Rights in his State of the Union Address. Franklin D. Roosevelt, *State of the Union Message to Congress* (Jan. 11, 1944). President Roosevelt’s notion of an economic bill of rights was designed to protect individuals from the vagaries of the market. See Weaver, *supra* note 8, at 13. Among those economic rights articulated by Roosevelt were a right to employment, a decent home, adequate medical care, protection from economic fears, and a good education. See Roosevelt, *supra*.

and adopting significant employment initiatives.⁷⁰ Similarly, the location of large Department of Defense contractors significantly transformed the economies of numerous localities.⁷¹

These kinds of top-down approaches to federal economic development continued through the 1950s, but were accompanied by massive flaws, including racial segregation.⁷² Post-World War II-era urban redevelopment efforts furthered segregation by generating both public housing projects and racially homogeneous suburbs.⁷³ In the 1960s, the Economic Opportunity Act of 1966 and the Fair Housing Act of 1968 sought to correct racial inequities of previous programs.⁷⁴ These reform efforts adopted a shift towards partnerships with private sector banks and developers to finance housing construction and job creation in poor areas.⁷⁵ Nonetheless, the negative effects of these early programs are coming into focus as the connection between place as a center for social and economic opportunity is developing in the literature.⁷⁶ Places matter in designing government interventions in policy since places matter to people.⁷⁷ Specific racial groups, such as African Americans, have made minimal progress towards racial

⁷⁰ See Pitegoff, *supra* note 57, at 92-93. The Wilson Dam was built by the Tennessee Valley Authority to create Wilson Lake around the time of World War I, and was one of many dams that created inexpensive electricity to power much of the southeastern United States. See generally DRIVE-BY TRUCKERS, TVA, on THE FINE PRINT: A COLLECTION OF ODDITIES AND RARITIES (New West 2009) (demonstrating public affection for the Tennessee Valley Authority).

⁷¹ Navy yards, for instance, have historically employed tens of thousands of workers in industries tied to defense contracting. The Brooklyn Navy Yard, for example, peaked at over 70,000 workers during World War II. See Lauren Cook, *Brooklyn Navy Yard Surpasses 10,000 Jobs for 1st Time in over 50 Years*, AMNY (Aug. 5, 2019), <https://www.amny.com/news/brooklyn-navy-yard-jobs-1.34563648> [<https://perma.cc/MG4M-M7H2>].

⁷² See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 17-20 (2017).

⁷³ See *id.* at vii-xi (arguing that the federal government endorsed a de jure segregated housing policy through much of the twentieth century).

⁷⁴ See Pitegoff, *supra* note 57, at 94.

⁷⁵ *Id.*

⁷⁶ See, e.g., Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 857 (2016) (finding that children who move to lower-poverty areas during youth have increased rates of college attendance, higher incomes, and decreased rates of single parenthood).

⁷⁷ See Bartik, *supra* note 24, at 32.

equality following the civil rights era in part because their communities and neighborhoods have faced persistent discrimination, severe disinvestment, and rigid segregation.⁷⁸ Ultimately, then, many mid-twentieth century place-based economic development strategies were undermined by their failure to include marginalized groups. Despite these drawbacks, large-scale government interventions continued to enjoy bipartisan support into the early 1970s.⁷⁹ However, a shift occurred in the 1970s with the Community Development Block Grants included in the Housing and Community Development Act of 1974, a tool to increase the diffusion and revenue sharing of federal economic development.⁸⁰ In the words of one team of researchers, the Community Development Block Grant is, historically speaking, “the most sizable, stable, and comprehensive support for community and economic development.”⁸¹ It was created through compromise between those wanting to devolve decision-making to the state and local level and those wanting to support low-income communities.⁸²

⁷⁸ See PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARDS RACIAL EQUALITY* 5 (2013).

⁷⁹ The 1972 budget of Richard Nixon’s Administration, for instance, called for fiscal and monetary policy to promote full employment, as well as revenue sharing between states and cities. See Weaver, *supra* note 8, at 27-28. Around this time, Nixon famously said: “I am now Keynesian in economics.” Leonard S. Silk, *Nixon’s Program—‘I Am Now a Keynesian,’* N.Y. TIMES, Jan. 10, 1971, at E1. A Nixon campaign radio advertisement argued: “we have to get enterprise into the ghetto, but also the people of the ghetto into enterprise.” Mehrsa Baradaran on *Black Banks & The Racial Wealth Gap, Season 1, Ep. 125*, IPSE DIXIT (Jan. 22, 2019) <https://shows.pippa.io/ipse-dixit/epi-sodes/mehrsa-baradaran-on-black-banks-the-racial-wealth-gap> [<https://perma.cc/DY42-DDZY>].

⁸⁰ See Pitegoff, *supra* note 57, at 94.

⁸¹ See Brett Theodos, Christina Plerhoples & Stacy Helen Ho, *Taking Stock of the Community Development Block Grant*, URB. INST. 1 (Apr. 2017), https://www.urban.org/sites/default/files/publication/89551/cdbg_brief_finalized_1.pdf [<https://perma.cc/Ry3D-XNLB>]. Funding for Community Development Block Grants have stagnated at around \$3 billion per year. *Id.* at 2. The Opportunity Zone will likely dwarf the amount of funds that the Department of Housing and Urban Development spends on the Community Development Block Grant. Cf. Drucker & Lipton, *supra* note 2 (suggesting the scope and scale of the Opportunity Zone).

⁸² See ALLEN R. HAYS, *FEDERAL GOVERNMENT AND URBAN HOUSING* 222 (2012); Alice O’Connor, *Swimming against the Tide: A Brief History of Federal Policy in Poor Communities*, in *URBAN PROBLEMS AND COMMUNITY DEVELOPMENT* 77, 80-81 (Ronald F. Ferguson & William T. Dickens eds., 1999); Theodos et al., *supra* note 81, at 1 (citing *CDBG: A 25-Year History*, 54 J. HOUSING & COMMUNITY DEV.

The diffuse nature of Community Development Block Grants—through local governments and local-level bodies—make rent-seeking and capture by those with resources more difficult. In many ways, this shift away from the top-down nature of earlier strategies is what makes the Community Development Block Grant so successful. Community Development Block Grants further the community-oriented side of community economic development. At the same time, demonstrating the impact of Community Development Block Grants remains key to their survival. The broad power-sharing nature of the strategy can make disclosure of the tool's success more difficult. Otherwise, the program faces criticism based on the bureaucratic nature of the disbursement, which can sometimes be slow, and the lack of market-based principles with which funds are distributed. The Urban Institute recently analyzed the state of the Community Development Block Grant and made a number of recommendations that included increasing funding and increased data collection, as well as other transparency initiatives.⁸³

That said, the future of the Community Development Block Grant is uncertain. The Trump Administration has zeroed out funding for the Community Development Block Grant, arguing that it is not targeted to poor communities and has not demonstrated an impact on those communities.⁸⁴ The Senate adopted a bill restoring funding for the Community Development Block Grant in the 2020 budget.⁸⁵

L. 20 (1999)). There are two tracks of funding: (1) grants administered to entitlement communities, and (2) grants directly administered by states who opt in, or small cities in states that do not opt in. *See id* at 5.

⁸³ Theodos et al., *supra* note 81, at 5, 13, 14.

⁸⁴ Press Release, U.S. Dep't Hous. and Urb. Dev., Trump Admin. Proposes 2020 HUD Budget (Mar. 11, 2019), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_027 [<https://perma.cc/SB2H-Y23U>] (“Since 1980, and most recently in 2013, HUD studies found that CDBG is not well targeted to the poorest communities and has not demonstrated a measurable impact on communities.”).

⁸⁵ *See* Erin Patterson, *Senate Passed Fiscal Year 2020 Appropriations Package Benefits Virginia*, ABC 13 NEWSNOW (Oct. 31, 2019, 2:21 PM), <https://www.13newsnow.com/article/news/politics/senate-passed-fiscal-year-2020-appropriations-package-benefits-virginia/291-0dc3fb44-b328-4b60-bf94-d98e68640fe1> [<https://perma.cc/5ULZ-9DU4>].

C. Place-Based Economic Development Shifts to a Hands-Off Approach

In the 1980s and 1990s, market-based interventions in the economy began to win bipartisan support among elected representatives.⁸⁶ Government interventions in the economy of places in recent decades generally have followed a neoliberal ideology.⁸⁷ The transition to such tools reflects a pro-growth viewpoint that particular places are in greater need than others of government support.⁸⁸ Neoliberal doctrine advances the notion that competitive and deregulated open markets are most effective tool for economic development and

⁸⁶ See Cummings, *supra* note 34, at 421-22 (“[T]he advent of Reagan neoconservatism in the 1980s followed by Clintonian neoliberalism in the 1990s led to a deterioration in the economic conditions of the poor and shifted antipoverty programs toward market-based reform strategies.”). The same type of bipartisan support exists for Opportunity Zones. See, e.g., Edwards, *supra* note 45; Eric Lipton & Jesse Drucker, *Symbol of '80 Greed Stands to Profit from Trump Tax Break for Poor Areas*, N.Y. TIMES (Oct. 26, 2019), <https://www.nytimes.com/2019/10/26/business/michael-milken-trump-opportunity-zones.html> [<https://perma.cc/GCY4-6M3Q>].

⁸⁷ See generally WEAVER, *supra* note 8 *passim*.

⁸⁸ Michelle D. Laysner, *The Pro-Gentrification Origins of Place-Based Investment Tax Incentives and a Path Toward Community Oriented Reform*, 2019 WIS. L. REV. 745 (2019) (discussing how the flexibility of current place-based economic development tax incentives are unsurprising given their pro-growth business and political champions).

societal well-being.⁸⁹ However, these hands-off approaches to development, including the Opportunity Zone, frequently lack clear goals,⁹⁰ definable metrics,⁹¹ and basic reporting requirements.⁹²

It was not surprising for conservatives to support market-based economic development tools. Such support is consistent with their overall political ideology and offers another justification to cut federal aid to cities.⁹³ Understanding liberal support for such market-based tools is not much more difficult. Timothy Weaver argues that Democrats in Congress gradually turned to a neoliberal viewpoint to solve the problem of urban poverty and unemployment.⁹⁴ Relatedly, if there is a program that will direct funds to communities in need, it is not difficult to understand political buy-in and support.

Research analyzing existing market-based place-based economic development tools indicate a number of disturbing findings that can be categorized through the Use-Transparency-Participation framework outlined in Part I. With respect to use, a strategy that focuses place-based strategies in particular areas of great need is more efficient than allocating resources into areas where need for such strategies is less. For example, job growth in distressed areas has a greater impact than in nondistressed areas.⁹⁵ However, place-based strategies are often not tailored to address those areas in most need of

⁸⁹ See Cummings, *supra* note 34, at 422; Kevin Fox Gotham & Miriam Greenberg, *From 9/11 to 8/29: Post-Disaster Recovery and Rebuilding in New York and New Orleans*, 87 SOC. FORCES 1039, 1041 (2008).

⁹⁰ The topic of how national goals with respect to community development interact with local priorities has been addressed in Sarah F. Liebschutz, *Community Development Dynamics: National Goals and Local Priorities*, 2 ENV'T & PLAN. C: GOV'T & POL'Y 295, 295-305 (1984) (finding that community development reflects both local priorities and national goals).

⁹¹ Among states, there is little uniformity in how laws take metrics into account. See Layser, *supra* note 61 (surveying the structure and design elements of state enterprise zones and finding significant variations across zone eligibility requirements, eligible investment types, incentives to invest in workers or workforce housing, and taxpayer eligibility).

⁹² The provisions governing the Opportunity Zone currently lack reporting requirements. See I.R.C. §§ 1400Z-1, 1400Z-2; see also Booker, *supra* note 48 (announcing a bill to rectify this).

⁹³ See WEAVER, *supra* note 8, at 70.

⁹⁴ *Id.* at 70-71.

⁹⁵ See Bartik, *supra* note 24, at 18 (describing how job growth in distressed areas will have greater private benefits since local workers will obtain more jobs than those workers will highly value).

aid.⁹⁶ Relatedly, place-based incentives favor industries that may not be the industries that most benefit the local communities.⁹⁷ With respect to transparency, successes of place-based economic development strategies are only evident through disclosure and reporting of outcomes. Research on the effectiveness of place-based interventions is mixed.⁹⁸ It is increasingly difficult to measure the impact of place-based economic development incentives given the prevalence of business location incentives that lack a particular place focus.⁹⁹ With respect to participation, some strategies appear ineffective at achieving their goals for local residents. Place-based tools like state enterprise zones, for instance, "do not have a significant impact on local employment"¹⁰⁰ and "little impact" on growing the economy.¹⁰¹ Despite

⁹⁶ In the Opportunity Zone context, for instance, elected officials designated areas for reasons other than the greatest need. See Section III.B.1 *infra*.

⁹⁷ See ALAN H. PETERS & PETER S. FISHER, STATE ENTERPRISE ZONE PROGRAMS: HAVE THEY WORKED 9 (2002), (finding that incentives are skewed towards more capital-intensive industries and manufacturing processes).

⁹⁸ Laysner summarized the empirical research around place-based tax incentives, concluding that their impact on poor communities remains unclear. See Laysner, *supra* note 9, at 405 n.8. Growth will sometimes come at the cost of nonzone jobs and economic activity. See Marilyn Rubin, *Urban Enterprise Zones: Do They Work? Evidence from New Jersey*, 10 PUB. BUDGETING & FIN. 3, 17 n.33 (noting that 2.5% of enrollees in New Jersey's Urban Enterprise Zone program came into the program from other parts of the state) (1990); cf. Timothy J. Bartik, *Jobs, Productivity, and Local Economic Development: What Implications Does Economic Research Have for the Government*, 47 NAT'L TAX J. 847, 851 (1994) (regarding economic development subsidies, "the success of one area causes negative externalities for other areas."); In another study, one researcher found no net loss of economic activity in neighboring areas to those with place-based disaster recovery economic development incentives. See Randall B. Bunker, *Are Regional Tax Investment Incentives a Zero-Sum Game? An Empirical Analysis of the Gulf Opportunity Zone Act of 2005*, 13 J. ACCT. & FIN. 118, 119 (2013) (indicating an initial conclusion that the Act had a zero-sum effect on neighboring areas but noting that the conclusion that neighboring areas were harmed by the Act was not statistically significant).

⁹⁹ See Bartik, *supra* note 24, at 1 ("We currently devote \$60 billion a year to policies that aim to increase jobs in some state, or in some local labor market."). Bartik also notes that the current system for bringing jobs to people in state and local government does not favor distressed places. *Id.* at 2.

¹⁰⁰ See Daniele Bondonio & John Engberg, *Enterprise Zones and Local Employment for the States' Programs*, 30 REGIONAL SCI. & URB. ECON. 519, 522 (2000).

¹⁰¹ PETERS & FISHER, *supra* note 97, at 13; WEAVER, *supra* note 8, at 161 – 163 (finding that the effects of empowerment zones were negligible on growing the economy of Philadelphia). In some instances, researchers have presented evidence of harmful impacts with respect to expanding public debt and speculative private sector involvement. See PETERS & FISHER, *supra* note 97, at 103-26.

the weaknesses revealed through this Use-Transparency-Participation framework, lawmakers often still operate under the assumption that neoliberal ideology is correct and that a “free market” approach is the best.¹⁰²

This subsection presents both a descriptive and analytic account of the range of federal, state, and local place-based economic development tools. It begins with the Employment-Based Fifth Preference, or “EB-5” tool, based in federal immigration law. Next, the subsection shifts to focus on tax tools—those that are disaster-based, and those that are not. Next, it addresses state-based enterprise zones, the expired federal empowerment zone law. This Part then addresses the most recent federal place-based economic development tool: the Opportunity Zone.

