

6-7-2019

Lands of Opportunity: An Analysis of the Effectiveness and Impact of Opportunity Zones in the Tax Cuts and Jobs Act of 2017

Joseph Bennett

Follow this and additional works at: <https://scholarship.law.nd.edu/jleg>

 Part of the [Administrative Law Commons](#), [Economic Policy Commons](#), [Legislation Commons](#), and the [Taxation-Federal Commons](#)

Recommended Citation

Joseph Bennett, *Lands of Opportunity: An Analysis of the Effectiveness and Impact of Opportunity Zones in the Tax Cuts and Jobs Act of 2017*, 45 J. Legis. 253 (2018).

Available at: <https://scholarship.law.nd.edu/jleg/vol45/iss2/5>

This Note is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized editor of NDLScholarship. For more information, please contact lawdr@nd.edu.

LANDS OF OPPORTUNITY: AN ANALYSIS OF THE EFFECTIVENESS
AND IMPACT OF OPPORTUNITY ZONES IN THE TAX CUTS AND JOBS
ACT OF 2017

Joseph Bennett[†]

INTRODUCTION

On December 22, 2017, President Donald Trump signed the sweeping Tax Cuts and Jobs Act into law.¹ By drastically altering many portions of the existing tax landscape, this bill marked the largest overhaul of the federal income tax since 1986.² In addition to the breadth of modifications to existing provisions of the Internal Revenue Code (“Code”) in Title 26, the bill contributes a number of new instances of tax expenditures as well.³ Amid the fervor surrounding highly debated portions of the new legislation,⁴ one of the new policies that seemed to get lost in the fray initially was the creation of Opportunity Zones.⁵

At their most basic level, Opportunity Zones encourage investors to move

[†]J.D. Candidate 2020 Notre Dame Law School; B.A., University of Illinois at Urbana-Champaign 2015. I would like to thank the Editorial Staff at the Notre Dame Journal of Legislation for their assistance and diligence. Most importantly, I would also like to thank my mom for her support throughout this process and my life as a whole.

¹ Christina Wilke, *Trump Signs GOP Tax Plan and Short-term Government Funding Bill on His Way Out of Town*, CNBC (Dec. 22, 2017, 10:50 AM), <https://www.cnbc.com/2017/12/22/trump-signs-gop-tax-plan-short-term-government-funding-bill.html>.

² *Everything You Need to Know About the Tax Cuts and Jobs Act*, TAX FOUND., <https://taxfoundation.org/tax-cuts-and-jobs-act-explained/> (last visited Feb. 28, 2019).

³ See generally Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

⁴ See, e.g., Alan S. Blinder, *Almost Everything is Wrong With the New Tax Law*, WALL ST. J. (Dec. 27, 2017, 6:15 PM), <https://www.wsj.com/articles/almost-everything-is-wrong-with-the-new-tax-law-1514416503>; Lauren Hirsch, *GOP Tax Bill Includes a Provision that Could Enrich Trump and Republican Senators*, CNBC (Dec. 17, 2017, 1:37 PM), <https://www.cnbc.com/2017/12/17/sen-john-cornyn-defends-tax-provision-that-could-benefit-trump.html>; John Sides, *Here's the Incredibly Unpopular GOP Tax Reform Plan — in One Graph*, WASH. POST (Nov. 18, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/18/heres-the-incredibly-unpopular-gop-tax-reform-plan-in-one-graph/?utm_term=.e45d86e8dbd0.

⁵ 26 U.S.C. § 1400Z-1 (2018); 26 U.S.C. § 1400Z-2 (2018). Since the start of research and preparation of this Note, there has been a dramatic increase of interest in the topic. As more investors and developers have begun taking advantage of the new provision, the legal community has responded in order to try to provide some guidance in the new frontier. See, e.g., Alexandre M. Denault, *New Qualified Opportunity Zone Guidance Released*, ACKERMAN (Oct. 24, 2018), <https://www.akerman.com/en/perspectives/new-qualified-opportunity-zone-guidance-released.html>; Nickolas Gianou & David F. Levy, *Opportunity Zone Funds Update*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM (Nov. 27, 2018), <https://www.skadden.com/insights/events/2018/11/opportunity-zone-funds-update>; Bill A. Levy et al., *New Proposed Tax Rules Favorable for Opportunity Funds*, KIRKLAND & ELLIS (Oct. 25, 2018), <https://www.kirkland.com/publications/newsletter/2018/10/pifo-opportunity-funds>.

capital they have earned from other investments towards low-income communities.⁶ They provide large tax breaks to those that take advantage of the program—the longer the investment is held by the investor, the greater the tax break.⁷ The provision is purported to benefit low-income communities proportionally to the investors' gain.⁸ However, this provision is unlikely to benefit the United States as a whole. Rather, Opportunity Zones will: (1) cause the United States to lose significant revenues; (2) cause harm to low-income communities; (3) disproportionately enrich America's wealthiest citizens; and (4) face—and continue to face—bureaucratic and interpretational problems with its implementation.

Part I of this Note will discuss the Opportunity Zone program as laid out in § 1400Z in greater detail and compare the new section to the history and purposes of the United States Federal Income Tax. In Part II, this Note will examine past federal low-income redevelopment projects and what it means to be a “Qualified Opportunity Zone” under § 1400Z-1. Part III will argue that due to the limited access to the program for investors and the great benefit to those who are able to take advantage of the provision, there will be a large national inequity created by Opportunity Zones. Part IV will discuss the present implementation problems that approach dangerous levels of vagueness that need significant clarification and further regulation if the Opportunity Zone program is going to succeed. Finally, Part V will conclude this Note by discussing the current, practical reality of § 1400Z.

I. OPPORTUNITY ZONES AND THE FEDERAL INCOME TAX

Article I of the United States Constitution grants Congress the “[p]ower [t]o lay and collect Taxes, Duties, Imposts and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States.”⁹ Although the power to tax is clearly enumerated in the Constitution, whether that power could be used to tax the income of citizens directly was not quite as clear when the original document was drafted.¹⁰ The first substantive attempt at federal income tax legislation came in 1861, as the government was struggling to pay for the efforts of the ongoing Civil War.¹¹ Unlike subsequent efforts to enact or amend federal income tax provisions, this pioneering statute was a mere three hundred words,¹² but, like many of its ancestors, it did not survive long.¹³ It was wholly repealed and replaced less than one

⁶ See Benjamin W. Kennedy, *The Opportunity Zone Program*, 26 NEV. LAW. 19, 19 (2018) (discussing Opportunity Zones generally).

⁷ *Id.*

⁸ Jonathan Curry, *Opportunity Zones Promising, but Must Overcome Lackluster Past*, TAX NOTES, Feb. 15, 2018, <https://www.taxnotes.com/tax-notes-today/tax-preference-items-and-incentives/opportunity-zones-promising-must-overcome-lackluster-past/2018/02/15/26wqf?highlight=opportunity%20zones>.

⁹ U.S. CONST. art. I, § 8, cl. 1.

¹⁰ See, e.g., *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 582 (1895) (“Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any State through a majority made up from the other States.”).

¹¹ J. S. SEIDMAN, SEIDMAN'S LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS: 1938–1861 vii (2d ed. 1953).

¹² Pub. L. No. 37-45, § 49, 12 Stat. 292, 309 (1861).

¹³ See generally SEIDMAN, *supra* note 11.

year later.¹⁴ The concept of a federal income tax was dealt a another significant blow in 1895, when the Supreme Court in *Pollock v. Farmers' Loan & Trust Co.* held that taxing many kinds of income, including rental income and income from bonds, was unconstitutional as a direct tax.¹⁵ This decision made the formation of income tax as a whole impractical for the time being.¹⁶ But the idea of a federal income tax was not wholly ruled out, and in 1913, Congress acted to ratify the Sixteenth Amendment to explicitly give Congress the “power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”¹⁷ Thus, the modern concept of a federal income tax was born.