1. Immigration Place-Based Development Tools

In an example of decentralization of economic development planning gone too far, in 1990, Congress adopted a Green Card program known as EB-5 for foreign investors who fund commercial real estate projects in poor areas.¹⁰³ Initially, the tool required foreign nationals seeking permanent residency in the United States to invest one million dollars in a project creating at least ten jobs for U.S. workers.¹⁰⁴ The tool was expanded in 1992 to expedite approval through regional centers in which eligible projects could be located, expand the job creation requirement to include indirect jobs such as service-based jobs aiding direct hires, and cut the investment amount to only \$500,000.¹⁰⁵ Today, 10,000 visas are made available each year

¹⁰² This appears to be the case with the Opportunity Zone legislation. Despite its bipartisan support, the Opportunity Zone program seems primed to do what other programs have done—create wealth generation opportunities for businesses already moving ahead with projects. See Timothy Weaver, *Tax Law’s “Opportunity Zone” Won’t Create Opportunity for People Who Need It Most*, SALON (May 21, 2018, 10:30 AM), https://www.salon.com/2018/05/21/tax-laws-opportunity-zones-wont-create-opportunities-for-the-people-who-need-it-most_partner/ [<https://perma.cc/EFU6-VRVG>] (calling instead for “urban social citizenship” where community members invest in neighborhood projects).

¹⁰³ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 4989 (codified at 8 U.S.C. § 1153(b)(5)); see also INA § 203(b)(5); 8 C.F.R. § 204.6.

¹⁰⁴ *Id.*

¹⁰⁵ Pub. L. No. 107-273, 116 Stat. 1758, 1846 (2002). The investment amount was not tied to inflation and has not increased in almost 30 years. Bob Goodlatte &

through the EB-5 program.¹⁰⁶ To receive one of these visas, investors and qualified family members need not create businesses themselves, but rather they can invest in a commercial enterprise within a regional center.¹⁰⁷

In addition, the EB-5 tool includes Targeted Employment Areas that are either (1) rural areas with under 20,000 people, or (2) areas with at least 150% of the national unemployment rate.¹⁰⁸ Investments in Targeted Employment Areas need only be \$500,000.¹⁰⁹ In 2017, approximately half the visas granted through the EB-5 tool were to Chinese nationals investing in Regional Target Employment Areas.¹¹⁰

The apparent purpose of the EB-5 tool is to combine the need for economic development in particular areas with a demand for U.S. green cards. An advocacy group representing organizational members that comprise the Regional Center Program tout project successes through a number of metrics—dollars invested, and jobs created being the most expediently highlighted.¹¹¹ Yet, merely indicating the amount of funds invested, or number of jobs created, does not tell the full story about the impact of EB-5. Specifically, such metrics do not address whether those places most in need of investment were the places where the projects were in fact created. In addition, metrics

Chuck Grassley, *Restoring Integrity to the Immigration System*, WASH. TIMES (May 16, 2018), <https://m.washingtontimes.com/news/2018/may/16/why-the-department-of-homeland-security-must-final/> [<https://perma.cc/CN6E-QJAH>].

¹⁰⁶ David North, *The Immigration Investor (EB-5) Visa: A Program that Is, and Deserves to Be, Failing*, Center for Immigration Studies, January 2012, <https://cis.org/sites/cis.org/files/articles/2012/investor-visa-program-is-failing.pdf>.

¹⁰⁷ See 11 U.S.C. § 1153 note (2018).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 4,441 visas out of a total of 9,602 issued in that year went to Chinese nationals. Report of the Visa Office 2017, *Table III: Immigrant Visas Issued (by Foreign State of Chargeability or Place of Birth) Fiscal Year 2017*, U.S. STATE DEP'T (2017), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports.html> [<https://perma.cc/5HGL-EPQL>] (follow link and navigate to Statistical Table III to access the document).

¹¹¹ Lee Li, *EB-5 Is Essential to the U.S. Economy*, INVEST IN THE USA (2018), <https://californiaeb5investments.com/wp-content/uploads/2018/11/EB-5-is-Essential.pdf> [<https://perma.cc/TDL9-FECX>].

about dollars and jobs alone do not tell the story about the people who may have benefitted from the creation of those real-estate projects.¹¹²

Instead, a more thorough analysis of the EB-5 tool reveals many abuses of the program. Most disturbing, foreigners often do not have to invest in distressed communities at all in order to receive an EB-5 visa. Instead, wealthy urban developers reportedly sell visas to foreign nationals not for any clear public benefit, but simply as a cheap source of capital.¹¹³ When foreigners actually do invest, the results are far from what the EB-5 program promises. Senator Chuck Grassley pointed out that minimum investment amounts have not been increased in decades, and that projects meant for rural and poor areas are focused in already “affluent urban hubs.”¹¹⁴ Supporting Grassley’s claim, currently 93% of EB-5 projects are real estate developments located in regional centers, mostly located in major cities, which often have been designated regional centers through gerrymandering to achieve a coveted “high-unemployment” designation.¹¹⁵ As a result, this location-based investment tool designed to bring capital to poor areas has funded luxury developments in expensive areas such as New York City,¹¹⁶ Beverly Hills,¹¹⁷ and Palm Beach, Florida.¹¹⁸

¹¹² Dollars invested and jobs created are important to know quantitatively, but it is difficult to be certain that those dollars and jobs arrived as a result of the EB-5 program. To make that claim, we must engage in a study of the projects that have been invested in as a result of the program, and we must also control for other economic development—or any other factors—that may otherwise confound analysis. Such a study is beyond the scope of the current Article.

¹¹³ See Goodlatte & Grassely, *supra* note 105.

¹¹⁴ *Id.*

¹¹⁵ Editorial, *The Investor Visa Program Should Be Scrapped*, BLOOMBERG (Mar. 22, 2018), <https://www.bloomberg.com/opinion/articles/2018-03-22/the-eb-5-investor-visa-program-deserves-to-be-scrapped> [<https://perma.cc/G69H-VW6D>]. Observers have pointed out that the geographic boundaries of the Targeted Employment Area are meaningless since nearly any location can be considered as having enough unemployment to qualify. See Gary Friedland & Jeanne Calderon, *EB-5 Reform on the Horizon—If the Palm House Hotel Debacle Does Not Precipitate Congressional Action, What Will?*, N.Y.U. STERN CTR. FOR REAL ESTATE FIN. RES. 4 (Mar. 2019), <https://www.stern.nyu.edu/sites/default/files/assets/documents/EB-5%20Reform%20on%20the%20Horizon%20-%20If%20the%20Palm%20House%20Hotel%20Debacle%20Does%20Not%20Precipitate%20Congressional%20Action%2C%20What%20Will.pdf> [<https://perma.cc/F69U-J7C9>].

¹¹⁶ Friedland & Jeanne Calderon, *supra* note 115.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

The end result is not improvements in the lives of disadvantaged Americans but rather waste and widespread allegations of fraud.¹¹⁹

Similarly, the Targeted Employment Area designation standards vary from state to state.¹²⁰ A federal approach to designating particular high-needs areas may curb abuses in the tool. There are additional areas for improvement too. The EB-5 tool lacks any meaningful engagement with local communities in which projects are located.¹²¹ Lack of any local participation may indicate potential project mismatch between needs, goals, and wants of current residents, and the goals of those investing capital.

2. Tax Place-Based Development Tools

Most place-based economic development tools function through tax law at the federal or state level.¹²² This section separates out into four important areas of tax law: the New Markets Tax Credit, Low-Income Housing Tax Credits, disaster-related relief programs, and state-based Enterprise Zones.

a) New Markets Tax Credits

Congress has adopted several generally available tax-based development tools for the purposes of economic development. One such tool, the New Markets Tax Credit, allows investors to purchase tax credits to reduce their own tax liability in exchange for investing in a commercial real estate project in a low-income community. The credit works as follows. An entity with significant tax liability, such as an insurance company or bank like Citibank, can reduce its taxable in-

¹¹⁹ See Goodlatte & Grassley, *supra* note 105; see also Editorial, *supra* note 115.

Editors at Bloomberg suggest the program be scrapped because of insufficient focus on supporting poor areas. See Editorial, *supra* note 115.

¹²⁰ See EB-5 Immigrant Investor Program Modernization, 82 Fed. Reg. at 4,738 (proposing federal standardization of Targeted Employment Area designation).

¹²¹ See 8 U.S.C. § 1153 (2018). This is in contrast to other place-based economic development tools, such as the Community Development Block Grant, which involves local government and often community residents in deciding how best to disburse funds for development projects in poor areas. See 42 U.S.C. § 5301 (2018).

¹²² Municipal or local economic development incentives exist in the form of property tax abatements. This Article, however, does not cover those tools in depth.

come by purchasing a “credit” to offset its liability. Citibank purchases a \$1 tax credit for \$0.90.¹²³ The tax syndicator from which Citibank purchased the credit then turns around and makes the capital provided by Citibank available for projects in a low-income community led by a member of the New Markets Tax Credit Coalition—a membership organization of Community Development Entities that take part in the New Markets Tax Credit.¹²⁴ The Coalition reports that since 2000 the New Markets Tax Credit has led to \$95 billion invested in nearly 6,000 projects, creating 1,000,000 jobs at a cost of \$20,000 per job.¹²⁵ Proponents claim that this tool is able to achieve this impressive result by reducing the cost of capital for commercial real estate projects in areas that need it.¹²⁶

The geographic boundaries for the New Markets Tax Credit tool are limited to census tracts with poverty rates of at least 20%.¹²⁷

¹²³ Pricing of the tax credit reflects a variety of factors, including the risk that the credit will be recaptured, as well as the time value of money. Martin D. Abravanel et al., *New Markets Tax Credit (NMTC) Program Evaluation: Final Report*, URB. INST. 87 (Apr. 2013) <http://www.urban.org/sites/default/files/publication/24211/412958-New-Markets-Tax-Credit-NMTC-Program-Evaluation.PDF> [<https://perma.cc/U2JP-ZXS8>] (noting that New Markets Tax Credits are allocated over a seven-year period, rather than at the time of investment).

¹²⁴ See, e.g., *New Markets Tax Credits*, ENTERPRISE COMMUNITY PARTNERS, <https://www.enterprisecommunity.org/financing-and-development/new-markets-tax-credits> [<https://perma.cc/MWH5-GQ3Z>]; *New Markets Tax Credits*, CITIGROUP, <https://www.citigroup.com/icg/sa/citicommunitycapital/docs/NMTCTransactions-FINAL.pdf> [<https://perma.cc/YN3E-T3HF>]. Note that the specific examples and figures were supplied for illustrative purposes. Professor Janet Jackson Thompson provides another illustrative example of how the tax credit works in a recent article. See Janet Thompson Jackson, *Can Free Enterprise Cure Urban Ills?: Lost Opportunities for Business Development in Urban, Low-Income Communities Through the New Markets Tax Credit Program*, 37 MEM. L. REV. 659, 697 (2007); see also Pitegoff, *supra* note 57, at 11 (<explanatory parenthetical>).

¹²⁵ *About the NMTC*, NEW MKTS. TAX CREDIT COALITION, <https://nmtccoalition.org/progress-report/about-the-nmtc/> [<https://perma.cc/YF2E-LJX5>].

¹²⁶ See *id.* (“[P]articipants are significantly lowering the cost of capital for borrowers in low-income communities and exceeding statutory and regulatory requirements for the targeting of economic distress.”).

¹²⁷ I.R.C. § 45D(e)(1)(A) (2018). Tax scholar Michelle Layser, who has researched and published extensively on the New Markets Tax Credit, has explored how the

The New Markets Tax Credit program allows participants to self-certify.¹²⁸ This self-certification process allows participants to include projects based on where qualified Community Development Entities, a necessary party to the issuance of the credit and which themselves must certify with the CDFI Fund, can articulate project need.¹²⁹

When President Clinton was campaigning for the New Markets Tax Credit, he completed a four-day tour across the country, visiting parts of the country with high poverty and unemployment, including rural Mississippi, East St. Louis, a Native American reservation in South Dakota, South Phoenix, and the Watts neighborhoods in Los Angeles.¹³⁰ In stumping for the New Markets Tax Credit, President Clinton noted that, while the surging internet economy was raising the economic boats for most, many places were still left behind.¹³¹

In this regard, the New Markets Tax resembles the EB-5 in recognizing that some areas are more in need of capital than others. An important difference, however, is the way in which the New Markets Tax Credit developed a transparency requirement.

Specifically, the regulation the Credit offers through the involvement of Community Development Entities brings disclosure and transparency that is lacking in many other place-based economic development strategies. Community Development Entities are mission-based, tax-exempt organizations regulated by the Internal Revenue Service,¹³² and certified by the Community Development Financial

credit has led to gentrification. Michelle D. Laysner, *supra* note 88, at 53-54 (discussing how projects created using the New Markets Tax Credit may lead to gentrification). One recent observer has argued for performance objectives and recapture provisions should participants in the New Market Tax Credit fail to serve low-income communities. See Meghan Bokath, *Take the Money and Run: A Case for Benchmarking in the New Markets Tax Credit Program*, 47 CAL. WESTERN L. REV. 411, 414 (2011).

¹²⁸ See Treas. Reg. § 1.45D-1(g)(2)(iii) (as amended in 2012) (instructing the taxpayer to file Form 8874 in order to claim the New Markets Tax Credit).

¹²⁹ See Dimitri Pappas, *A New Approach to a Familiar Problem: The New Market Tax Credit*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 323, 325 (2001) (discussing the role of Community Development Entities in identifying potential projects of businesses for investors to support).

¹³⁰ Lily Geismer, *The Places Left Behind*, JACOBIN, (Nov. 1, 2016), <https://jacobin-mag.com/2016/11/bill-clinton-poverty-tour-hillary-new-markets> [<https://perma.cc/SCJ2-3VM3>].

¹³¹ *Id.*

¹³² That is, insofar as tax-exempt entities must comply with I.R.C. § 501(c)(3) (2018).

Institutions Fund of the U.S. Treasury. By nature of this regulatory involvement, projects that involve New Markets Tax Credits must be issued by Community Development Entities. The inclusion of an intermediary organization is key to the transparency that the New Markets Tax Credit imbues.¹³³ Furthermore, transparency is also enhanced by the fact that the geographic boundaries are set by a clear formula rather than an opaque district drawing process. In this way, the New Markets Tax Credit both overcame major issues associated with the previous top-down model by decentralizing power, and avoided excesses of some market-based tools.

It is true that some Community Development Entities are formed by large banks.¹³⁴ It is possible that lenders that control a certified Community Development Entity could use New Markets Tax Credits to advance projects that have some advantage for the lender. Many New Markets Tax Credit projects, for instance, include retail uses as part of the overall mixed-use nature of the project. Nevertheless, in a variety of regulatory filings, the Community Development Entity is still required to articulate the aspect of how the use of New Markets Tax Credits are appropriate.¹³⁵

Despite these advantages, the New Markets Tax Credit program is not without its shortcomings. Of note, because residents lack standing to challenge the use of the Credit in court, there are few legal remedies available to third parties to dispute the manner in which a party claims or issues a New Markets Tax Credit. Accordingly, litigation under the program is infrequent.¹³⁶ For example, in one case a trial court judge in the United States District Court for the Eastern District of Missouri dismissed a complaint brought by a gas station

¹³³ See Lambie-Hanson, *supra* note 9, at 7-8.