Since 1916, a number of legislative additions were made to the federal income tax in Title 26 of the United States Code.¹⁸ Significantly, the Supreme Court in *Commissioner v. Glenshaw Glass Co.* ruled that “income” included “gains or profits and income derived from any source whatever.”¹⁹ With this clarification, gross income—and therefore what was subject to the federal income tax—included any wages earned, compensation for property, dividends, rent, or generally transactions of any business.²⁰ From there, the Internal Revenue Code can—and does—exempt some of this income in the general sense from income subject to federal taxation.²¹ Although some of the touted “tax cuts” are really reductions in the actual rates of taxation, many “tax cuts” are instead exclusions in what is considered taxable income.²²

The Tax Cuts and Jobs Act of 2017 is no different. Although the taxation rate for the highest income tax bracket was temporarily reduced from 39.6% to 37%, many of the “tax cuts” for which it is named involve federal tax expenditure programs and reduction in what is considered income subject to federal taxation.²³ One such expenditure program is the introduction of Opportunity Zones.²⁴

The Opportunity Zone program was designed to “encourage long-term private capital investment in economically distressed communities.”²⁵ There are a number of guidelines that must be followed in order for an investment to be eligible for the program.²⁶ First, the federal government grants the power of designating tracts of

14 *See id.* at 1036.

15 *Pollock*, 157 U.S. 429 (1895). U.S. CONST. art. I, § 9, cl. 4 states that “[n]o capitation, or other direct, [t]ax shall be laid, unless in [p]roportion to the [c]ensus or [e]numeration herein before directed to be taken.”

16 JAMES L. FREELAND ET AL., *FUNDAMENTALS OF FEDERAL INCOME TAXATION: CASES AND MATERIALS* 14 (Saul Levmore et al. eds., 19th ed. 2018).

17 U.S. CONST. amend. XVI.

18 *See generally* SEIDMAN, *supra* note 11 (outlining changes to the Tax Code and the legislative intent behind the changes up to 1938); J. S. SEIDMAN, *SEIDMAN'S LEGISLATIVE HISTORY OF FEDERAL INCOME AND EXCESS PROFITS TAX LAWS: 1953-1939* (1954) (outlining Tax Code changes from 1939-1953).

19 *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 429 (1955).

20 *Id.*

21 FREELAND ET AL., *supra* note 16, at 65.

22 *Id.*

23 I.R.C. § 1 (2018). Note that although tax rates for individuals were not significantly reduced, the rates for corporations were reduced from 35% to a flat 21%. I.R.C. § 11 (2018).

24 I.R.C. § 1400Z-1 (2018); I.R.C. § 1400Z-2 (2018).

25 Kennedy, *supra* note 6, at 19.

26 *See* §§ 1400Z-1; 1400Z-2.

land in certain low-income communities as “Qualified Opportunity Zones” in each state to the governor or other chief executive of that state.²⁷ However, the governor may not designate more than 25% of tracts of land in low-income communities as Qualified Opportunity Zones.²⁸

Once the tracts of land have been designated by the governor, the onus is on the potential investors to act. In order to be eligible, an inclined investor must establish a legal entity as a Qualified Opportunity Fund (“Fund”).²⁹ A Fund must be organized as either a corporation or a partnership, and at least 90% of its assets must be Qualified Opportunity Zone property.³⁰ No individual can invest directly into a Qualified Opportunity Zone.³¹ In order for a Fund to be eligible for the benefits, the money must either create a new use for the property (i.e., tear down blighted building and build new multi-use facility), or “substantially improve[]” the property.³² In order to qualify as “substantially improved,” a Fund must spend, on improvements alone, an amount greater than the cost basis of the property.³³

Those who opt into the program—and the communities they invest in—receive substantial benefits. First, in a manner similar to a § 1031 Exchange,³⁴ investors are allowed to defer payment of taxes on any capital gains used for the purchase of property in a Qualified Opportunity Zone until 2026 or the time the property is sold, whichever is sooner. In doing so, investors are allowed to utilize capital that would have otherwise been needed for taxes.³⁵ However, unlike a § 1031 Exchange, the property sold in the initial transaction does not have to be like-kind: a Fund can sell shares of stock, bonds, or any other property and place the funds into a Qualified Opportunity Zone.³⁶ Next, a Fund’s long-term investment in a Qualified Opportunity Zone also allows for stepped-up cost basis in the Qualified Opportunity Zone property.³⁷ If a Fund holds the property for five years, then it can report its basis in the property as 10% higher than it was when it was purchased, thereby saving that amount on future capital gains tax in any eventual sale of the property.³⁸ If the Fund holds the property for seven years, then the basis is stepped-up an additional 5% to 15%.³⁹ Finally, if the Fund holds the property in the Qualified Opportunity Zone for ten years or longer, the basis is fully stepped-up to the value for which the property is eventually sold, effectively eliminating all tax on any capital gains in the property regardless of when, after the ten-year mark, the property is subsequently sold.⁴⁰

27 § 1400Z-1.

28 *Id.*

29 § 1400Z-2.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 I.R.C. § 1031 (2018). (allowing a seller of real property to postpone the recognition of any capital gain if the proceeds from the sale are used for the purchase of some other “like-kind” piece of real property).

35 § 1400Z-2.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

At its core, the purpose of a federal income tax is a revenue raising device.⁴¹ Ideally, this goal should be attained while maintaining, wherever possible, “equity; economic efficiency; and a combination of simplicity, transparency, and administrability.”⁴² Unfortunately, in the case of Opportunity Zones, there is little evidence to show that these factors were carefully considered. In fact, the provision was not in the original plan for the bill and was only added in the Senate before the bill was hurriedly pushed through for final approval.⁴³

The concepts of equity, simplicity, transparency, and administrability as related to Opportunity Zones will be discussed later in this Note.

In regard to economic efficiency, however, this program oversteps its objective as a tax provision. Economic efficiency issues in the Internal Revenue Code “result from taxes changing the economic decisions that people make—decisions such as how much to work, how much to save, what to consume, and where to invest. These changes . . . reduce people’s well-being in a variety of ways that can include a loss of output or consumption opportunities.”⁴⁴ In short, tax legislation should avoid economic efficiency costs influencing the way potential taxpayers act.⁴⁵ Programs that have high economic efficiency costs can go as far as influencing whether or not taxpayers decide to get married, whether they will act in the market at all, or instead hold onto their money and remove potential action from commerce.⁴⁶ The Opportunity Zone program, at its base, will “change the economic decisions that people make.”⁴⁷ The large tax benefits will significantly encourage taxpayers to invest in locations covered by the program over those that are not. The desired consequences of this influence for the targeted communities will be discussed in Part II of this Note, but at a more philosophical level, this program will influence the economies of the States as a whole. When the federal government steps in and designates areas for tax benefits, it takes potential investment away from other potential investment locations. Opportunity Zones do not encourage investment as a whole; they encourage investment in certain designated areas over those which are not. This external influence disrupts a free market and prevents economic growth from occurring naturally.⁴⁸

In addition, the Opportunity Zone program is expected to be a large expenditure in the Internal Revenue Code. According to Congress’s own conservative estimates in their budget report on the Tax Cuts and Jobs Act, the Opportunity Zone program will result in a revenue loss for the federal government of an average of \$1.6 billion

41 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-1009SP, UNDERSTANDING THE TAX REFORM DEBATE: BACKGROUND, CRITERIA, AND QUESTIONS, 1 (2005).