¹³⁴ Roughly one-third of CDEs formed by CDFIs, community development banks, and other mission-driven lenders received allocations of tax credits between 2002-2006, while 17% of CDEs formed by for-profit financial institutions received tax credit allocations during the same period. See Abravanel, *supra* note 123, at 61.

¹³⁵ *Id.* at xii.

¹³⁶ A Westlaw search conducted on December 11, 2019 using the search term “new markets tax credit” for all federal and state jurisdictions yielded fourteen results for dates ranging from March 16, 2015 to November 20, 2018. One such case highlighted that the New Markets Tax Credit lacks a private right of action for individuals to claim a violation of the law. See *Westmoreland Real Estate, LLC v. City of St. Louis*, No. 4:11CV1648 CDP, 2012 WL 2458403, at *7 (E.D. Mo. June 27, 2012) (“In order to state a [42 U.S.C.] § 1983 claim, plaintiffs must allege that their federal rights were violated, but the statute does not provide plaintiffs with any substantive rights.”).

owner who objected to the issuance of New Markets Tax Credits to the owner of an adjacent property to construct a gas station/ rest stop.¹³⁷ In issuing its ruling, the court found that the program lacked a private right of action.¹³⁸ The absence of a private right of action makes transparency of the New Markets Tax Credit that much more important.

Despite its market-based approach, the New Markets Tax Credit overall performs well on the Use-Transparency-Participation framework. The use of the tax credit is directed by a clear formula to define the available investment areas and the presence of an intermediary institution that guides dollars toward fruitful investments. These aspects of the program also advance the goal transparency, as individuals in the community have greater purview into where dollars can be and are being spent. However, the presence of large for-profit lenders acting through intermediary organizations, and the lack of a private right of action to challenge the use of the Credit, indicates room for improvement with respect to participation.

b) Low-Income Housing Tax Credits

The Low-Income Housing Tax Credit, the largest U.S. government intervention in the rental housing market, was designed to stimulate the construction of affordable housing units that otherwise would not be built by market participants.¹³⁹ Adopted as part of the tax reform of 1986, the program allows nonprofit and for-profit developers to rehabilitate or construct housing for low-income individuals using federal tax credits.¹⁴⁰ In theory, the tailoring of this tax incentive to a particular use is novel and significant. Linking the credit to a particular use—in this case, housing for individuals and families of limited means—provides a clear connection between the use of public funds and an agreed-upon public purpose.

¹³⁷ *Id.*

¹³⁸ *Id.* (“In order to state a [42 U.S.C.] § 1983 claim, plaintiffs must allege that their federal rights were violated, but the statute does not provide plaintiffs with any substantive rights.”).

¹³⁹ Brandon M. Weiss, *Residual Value Capture in Subsidized Housing*, 10 HARV. L. & POL’Y REV. 521, 525 n.17 (2016) (estimating that the federal government foregoes approximately \$8 billion per year in revenue through the Low-Income Housing Tax Credit, dwarfing other supply-side spending on housing construction).

¹⁴⁰ I.R.C. § 42 (2018).

In practice, ensuring that the units of housing are built in the areas most in need remains a challenge. The Low-Income Housing Tax Credit struggles at delivering the right number of units at the price that people across incomes can afford and in places people want to live. In recent congressional testimony, Low-Income Tax Credit expert Kirk McClure pointed out that the credit has created a surplus of housing in some areas, while failing to provide adequate housing in others areas, particularly those with very low incomes.¹⁴¹ In particular, housing constructed using the credit is frequently in areas where there is already a supply of housing and at rents that are close to market rents.¹⁴² This distortion in the allocation of Low-Income Housing Tax Credits was the subject of a recent Supreme Court case in which the Inclusive Communities Project argued that the Texas Department of Housing and Community Affairs violated the Fair Housing Act in its allocation of Low-Income Housing Tax Credits.¹⁴³ Brandon Weiss points out that *Inclusive Communities* articulates the long-standing housing policy debate about whether governments should be supporting housing construction in lower income, largely nonwhite, neighborhoods in the urban core, or in higher-income, predominately white, suburbs.¹⁴⁴ Policy debates about how to develop the economy of poor areas mirror those regarding the construction of affordable housing.¹⁴⁵

Returning to the Use-Transparency-Participation framework, a key takeaway from the Low-Income Housing Tax Credit is the restriction on the uses that builders may achieve through the Low-Income Housing Tax Credit. It is an incentive limited to affordable housing construction. Taxes otherwise collectible by government are forewent in exchange for affordable housing construction that build-

¹⁴¹ *America's Affordable Housing Crisis: Hearing Before the S. Comm. on Fin.*, 117th Cong. 10-11 (2017) (statement of Kirk McClure, Professor, University of Kansas).

¹⁴² See Brandon M. Weiss, *Locating Affordable Housing: The Legal System's Misallocation of Subsidized Housing Incentives*, 70 HASTINGS L.J. 215, 219-20 (2019).

¹⁴³ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 531 (2015). While the Court did not reach the merits of the claim concerning the location of allocated credits, it did for the first time recognize disparate impact as a way to prove an FHA violation. *Id.* at 543-47.

¹⁴⁴ See Weiss, *supra* note 142, at 219.

¹⁴⁵ Housing itself is an important economic driver of place-based development—though, for this Article, the focus is particularly on economic development tools with place-based characteristics.

ers as market participants otherwise would not build. While such a restriction is a positive development, the program also demonstrates that smart design is of limited value if not properly implemented. This only further demonstrates the need for transparency and participation to ensure that a program actually delivers its intended result.

c) Disaster-Related Tools

Unlike the more general development tools discussed above, disaster-related economic development tools arise in response to natural or human-created disasters.¹⁴⁶ This subsection analyzes the Liberty Zone in Lower Manhattan and the Gulf Opportunity Zones in the southeastern United States using the Use-Transparency-Participation framework. These insights are particularly valuable in the current moment, as I have argued along with other scholars that governmental responses to the COVID-19 pandemic related to mitigating housing instability ought to include both place-based and people-based strategies.¹⁴⁷

The Liberty Zone—following the terrorist attacks of September 11, 2001—was the first congressional tax benefit program to target a particular disaster-impacted geographic zone.¹⁴⁸ At the time, some called for the expansion of government-led welfare programs,

¹⁴⁶ For background on the treatment of individual giving following disasters, see Danshera W. Cords, *Charitable Contributions for Disaster Relief: Rationalizing Tax Consequences and Victim Benefits*, 57 CATH. U. L. REV. 427 (2008).

¹⁴⁷ Michelle D. Laysner et al., *Mitigating Housing Instability During a Pandemic 3-6* (Northeastern Univ. Sch. of Law, Research Paper No. 386-2020, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3613789 [<https://perma.cc/6UHW-AG8D>].

¹⁴⁸ See Kevin Fox Gotham, *Dilemmas of Disaster Zones: Tax Incentives and Business Reinvestment in the Gulf Coast After Hurricanes Katrina and Rita*, 12 CITY & COMMUNITY 291, 292 (2013). In this case, a total of \$20 billion in aid was split between \$8 billion for infrastructure improvements related to the Department of Transportation and the Federal Emergency Management Agency's emergency aid, and \$12 billion for economic development. Gotham & Greenberg, *supra* note 89, at 1044. The approximately \$12 billion in funding for economic development was split as follows. First, \$3.7 billion in Community Development Block Grants were administered by a state-city corporation called the Lower Manhattan Development Corporation. Second, authority to allocate \$8 billion in private activity bonds—called Liberty Bonds—used to reconstruct buildings in Lower Manhattan were placed under the joint control of the Governor of New York and the Mayor New York City. *Id.*

activist interventions to stabilize communities and neighborhoods, and even the creation of a new federal agency.¹⁴⁹ Instead, neoliberal ideas prevailed, and the result was a public-private partnership model to redevelop the area.¹⁵⁰ Residential development of high-end condominiums and rental properties were financed largely through Liberty Bonds.¹⁵¹ As a result, the greatest recipients of the private activity bonds were Larry Silverstein, developer of the new World Trade Center buildings, Goldman Sachs, which constructed a new headquarters adjacent to the world trade center site, and corporations such as Bank of America, which located its headquarters in midtown, miles from lower Manhattan.¹⁵²

As a place-based economic development strategy, one can view the Liberty Bond askance. Funds were used for development following a particularly crucial moment following a terrorist attack, and some development occurred outside the main area surrounding the attack. The governor of New York State and the mayor of New York City, along with a newly formed public authority, distributed the funds. The governor and mayor were politically accountable to voters; however, participation in the program by residents was not a significant component of Liberty Bonds. A policy outcome of the Liberty Zone was that it has been mimicked in future disaster recovery legislative efforts. The most prominent is the recovery of the Gulf Region following Hurricanes Katrina, Rita, and Wilma.¹⁵³

¹⁴⁹ See Gotham & Greenberg, *supra* note 89, at 1043-44.

¹⁵⁰ See Robert Kolker, *The Power of Partnership*, N.Y. MAG. (Nov. 26, 2001), <http://nymag.com/nymetro/news/sept11/features/5425> [<https://perma.cc/XK7Y-BABR>]. As Gotham and Greenberg point out, relying on private markets to handle disaster recovery removes public accountability since there is no longer a requirement that expenditures be for a “public benefit.” Gotham & Greenberg, *supra* note 89, at 1043. Low-income workers and small businesses were not prioritized in the funding program by design. *Id.* at 1047. Legislators allocated funds for a series of tunnels, including a rail link to J.F.K. Airport and the suburbs connecting lower Manhattan. Eliot Brown, *The Tunnel from Nowhere*, OBSERVER (Mar. 24, 2009, 10:56 PM), <https://observer.com/2009/03/the-tunnel-from-nowhere> [<https://perma.cc/GP88-VVDL>]. Such a project (which was eventually dropped) potentially would have benefitted visitors and out-of-towners much more than local residents and small business owners.

¹⁵¹ Kolker, *supra* note 150. The average income of residents in the neighborhood increased. *Id.*

¹⁵² See Gotham & Greenberg, *supra* note 89, at 1050.

¹⁵³ In December 2005, just several months after Hurricane Katrina made landfall in New Orleans, Congress amended the Internal Revenue Code to include the Gulf

Gulf Opportunity Zones provided the ability for the states of Alabama, Louisiana, and Mississippi, or any municipality or locality within those states, to issue bonds for redevelopment.¹⁵⁴ Research indicates that Gulf Opportunity Zone investments did not have a significant negative economic impact on neighboring areas that were outside the Zone.¹⁵⁵ Katrina, the worst natural disaster in the nation's history with respect to geographic scope, led to significant population displacement of persons out of the area, which is difficult to account for through empirical analysis.¹⁵⁶ Gotham points out that while government officials publicly touted that the aid would go to the hardest hit areas – in fact, it went to areas with the greatest potential for future growth and investment, and not those that were hardest hit by the storm.¹⁵⁷

d) State-based Enterprise Zones & Federal Empowerment Zones

In the context of place-based economic development incentives, the laboratories of democracy appear to be malfunctioning.¹⁵⁸ State enterprise zone legislation serves broadly to influence business location decisions through a menu of possible incentives that vary by

Opportunity Zone tax program. Among other things, the program extended tax benefits related to Hurricanes Rita and Wilma to victims of Hurricane Katrina. I.R.C. § 1400T (2018).

¹⁵⁴ I.R.C. § 1400N(I). The total amount of bonding authorized was \$2,500 per person in the state as of a certain date. *Id.* § 1400N(a). The total amount of Gulf Opportunity Zone Bonds authorized was approximately \$8 billion. *Id.* § 1400N(b). A challenge of the Gulf Opportunity Zone was the timing of the authority to issue bonds. Credit all but dried up in 2007 and 2008. As a result, even viable projects could not take advantage of the bonds made available. *See* Gotham, *supra* note 148, at 301. Gotham indicates that approximately 44% of aid went to promote manufacturing and oil industry infrastructure, and all of those projects were located outside of the New Orleans metropolitan area. *Id.* at 304.

¹⁵⁵ Randall B. Bunker, *supra* note 98, at 119 (indicating an initial conclusion that the act had a zero-sum effect on neighboring areas but noting that the conclusion that neighboring areas were harmed by the act was not significantly negative).

¹⁵⁶ *Id.* at 130.

¹⁵⁷ Gotham, *supra* note 148, at 305.

¹⁵⁸ Justice Brandeis famously wrote that in areas of social and economic policy, “a single courageous state . . . may serve as a laboratory” to experiment without harm to the country as a whole. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

state.¹⁵⁹ The best policies have not necessarily spread across the states and up to the federal government. Rather, enterprise zones—which in many instances have proven unsuccessful—have spread across states and the federal government.¹⁶⁰

While 33 of the 50 states have state enterprise zone programs today, they are not necessarily uniform.¹⁶¹ Differences exist with respect to “one eligibility requirements, eligible investment types, incentives to invest in human capital or affordable housing, and taxpayer eligibility.”¹⁶² Across these differences, however, the commonality appears to be that these programs generally lack a clear vision of what they are attempting to achieve. One study found that there is considerable confusion about the goals of state Enterprise Zone laws and the mechanisms used to achieve those goals.¹⁶³ Zone incentives favor capital over labor and are a “chaotic and unplanned” state-based industrial policy.¹⁶⁴ In the end, Enterprise Zones do not appear to improve spatial access to opportunity, such as increasing employment for those workers in need of jobs.¹⁶⁵

¹⁵⁹ See PETERS & FISHER, *supra* note 97, at 21-52.

¹⁶⁰ Karen Mossberger, *State-Federal Diffusion and Policy Learning: From Enterprise Zones to Empowerment Zones*, 29 PUBLIUS: J. FEDERALISM 31, 32, 47 (1999).

¹⁶¹ See Layser, *supra* note 91, at 1. Layser, in her work to map the typology of federal and state tax incentives, shows significant differences across different states. *Id.*

¹⁶² *Id.*

¹⁶³ PETERS & FISHER, *supra* note 97, at 6.

¹⁶⁴ *Id.* at 14.

¹⁶⁵ *Cf. id.* (stating that Enterprise Zones do not improve “spatial accessibility of employment to the disadvantaged”).

Nevertheless, in 1993 the federal government entered the fray with the passage of the Empowerment Zone and Enterprise Communities Act.¹⁶⁶ In the implementation of the federal empowerment program, evidence suggests that the federal law was based on summary information rather than specific state goals or outcomes.¹⁶⁷

D. Investing in Opportunity Act

Building on this overall evolution toward market-based economic development tools, Congress adopted the Opportunity Zone, the latest place-based economic development program, as part of the 2017 tax overhaul. Opportunity Zones attempt to attract capital to disadvantaged communities that continue to struggle following the Great Recession by offering tax incentives to investors. An investor who places funds in a Qualified Opportunity Zone can defer all capital gains for a ten-year period ending December 31, 2026.¹⁶⁸ In addition, funds kept in a Qualified Opportunity Zone Fund can receive a stepped-up basis on the appreciation in value of real estate held through the end of the calendar year 2026.¹⁶⁹ As of December 14,

¹⁶⁶ See Omnibus Budget Reconciliation Act of 1993, I.R.C. §§ 1391-1397(d) (1994), amended by Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §§ 951-952, 111 Stat. 788, 885; see also Mossberger, *supra* note 160, at 32 (arguing that enterprise zone policy at the federal level has often diffused down to states, rather than individual states serving as particular policy laboratories). The Empowerment Zones and Enterprise Communities Program was enacted by Congress through the Omnibus Budget Reconciliation Act of 1993. Marilyn Marks Rubin, *Can Reorchestration of Historical Themes Reinvent Government? A Case Study of the Empowerment Zones and Enterprise Communities Act of 1993*, 54 Public Administration Review 161 (1994).