42 *Id.* at 24.

43 See JOINT COMM. TAXATION, JCX-65-17, COMPARISON OF THE REVENUE PROVISION CONTAINED IN H.R. 1, THE “TAX CUTS AND JOBS ACT,” AS PASSED BY THE HOUSE OF REPRESENTATIVES, AND AS AMENDED BY THE SENATE, 8 (2017).

44 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-1009SP, *supra* note 41, at 35..

45 *See id.*

46 *See id.*

47 *Id.*

48 *Id.* (“From a national perspective tax revenue is not a cost. Tax revenue is not lost to the nation—it is moved from taxpayers’ pockets to the Treasury in order to pay for the programs and services that the government provides . . . [E]fficiency costs . . . can result in forgone production and consumption opportunities.”).

per year for the next eight years.⁴⁹ In fact, “[t]he revenue loss from the program might be greater than the Joint Committee on Taxation estimated because the incentives for investments are more generous than those for investments under previous programs.”⁵⁰ With the federal deficit already above \$20 trillion,⁵¹ and the rest of the Tax Cuts and Jobs Act projected by Congress’s own conservative estimates to cost the government an average of \$180 billion per year over that same eight-year stretch,⁵² the source of revenue to fund this program is unclear. As a result, § 1400Z’s presence as part of the Internal Revenue Code is not easily reconciled with the purposes and goals of the federal income tax as a whole.

I. IMPACT OF REDEVELOPMENT PROGRAMS ON COMMUNITIES

Regardless of economic efficiency concerns, one of the legislative goals of the Opportunity Zone program is to “encourage long-term private capital investment in economically distressed communities.”⁵³

The process begins with a designation of Qualified Opportunity Zones.⁵⁴ The areas eligible for this designation are limited to those defined as a “low-income community.”⁵⁵ A “low-income community” is a population census tract where the poverty rate of the tract is 20%, or the median family income for the tract is 80% or less of either the median family income of the given metropolitan area or the median family income of the state as a whole.⁵⁶ The governor or chief executive of a given state may designate 25% of these low-income communities as “Qualified Opportunity Zones” ripe for an investment from a potential investor.⁵⁷

This current iteration of Opportunity Zones is far from the first attempt at creating a tax incentive for investors to place funds into economically distressed areas.⁵⁸ One early iteration was proposed by Richard Nixon during his 1968 presidential campaign, and gained support of his then opponent, Robert Kennedy, as

49 JOINT COMM. TAXATION, JCX-67-17, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE “TAX CUTS AND JOBS ACT”, 6 (2018). This tax expenditure estimate does not reach out far enough to encompass the full step up in cost basis for property held for ten years. As long as the Opportunity Zone program is taken advantage of to its full extent, it should be the most significant loss of revenue surrounding the Opportunity Zone portion of the Tax Cuts and Jobs Act. The costs to the federal government due to this step up will begin in the year 2029 and could potentially continue for decades afterward as well.

50 Zoe Sagalow, *Opportunity Zones Could Benefit Investors More Than Communities*, TAX NOTES, Aug. 6, 2018, <https://www.taxnotes.com/tax-notes-today/tax-cuts-and-jobs-act/opportunity-zones-could-benefit-investors-more-communities/2018/08/06/289zk>.

51 Michael Collins, *The National Debt and the Federal Deficit are Skyrocketing. How it Affects You*, USA TODAY (Oct. 16, 2018, 6:00 AM), <https://www.usatoday.com/story/news/politics/2018/10/16/government-spending-how-rising-federal-debt-deficit-impact-americans/1589889002/> (“The national debt is \$21 trillion and counting.”).

52 See JOINT COMM. TAXATION, JCX-67-17, *supra* note 49.

53 Kennedy, *supra* note 6.

54 I.R.C. § 1400Z-1 (2018).

55 *Id.*

56 I.R.C. § 45D (2018). In 26 U.S.C. § 1400Z-1(c)(1), “low-income community” is described as having the same definition as in 26 U.S.C. § 45D(e).

57 26 U.S.C. § 1400Z-1 (2018).

58 See Curry, *supra* note 8.

well.⁵⁹ Neither this, nor any similar proposal, ended up being enacted during his Presidency, yet the ideas and reasoning presented by the candidates mirrored those of many similar programs that followed:

Tax incentives—whether direct credits, accelerated depreciation or a combination of the two—should be provided to those businesses that locate branch offices or new plants in poverty areas, whether in the core cities or in rural America . . . We need seed capital and seed effort in the ghetto. We need a self-perpetuating program which does not rest on barren subsidies which when removed merely return the ghettos of America to their original state. It will be important to devise tax credit programs so that each dollar of credit will have a maximum impact. Once private enterprise begins to develop in the ghetto, it will become cumulative and self-perpetuating. The economic iron curtains which now encompass the ghettos of this country will be dismantled and the people living there will gradually phase into the mainstream of American economic life.⁶⁰

Past programs, both from the federal and state level, have gone by names such as “Empowerment Zones,”⁶¹ “Renewal Communities,”⁶² “Enterprise Communities,”⁶³ and “Enterprise Zones.”⁶⁴ Implementation in the communities at large has been limited, and where they *have* been implemented, studies found “modest effects overall with relatively high costs.”⁶⁵ Where positive change has occurred, analysis

⁵⁹ Robert B. Semple, Jr., *Nixon Gives Plan for Aiding Slums*, N.Y. TIMES (May 3, 1968), at 26.

⁶⁰ Bruce Bartlett, *Enterprise Zones: The Good, The Bad, and The Muddled*, TAX NOTES, Jan. 21, 2014, <https://www.taxnotes.com/tax-notes-today/incentives/enterprise-zones-good-bad-and-muddled/2014/01/21/fb98> (quoting 1968 Nixon Campaign Document).

⁶¹ See generally Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295 (1999). Empowerment Zones as mentioned here were created in 1993 as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (1993). In contrast to Opportunity Zones, they were designed for inner-city use only.

⁶² See generally Kara Lamb, *Revitalization from the Inside Out: The Attempts to Move Towards an Urban Renaissance in the Cities of the United States and the United Kingdom*, 19 CONN. J. INT’L L. 159 (2003). This version of Renewal Communities was established in the Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554 (2000). There were eighty Renewal Communities created in the programs first three years.

⁶³ See generally Wilton Hyman, *Empowerment Zones, Enterprise Communities, Black Business, and Unemployment*, 53 WASH. U. J. URB. & CONTEMP. L. 143 (1998). These Enterprise Communities were established alongside Empowerment Zones in the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (1993). In 1998, there were ninety-five across the country.

⁶⁴ See generally Ellen P. Aprill, *Caution: Enterprise Zones*, 66 S. CAL. L. REV. 1341 (1993). This iteration of Enterprise Zones was introduced by President George H. W. Bush in response to unrest in Los Angeles during the early 1990s. They entertained bipartisan support in Congress, but the provision was ultimately pocket vetoed by President Bush.

⁶⁵ JOINT COMM. TAXATION, JCX-38-09, INCENTIVES FOR DISTRESSED COMMUNITIES: EMPOWERMENT ZONES AND RENEWAL COMMUNITIES, 22, (2009). See also Deirdre Oakley & Hui-Shien Tsao, *A New Way of Revitalizing Distressed Urban Communities? Assessing the Impact of the Federal Empowerment Zone Program*, 28 J. URBAN AFFAIRS 443 (2006) (“With the exception of a few isolated incidences where individual zones fared better than comparison areas, zone initiatives had little impact.”); Joel A. Elvery, *The Impact of Enterprise Zones on Resident Employment*, 23 ECON. DEV. Q. 44 (2009) (“The author finds no evidence that these enterprise zones affected the employment of zone residents.”); Robert T. Greenbaum & Jim Landers, *Why Are State Policy Makers Still Proponents of Enterprise Zones? What Explains Their Action in the Face of a Preponderance of the Research?* 32 INT’L REG’L SCI. REV. 466 (2009) (“There is little evidence that they have

“could not tie these changes definitively to the empowerment zone designation” due to a general uptick in the economy as a whole during the period analyzed.⁶⁶ More than simply being ineffectual, there is evidence to suggest that these programs may have actually been harmful to the economic well-being of the nation.