¹⁶⁷ See Mossberger, *supra* note 160, at 36 (arguing that states tend to pick up economic development ideas not by following the example of one particular state but rather by seeing what a cluster of other states are doing). Some laws, such as the federal Empowerment Zone and Enterprise Communities Act, featured a preference for applications that reflected broad local-level stakeholder engagement. Sarah F. Liebschutz, *Empowerment Zones and Enterprise Communities: Reinventing Federalism for Distressed Communities*, 25 PUBLIUS: J. FEDERALISM 117, 120 (1995) (describing the significant level of local autonomy offered local plan designers).

¹⁶⁸ H.R. 1, 115th Cong. § 13823 (2017); see also I.R.C. § 1400Z-1 (2018) describing the zone designation process).

¹⁶⁹ I.R.C. § 1400Z-2(c).

2018, the U.S. Treasury announced the final opportunity zone designations for all 50 states, Puerto Rico, the U.S. Virgin Islands, American Samoa, and Guam.¹⁷⁰

The graph below shows a comparison of estimated per-year cost of the place-based economic development tools discussed so far. The Low-Income Housing Tax Credit is the most costly tool at roughly \$9 billion per year.¹⁷¹ Next highest is the Community Development Block Grant at around \$3 billion per year,¹⁷² followed by Liberty Zones and Gulf Opportunity Zones at \$2 billion¹⁷³ and \$0.9 billion, respectively.¹⁷⁴ New Markets Tax Credits have “held steady at around \$1.4 billion per year, rising to \$1.9 billion in 2019 following Congressional expansion.”¹⁷⁵ The EB-5 tool does not actually involve an outlay of federal dollars, so it is listed as \$0. The Opportunity Zone, since it currently lacks any reporting requirements, is a big question mark. The cost of the tool depends on how much is invested, something that we will not find out without mandatory reporting.¹⁷⁶

¹⁷⁰ See Cmty. Dev. Fin. Inst. Fund, *Opportunity Zone Resources*, U.S. DEP'T TREASURY, <https://www.cdfifund.gov/Pages/Opportunity-Zones.aspx> [<https://perma.cc/7JHU-SFJZ>].

¹⁷¹ TAX POL'Y CTR., *What Is the Low-Income Housing Tax Credit and How Does It Work?* (May 2020), <https://www.taxpolicycenter.org/briefing-book/what-low-income-housing-tax-credit-and-how-does-it-work> [<https://perma.cc/4QGZ-CFZJ>].

¹⁷² *CDBG Funding and Number of Metro Cities & Urban Counties, by Fiscal Year*, U.S. DEP'T HOUS. & URB. DEV., <https://www.hudexchange.info/onecpd/assets/File/CDBG-Allocations-History-FYs-1975-2014.pdf> [<https://perma.cc/E64D-W8AM>] (providing data for 1975 through 2014).

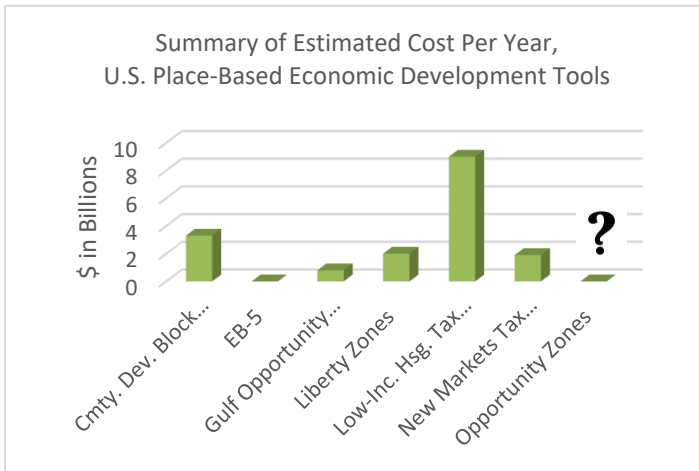
¹⁷³ See Gotham & Greenberg, *supra* note 89, at 1044 (stating that \$20 billion in Liberty Bonds are allocated over ten years, which is \$2 billion per year).

¹⁷⁴ See Bunker, *supra* note 98, at 119 (estimating the cost at \$9 billion, over 10 years, which is \$0.9 billion per year). Spending for Fiscal Year 2020 was \$3.4 billion. HUD Exchange, CDBG Activity Expenditure Reports, https://www.hudexchange.info/onecpd/assets/File/CDBG_Expend_NatAll.xlsx

¹⁷⁵ TAX POL'Y CTR., *What Is the New Markets Tax Credit, and How Does It Work?*, <https://www.taxpolicycenter.org/briefing-book/what-new-markets-tax-credit-and-how-does-it-work> [<https://perma.cc/QXW2-KQEM>]; Ayrienne Parks, *New Markets Tax Credit Receives One-Year, \$5 Billion Extension*, NEW MKTS. TAX CREDIT COALITION (Dec. 20, 2019), <https://nmtccoalition.org/2019/12/20/new-markets-tax-credit-receives-one-year-5-billion-extension/> [<https://perma.cc/48RU-RW37>].

¹⁷⁶ One voluntary reporting source shows \$7.57 billion in capital raised through January 2020. See Novogradac, *supra* note 6. As discussed above, it's possible to have

However, preliminary data suggests that the program's costs will be significant.¹⁷⁷



And yet, despite the potentially hefty price tag, the Opportunity Zone appears to embrace a hands-off strategy.¹⁷⁸ Proponents of the Opportunity Zone legislation appear to agree that particular outcomes are less important than increasing investment in poor areas broadly. Specifically, the legislation is agnostic about what types of projects are created, by whom, and for what purpose.¹⁷⁹

as great as a 96.5% tax expenditure through the Opportunity Zone. *See* Bernard Capital Partners, *supra* note 19. Under a 96.5% assumption, the cost based on the voluntarily reported data could be as much as \$7.3 billion; taken over 10 years, a modest \$0.73 billion. However, the total amount of funds raised is likely much higher than the voluntary reporting.

¹⁷⁷ EASTMAN & KAEDING, *supra* note 9, at 6. Further, regulations indicate that the program could continue through 2047 and costs of the program could increase. *Id.*

¹⁷⁸ Timothy Weaver has pointed out that the theoretical mold underpinning Opportunity Zones is a neoliberal belief in supply-side economics that has shaped urban economic development policy in the United States and United Kingdom for decades and across political ideology. *Cf.* WEAVER, *supra* note 102 (stating that the fundamental approach of the Opportunity Zone “is nothing new,” as it bears the intellectual heritage of the Thatcherian “enterprise zone”).

¹⁷⁹ The legislative text talks about designating Opportunity Zone boundaries in a manner consistent with existing state and local economic development projects, but it does not say, for instance, that affordable housing projects, green markets or grocery stores, public or private infrastructure projects, or other types of uses are preferred. Certain businesses already banned from receiving other tax benefits such as massage parlors, racetracks, and liquor stores, and other businesses listed in the Internal Revenue Code, § 144(c)(6)(B), are excluded from Opportunity Zone incentives as well. I.R.C. § 1400Z-2(d)(3) (2018).

In 2019, at a White House gathering, Senator Tim Scott of South Carolina, a sponsor of Opportunity Zone legislation, commented that Opportunity Zones were working because property values in the designated zones had already increased 20 percent.¹⁸⁰ Senator Scott went on to say that the increased property value was a positive outcome since half of residents in the zones owned their own properties.¹⁸¹ As discussed in more detail below, this singular focus on increasing property values belies the fact that property value, a form of exchange value, only really benefits owners looking to sell, or command increased rents. To benefit from increased property values, an owner must sell and exit, charge higher rent to a tenant, or borrow against the increased value of the property and use the loan proceeds for another expense or investment. Put another way, proponents of Opportunity Zones appear singularly focused on increasing exchange value of land by attracting mobile outsider capital, not on improving the lives of individuals who live in the communities the program purports to serve.

Furthermore, early research indicates that the tool will not actually increase investment in areas starved for capital. Opportunity Zone boundary designations included areas immediately adjacent to neighborhoods in transition or that were already starting to receive outside investment.¹⁸² Reports have identified that previously proposed or approved projects can exploit Opportunity Zones instead of attracting new investment which runs counter to the law's stated purpose.¹⁸³ Studies of previous place-based economic development efforts are unable to conclude that such laws achieved what they set out to do: to increase the economic vitality of poor areas.¹⁸⁴ All of this suggests that Opportunity Zones may be little more than Opportunism Zones, playgrounds for rent-seekers.

¹⁸⁰ See The White House, Remarks by President Trump at Signing of Executive Order Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing (June 25, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-executive-order-establishing-white-house-council-eliminating-regulatory-barriers-affordable-housing/> [<https://perma.cc/55S4-MBFH>].

¹⁸¹ *Id.*

¹⁸² See Eldar & Garber, *supra* note 46, at 9.

¹⁸³ See Nitkin, *supra* note 5.

¹⁸⁴ See Layser, *supra* note 9, at 405-06 & n.8.

III. OPPORTUNISM ZONES

It is too early to definitively comment on the outcomes of the Opportunity Zone.¹⁸⁵ Nevertheless, the past two years provide ample basis to analyze the legislation, identify its flaws, and propose a framework for assessing how to judge its successes and weaknesses. In conducting this analysis, I employ the Use-Transparency-Participation framework. This framework reveals troubling issues with the design of the Opportunity Zone tool. These design flaws are not innate in place-based economic development strategies; rather, they reflect an extension of the market-based approach to its outermost extremes. Without any limitations on use, investors are able to deploy tax credits to fund projects of limited tangible benefit to the broader community; indeed, these projects may actually harm residents. Without transparency in designating Opportunity Zones or tracking investments, accountability is lacking and corruption thrives. Finally, without opportunities for meaningful participation from the community, the stated beneficiaries of the tool are instead rendered passive bystanders, mere spectators as outside investors reap profits. In sum, without immediate reform, Opportunism Zones threaten to do exactly the opposite of what they promise.

A. Use

The first vector along which Opportunism Zones should be analyzed is *use*: what types of assets and benefits does the program create for the community? Part II cataloged the various use limitations posed on previous development strategies. For example, the Low-Income Housing Tax Credit, as the name suggests, limits use of tax credits for affordable housing preservation and development. By contrast, the Opportunity Zone is almost entirely silent with respect to use

¹⁸⁵ Two recent reports have offered early analysis of the Opportunity Zone's efficacy. See Richardson et al., *supra* note 30; Brett Theodos et al., *An Early Assessment of Opportunity Zones for Equitable Development Projects: Nine Observations on the Use of the Incentive to Date*, URB. INST. (June 2020), https://www.urban.org/sites/default/files/publication/102348/early-assessment-of-ozs-for-equitable-development-projects_0.pdf [<https://perma.cc/T9FX-7B8F>].

limitations.¹⁸⁶ Under the law, there are three types of Qualified Opportunity Zone Property: qualified opportunity zone stock, qualified opportunity zone partnership interest, and qualified opportunity zone business property.¹⁸⁷ While the tool allows for investment directly into a business, through stock investment or percentage ownership, there is no mention of the particular *type* of business.¹⁸⁸ In casting a wide net with respect to what uses investors may do with Qualified Opportunity Funds, Congress has apparently placed great faith in the idea that investors will direct their investments to uses that are actually needed.

This faith is misguided. Despite investors' abilities to direct capital to businesses, their focus appears to be on business property, and commercial real estate in particular.¹⁸⁹ The motivation is no mystery. The statute provides that investors can avoid all federal income tax invested in a Qualified Opportunity Fund as long as the fund has a low value at the end of an initial holding period, which expires at the end of 2026.¹⁹⁰ Investors, in this instance, who sell property held in a Qualified Opportunity Fund following 2026 enjoy tax-free capital gains. This tax incentive maximization strategy is referred to as a J-curve.¹⁹¹ As such, the Opportunity Zone tool favors investors who find "unicorn" businesses or properties that will have low initial value in 2026—the end of a 10-year required holding period—and then increase rapidly in value afterwards.¹⁹²

Without a use preference articulated in the law, investor imagination is likely to proliferate ideas to maximize financial return rather

¹⁸⁶ The Opportunity Zone text only references "sin" businesses referenced in the Internal Revenue Code § 144(c)(6)(B) as excluded. I.R.C. § 1400Z-2(d)(3) (2018).

¹⁸⁷ § 1400Z-2(d)(2)(A)(i)-(iii).

¹⁸⁸ § 1400Z-2(d)(2)(B)-(C).

¹⁸⁹ § 1400Z-2(d)(2)(D); *see also* Nitkin, *supra* note 5 (reporting the interest from investors in directing capital into Qualified Opportunity Zone funds with a focus on commercial real estate in Opportunity Zones).

¹⁹⁰ *See, e.g.*, Libin Zhang, *Springtime for Opportunity Zones and Exclusion of All Gain*, 165 TAX NOTES 1587, 1587 (Dec. 9, 2019) (citing § 1400Z-2(b)(2)(A)(i)).

¹⁹¹ *Id.* at 1588 ("A QOF and its investors may take action to help achieve a J curve, by investing in start-ups and other non-real-estate qualified Opportunity Zone businesses that may experience an initial period of negative cash flow and negative returns.").

¹⁹² *Id.* at 1588-59 (offering as a possible example low-income housing where rents are capped initially).

than improve the lives of individuals actually living in the community. To understand why this outcome is so pernicious, it is critical to understand the central difference exchange value and use value.

1. Use Value vs. Exchange Value

In the late 1980s, sociologists John Logan and Harvey Molotch co-authored a seminal book on the political economy of place.¹⁹³ In that book, Logan and Molotch argue that urban development follows a pro-growth agenda favoring exchange value of commercial real property over the use value that such property affords residents.¹⁹⁴ Specifically, they theorize the city as “growth machine,” perpetuating market-based, value-free development.¹⁹⁵ The neighborhood is the battleground where *exchange value*, or commodification, of residential property competes with *use value*, or benefits and enjoyment residents derive from real property.¹⁹⁶

Logan and Molotch identify six categories of use value. They are: (1) the daily round, (2) informal support networks, (3) security and trust, (4) identity, (5) agglomeration benefits, and (6) ethnicity.¹⁹⁷ First, one’s place of residence provides access to the daily round, defined by the ability to shop, work, access education and transportation, centers of health care, and other necessary daily routines.¹⁹⁸ Second, one’s place of residence offers value in terms of informal support networks, which offer ways for people and families to take care of one another in a mutually satisfactory way.¹⁹⁹ Third, through these informal support networks one’s place of residence should provide security and trust which in turn generate membership and protection.²⁰⁰

¹⁹³ LOGAN & MOLOTCH, *supra* note 43.

¹⁹⁴ *Id.* at 1-4.

¹⁹⁵ *Id.* at 32 (“They unite behind a doctrine of *value-free* development—the notion that free markets alone should determine land use.”); *see also*, Molotch, *supra* note 43, at 309-310.

¹⁹⁶ *Id.* at 99 (“From the point of view of residents, the creation and defense of the use values of neighborhood is the central urban question . . .”).