First, according to one study, apparent modest increases in the economic well-being of those inside the zones “may mask countervailing effects on different subsets of firms” and “[i]ncreases in employment, sales, and capital expenditures in new and existing establishments may be mostly offset by losses in employment, sales, and capital expenditures among firms that close or leave the zone.”⁶⁷ For most “zone” programs, a limited number of available designations competes with demands to disperse those designations throughout the country without placing any one zone adjacent to another.⁶⁸ While one census tract may be designated as a zone eligible for one of these programs, its neighbors that are similarly situated economically may not be granted the same designation. When there is a legislatively established tax incentive to bring business into one zone rather than another, the choice of where an investor might place his or her business is likely affected.⁶⁹ While the effect of this choice may initially appear to be a gain to the designated zone, it may, in fact, be a larger detriment to its neighbor that might have otherwise earned the opportunity for the business itself.⁷⁰ There is even evidence to suggest that some businesses were prompted to move from one non-designated tract to its designated neighbor, thereby not only not causing a net economic gain for the community as a whole, but instead incurring transactional relocation costs that take revenue out of the community completely.⁷¹

succeeded.”); Stephanie Cumings, *Governor Calls Enterprise Zones ‘A Failed 30-Year Experiment*, TAX NOTES, Sep. 12, 2016, <https://www.taxnotes.com/state-tax-notes/legislation-and-lawmaking/governor-calls-enterprise-zones-failed-30-year-experiment/2016/09/12/bd7w> (the then-Governor of New Jersey, Chris Christie, said in a statement after vetoing a renewal of an Enterprise Zone bill: “I am concerned that this bill simply continues a failed 30-year experiment with UEZs at significant costs for the State.”).

66 *Id.* (quoting U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-727, EMPOWERMENT ZONE AND ENTERPRISE COMMUNITY PROGRAM: IMPROVEMENTS OCCURRED IN COMMUNITIES, BUT THE EFFECT OF THE PROGRAM IS UNCLEAR, 4 (2006)); see also Jed Kolko & David Neumark, *Do Some Enterprise Zones Create Jobs?* 29 J. POL’Y ANALYSIS & MGMT. (2010) (“Overall, the evidence indicates that enterprise zones do not increase employment.”).

67 JOINT COMM. TAXATION, JCX-38-09, *supra* note 65, at 23; but see Robert T. Greenbaum & John B. Engberg, *The Impact of State Enterprise Zones on Urban Manufacturing Establishments*, 23 J. POL’Y ANALYSIS & MGMT. 315 (2004) (“Zones did lead to new business activity inside the zones. The number of [enterprise] births and employment, payroll, and shipments due to those births all increased significantly in the zones post-designation.”).

68 See, e.g., Lamb, *supra* note 62. The initial legislation limited the total number of renewal communities designatable to forty.

69 See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-1009SP, *supra* note 41, at 35 (reviewing the concept of economic efficiency as detailed above).

70 See generally JOINT COMM. TAXATION, JCX-38-09, *supra* note 65.

71 *Id.*; see also Andrew Hanson & Shawn Rohlin, *Do Spatially Targeted Redevelopment Programs Spill Over?* 43 REG’L SCI. & URBAN ECON. 86 (2013) (“Establishments can benefit by literally moving across the street into the EZ to enjoy the benefits of the program without incurring relocation costs associated with moving further from a customer base, employees, or losing other advantages of the immediate location . . . If the goal of policy makers is to induce relocation, it seems that even this modest objective may come at a cost of destroying jobs and establishments in areas that compete with targeted places.”); Robin P. Malloy, *The Political Economy of Co-Financing America’s Urban Renaissance*, 40 VAND. L. REV. 67, 79 (1987) (“Ultimately, a continuing question about enterprise zones is the extent to which they foster new investment and new job opportunities

Next, there is evidence to suggest that those who lived in the designated zones beforehand were negatively impacted by the implementation as well.⁷² In one study, rents increased in the zones by approximately 7%, but the wages earned remained stagnant.⁷³ As a result, those who were already employed in the zones had to pay more in rent, while earning the same amount of money that they did before the creation of the zone. Housing values increased by approximately 22%—significantly higher than the rent increased.⁷⁴ Although this would help those in the zone that owned their home beforehand, it would also make buying less accessible to those who did not already own a home. Another study found that:

[a]mong the new establishments, the [Enterprise Zone] incentives are found to reduce payroll per employee, indicating the new jobs are low-paying ... [Enterprise Zone] policies, finally, are found to significantly accelerate the loss of employment, sales, and capital expenditures accounted for by vanishing establishments, thus offsetting the gains to the other establishments and resulting in the finding of no zone impact common in other studies.⁷⁵

Finally, there are impacts from Enterprise Zones that extend beyond economics. These zones, and other like programs,⁷⁶ can encourage businesses to relocate to places with less established public transportation and force sprawl.⁷⁷ In addition to business relocation, if a large portion is redeveloped, it can force those living in the areas out of their homes and again require those that work in the zone to come from further distances to get to work.⁷⁸

Although these previous programs were similar to Opportunity Zones, they are not the same as Opportunity Zones themselves. Many people still have hope that this new program will be able to benefit low-income communities in the way past programs have purported to do.⁷⁹ There are three primary ways in which the Opportunity Zone program differs from these various examples of past programs.⁸⁰ First, Opportunity Zones are not limited to metropolitan areas.⁸¹ Many past iterations of similar programs have been definitionally constrained to high-density urban areas, while Opportunity Zones can be designated in any tract where the median income is

as opposed to merely shifting business from outside the zone to within the zone.”).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Daniele Bondonio & Robert T. Greenbaum, *Do Local Tax Incentives Affect Economic Growth? What Mean Impacts Miss in the Analysis of Enterprise Zone Policies*, 37 REG'L SCI. & URBAN ECON. 121 (2007).

⁷⁶ See generally Sarah Kogel-Smucker, *Zoning Out: State Enterprise Zones' Impact on Sprawl, Job Creation, and Environment*, 35 B.C. ENVTL. AFF. L. REV. 111 (2008).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Curry, *supra* note 8. (“[W]hile earlier opportunity zone iterations that are no longer in effect, like renewal communities or enterprise zones, were generally found to have disappointing results, opportunity zone proponents say this time will be different.”).

⁸⁰ *Id.*

⁸¹ I.R.C. § 1400Z-1 (Supp. V 2017).