¹⁹⁷ *Id.* at 103-10.

¹⁹⁸ *Id.* at 103-04.

¹⁹⁹ *Id.* at 104-05. This can include sharing the obligations associated with childcare or other family or personal responsibilities. *Id.*

²⁰⁰ *Id.* at 105-07. The notion of protection through eyes on the street and other forms of protection afforded by neighborhoods is included in the use value of security and trust. *Id.*

The final three categories of use value focus on connectedness of individuals and groups based on shared background. One place of residence is connected with one's identity.²⁰¹ There are agglomeration benefits associated with many people of a shared identity or ethnicity living or working in a single place.²⁰² Lastly, individuals with shared ethnicities share common bonds that are developed within a neighborhood.²⁰³

The categories of use value articulated by Logan and Molotch only scratch the surface of the many ways in which places matter to people. By understanding the importance of these various dimensions of space, we can begin to understand that while exchange value is certainly a necessary and important component of how families advance socially and economically, it is just one piece of a much larger puzzle.²⁰⁴ Use values—the ways that people derive social and economic benefits from place—are often reflected in exchange values, but the two categories are not interchangeable.²⁰⁵

²⁰¹ *Id.* at 107-08. Who we are and what we do has a great deal to do with where we are from, and where we identify with as being from.

²⁰² *Id.* at 108-09. There are rich stories of “clustering” of business together in order to cooperate in attracting customers while also competing on price and service. *See, e.g.,* Corey Kilgannon & Andrea Salcedo, *How the Immigrant Dream Died in a Shantytown*, N.Y. TIMES (Dec. 18, 2019), <https://www.nytimes.com/interactive/2019/12/18/nyregion/willets-point-development-queens.html> [<https://perma.cc/7NL9-SQ38>] (reporting on an auto repair shop district in Queens, New York that was displaced by a city-sponsored redevelopment).

²⁰³ LOGAN & MOLOTCH, *supra* note 43, at 109-10.

²⁰⁴ *See* ROTHSTEIN, *supra* note 72 *passim* (noting the importance of residential home equity to white suburban families in advancing and growing family wealth and government policies to exclude families based on race from home ownership opportunities).

²⁰⁵ For instance, researchers have studied the impact of public-school quality and housing prices. *See, e.g.,* Theodore M. Crone, *House Prices and the Quality of Public Schools: What Are We Buying?*, FED. RES. BANK PHILA. BUS. REV., Sept.-Oct. 1998, at 3, 4-5 (reviewing recent research which in some instances found connections between variations in home prices and both school reputation and property tax rates). The concept of homeownership affords a family the ability to enjoy both exchange value and use value. *See* LOGAN & MOLOTCH, *supra* note 43, at 20. A home can be mortgaged to pay for things like higher education, used like a piggy bank when its equity increases, and sold when a family decides to move or when people pass away. It also has use value—stability for raising children, locating one in a place, and enjoying the benefits of community. In the Logan and Molotch theory, homeowners often receive less attention than do city officials and the business owners with whom they collaborate. A recent Furman Center study, however, suggests that, in urban areas, homeowners are more powerful than previously thought. Vicki

The particular design of the Opportunity Zone is susceptible to Logan and Molotch's critique. The program's benefit to residents comes via exchange value. Yet, there is merely *de minimis* sharing of exchange value with non-owner residents of Opportunity Zones.²⁰⁶ For non-property-owning residents, the benefits are primarily those concerning use value. However, the use value produced by Opportunity Zones is often underwhelming. Part of the outrage about Amazon's potential second headquarters in New York's Long Island City neighborhood arose from fact that the office space would be constructed using Opportunity Zone incentives and the increased property values flowing to local homeowners.²⁰⁷ Further, although the Opportunity Zone may be designed to create jobs and improve communities, reports indicate that investments are overwhelmingly flowing into real estate.²⁰⁸ Additionally, Opportunity Zones are prone to gentrification because of the spill-over effects coming from bordering neighborhoods that have already gentrified.²⁰⁹ For example, research by the Kinder Institute at Rice University indicates that two thirds of neighborhoods in Houston susceptible to gentrification are located in Opportunity Zones, indicating a likelihood that rising land values will displace longtime residents.²¹⁰

Been, Josiah Madar & Simon McDonnell, *Urban Land Use Regulation: Are Homevoters Overtaking the Growth Machine*, 11 J. EMPIRICAL L. STUDIES 227, 259-61 (2014).

²⁰⁶ According to Senator Scott, at least fifty percent of residents of Opportunity Zones do not own their property. *Opportunity Zones*, SEN. TIM SCOTT, <https://www.scott.senate.gov/opportunityzones> [<https://perma.cc/M4WQ-BTN6>].

²⁰⁷ Bernard Condon & Stephen Braun, *Amazon's NYC headquarters in 'opportunity zone' eligible for GOP tax breaks*, PBS NEWSHOUR (Nov. 14, 2018, 11:26 AM), <https://www.pbs.org/newshour/economy/amazons-nyc-headquarters-in-opportunity-zone-eligible-for-gop-tax-breaks> [<https://perma.cc/FC4S-LA8G>].

²⁰⁸ An analysis of 621 QOFs found that only four percent of funds had a sole or partial focus on operating businesses. Theodos et al., *supra* note 185, at 22 (citing Michael Novogradac, *Novogradac Opportunity Funds List Surpasses \$10 Billion in Investment*, NOVOGRADAC (Apr. 29, 2020, 12:00 AM), <https://www.novoco.com/notes-from-novogradac/novogradac-opportunity-funds-list-surpasses-10-billion-investment> [<https://perma.cc/7PYZ-WNEK>]).

²⁰⁹ See Richardson, *supra* note 30.

²¹⁰ William Fulton, Kinder Inst., *Opportunity Zones: Gentrification on Steroids?*, RICE UNIV. (Feb. 20, 2019), <https://kinder.rice.edu/urbanedge/2019/02/20/opportunity-zones-gentrification-steroids> [<https://perma.cc/K2NE-V86M>].

It is therefore not surprising that arguments used to advance the Opportunity Zone tool emphasize exchange value over use value. In advocating for Opportunity Zones, tech billionaire Sean Parker framed the problem of urban poverty as a capital access problem.²¹¹ Essentially, Parker argues that poor urban neighborhoods will improve if the correct incentives to invest are offered.²¹²

The reality is much more complex. Parker and other backers of Opportunity Zones ignore the fact that outcomes matter as much as does attracting capital.²¹³ Operating in the mindset of value-free development, investors do not care about how their funds are used, as long as the tax benefits are exploited.²¹⁴ However, maximizing exchange value of real property does not necessarily improve neighborhoods and communities. Instead, it often threatens their very existence.²¹⁵

Put plainly, the Opportunism Zone is an exchange value maximizer.²¹⁶ But maximizing exchange value fails to account for uses and the use value that existing and future residents care about. If the law does not factor in resident use value and fails to measure outcomes, the Opportunism Zone will struggle to achieve meaningful community development ends. Proponents, wooed by increasing real estate values, may continue to argue for its efficacy. Yet, residents, many of which do not share in the benefits of exchange value, will fail to see their use values or exchange values increase.

2. People-Based vs. Place-Based Strategies

²¹¹ See Bertoni, *supra* note 11 (“The incentive needs to be powerful enough that it can unlock large amounts of capital, aggregate that capital into funds and force the funds to invest in distressed areas.” (quoting Parker)).

²¹² *Cf. id.* (“Instead of having governmental hand out pools of taxpayer dollars, you have savvy investors directing money into projects they think will succeed.” (quoting Parker)).

²¹³ See LOGAN & MOLOTCH, *supra* note 43, at 13.

²¹⁴ Tax advisers offering advice to Qualified Opportunity Zone Fund investors focus on the most profit generating projects—or those with the greatest exchange value. See Zhang, *supra* note 190, at 1588.

²¹⁵ See LOGAN & MOLOTCH, *supra* note 43, at 111.

²¹⁶ Not all government interventions in place have a similar focus on increasing exchange value. In the context of zoning, for instance, regulation focuses on use over ownership or exchange. See, e.g., Michael Alan Wolf, *A Common Law of Zoning*, 61 ARIZ. L. REV. 771, 774 (2019) (arguing for the notion that zoning regulates use and not ownership).

Governments can intervene in a local economy either by supporting particular places or by supporting certain populations. Place-based economic development tools are part of experimental policy, and an accompanying literature, about place-based versus people-based governmental interventions.²¹⁷ Importantly, economic development tools designed to attract or retain people are different and apart from poverty alleviation tools, designed to support individual and family needs regardless of impact on the economy.²¹⁸ For instance, subsidies to groups of people may include population attraction mechanisms, such as assistance to pay down student loan debt,²¹⁹ or a natural resources dividend.²²⁰

While place-based economic development strategies aim to improve particular places, they ought to focus on improving the lives of people living in those places. Here, the Opportunity Zone's agnosticism with respect to use and the individuals who stand to benefit from particular uses is harmful.²²¹ The singular focus on place and not people demonstrates a troublesome shift away from any consideration of the ideal beneficiaries of development: individuals already residing in low-income communities.²²²

²¹⁷ See, e.g., Louis Winnick, *Place Prosperity Versus People Prosperity: Welfare Considerations in Geographic Redistribution of Economic Activity*, in *ESSAYS IN URBAN LAND ECONOMICS: IN HONOR OF THE SIXTY-FIFTH BIRTHDAY OF LEO GREBLER* 273, 274 (1966) (“[P]lace prosperity is only a means to people prosperity.”); see also Layser et al., *supra* 147, at 62-71 (proposing both people-based and place-based recommendations for addressing housing insecurity through the policy response to the COVID-19 pandemic).

²¹⁸ For a discussion of people-based and place-based poverty alleviation policies, see Nestor M. Davidson, *Reconciling People and Place in Housing and Community Development Policy*, 16 *GEO. J. POVERTY L. & POL’Y* 1, 10 (2009) (discussing, for example, investments to reduce poverty through supply-side or demand-side subsidies).

²¹⁹ See, e.g., ME. STAT. tit. 36, § 5217-D (2019) (outlining Maine’s support for new residents by paying off student loan debt of new arrivals).

²²⁰ See, e.g., ALASKA STAT § 43.23.005 (2020) (stating eligibility requirements for Alaska oil dividend program).

²²¹ This swing towards place-based government intervention, away from people-based government support, illustrates Winnick’s argument that place-based investment is simply a tool to develop people. See Winnick, *supra* note 217, at 274-75.

²²² Further, the Opportunism Zone constitutes a pendulum swing away from Winnick’s people-focused theory, which comports with the notion of improving lives of individuals as an ideal end of development. *Id.*

3. Insiders vs. Outsiders

Interventions in place impact people. Human beings experience places in different ways.²²³ Occasional or infrequent visitors to a place will likely perceive and value it much differently than residents.²²⁴ Such inconsistent visitors, to a productive metropolitan region or isolated backwater, often have a significant effect on the economy.²²⁵ Unfortunately, the Opportunity Zone lays bare the competition for place between outsiders and insiders in its prioritization of the former over the latter.

Investments into Qualified Opportunity Zone Funds provide investors the opportunity to forego capital gains tax if their investments remain in a qualified fund for a ten-year period.²²⁶ The publicly-funded incentives for a qualified opportunity zone investor are potentially enormous. For example, the marginal capital gains rate for an individual earning over \$434,550 is 20%. Thus, the federal government is offering up to a 20% subsidy per dollar over a ten-year period, plus any additional earnings, to the already wealthy. As in any investment scenario, investors will seek to minimize risk and maximize gain. Such a mindset will lead investors to seek out the safest, often the most financially conservative, investment option.

This conservatism can manifest itself in a number of ways. In particular, more secure forms of commercial real estate are likely to be favored over less secure ones. Hotels, for instance, which favor outsiders in an area, at least prior to the COVID-19 pandemic, were likely to be more favored by Qualified Opportunity Zone investors.²²⁷

²²³ For example, while chain stores may provide convenience for some, there was a movement, around a hundred years ago, to limit the proliferation of chain stores from neighborhoods. See generally Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 101 (2005) (detailing this movement).

²²⁴ Concertgoers may flood into town, stay at hotels, fill up seats in restaurants and cocktail lounges and spur a local economy. High season out-of-town travelers routinely pack streets, sidewalks, beaches, clam shacks, and other spots of local character, only to depart at the end of the weekend or season.

²²⁵ Inconsistent weather can keep visitors away—too much rain does not a beach day make; lack of snow means that skiers and snowboarders stay off the slopes.

²²⁶ 26 U.S.C. § 1400Z-2(c) (2018).

²²⁷ Due to the current public health crisis and ensuing economic shutdown, investors are likely to be much more restrained in their Opportunity Zone investing activity. The Treasury offered a number of extensions to Qualified Opportunity Fund investors due to the COVID-19 pandemic. See, e.g., Rev. Notice 2020-39, 2020-26 I.R.B.

Moreover, investors are likely to prioritize high-profit projects, such as luxury housing, thus limiting the impact on residents of communities that need investment dollars the most.²²⁸

All of this amounts to minimal value for insiders. Benefits may come through indirect ways, such as temporary construction jobs, additional permanent service-sector jobs, or public services which are funded through property taxation. Such increases in property values reach most insiders as indirect benefits, which may be important, are ultimately different than direct benefits that accrue primarily to landowners. Such benefits to landowners of increased property values are typically realized through exit or a refinancing transaction. Increased land costs can lead to increased rents and changing neighborhood demographics, rather than a boom for insiders.²²⁹

Finally, while outsider investment is encouraged,²³⁰ development led by existing community members is disfavored.²³¹ With respect to barriers to participation for existing community members, we

984. Representatives John Curtis of Utah and Henry Cuellar of Texas introduced the Small Business Opportunity Zone Act in April 2020 that would designate small businesses impacted by the COVID-19 pandemic as eligible to receive Qualified Opportunity Zone Funds. H.R. 6529, 116th Cong. (2020).

²²⁸ See Laysen, *supra* note 42, at 62 (describing the prioritization of luxury housing projects).

²²⁹ LOGAN & MOLOTCH, *supra* note 43, at 111.

²³⁰ States and cities routinely incentivize commercial real estate development to entice prospective businesses and to placate those that threaten to leave. See, e.g., Editorial, *Amazon's Golden Fleecing*, WALL ST. J. (Nov. 14, 2018, 6:33 PM EST), <https://www.wsj.com/articles/amazons-golden-fleecing1542230916> [<https://perma.cc/WNH3-TNNS>].

²³¹ For instance, the Community Development Block Grant program allows the cities and counties receiving funding to demand that funds be allocated to projects on a reimbursement basis, which ensures that projects have already engaged in capital-raising. See OFFICE OF CMTY. PLANNING & DEV., U.S. DEP'T HOUSING & URB. DEV., PLAYING BY THE RULES: A HANDBOOK FOR CDBG SUBRECIPIENTS ON ADMINISTRATIVE SYSTEMS 2-14 (rev. ed. Mar. 2005), <https://files.hudexchange.info/resources/documents/Playing-By-the-Rules-a-Handbook-for-CDBG-Subrecipients-On-Administrative-Systems.pdf> [<https://perma.cc/EU7F-WPT7>]. This creates difficulty for low-resourced groups to move forward with particular projects. See, e.g., Pete DeMola, *Miracle on Craig Street in Limbo in Schenectady as Nonprofit Awaits Building Handover*, DAILY GAZETTE (Schenectady, N.Y.) (Sept. 5, 2019), <https://dailygazette.com/article/2019/09/05/miracle-on-craig-street-in-limbo-as-nonprofit-awaits-building-handover> [<https://perma.cc/YY22-7Q43>].

will explore this insight in greater detail in Section III.C on Participation below.

B. Transparency

A second lens through which to view the Opportunity Zone is transparency. Congress left the task of designating zone boundaries to state governors.²³² Generally, each state could designate only 25% of low-income community census tracts in a state as zones.²³³ The Opportunity Zone law borrowed the New Markets Tax Credit definition of a low-income community, defining such a community as a census tract with either at least 20% of individuals at or below the poverty rate, or the median family income is below 80% of the statewide median income or metropolitan area median family income.²³⁴ Census tracts contiguous to low-income community census tracts were also able to be designated Opportunity Zones so long as the median family income did not exceed 125% of the median family income of the contiguous low-income community census tract.²³⁵ However, despite these guardrails, it has become clear that the designation process is ripe with political pandering and outright corruption. Governors have favored counties that had supported them in the prior election, and lobbyists have successfully pushed for zone designations where individual investors stand to gain from the Opportunity Zone.²³⁶

Beyond the designation phase, an ongoing transparency problem is the Opportunity Zone's lack of an annual reporting requirement. Without metrics to judge the strengths and challenges of this tool, organizations and private parties will be on their own to collect data to assess the Opportunity Zone's effectiveness. A lack of annual reporting has dogged other place-based economic development strategies, such as Community Development Block Grant, that benefit from

²³² See I.R.C. § 1400Z-1(b)(1) (2018). For an analysis of how states performed in designating Opportunity Zones, see Brett Theodos, Brady Meixell & Carl Hedman, *Did States Maximize Their Opportunity Zone Selections?: Analysis of Opportunity Zone Designations*, URB. INST. (July 2018), https://www.urban.org/sites/default/files/publication/98445/did_states_maximize_their_opportunity_zone_selections_7.pdf [<https://perma.cc/GW53-C6DA>].

²³³ § 1400Z-1(d)(1).

²³⁴ § 1400Z-1(c)(1) (“The term ‘low-income community’ has the same meaning as when used in [S]ection 45D(e).”).

²³⁵ § 1400Z-1(e).

²³⁶ See Eldar & Garber *supra* note 46, at 3.

decentralized decision-making.²³⁷ Yet, the public deserves improvement in the Opportunity Zone, not mere mimicry.

1. Corruption in the Designation Process

The lack of transparency in the Opportunity Zone designation process has led to political pandering and corruption. One study found that zone designations favored areas in counties that supported the governor in the last election.²³⁸ Such areas also had higher unemployment and poverty levels, lower incomes, and were on an upward trajectory with respect to poverty and income.²³⁹ Thus far, I have characterized the Opportunism Zone primarily as a tool for developers, landowners, and others who might benefit financially from investments. But this study may also suggest that elected officials may also be using the Opportunism Zone as a form of political payoff. Specifically, residents and business owners in counties that received designations were able to avail of additional public subsidy.

The competition for investors through the Opportunism Zone is such that less productive areas of the country are in competition for fund investment from the nation's most productive metropolitan regions.²⁴⁰ As a result, simply designating an area as within a zone does not guarantee investment. As such, I hesitate to make too much of this study. Nonetheless, a designation may send a message that the area is favored over others, which can benefit politically those in power.

In addition to governors throwing pork to their voting bases, reports have also documented efforts among special interest groups, such as landowners and developers, to influence Opportunism Zone designation.²⁴¹ One particular neighborhood on the West Side of Manhattan was included in a zone even though some market rate rents in the neighborhood are in excess of \$8,000 per month per apartment, and incomes exceeded \$112,000 in mean household income in 2017.²⁴² Economic development officials in Detroit included areas

²³⁷ See Press Release, U.S. Dep't of Housing and Urb. Dev., *supra* note 84.

²³⁸ Eldar & Garber, *supra* note 46, at 3.

²³⁹ *Id.* at 4.

²⁴⁰ Cf. Schragger, *supra* note 33 *passim* (discussing the issues with interstate and interlocal competition).

²⁴¹ See Small, *supra* note 47.

²⁴² *Id.*

designated by a local developer.²⁴³ The Department of Treasury designated a Nevada census tract based on lobbying from a wealthy landowner.²⁴⁴ Such conduct may best be solved through disgorgement, which could entail redrawing zone boundaries.²⁴⁵ In any case, the tool needs reform so that investors have the burden of proving that funds are flowing to benefit the public.

2. Lack of Annual Reporting Requirement

Apart from designation, the most significant area of concern with respect to transparency is the lack of an annual reporting requirement for Qualified Opportunity Zone funds and fund investors.²⁴⁶ At present, there are no reporting requirements.²⁴⁷ By comparison, the New Markets Tax Credit Coalition reports annually on the use of the New Markets Tax Credit.²⁴⁸ The Coalition also advocates for continued funding of the New Markets Tax Credit.²⁴⁹ The Coalition's annual report may appear self-serving, but it can also demonstrate

²⁴³ See Jeff Ernsthausem & Justin Elliott, *How a Tax Break to Help the Poor Went to NBA Owner Dan Gilbert*, PROPUBLICA (Oct. 24, 2019, 2:10 PM EST), <https://www.propublica.org/article/how-a-tax-break-to-help-the-poor-went-to-nba-owner-dan-gilbert> [<https://perma.cc/6C4D-5QZU>] (“Quicken’s top lobbyist was so enmeshed in the process, his name appears on an opportunity zone map made by the city economic development organization, recommending part of downtown be included in the tax break. No other non-city officials are named on the document.”).

²⁴⁴ See Lipton & Drucker, *supra* note 86.

²⁴⁵ For a recent discussion of restitutionary disgorgement of improper gains, see Caprice L. Roberts, *Disgorging Emoluments*, 103 *Marquette L. Rev.* 1 *passim* (2019).

²⁴⁶ See, e.g., Noah Buhayar, *Trump Tax Break’s Hidden Frenzy: Corporate Giants Are Rushing In*, BLOOMBERG (Dec. 12, 2019, 9:53 PM), <https://www.bloombergquint.com/business/filing-frenzy-shows-companies-lining-up-for-poor-area-tax-breaks> [<https://perma.cc/F3CB-PU9A>] (“The filings underscore the lack of transparency surrounding a federal subsidy that could cost billions of dollars”)

²⁴⁷ See I.R.C. § 1400Z-1-2 (2018). For a discussion of how existing place-based economic development strategies include reporting requirements, see Brett Theodos & Brady Meixell, *Urb. Inst.*, Public Comment on Reporting Requirements in Proposed Opportunity Zone Regulations 3-4 (Dec. 28, 2018), https://www.urban.org/sites/default/files/publication/99621/public_comment_on_reporting_requirements_in_proposed_oz_regulations.pdf [<https://perma.cc/FQ4B-RZDZ>].

²⁴⁸ See, e.g., NEW MARKETS TAX CREDIT COAL., *NEW MARKETS TAX CREDIT PROGRESS REPORT: 2019* (July 2019), <https://nmtcoalition.org/wp-content/uploads/2019/09/2019-NMTC-Progress-Report.pdf> [<https://perma.cc/AC39-B4V8>].

²⁴⁹ *Id.* at 2.

strengths and weaknesses of the New Markets Tax Credit. That information can serve as the basis of regulatory reform. A significant criticism of the Community Development Block Grant is its lack of reporting and demonstrating success.²⁵⁰ The New Markets Tax Credit Coalition Report, and lack of a unified Community Development Block Grant report, point to the need for Opportunity Zone transparency and reporting.

C. Participation

Participation is the third and final lens through which this article analyzes the Opportunism Zone. The only participation required in the governance of the Opportunism Zone is in tasking the governor of each state to designating each zone (or to delegate that task).²⁵¹ The focus in this Section's participation-prong analysis is on the significant cost of participating in an Opportunism Zone investment.

1. Costs of Participating in an Opportunism Zone Investment

The requirements for participating in the Opportunism Zone are significant. On the investment side, there are burdensome requirements to both organize and invest in a Qualified Opportunity Zone Fund. There are also significant professional costs to developing a project that might seek financing from a Qualified Opportunity Zone Fund. As a recent report from the Urban Institute notes, it is very unlikely that Opportunity Zone residents will have the ability to invest in projects that will likely shape their neighborhoods.²⁵²

First, it is important to note the significant compliance costs associated with entry. The actual text of the Investing in Opportunity Act is under three thousand words.²⁵³ Yet the final regulations on investing in Qualified Opportunity Funds issued by the U.S. Treasury

²⁵⁰ See Theodos et al., *supra* note 81, at 13.

²⁵¹ § 1400Z-1(b)(1).

²⁵² See Theodos et al., *supra* note 185, at 13 (discussing the misalignment of investors with capital gains to invest and the modest incomes of residents of Opportunity Zones).

²⁵³ The final statute that was adopted was even more brief. See § 1400Z-1-2.

Department and the Internal Revenue Service total some 544 pages.²⁵⁴ While the design of the Investing in Opportunity Act may not have intended to be burdensome on participants, the resulting regulations are incredibly complex. As a result, simply complying with the regulations of the Opportunity Zone tool creates significant barriers to individuals and groups participating in zone investments.²⁵⁵ Complying with the requirements will no doubt require significant expenses including professional tax, financial, and legal assistance—all professional service providers who stand to profit from the expense of compliance—yet another category of opportunistic actors.²⁵⁶

Second, the high barriers to entry to investing in a Qualified Opportunity Zone Fund reinforces the program's prioritization of wealthy outsiders over community insiders. For starters, an investor must have capital gains from the sale of assets, such as stocks or real estate, with which to invest in a Qualified Opportunity Zone Fund.²⁵⁷ Reports indicate that capital gains go overwhelmingly to already well-off families.²⁵⁸ The majority of taxpayers are therefore unlikely and, in most cases, unable to even participate in organizing and investing in a Qualified Opportunity Zone Fund.²⁵⁹ Thus, the wealthy—rather

²⁵⁴ Investing in Qualified Opportunity Funds, Treas. Reg. §§ 1.1400Z2(a)-1 to (d)-2, 1.1400Z2(f)-1, 1.1502-14Z, 1.1504-3 (2019).

²⁵⁵ See, e.g., Jon Banister & Matthew Rothstein, *The Real Opportunity Zone Gold Rush Is Happening at Events, in Consultants' Offices*, BISNOW (Aug. 5, 2019), <https://www.bisnow.com/national/news/opportunity-zones/inside-the-industry-forming-around-the-opportunity-zone-program-100192> [<https://perma.cc/F339-269L>] (describing how the need for expensive professional services could keep small community-based groups from participating).

²⁵⁶ *Id.* ("Opportunity zones will likely prove to be a windfall for law and accounting firms advising investors . . .").

²⁵⁷ See § 1400Z-2.

²⁵⁸ See, e.g., *T18-0231 – Distribution of Long-Term Capital Gains and Qualified Dividends by Expanded Cash Income Percentile, 2018*, TAX POL'Y CTR. (Nov. 16, 2018), <https://www.taxpolicycenter.org/model-estimates/distribution-individual-income-tax-long-term-capital-gains-and-qualified-30> [<https://perma.cc/6YSX-E5Z3>] (noting that the top 1% of families earned almost 70% of capital gains in 2018).

²⁵⁹ It may be immaterial that participation in organizing and investing in Qualified Opportunity Zone Funds is limited to the already wealthy. If the goal of the Opportunity Zone is to direct capital to areas where it is lacking, the source of the funds may not make a difference. However, from a normative design perspective, limiting participation to only those with existing wealth may limit the types of projects that are selected and invested in.

than the everyday resident of Opportunity Zone tracts—are in a prime position to organize or invest in a Qualified Opportunity Zone Fund.

Third, there is a stickiness about investing in a Qualified Opportunity Zone Fund beyond the fact that the ability to participate is contingent on capital gains realization. Fund organizers often require large minimum investments due to the hassle involved in organizing and operating funds. One report indicates that most funds come with a six-figure minimum investment amount.²⁶⁰ As a result, most individual taxpayers, even if they had capital gains to invest, would be shut out of any possible gains from investing due to the amount of funds required to invest.²⁶¹

There is still another hurdle: cash invested in a Qualified Opportunity Zone must remain for a certain period of time in order to maximize tax incentives.²⁶² Fund organizers must clearly articulate how assets will be invested in projects.²⁶³ As with other sorts of financial investments, investors must be comfortable leaving their assets invested in a fund without the certainty that they will even be able to recoup their investment should projects not produce returns.

Not only does the complexity and risk associated with organizing and investing in Qualified Opportunity Zone Funds lock many community members out of the process, but it also further exacerbates the propensity for conservative, less risky investing. In order to take advantage of both the capital gains deferral, and the stepped-up basis components of the Opportunity Zone, Qualified Opportunity Zone Funds are unlikely to invest in projects that are either risky or unlikely

²⁶⁰ Ryan Ermey, *Opportunity Zone Investing: Is It for You?*, KIPLINGER (June 5, 2019), <https://www.kiplinger.com/article/investing/T041-C000-S002-opportunity-zone-investing-is-it-for-you.html> [<https://perma.cc/K53C-5R23>].

²⁶¹ This aspect of the story is really about economies of scale. To set up a Qualified Opportunity Zone fund, one must pay professionals, like accountants, lawyers, and other specialists. Complying with program requirements is expensive. It is less profitable to allow more taxpayers to join a fund than it is to set high minimum investment amounts and focus on fewer investors.

²⁶² See § 1400Z-2(b) (determining tax basis in opportunity zone property after five, seven, or ten years).

²⁶³ This Article acknowledges disclosure requirements associated with organizing and investing in a Qualified Opportunity Zone Fund, but also notes that it is beyond the scope of the present argument.

to increase in property value. Small businesses are less likely to receive investor attention given the emphasis on real estate from the investment community.²⁶⁴

As a result, projects with more fixed return, such as market rate housing, as well as hotels and other commercial real estate projects serving particular segments of the population (i.e. tourists, visitors, businesspeople) are more likely to receive funds. Investment in job creation and business growth in particular could do much to benefit residents who have lived and worked in a zone for years.²⁶⁵

2. Broader Implications of Participation

Jocelyn Simonson and Sabeel Rahman have explored the various ways that popular participation shapes important government functions such as administration of the criminal justice system and in developing responses to inequality in economic systems.²⁶⁶ This combined work builds on arguments advanced by Simonson and Rahman have explored independently elsewhere. For Simonson, bottom up participation of the people through court watching, participatory defense, and community bail funds, shapes both criminal procedure and constitutional norms.²⁶⁷ For Rahman, how we govern access to essential necessities, like water and housing, should be viewed through inequality and exclusionary administration.²⁶⁸

I have made the connection between participation and connection community-based economic development elsewhere.²⁶⁹ With respect to the Opportunism Zone, participation matters in many of the same ways that place matters. If the purpose behind the tool is to pro-

²⁶⁴ See Theodos et al., *supra* note 185, at 22-23.

²⁶⁵ See, e.g., Andrew Dunn, *Opportunity Zones Are Creating Opportunity – For Charlotte’s Rich*, CHARLOTTE AGENDA (Jan. 14, 2019), <https://www.charlotteagenda.com/153652/opportunity-zones-charlotte> [<https://perma.cc/JD2R-5VUM>].

²⁶⁶ See K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679 *passim* (2020).

²⁶⁷ See Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019).

²⁶⁸ See K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447 (2018).