80% or less than the median income statewide.⁸² This includes rural areas, small towns, and anything that fits that definition in between.⁸³ Next, Opportunity Zones encourage investors with larger amounts of capital than most programs, such as “private equity firms, banks, venture capitalists, mutual funds, and hedge funds,” to invest to a much greater extent than past programs have.⁸⁴ This, on its own, should not affect the end result to the low-income communities much, but it ties into the last difference between Opportunity Zones and many past programs: scalability, or the ability to reach a larger portion of the country. Many past programs have provided upfront subsidies or tax credits of some sort for investing in these areas.⁸⁵ In contrast, the Opportunity Zone program provides its benefits on the back end—via tax reductions—by deferring the capital gains tax and stepping-up the cost basis.⁸⁶ This foregone revenue does not require any initial expenditure by the federal government and thus allows for this program to be taken advantage of without any cost limit on the scale.⁸⁷ When paired with the way that the program is open to larger investors, this scalability allows for much larger amounts of capital to be placed into the low-income communities than past programs have.⁸⁸

Even with these differences between many past programs and the current Opportunity Zone program, the end result will likely be the same for targeted low-income communities. These differences allow the program to be more widely available, but do not address many of the primary criticisms of this type of program generally. This program has no protection against incentives of businesses to relocate from areas nearby—but outside a designated Opportunity Zones—into the Opportunity Zones solely for the Tax Credit.⁸⁹ Regarding the economic status of those already within future Opportunity Zones, there is little evidence to suggest that their experience might differ from past programs as well. There is little change in the overall principal in this aspect of the program; it is not addressed in any substantially different manner than any of the predecessors of Opportunity Zones.

82 See Curry, *supra* note 8.

83 *Id.*

84 JARED BERNSTEIN & KEVIN A. HASSETT, ECON. INNOVATION GRP., UNLOCKING PRIVATE CAPITAL TO FACILITATE ECONOMIC GROWTH IN DISTRESSED AREAS, 17 (2015).

85 Curry, *supra* note 8.

86 *Id.*

87 *Id.*

88 *Id.*; see also BERNSTEIN & HASSETT, *supra* note 84 (“Our key observation is that existing and prior approaches have not harnessed the power of intermediaries such as private equity firms, banks, venture capitalists, mutual funds, and hedge funds. By focusing on often small individual businesses, policies have implicitly required an unrealistically large amount of coordination among potential investors, and hence, have failed.”). A focal point of the argument made by Bernstein and Hassett in their 2015 report was the need to allow an Opportunity Zone-like program to be more accessible to these “intermediaries.” *Id.* In theory, it would allow for more capital to be placed into the communities by being both a larger source of that capital and requiring less coordination between parties to formulate larger-scale projects in targeted low-income communities. A project of the size discussed here would often require government funding and action for redevelopment, but this type of program would allow private investors to act in the manner and at the scale of a government project.

89 See generally I.R.C. § 1400Z-1 (Supp. V 2017); I.R.C. § 1400Z-2 (Supp. V 2017); Hanson & Rohlin, *supra* note 71, at 86 (“[E]stablishments can benefit by literally moving across the street into the EZ to enjoy the benefits of the program without incurring relocation costs associated with moving further from a customer base, employees, or losing other advantages of the immediate location . . . [I]f the goal of policy makers is to induce relocation, it seems that even this modest objective may come at a cost of destroying jobs and establishments in areas that compete with targeted places.”).

Whether or not employers pass savings onto their employees by creating more jobs, raising wages, or some other means is completely up to the employer.⁹⁰ History demonstrates employers do not typically pass down such savings to their employees.⁹¹ In addition, the effects on sprawl will likely not be affected much by this new program. Although Opportunity Zones, unlike many previous iterations, do allow for these zones to be placed in rural areas, based upon sheer need and stated purpose, the majority will likely still be placed in urban communities.⁹²

Section 1400Z-1's definition of "tract of land eligible" is an additional issue that could limit Opportunity Zones tangible benefits to communities. Defined as a "Qualified Opportunity Zone," it focuses only upon the income of the residents in a given tract of land.⁹³ There is some understandable fear surrounding this lack of clarification for a number of reasons.⁹⁴ First, there could be a tract that is economically stable with some profitable commercial properties and a small amount of low-income housing.⁹⁵ In addition, tracts adjacent to Qualified Opportunity Zones that have an income level above the threshold may be lumped into the program as long as their income level does not exceed 125% of the contiguous tract.⁹⁶ Or the tract could be immediately adjacent to an already economically successful area that would receive a significant amount of the benefit.⁹⁷ Because of this, there is considerable concern that low-income communities might not benefit much at all from the program.⁹⁸

Many scholars believe that the heart of the problem lies deeper than an incentive investors can solve.⁹⁹ Many believe the root of the problem is a need for social—rather than economic—change, especially one targeted in the manner that this program is.¹⁰⁰ The evidence shows that programs similar to Opportunity Zones "fail to promote the social change necessary to support sustainable communities."¹⁰¹

90 See generally I.R.C. § 1400Z-1 (Supp. V 2017); I.R.C. § 1400Z-2 (Supp. V 2017); Joel A. Elvery, *The Impact of Enterprise Zones on Resident Employment*, 23 ECON. DEV. Q. 44, 44 (2009) ("[T]he author finds no evidence that these enterprise zones affected the employment of zone residents.").

91 *Id.*

92 See Kennedy, *supra* note 6; see generally Sarah Kogel-Smucker, *Zoning Out: State Enterprise Zones' Impact on Sprawl, Job Creation, and Environment*, 35 B.C. ENVTL. AFF. L. REV. 111 (2008).

93 I.R.C. § 1400Z-1 (Supp. V 2017).

94 See Cedric L. Richmond, *Congressional Black Caucus Raises Concerns with O-Zone Regs*, TAX NOTES, Dec. 28, 2018, <https://www.taxnotes.com/tax-notes-today/opportunity-zones/congressional-black-caucus-raises-concerns-o-zone-regs/2019/01/09/291d9?highlight=opportunity%20zones%20basis> ("[T]he Treasury Department should draft rules that ensure that benefits flow to communities and residents, not just wealthy investors.").

95 *Id.*

96 I.R.C. § 1400Z-1 (Supp. V 2017).

97 Richmond, *supra* note 94. ("Some of the already designated Opportunity Zones . . . about communities that are well off already or already receiving ample investment flows.").

98 *Id.*

99 See generally Sagalow, *supra* note 50.

100 Bruce Bartlett, *Enterprise Zones: The Good, The Bad, and The Muddled*, TAX NOTES (Jan. 21, 2014), <https://www.taxnotes.com/tax-notes-today/incentives/enterprise-zones-good-bad-and-muddled/2014/01/21/fb98>.

101 Jennifer Forbes, *Using Economic Development Programs as Tools for Urban Revitalization: A Comparison of Empowerment Zones and New Markets Tax Credits*, 2006 U. ILL. L. REV. 177, 197. See also Richmond, *supra* note 94 (As it stands, the Congressional Black Caucus states that "[t]he Treasury Department

If programs similar to Opportunity Zones have, in the past, failed to benefit the targeted communities and Opportunity Zones themselves seem like they will not be much different, the question becomes: “who *does* stand to benefit from Opportunity Zones?”

II. THE SCALE OF THE BENEFITS TO INVESTORS UNDER § 1400Z

The true beneficiaries of the implementation of Opportunity Zones are the investors that take advantage of the program. Although it was touted as a program that would primarily benefit those who live in low-income communities,¹⁰² most of the economic benefit will be gained by investors instead.¹⁰³

By one estimate from the Joint Committee on Taxation, the Opportunity Zone program is expected to amount to an expenditure of \$6.7 billion over the next five years.¹⁰⁴ In the black letter of the Tax Cuts and Jobs Act, none of that expenditure goes directly to the targeted low-income communities.¹⁰⁵ The full extent of the expenditure comes in the form of tax breaks to the investors.¹⁰⁶ This is not to say that the program does not have a supposed benefit to the target communities, but it does not arise in a direct manner.¹⁰⁷ The previous section explored what benefits were supposed to be gained by the private investment into communities labelled as Opportunity Zones.