²⁶⁹ Edward W. De Barbieri, *State and Local Economic Development and Urban Anticipatory Governance*, 43 PLANNING & ZONING L. REP. 1 *passim* (May 2020).

vide local residents with greater capital access, it would stand to reason that involving residents in the decisions driving capital influx ought to improve outcomes.

This is no doubt easier said than it is done. Legislative attempts to make development more palatable face significant opposition.²⁷⁰ The theory that resident homeowners will vote their economic interest—and encourage their elected officials to do the same—is not new,²⁷¹ but it should not deter the push for greater participation. In recent years, for instance, efforts to expand participation in commercial real estate investing through cooperative ownership have taken hold.²⁷² When the law excludes participation, it impedes the benefits that flow from the checks and balances of governance.

IV. POTENTIAL OPPORTUNITY ZONE FIXES

The Use-Transparency-Participation framework not only helps highlight the shortcomings of the Opportunity Zones law, but it also offers a roadmap for potential design fixes. This Part provides an overview of those reforms by building off legislative fixes that have already been proposed. If implemented, this package of reforms could transform Opportunism Zones and ensure that the program is a tool of empowerment for the individuals within the targeted communities, rather than a mere device for rent-seeking by outsiders.

A. Use

²⁷⁰ Recently, a bill in the California State Senate that would have eliminated certain zoning restrictions near transit lines and job centers was defeated. Scott Brinklow, *California's Transit-Housing Bill SB 50 Stuck in Limbo Until 2020*, CURBED S.F. (May 16, 2019, 11:53 AM), <https://sf.curbed.com/2019/5/16/18617019/transit-housing-bill-sb-50-appropriations-committee-suspense-wiener> [<https://perma.cc/A9RB-NR9V>].

²⁷¹ Here, William Fischel's notion that local governments act in the interest of current resident homevoters to the exclusion of others, such as owners of newly built homes, renters, and apartment dwellers, is informative. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 9-10 (2001). Homevoter preferences will impact the places where development occurs in a number of ways. It will prevent the deregulation of local zoning ordinances. *Id.* at 54-57. It will prevent certain economic development projects. *Id.* at 8-10.

²⁷² See, e.g., *About NYC REIC*, N.Y. CITY REAL ESTATE INV. COOPERATIVE, <http://nycreic.com/about> [<https://perma.cc/Q7SR-MWW2>]; *Our Story*, NORTHEAST INV. COOPERATIVE, <http://www.neic.coop/our-story> [<https://perma.cc/9UEQ-4S7E>].

In Part III, this Article discussed two primary problems with respect to use. First, under the current law, Qualified Opportunity Zone Fund investments need not be limited to any particular project-type. Second, by maximizing exchange value, the Opportunism Zone largely ignores the use value that residents receive from particular aspects of neighborhood life. Failing to restrict project type, or to consider use value, means that Opportunity Zone investments need not necessarily contain a public benefit other than the mere investment of capital itself. Capital alone, however, is insufficient to ensure a public benefit. An investment that improves a piece of real estate, or supports a new or operating business, does not necessarily improve the lives of a designated neighborhood's existing residents. As this Article has argued, focusing uses on development that improves the lives of existing residents ought to be a primary purpose of a community economic development strategy.

With respect to addressing these two use problems, there are a number of legislative solutions. First, more stringent restrictions could be placed on the uses of Qualified Opportunity Zone Fund investments. Second, use restrictions can focus on particular projects that bring the greatest use values to existing neighborhood residents. Finally, place-based and people-based strategies might be combined to give choice regarding use of funds to people who need assistance in the form of an expanded cash transfers.

Currently, a pair of bills introduced in the House and Senate would begin the process of limiting the uses from Opportunity Zones. The Opportunity Zone Reporting and Reform Act, introduced by Senator Ron Wyden, would eliminate the use of Opportunity Zone incentives for self-storage facilities, sports stadiums, and any housing that does not include 50% rent-restricted by the Low-Income Housing Tax Credit, and occupied by individuals earning less than 50% of area median income.²⁷³ In the House, a bill introduced in the Majority Whip James Clyburn would build on the Wyden proposal but add parking as a prohibited use for Opportunity Zone investments.²⁷⁴ While these proposals would be a step in the right direction, neither is perfect when viewed through the Use-Transparency-Participation Framework.

²⁷³ Opportunity Zone Reporting and Reform Act, S. 2787, 116th Cong. § 6(c)(1)(B) (2019).

²⁷⁴ Opportunity Zone Reform Act, H.R. 5042, 116th Cong. § 5(c)(1) (2019).

1. Restrict Uses of Qualified Opportunity Zone Fund Investments

As mentioned above, there are virtually no restricted uses for Qualified Opportunity Zone Funds as they exist now.²⁷⁵ Aligning use restrictions on particular policy outcomes may increase public benefits in designated neighborhoods. These restrictions could be implemented in a variety of ways, and there are a number of place-based economic development strategies to consider as guides in this analysis.

For instance, the Low-Income Housing Tax Credit represents the most extreme limitation on use, as the tax credit is only available for the creation of affordable housing. In critiquing the Low-Income Housing Tax Credit, particularly for not delivering affordable housing where it is needed, scholars also note the virtues of the tool in creating affordable housing.²⁷⁶ By contrast, the New Markets Tax Credit takes a more lax approach to use restriction by allowing projects to contain a variety of uses. In 2018, for instance, New Markets Tax Credit projects included approximately 37% of projects with a retail component, such a mixed-use projects, retail, restaurants, and service sector, and miscellaneous small business and office space.²⁷⁷ While this program design may not be as tailored as the Low-Income Housing Tax Credit, by classifying projects by use and location it still allows for evaluation and consideration effectiveness of the incentive.

By restricting real estate development to only affordable housing, the legislative proposals discussed above steer more towards the narrow Low-Income Housing Tax Credit approach than the broader New Markets Tax Credit approach. In the end, such a narrow focus may be overly restrictive. While such a proposal is no doubt a net

²⁷⁵ Other than the prohibited business excluded in Internal Revenue Code Section 144(c)(6)(B), the potential use of Opportunity Zone funds is extremely broad. *See* I.R.C. § 1400Z-2(d)(3) (2018).

²⁷⁶ *See* Weiss, *supra* note 142 *passim*.

²⁷⁷ Mixed-use projects, grocery stores, recreation, retail, restaurants, and service sector, hotels and tourism, and miscellaneous small business and office space New Markets Tax Credit projects in 2018 totaled 106 projects. Divided by the total number of New Markets Tax Credit Projects in 2018 of 286, these represent approximately 37% of all projects. NEW MARKETS TAX CREDIT COAL., *supra* note 248, at 16.

positive because it brings to the fore how projects will impact neighborhoods and their existing residents, the proposal could be improved upon by thinking more holistically about use value.

2. Consider Use Value When Restricting Uses of Qualified Opportunity Zone Fund Investments

Access to employment opportunities, health care, and education are all key assets to building stable neighborhoods, and in serving marginalized populations.²⁷⁸ As such, affordable housing, health clinics or medical facilities, and other projects that locate affordable housing near centers of employment, health care, and education have particularly high use value to low-income residents.

Other place-based economic development incentives include opportunities to consider use value. Community Development Entities, certified by the Treasury's Community Development Financial Institutions Fund, must have as their missions the primary purpose of serving low-income individuals.²⁷⁹ Such entities, in selecting a particular project to approve and finance in the process of a New Markets Tax Credit transaction must consider factors such as how the project will improve current resident quality of life—in other words, use value.²⁸⁰ State housing agencies may consider proximity to grocery stores, transportation, and other amenities in deciding to which projects and developers to extend Low-Income Housing Tax Credits.²⁸¹ Local government agencies can consider particular project features which may fall under one of the six use value categories when considering Community Development Block Grant awards.²⁸² Currently, no similar moments or processes exist to formalize consideration of use value in Opportunity Zone investments. Any use value considerations

²⁷⁸ See, e.g., Caitlin M. Stover, Margaret B. Drew & Jason Potter Burd, *Services and Resources for People Living with HIV/AIDS in the Southcoast of Massachusetts: "Can't Get There From Here!"*, 2 J. Nursing & Healthcare 1, 3 (2017) (identifying transportation as a major barrier in the inability of vulnerable groups in accessing health care).

²⁷⁹ See 26 U.S.C. § 45D(c) (2018).

²⁸⁰ See Pappas, *supra* note 129, at 325-28.

²⁸¹ See Weiss, *supra* note 142, at 233 ("Market analysts are instructed to analyze a wide variety of factors in the 'primary market area' . . . including . . . location, employment and local economy, area demographics . . .").

²⁸² See 42 U.S.C. § 5301(c) (2018); Theodos et al., *supra* note 81, at 7-8.

are left to private investors, who, as already discussed, tend to narrowly focus on exchange value.²⁸³ Given the incentives to maximize profits of the Opportunity Zone, health care and related facilities are unlikely to receive investments.²⁸⁴

Some of the currently proposed legislative fixes, such as eliminating particularly undesirable uses like storage facilities, sports stadiums, and parking lots, address use value concerns. These facilities are, in many cases, designed to benefit transient or out-of-town populations, often to the detriment of existing neighborhood residents. Sport stadiums, which already receive massive public subsidy, have recently come under scholarly focus as they tend to offer little value to insiders.²⁸⁵ Imposing such restrictions aims to increase use value for existing residents. However, rather than a purely negative approach that eliminates certain categories of investment, Opportunity Zones would stand to benefit from a positive approach that more fully integrates use considerations into every decision to extend subsidies.

3. Combine Place-Based and People-Based Subsidies

One legislative proposal for reform might include both place-based *and* people-based subsidies. For example, the Earned Income Tax Credit provides a wage subsidy for poor workers.²⁸⁶ Reshaping the Opportunity Zone to give a percentage boost to the Earned Income Tax Credit for residents of Opportunity Zones, in addition to the capital gains tax expenditures of the existing law, might address some of the distributional issues revealed through the Use frame.

²⁸³ See Zhang, *supra* note 190, at 1588-89.

²⁸⁴ Here, there is a clear contrast between the Opportunity Zone as currently in force and the New Markets Tax Credit: New Markets Tax Credit projects are subsidized tax-exempt, often mission-based Community Development Entities which themselves benefit from financing provided by Treasury's CDFI Fund. See *supra*, Section II.C.2.a.

²⁸⁵ See, e.g., Matthew J. Parlow, *Publicly Financed Sports Facilities: Are They Economically Justifiable? A Case Study of the Los Angeles Staples Center*, 10 U. MIAMI BUS. L. REV. 483, 509-23 (2002).

²⁸⁶ See MICHELLE LYON DRUMBL, TAX CREDITS FOR THE WORKING POOR: A CALL FOR REFORM 2-3 (2019).

While not tied to the Opportunity Zone, Senator Elizabeth Warren's American Housing and Economic Mobility Act of 2019 offers similar elements of place-based and people-based reform.²⁸⁷ Such a bill, which provides a benefit for existing residents who have lived in a neighborhood for at least four years, demonstrates the challenges inherent in benefiting existing residents, since gentrifying residents could benefit alongside longer-term residents.²⁸⁸ Nevertheless, creating some ability for existing residents to decide how to make use of public resources designed to improve their lives is an important direction for place-based economic strategies to head.

4. Against Use Requirements

An obvious argument against regulating use and including factors associated with use value is that increased regulation does not always lead to better outcomes. There is evidence, for instance, to support the assertion that decreasing land use regulation can result in a decrease in housing prices.²⁸⁹ If a goal of economic development tools like Opportunity Zones is to address issues of affordable housing, perhaps we should consider deregulatory efforts too. To see how this could work in practice, consider the case of deregulation of craft beverage laws. A study of Charlotte, North Carolina, indicated that proximity of housing to new craft breweries resulted in an increase in property values, with an almost 10% increase in the average cost of

²⁸⁷ S. 787, 116th Cong. § 201 (2019) (providing down payment assistance for African American and other marginalized groups seeking to purchase homes).

²⁸⁸ See Kriston Capps, *Elizabeth Warren's Housing Crisis Plan Hints at Reparations*, BLOOMBERG CITYLAB (Jan. 4, 2019 1:29 PM), <https://www.bloomberg.com/news/articles/2019-01-04/inside-senator-elizabeth-warren-s-housing-crisis-fix> [<https://perma.cc/G3VP-H2ER>].

²⁸⁹ Desen Lin & Susan Wachter, *The Effect of Land Use Regulation on Housing Prices: Theory and Evidence from California* (Samuel Zell & Robert Lurie Real Estate Ctr., Working Paper No. 817, 2019) http://realestate.wharton.upenn.edu/wp-content/uploads/2019/04/LinWachter19_04042019.pdf [<https://perma.cc/MN7G-WJME>].

single-family homes and a 3% increase in the value of condominiums.²⁹⁰ However, the study is silent with respect to change in rents, or impact on rental housing prices.²⁹¹

In the conversation about use, it is important to discuss how regulations on use can lead to exclusion. For instance, scholars have critiqued urban policy in the United States focused on building power and autonomy in the suburbs, a use value increase for suburban residents, to the exclusion of residents of the urban core.²⁹² There is a recognition and concern that past inequities under law, such as those perpetuated by redlining and other racially discriminatory laws, not be repeated.²⁹³ Even well-intentioned, or well-designed tools, over time can be less useful. For instance, programs like the Community Development Financial Institution Fund of the U.S. Treasury, may take on more conservative, less favorable policies due to the institutional needs of the organizations themselves.²⁹⁴

A theoretical counter to arguments against use may be that use and use value is a better mechanism to address human flourishing. Gregory S. Alexander has articulated property-based theories that support human flourishing.²⁹⁵ Alexander's notion of private ownership is justified on the basis that ownership facilitates the opportunity for people to live "well-lived lives."²⁹⁶ The theoretical basis of the Opportunity Zone seems inconsistent with Alexander's notion of human flourishing because of the absence of a prioritization of use. The

²⁹⁰ David Hopper & Neil Reid, *University of Toledo – Craft Breweries Increase Residential Property Values*, ACADEMIC MINUTE (Sept. 26, 2019, 12:01 PM) <https://academicminute.org/2019/09/neil-reid-university-of-toledo-craft-breweries-increase-residential-property-values/> [<https://perma.cc/85GL-M8L4>].

²⁹¹ Deregulatory efforts that disproportionately benefit homeowners can be seen as subsidizing homeownership.

²⁹² See, e.g., Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1068-81 (1996).

²⁹³ See Andre M. Perry & David Harshbarger, *America's Formerly Redlined Neighborhoods Have Changed, So Must Solutions to Rectify Them*, BROOKINGS (Oct. 14, 2019), <https://www.brookings.edu/research/americas-formerly-redlines-areas-changed-so-must-solutions/> [<https://perma.cc/F7N9-73FD>].

²⁹⁴ See Miriam Axel-Lute, *Is Success Making CDFIs Too Risk Averse?*, SHELTERFORCE (Aug. 29, 2019), <https://shelterforce.org/2019/08/29/is-success-making-cdfis-too-risk-averse/> [<https://perma.cc/Y8NN-2RDY>] (examining whether community development financial institutions are taking on enough risk in furtherance of their missions to serve undercapitalized entrepreneurs who traditional lenders will not lend to).

²⁹⁵ Gregory S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING (2018).

²⁹⁶ *Id.* at xiii.

Opportunity Zone is supposed to direct capital to capital starved areas, but without any use-specificity. If capital does not contribute to use that improve the lives of those living in designated zones, then the tool ought to be revised and reconsidered. And for the reasons discussed above, use restrictions would help guarantee that Opportunity Zones provide actual benefits to low-income communities and not only to rent-seeking outsiders.