The theory through which the benefit is supposed to materialize in the low-income communities is “trickle-down” economics.¹⁰⁸ The thought behind this theory in regard to an Opportunity Zone-like program contends that “[i]nvesting in downtown shopping centers, hotels, office buildings, and restaurants is supposed to create job opportunities for the unskilled and difficult to employ.”¹⁰⁹ According to Malloy, the “problem with the trickle down assertion is that it ignores simple economic realities about job creation. As long as money is not stuffed in a mattress, it will be employed in some capacity in the economy. The result is that jobs will be created with that money.”¹¹⁰ In addition, there are strong arguments that the trickle-

should take its responsibility seriously here and ensure that the public's interest in promoting sustainable economic and community development is being met.”).

102 See Kennedy, *supra* note 6.

103 See generally Stephen M. Rosenthal, *Opportunity Zones May Create More Opportunities for Investors and Syndicators than Distressed Communities*, TAX POL'Y CTR. (Aug. 2, 2018) <https://www.taxpolicycenter.org/taxvox/opportunity-zones-may-create-more-opportunities-investors-and-syndicators-distressed>.

104 See Sagalow, *supra* note 50.

105 See generally Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2044 (codified as amended in scattered sections of 26 U.S.C.).

106 See generally 26 U.S.C. § 1400Z-2 (Supp. V 2017).

107 *Id.*

108 See Malloy, *supra* note 71, at 123-24; Tejvan Pettinger, *Trickle Down Economics*, ECON. HELP (Nov. 9, 2017), <https://www.economicshelp.org/blog/174/economics/trickle-down-economics/> (“[t]rickle down economics is a term used to describe the belief that if high-income earners gain an increase in salary, then everyone in the economy will benefit as their increased income and wealth filter through to all sections in society.”).

109 Malloy, *supra* note 71, at 123.

110 *Id.* at 124. Malloy continues:

For instance, a city's using one million dollars in tax revenues to subsidize a business that employs a number of people only means that the one million dollars that would have been available for individuals to invest in the marketplace has been invested for them by the city. Individuals in possession of the money would

down theory does not actually “trickle”.¹¹¹ In many cases, the beneficiaries of tax expenditures end up holding the wealth themselves instead of passing it along in the form of more jobs, higher wages, or even expenditures of their own.¹¹²

As Malloy said, “[a]s long as money is not stuffed in a mattress, it will be employed in some capacity in the economy.”¹¹³ But there is nothing in the Opportunity Zone provision that would require—or even strongly encourage—the beneficiaries of an Opportunity Zone to place that money back into the community from which the tax benefit was gained.¹¹⁴ Opportunity Zones cannot be taken advantage of by individual investors looking to better their community;¹¹⁵ instead only entities, Funds, can invest through the program.¹¹⁶ The fact that only entities can invest in the Opportunity Zones creates a barrier to smaller investors, and, as a result, the majority of Funds will likely be created by the extremely wealthy, with interests far wider than the community affected by the program. A Fund can invest in an Opportunity Zone in Jackson, Mississippi and take the tax savings from the project and instead use it to improve the Fund owner’s corporate office in Santa Clara, California. Or, in an even less beneficial outcome to the economy of the community, it could simply hold it in their tax haven in Venezuela.¹¹⁷ As a result, “[t]he evidence that . . . a supply-side tax cut to the top income level will grow the economy, is no stronger than the evidence for an enterprise zone.”¹¹⁸

Whether an investor has the community in mind or is truly self-interested, there is a large incentive to take advantage of the Opportunity Zone program. Although the benefits to the targeted communities are more ethereal and theoretical, the benefits to the investors are concrete and substantial.¹¹⁹

First, placing money into a Fund and investing in an Opportunity Zone allows for a deferment of any capital gains income tax that may be due on the property sold.¹²⁰ When investors sell property that is eligible for treatment as a capital gain

have purchased more goods and services than they otherwise were able to and thereby would have increased job opportunities in the activities most valued by community members. Thus, the one million dollars is still only one million dollars no matter who is spending it, and the jobs created by one project merely mean the loss of potential jobs elsewhere.

Id. at 124-25.

111 John Kenneth Galbraith, *Recession Economics*, N.Y. REV. OF BOOKS (Feb. 4, 1982) (recalling the nineteenth-century “horse-and-sparrow” theory, a predecessor of trickle-down economics: “[i]f you feed the horse enough oats, some will pass through to the road for the sparrows.”); see also David Weigel, *It’s the One Thing Rand Paul and Barack Obama Agree On, and It Doesn’t Work*, SLATE (Jan. 10, 2014), <https://slate.com/news-and-politics/2014/01/enterprise-zones-the-one-thing-rand-paul-and-barack-obama-agree-on-and-it-doesn-t-work.html>.

112 See Heather Stewart, *Wealth Doesn’t Trickle Down—It Just Floods Offshore, Research Reveals*, GUARDIAN (Jul. 21, 2012), <https://www.theguardian.com/business/2012/jul/21/offshore-wealth-global-economy-tax-havens>.

113 Malloy, *supra* note 71, at 124.

114 See I.R.C. § 1400Z-2 (Supp. V 2017).

115 *Id.*

116 See BERNSTEIN & HASSETT, *supra* note 84, at 1, 17 (urging the any new program—the eventual Opportunity Zone program—to utilize intermediaries as investors instead of individuals).

117 See, e.g., Stewart, *supra* note 112.

118 Weigel, *supra* note 111.

119 See Kennedy, *supra* note 6.

120 I.R.C. § 1400Z-2 (Supp. V 2017).

and reinvest it into an Opportunity Zone, the capital gains income tax can be deferred in the same way a § 1031 Exchange can.¹²¹ The primary difference between the income tax deferral in a § 1031 Exchange and the Opportunity Zone program, is that a § 1031 Exchange is required to be a like-kind exchange; most often, capital from the sale of a real estate investment property repurposed into the purchase of a new real estate investment property.¹²² An investment in an Opportunity Zone, on the other hand, does not have to be a like-kind exchange.¹²³ Instead, any property eligible for treatment for capital gains—whether it is a piece of real estate investment property, stocks or other securities interests, or any other type of capital gains property—may be rolled over into a Fund and deferred.¹²⁴ The deferral for an Opportunity Zone lasts until the earlier of the end of 2026 or the date the Opportunity Zone property is eventually sold.¹²⁵ Although the income tax for capital gains will eventually be paid by the investor, the time value of money results in greater value on their income than would have otherwise been possible without deferral.¹²⁶ Although the deferral of tax allows capital to be utilized more freely, a much larger benefit of the program is the option to pay no tax on income from a particular transaction.¹²⁷

In addition to deferral, the Opportunity Zone program also offers the avoidance of some taxes altogether. For tax purposes, income from the sale of property is calculated by finding the difference between the amount realized by the taxpayer in the final sale of the property and the taxpayer's adjusted basis in the property.¹²⁸ A property's basis is effectively the purchase price with certain statutory adjustments in the Internal Revenue Code such as depreciation.¹²⁹

Opportunity Zones offer one such adjustment to the basis of a property.¹³⁰ After a Fund holds a property for five years, the basis of that property is adjusted up by 10%, thus exempting the fund from all taxation on that extra 10% of the purchase price.¹³¹ After an additional two years, that basis is raised another 5%, totaling an exemption of 15% of the original purchase price.¹³²

The most significant benefit for investors in the Opportunity Zone program

121 I.R.C. § 1031 (2012 & Supp. V 2017); *see also* I.R.C. § 1400Z-2 (Supp. V 2017).

122 *See* INTERNAL REVENUE SERVICE, LIKE-KIND EXCHANGES UNDER IRC CODE SECTION 1031 (2008), <https://www.irs.gov/newsroom/like-kind-exchanges-under-irc-code-section-1031> (explaining the requirements of a like-kind exchange for the purposes of a tax deferral).

123 I.R.C. § 1400Z-2 (Supp. V 2017).

124 *See* Kennedy, *supra* note 6.

125 I.R.C. § 1031 (2012 & Supp. V 2017).

126 *Glossary of Terms*, NEW BRANCH REAL ESTATE ADVISORS, <http://www.newbranchre.com/Market/Glossary-of-Terms> (last visited Apr. 14, 2019)(defining the time value of money as “[a]n economic principle recognizing that a dollar today has greater value than a dollar in the future because of its earning power.”); *see also* *Time Value of Money*, INVESTOPEDIA, (last visited Apr. 14, 2019) (“[M]oney available now is worth more than the same amount in the future because of its potential earning capacity.”).

127 *See generally* LYSANDER SPOONER, NO TREASON: THE CONSTITUTION OF NO AUTHORITY (1870).

128 I.R.C. § 1001 (Supp. V 2017).

129 FREELAND ET AL., *supra* note 16, at 115.

130 I.R.C. § 1400Z-2 (2018).

131 *Id.*

132 *Id.*

arises when a Fund has held a piece of property for ten years or more.¹³³ If a property held by a Fund in an Opportunity Zone is eventually sold, the basis for the property is fully stepped-up to the fair market value of the property on the day it is sold, all but eliminating taxable income realized in the transaction.¹³⁴ As a hypothetical example, if an abandoned warehouse in an Opportunity Zone was purchased by an investor through a Fund for \$500,000 in 2019, then redeveloped into a new, multi-use building at a cost of \$3,000,000, and sold in 2030 for its fair market value of \$8,000,000, no income would be recognized in the sale at all. The investor would avoid taxation on \$4,500,000 of income that any other person not able to take advantage of the Opportunity Zone program would have to pay.

There is an immense separation between the benefits gained by the investors of Opportunity Zones through the program and those gained by the targeted communities. As discussed in the previous section of this Note, the benefits to the communities are minute, if present at all.¹³⁵ Yet, as discussed in this section, there is potential for huge benefits in the form of tax breaks for investors.¹³⁶ This disconnect has been prevalent historically throughout programs similar to Opportunity Zones as well.¹³⁷

Now that the benefits for the investors have reached an elevated level, this disconnect has the potential to be even greater for the Opportunity Zone program.¹³⁸ As tax policy expert, Stephen M. Rosenthal, stated, “[t]he fundamental problem with Opportunity Zones is the disconnect between the size of the potential tax costs, which are uncapped, and the social benefits from the investments, which will be hard to measure.”¹³⁹ The disconnect between the size of the benefits to investors and the lack of benefits to the community also indicates a disconnect between the benefit to the communities and the tax costs to the country.¹⁴⁰ Every dollar that is saved by the investors due to the tax breaks in the Opportunity Zone program is a dollar of tax expenditures and foregone revenue by the federal government.

Returning to the purposes of an effective Federal Income Tax, this disconnect between investor gain and community benefit goes against the tax policy goal of vertical equity.¹⁴¹ In the United States, the progressive tax system attempts to allocate the tax burden relatively equitably by ability to pay;¹⁴² those with higher levels of

133 See Merrill Hoopengardener & Forrest David Milder, *Historic Tax Credit Group Seeks Clarity Under O-Zone Regs*, TAX NOTES, Dec. 28, 2018, <https://www.taxnotes.com/tax-notes-today/opportunity-zones/historic-tax-credit-group-seeks-clarity-under-o-zone-regs/2019/01/09/291db?highlight=opportunity%20zones%20basis> (discussing the magnitude of potential issues from the ten-year step-up in basis).

134 I.R.C. § 1400Z-2 (2018).

135 See generally Sagalow, *supra* note 50.

136 See generally Kennedy, *supra* note 6.

137 See, e.g., Aprill, *supra*, note 64, at 1347 (“On average in 1987, for each dollar of employee compensation, these pharmaceutical companies received \$2.67 in tax benefits.” The pharmaceutical companies that benefitted from this particular Opportunity Zone-like provision turned less than 40% of its gain into employee wages.).

138 Rosenthal, *supra* note 103; see also Sagalow, *supra* note 50 (“[T]he incentives for investments are more generous than those for investments under previous programs.”).

139 *Id.*

140 *Id.*

141 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-1009SP, *supra* note 41, at 24.

142 *Id.*

income are subject to a higher tax rate than those with lower levels of income.¹⁴³ However, the Opportunity Zone program goes against this established principle. The tax benefits available through the program are only available to the wealthiest of people in the country.¹⁴⁴ These substantial tax breaks will significantly reduce their effective tax rates, while those living in the targeted communities will still be subject to the same rates as before. This is counter to the concept of vertical equity as it brings the country closer to a flat tax rate.¹⁴⁵

The Opportunity Zone program conflicts with the tax policy goal of horizontal equity as well.¹⁴⁶ Horizontal equity is the principal “that taxpayers who have similar ability to pay taxes receive similar tax treatment.”¹⁴⁷ A Fund—which must be a legal entity and not an individual taxpayer—must be used to invest in an Opportunity Zone.¹⁴⁸ As a hypothetical, two taxpayers—one a corporation, and one an individual—each have identical gross income, purchase identical properties next door to one another, and redevelop them into identical new buildings. Because of the Opportunity Zone program, they could have vastly different levels of adjusted gross income—and, therefore, tax liability—at the end of the year just because of the fact that one is a legal entity and the other is not.

In its attempt to help low-income communities as advertised, the program falls short, revealing that the true beneficiaries of the Opportunity Zone program are the investors. Moreover, the uncertainty regarding the interpretation and procedure surrounding § 1400Z only further adds to the legislation’s shortcomings.

III. PROBLEMS WITH IMPLEMENTATION OF § 1400Z

From the moment the Tax Cuts and Jobs Act of 2017 was passed, the Opportunity Zone program outlined in § 1400Z faced immediate implementation issues. The House version of the bill did not contain the provision at all,¹⁴⁹ and the Senate hurriedly pushed the rest of the bill through without much opportunity for debate.¹⁵⁰ As a result, very little review of the Opportunity Zone provision occurred. The resulting jumbled Code section reflects this sparse discourse.

The Code provision has already been the subject of a number of requests for clarification, interpretation issues, and revenue rulings. In fact, the Joint Committee on Taxation stated that “[a] technical correction may be needed to reflect . . . intent” in regard to a portion of the Opportunity Zone legislation.¹⁵¹ In the meantime, the

143 I.R.C. § 1 (2018).

144 See Sagalow, *supra* note 50.

145 See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-1009SP, *supra* note 41, at 28.

146 *Id.* at 27.

147 *Id.*

148 I.R.C. § 1400Z-2 (2018).

149 See JOINT COMM. TAXATION, JCX-65-17, *supra* note 43.

150 Andrew Schwartz & Galen Hendricks, *One Year Later, the TCJA Fails to Live Up to Its Proponents’ Promises*, CTR. FOR AM. PROGRESS (Dec. 20, 2018), <https://www.americanprogress.org/issues/economy/reports/2018/12/20/464534/one-year-later-tcja-fails-live-proponents-promises/> (“[T]he hurried and partisan process of the bill’s passage resulted in several new and continued loopholes.”).