B. Transparency

There are two key problems with respect to transparency as it applies to improving the Opportunism Zone. First, the tool lacks a periodic reporting requirement. Second, the process for zone designation in the states and territories is opaque, and this opacity has sometimes led to allegations of landowners directly lobbying for census tract designation. Promising legislative reforms in Congress to address transparency in the Opportunity Zone include both an annual reporting requirement, as well as disclosure concerning particular tracts that ought not have been designated.

1. Annual Reporting Requirements

Transparency in the form of required reporting is perhaps the most intuitive aspect of the Use-Transparency-Participation frame. For such a technical tool—a tax incentive to defer capital gains—data about outcomes and benefits to the public can seem removed and abstract. But data will be critical in assessing whether Opportunity Zones in fact benefit residents of the community, while avoiding relegation as mere Opportunism Zones.

Indeed, the original draft of the Investing in Opportunity Act required a progress report five years after the bill was adopted, and annually thereafter.²⁹⁷ Unfortunately, the reporting requirement was removed in the language that was ultimately passed into law.²⁹⁸

Today, the call for increased transparency and reporting requirements garners bipartisan support. One Senate proposal, introduced by Republican Senator and Opportunity Zone proponent Tim Scott, includes reporting requirements in the form of an annual report by the Treasury about the impact of the tool.²⁹⁹ Such a requirement

²⁹⁷ See Investing in Opportunity Act, S. 293, 115th Cong. § 2(c) (2017).

²⁹⁸ I.R.C. § 1400Z-1-2 (2018).

²⁹⁹ S. 2994, 116th Cong. sec. 3, § 6039K (2019).

falls short of guaranteeing public disclosure of project-level data. Also, it fails to guarantee that third-party, nonpartisan researchers can analyze the data and study Opportunity Zone outcomes on communities. Meanwhile, major Democratic-led legislative reform proposals in the House and Senate agree about the need for transparency in the Opportunity Zone. The proposals introduced by Senator Wyden,³⁰⁰ and Majority Whip Clyburn³⁰¹ would require the Government Accountability Office to issue a report every five years on the community impact of the Opportunity Zone on designated and non-designated census tracts.

2. Opportunity Zone Designation

In addition to annual reporting requirements, it is also essential that there be more transparency in the Opportunity Zone designation process. As discussed above, a number of state Opportunity Zone designation processes revealed significant lobbying from investors.³⁰² Setting aside instances where lobbyists and developers sought to influence the Trump Administration's Treasury Department certification of Opportunity Zones,³⁰³ there are reasons for local elected officials to make particular Opportunity Zone designations as well. If local elected officials knew that particular investors owned property, officials could include those parcels in designated Opportunity Zones to offer an additional incentive for that development to occur.³⁰⁴ Local elected officials, very sensitive to increasing local property tax revenue, were in a position to use the federal Opportunity Zone designation process in a way that increased or attempted to increase property tax revenue and expand growth.³⁰⁵

³⁰⁰ See S. 2787, 116th Cong. § 8 (2019).

³⁰¹ See H.R. 5042, 116th Cong. § 7 (2019).

³⁰² See *supra* Section III.B.1.

³⁰³ See, e.g., Ernsthäusen & Elliott, *supra* note 243.

³⁰⁴ Internal Revenue Code Section 1400Z-1(b)(1) authorizes state governors (or chief executive in territories) to designate Opportunity Zones. It was not uncommon for governors to tap local economic development officials to designate particular census tracts. See Ernsthäusen & Elliott, *supra* note 243 (“[O]fficials in cities like Detroit would have a lot of sway in the [Michigan designation] process. A week later, a top economic development official in Detroit emailed maps of areas that the city wanted to nominate for the program to state officials.”)

³⁰⁵ In this way, the Opportunity Zone is yet another instance of Molotch's notion of the city as growth machine. See Molotch, *supra* note 43.

However, there is absolutely no reason why Congress should add an additional federal subsidy to commercial real estate development in an area already attracting, or likely to attract, capital. And Congress certainly should not be designating Opportunity Zones without a transparent and open process subject to public scrutiny. If the Opportunity Zone is to survive, the designated census tracts should absolutely be in bona fide distressed areas not already attracting capital.³⁰⁶ For landowners to reap an outsized benefit because they were able to influence the designation process is wrong, and it points towards the worst aspect of the Opportunism Zone.

The experience of Portland, Oregon is once again instructive. In Portland, fear of gentrification led to no distressed neighborhoods being designated.³⁰⁷ Instead, the entire central downtown business area was designated.³⁰⁸ However, the revelation that only the downtown Portland area was designated led some to question the goals of the Opportunity Zone incentive in funding capital investment in an area already attracting capital.³⁰⁹

A fair designation process, that gave eligible tracts the possibility for designation based objective criteria, should be the standard. Mechanisms to reveal designation processes, and to redo improper

³⁰⁶ Observers have pointed out some state examples, such as Wisconsin, where no Opportunity Zone designation occurred in non-low-income contiguous tracts. *See, e.g.,* @NateMJensen, TWITTER (Dec. 3, 2019, 11:56 AM) <https://twitter.com/NateMJensen/status/1201908081757769729> [<https://perma.cc/Q9K5-SRFW>] (citing *Opportunity Zones in Wisconsin*, OPPORTUNITY DB, <https://opportunitydb.com/location/wisconsin> [<https://perma.cc/MJ96-Z9FV>]).

³⁰⁷ *See* Melody Carter, *Federal Opportunity Zones: The Newest Gentrification Tool?* 27 (2019), <https://smartech.gatech.edu/handle/1853/61326> [<https://perma.cc/L9YR-8Y3Q>] (citing an interview with Troels Adrian of Prosper Portland on February 5, 2019). Although place-based tax incentives come in a variety of forms, they tend to result in gentrification. *See* Layser, *supra* note 88 *passim*; Eric Willett & Brett Dunlavey, *Building Opportunity: Mapping Gentrification and Investment across Opportunity Zones*, RCLCO 2-4 (Jan. 29, 2019), <https://www.rclco.com/wp-content/uploads/2019/02/Advisory-Opportunity-Zones-Gentrification-Investment.pdf> [<https://perma.cc/Z5WA-2XHC>].

³⁰⁸ *See* *Opportunity Zones in Oregon*, OPPORTUNITY DB, <https://opportunitydb.com/location/oregon> [<https://perma.cc/MJ96-Z9FV>].

³⁰⁹ *See* Noah Buhayar & Lauren Leatherby, *Welcome to Tax Breaklandia*, BLOOMBERG BUSINESSWEEK, <https://www.bloomberg.com/graphics/2019-portland-opportunity-zones> [<https://perma.cc/T8HJ-2WXV>].

designations, are important to ensuring equitable distribution of public benefits arising from Opportunity Zone designation.

Unfortunately, the current legislative proposals to address the designation process are insufficient. Both the Clyburn and Wyden proposals would merely eliminate designated census tracts that are contiguous to low-income communities. The Scott proposal, meanwhile, would leave the designations alone. The proposal introduced by Representative Rashida Tlaib, whose district includes the city of Detroit, would repeal the Opportunity Zone, thus undoing the designations entirely.³¹⁰ To truly solve the designation problem, we need not only limitations on what communities can be designated Opportunity Zones, but also greater community voice in that designation process.

3. Against Transparency Requirements

Robust transparency and reporting requirements were included in the initial Investing in Opportunity Act.³¹¹ Statements from Opportunity Zone proponents indicate that the transparency and reporting provisions were removed from the 2017 tax overhaul because of procedural considerations.³¹² Today, however, proposals in Congress from Opportunity Zone supporters include transparency and reporting requirements.³¹³

Excessive disclosure in the form of burdensome documents or forms might perhaps cause time delay and slow deal flow. However, such transparency efforts could ensure that the deals made are actually benefitting the community and not simply outside investors. Thus, a transparency focus could address the disconnect between Opportunity Zones, a tool to expand the horizons of those living in poor communities, and Opportunism Zones, playgrounds for rent-seeking by outside investors.

³¹⁰ H.R. 5252, 116th Cong. § 1 (2019).

³¹¹ S. 293, 115th Cong. § 2(c) (2017).

³¹² See, e.g., Abby Shultz, *Private Sector Looks to Measure Impact of Opportunity Zones*, BARRON'S (Feb. 27, 2019, 9:36 AM) <https://www.barrons.com/articles/private-sector-looks-to-measure-impact-of-opportunity-zones-01551278200> [<https://perma.cc/JBL4-5NQ8>] (“It was deemed those reporting requirements were not relevant—it wasn’t a political or substantive decisions, it was a procedural decision . . .”).

³¹³ See, e.g., S. 2994, 116th Cong. sec. 3, § 6039K (2019).

Nevertheless, despite the blatant need and bipartisan support for greater transparency, actually achieving that transparency will not be easy. Measuring success is difficult, especially when the return on investment is hard to quantify. An attempt to define appropriate metrics can be a fraught endeavor. Choosing priorities among those metrics is not easy. With that being said, legislative proposals such as the IMPACT Act would impose more reporting requirements than currently exist.³¹⁴ Those reporting requirements would focus on the number of full-time equivalent jobs resulting from Opportunity Zone investments, as well as amount of funds invested in the designated zones.³¹⁵

C. Participation

At present, the Opportunity Zone lacks any requirement for public or governmental participation in the investment selection and approval process. Potential legislative solutions to address this participation gap include involving Community Development Entities and involving local government bodies, among other proposals.

1. Involve Community Development Entities

One avenue for stimulating public participation, or at least attaining a proxy for such participation, is to require the involvement of an already highly regulated entity, such as a Treasury-certified Community Development Entity.³¹⁶ Community Development entities are defined as entities whose primary mission is to serve or provide investment capital for low-income communities and individuals, and they are accountable to those groups through governance mechanisms.³¹⁷ Issuing tax credits through a Community Development Entity is the vehicle used by the New Markets Tax Credit.³¹⁸ If the Treasury and the Internal Revenue Code have an existing definition and certification process for mission-based groups serving low-income communities and individuals, it is logical to involve those same groups in the Opportunity Zone tool.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ I.R.C. § 45D(c) (2018).

³¹⁷ *Id.* § 45D(c)(1)(A)-(C).

³¹⁸ *Id.* § 45D(c).

There is some evidence that such involvement is beginning to take shape. Community Development Entities and Community Development Financial Institutions (CDFIs), another certification offered by Treasury, have announced developments with Qualified Opportunity Zone Funds.³¹⁹ Recently, Clearinghouse CDFI announced a 31-unit multi-family housing development in the Koreatown neighborhood of Los Angeles.³²⁰ National nonprofits with affiliated Community Development Financial Institutions, such as Enterprise Community Partners and Local Initiatives Support Corporation, also have provided resources for investors and local government officials to use the Opportunity Zone.³²¹

Involving mission-based groups that have a focus on low-income communities facilitates consideration of the impact of potential investments on existing residents in Opportunity Zone tracts. If low-income communities have a mechanism to participate in the governance of a mission-based group, there is the chance to raise local resident concerns that are not the likely focus of the Qualified Opportunity Zone Fund investor. Requiring the involvement of a Community Development Entity or Community Development Financial Institution would allow for certainty that funds and projects will be focused on low-income communities and individuals.

2. Involve Local Government Bodies

Another way to involve a proxy for local participation is to require a local government agency—such as an economic development body—be involved. The Community Development Block Grant process engages state and local governments.³²² For example, in 2019,

³¹⁹ See, e.g., *Clearinghouse CDFI Closes First Opportunity Zone Development*, CLEARINGHOUSE CDFI (Dec. 5, 2019), <https://www.clearinghousecdfi.com/ccdfi-closes-first-opp-zone-development> [<https://perma.cc/ATV4-DYSK>].

³²⁰ *Id.*

³²¹ See, e.g., *Opportunity360*, ENTERPRISE COMM. PARTNERS, <https://www.enterprisecommunity.org/opportunity360> [<https://perma.cc/Z56C-DCPK>].

³²² See 42 U.S.C. 69 § 5303 (2018) (“The Secretary [of Housing and Urban Development] is authorized to make grants to States, units of general local government, and Indian tribes to carry our activities in accordance with the provisions of this chapter.”).

the State of Kansas announced \$11 million in Community Development Block Grant funds to be awarded for community improvement projects in 23 communities.³²³

A similar mechanism could add a layer of community representation in Opportunity Zones. States could allocate grants to local communities for particular projects that either nonprofit or for-profit developers have proposed. Coalitions and partnerships with public support could self-organize and engage in investing or development. Thus, the six categories of use value are more likely to be a consideration when evaluating projects if there is a local constituency involved.

3. Against Participation Requirements

Perhaps the strongest arguments against increasing participation is efficiency: additional participation can delay projects. Time kills all deals. Delay, therefore, especially from additional participation, can be fatal to projects moving forward. Participation, or over-participation, can certainly lead to unnecessary delay. However, given the significant flaws in the design of the Opportunity Zone—both with respect to zone designation, design focus on exchange value, and lack of transparency—participation seems a limited constraint on an otherwise generous tool. Participation might permit time to fully explore whether a project is actually in need of an Opportunity Zone incentive, answering the question whether the project would occur “but for” the incentive.³²⁴ If a project would occur whether or not the Opportunity Zone incentive is claimed, that fact erodes the justification for the incentive in the first place.

V. CONCLUSION

At a time when elected officials are increasingly under political pressure to deliver jobs and economic development, all levels of government are pushing for place-based tools to drive growth. The Opportunity Zone is but the most recent place-based economic development law designed to increase capital investment in capital-starved communities.

³²³ \$11 Million in Community Development Block Grants Awarded for Community Improvement Projects, KAN. DEP'T COMM. (Jan. 24, 2019), <https://www.kansascommerce.gov/2019/01/11-million-in-community-development-block-grants-awarded-for-community-improvement-projects> [<https://perma.cc/BYZ7-N9MU>].

³²⁴ See Theodos et al., *supra* note 185, at 26-31.

Proponents of Opportunity Zones, on both sides of the political aisle, trumpet the far-reaching potential that the Opportunity Zone professes.

However, as this Article has demonstrated, the Opportunity Zone is a radical, dangerous economic development tool that exemplifies the worst tendencies of the trend toward market-based solutions to societal problems. Where once the federal government led economic development efforts through a command and control approach, the federal government has largely taken its hand off the wheel. On its face, the Opportunity Zone appears to be just another effort to develop local economies through the same old approach. The reality, however, is much worse. While many aspects of the Opportunity Zone are not new, the total lack of use restrictions, absence of transparency, and deficiency of public or government participation in project selection make likely outcomes frightening.

Fortunately, there are a number of potential fixes to the Opportunity Zones design flaws. Some proposals—a number of which are pending in Congress—focus on factoring in use when examining Opportunity Zone investments, transparency and reporting. These programs also seek to increase participation by mission-based organizations and local government. While lawmakers are still coalescing around a compromise approach, these reforms have support from lawmakers of all political stripes.

Lawmakers who are able to drive place-based economic growth will continue to enjoy constituent support. But tax, economic development, and other areas of law should constrain spending efforts that are ineffective, inefficient, and serve to mask unsavory windfalls. Legal tools, such as the Opportunity Zone, must be analyzed and viewed skeptically. Otherwise, any potential gains are likely to be vastly outweighed by unwise losses, harming those who struggle to succeed and improve their lives and the lives of their children and loved-ones.