151 JOINT COMM. ON TAXATION, JCT-1-18, GENERAL EXPLANATION OF PUBLIC LAW 115-97., 317 n.1478 (2018).

Internal Revenue Service has devoted significant resources in an attempt to clarify how it will view significant portions of the provision. For example, REG-115420-18 attempts to clarify what types of income are eligible for tax deferral,¹⁵² and Revenue Ruling 2018-29 attempts to clarify what sort of uses qualify as “substantially improved” uses in order to determine whether a property is eligible for beneficial tax treatment.¹⁵³ However, even after these much-requested clarifications, some are still calling for more.¹⁵⁴ According to John Lettieri of the Economic Innovation Group, “[i]nvestors have yet to receive the formal guidance or regulatory clarity needed to inform their decision-making” in regard to Opportunity Zones, even going as far as to say that the success of the program relies on clarification and Treasury rules.¹⁵⁵

In cases where clarifications were provided, they were sometimes too late to counteract one of the prevailing issues with the legislation: namely, the ninety-day window for Qualified Opportunity Zone designation.¹⁵⁶ In the Tax Cuts and Jobs Act, Congress delegated the power of designating Qualified Opportunity Zones to the chief executives of the states subject to the guidelines in § 1400Z-1.¹⁵⁷ In doing so, Congress laid out an appreciably vague set of standards as to what was eligible for designation by the governors.¹⁵⁸ The only significant requirement was that the tract qualifies as a “low-income community.”¹⁵⁹ That is, a population census tract where the poverty rate of the tract is 20% or the median family income for the tract is 80% or less of either the median family income of the metropolitan area or the median family income of the state as a whole.¹⁶⁰

This vagueness can be abused in a number of ways: (a) tracts can be in economically viable areas already with a small amount of housing that is disproportionately low-income;¹⁶¹ (b) tracts can be immediately adjacent to an already economically strong tract;¹⁶² or (c) a tract can be within an economically strong metropolitan area and simply below the median income in that area.¹⁶³ In response to these open doors for abuse, the Congressional Black Caucus urged that “the Treasury Department should draft rules that ensure that benefits flow to communities and residents, not just wealthy investors.”¹⁶⁴ However, new rules would likely not remedy any of these

152 See Treas. Reg. § 115420-18 (2018).

153 See Rev. Rul. 18-29 (2018).

154 See, e.g., Novogradac & Company LLP, *Lack of O-Zone Guidance Deterring Investments, Firm Says*, TAX NOTES, Nov. 26, 2018, <https://www.taxnotes.com/tax-notes-today/deferral-taxes/lack-o-zone-guidance-deterring-investments-firm-says/2018/12/07/28np6>.

155 Stephen K. Cooper, *Success of Opportunity Zones Tied to Treasury Rules*, TAX NOTES, Oct. 4 2018, <https://www.taxnotes.com/tax-notes-today/dividends/success-opportunity-zones-tied-treasury-rules/2018/10/04/28h52>.

156 I.R.C. § 1400Z-1 (2018).

157 *Id.*

158 See *id.*

159 I.R.C. § 45D(e) (2018). In 26 U.S.C. § 1400Z-1(c)(1), “low-income community” is described as having the same definition as in I.R.C. § 45D(e).

160 *Id.*

161 See Richmond, *supra* note 94.

162 *Id.*

163 I.R.C. § 45D.

164 Richmond, *supra* note 94.

issues due to the ninety-day window for designation of Opportunity Zones. States had until only ninety days after the passing of the bill to designate Opportunity Zones. This deadline ran on March 21, 2018.¹⁶⁵ After a few statutorily eligible extensions, the final deadline for designation was June 18, 2018.¹⁶⁶ As a result, every Opportunity Zone that will be created is already in existence, and further regulation in this area would not accomplish anything.

Although no one of these potential concerns with the interpretation and implementation is likely to become a fatal flaw in § 1400Z, together they paint a picture of a less than fully-formed piece of legislation. One of the primary goals of an effective tax program is a combination of simplicity, transparency, and administrability.¹⁶⁷ The interpretation issues that need to be addressed in the Opportunity Zone program significantly hinder these concepts.¹⁶⁸ Paired with the lack of effectiveness in the program's stated goals and the inequities it created, the picture becomes even more muddled.

IV. CONCLUSION

The deadline for designation of Opportunity Zones by state executives has since passed¹⁶⁹ and roughly 8,700 Opportunity Zones were certified by the Treasury Department,¹⁷⁰ amounting to 12% of United States census tracts.¹⁷¹ This program has already laid the foundation for a major impact on the United States economy and tax system and investors have begun to formulate plans on how to take advantage of the opportunity it provides. Estimates on tax expenditures by the federal government for the program are significant,¹⁷² and many believe they are drastically understated.¹⁷³

As discussed throughout this Note, the goals of a tax code should be to raise revenue while maintaining “equity; economic efficiency; and a combination of simplicity, transparency, and administrability.”¹⁷⁴ The Opportunity Zones program is far-reaching, and it fails to achieve the goals of a portion of the tax code. The program is horizontally inequitable by favoring certain types of investors and vertically inequitable by benefitting the wealthy to the detriment of—or at least no benefit to—

165 Adam S. Wallwork & Linda B. Schakel, *Primer on Qualified Opportunity Zones*, TAX NOTES, May 14, 2018, <https://www.taxnotes.com/tax-notes-today/real-estate-taxation/primer-qualified-opportunity-zones/2018/05/14/27zzt>.

166 *Id.*

167 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-1009SP, *supra* note 41, at 45.

168 *Id.*

169 I.R.C. § 1400Z-1.

170 Notice.2018-28, 2018-28 I.R.B.

171 Steve Rosenthal, *Opportunity Zones May Help Investors and Syndicators More Than Distressed Communities*, FORBES (Aug. 20, 2018), <https://www.forbes.com/sites/stevenrosenthal/2018/08/20/opportunity-zones-may-help-investors-and-syndicators-more-than-distressed-communities/#6250d37a76f2>.

172 JOINT COMM. TAXATION, JCX-67-17, *supra* note 49. The tax expenditure was estimated by the Joint Committee on Taxation at an average of \$1.6 billion annually over the next eight years. However, the estimates do not reach far enough to encompass the ten-year stepped-up basis provision, which is expected to be the largest expenditure in the program.

173 Sagalow, *supra* note 50. (“The revenue loss from the program might be greater than the Joint Committee on Taxation estimated because the incentives for investments are more generous than those for investments under previous programs.”).

174 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-1009SP, *supra* note 41, at 24.

the low-income communities targeted by the program. The program is inefficient in that it encourages investments in different areas over others that may be similarly situated and viable, and in that it encourages investments be made through legal entities—not by individuals. The program is not simple, transparent, nor administrable because it further convolutes the tax code, leaves large portions up to the discretion of state executives, and there have been—and continue to be—numerous calls for clarification. All the while, Opportunity Zones are projected to cost taxpayers billions of dollars.¹⁷⁵

Whether the overall Opportunity Zone program was not fully thought out, simply implemented poorly, or constructed deliberately to benefit the wealthy, it is not effective tax policy as a whole. Although they might not have had the chance to redevelop, many investors have already begun exchanging for Opportunity Zone-eligible property in reliance on the statute.¹⁷⁶ However, the major problem with this program is the lack of actual help provided to the communities. Many believe that programs in the past have “fail[ed] to promote the social change necessary to support sustainable communities,”¹⁷⁷ and that that is their major shortcoming. Instead of promoting generic, blanket economic growth, programs that target actual social change through tangible benefits like money for schools, day cares, parks, community centers, etc., might accomplish more good in the very communities that the Opportunity Zone program purportedly seeks to help.

175 JOINT COMM. TAXATION, JCX-67-17, *supra* note 49.

176 *See generally* Lemon v. Kurtzman, 411 U.S. 192 (1973) (holding that actions taken in reliance of a repealed statute were valid).

177 Jennifer Forbes, Note, *Using Economic Development Programs as Tools for Urban Revitalization: A Comparison of Empowerment Zones and New Markets Tax Credits*, 2006 U. ILL. L. REV. 177, 197 (2006).