Opportunity Zones, 1031 Exchanges, and Universal Housing Vouchers

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The Tax Cuts and Jobs Act of 2017 contained former President Trump's signature economic development initiative: the Opportunity Zone program. Allowing a deferral of capital gains tax for certain qualifying investments in low-income areas, the Opportunity Zone program aims to spur economic development by steering capital into economically distressed neighborhoods. The program is the latest iteration of an overly simplistic market-based approach to community development—an approach that transcends political party—based on a flawed yet enduring notion that mere proximity of capital will solve deeply entrenched issues of poverty and racial inequity. In reality, the legacy of Opportunity Zones is likely to be one of accelerated neighborhood gentrification left in the wake of wealthy taxpayer windfalls.

Opportunity Zones are more akin to a classic tax shelter than an effective anti-poverty strategy. They share a fundamental DNA with a much older real estate-related tax break, § 1031 like-kind exchanges, which allow for the nonrecognition of gains for certain qualifying transactions that involve trading one piece of real estate for another. Section 1031 is one of the largest corporate tax expenditures in the U.S. tax code. Yet, as examined in this Article, the four primary theoretical bases upon which § 1031 rests—measurement, administrability, liquidity, and economic stimulus—have eroded over time and are ultimately unpersuasive.

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Redirecting the value of the Opportunity Zone program and § 1031 exchanges to the Housing Choice Voucher program could roughly double the number of housing vouchers available to extremely low-income households in the United States. I argue that this sort of intervention would have far greater impact in addressing the ills of poverty and racial inequality in the United States than the Opportunity Zone program. This argument is timely in light of President Biden's recent support for reforming Opportunity Zones, limiting § 1031, and expanding the Housing Choice Voucher program.

Introduction 180
I. The Opportunity Zone Program 186
 A. Basic Mechanics 186
 B. Critiques 190
II. Section 1031 Like-Kind Exchanges 199
 A. Basic Mechanics 199
 B. Comparison of Opportunity Zones and Section 1031 202
 C. Policy Rationales & Critiques 204
III. Universal Housing Vouchers 209
 A. Housing Affordability Challenges 209
 B. A Universal Housing Voucher for Extremely Low-Income Renters 213
  1. Funding a Universal Voucher 213
  2. Political Challenges 217
  3. Psychological Challenges 220
Conclusion 223

INTRODUCTION

> "My Admin has done more for the Black Community than any President since Abraham Lincoln. Passed Opportunity Zones with @SenatorTimScott, guaranteed funding for HBCU's, School Choice, passed Criminal Justice Reform, lowest Black unemployment, poverty, and crime rates in history. . . ."
>
> —Donald Trump, Twitter, June 2, 2020[1]

Among the achievements touted by former President Trump during his presidency, one of the most frequent was the passage of a relatively arcane

1. Donald Trump (@realDonaldTrump), TWITTER (June 2, 2020, 2:27 PM), https://twitter.com/realdonald trump/status/1267885675338219520?lang=en [https://perma.cc/2NBF-E8DB].

addition to the U.S. tax code: the Opportunity Zone program.[2] Held up as his signature economic development initiative, the program was intended to spur investment in economically distressed communities by providing a variety of incentives for taxpayers to invest capital gains in those neighborhoods. Estimates projected that the program could tap into more than $6 trillion in unrealized gains.[3] By September 2020, Opportunity Zone funds had already raised more than $12 billion, approximately 96 percent of which went to investment in real estate projects.[4] The unexpectedly strong investor demand led the Joint Committee on Taxation to revise its estimate of the program's cost to the federal treasury upward on multiple occasions.[5]

Trump received praise for the program from unlikely quarters[6] and missed no opportunity to celebrate what it would mean for those living in low-income communities.[7] To dramatize the point, he invited Tony Rankins, a formerly

2. The program was enacted as part of the Tax Cuts and Jobs Act of 2017. *See* Pub. L. No. 115-97, § 13823, 131 Stat. 2054, 2183–84 (codified at 26 U.S.C. §§ 1400Z-1, 1400Z-2). Trump frequently referenced Opportunity Zones throughout the 2020 presidential election cycle. *See, e.g.*, *Presidential Debate at Belmont University in Nashville, Tennessee*, COMM'N ON PRESIDENTIAL DEBATES (Oct. 22, 2020), https://www.debates.org/voter-education/debate-transcripts/october-22-2020-debate-transcript/ [https://perma.cc/MG2V-SVXN] ("Nobody has done more for the Black community than Donald Trump . . . with the . . . possible exception . . . of Abraham Lincoln. . . . Criminal justice reform, prison reform, opportunity zones with Tim Scott, a great senator from South Carolina. He came in with this incredible idea for opportunity zones. It's one of the most successful programs. People don't talk about it. Tremendous investment is being made. Biggest beneficiary, the Black and [Latinx] communities . . . .").

3. *Opportunity Zones: Tapping into a $6 Trillion Market*, ECON. INNOVATION GRP. (Mar. 21, 2018), https://eig.org/news/opportunity-zones-tapping-6-trillion-market [https://perma.cc/7N8C-2994].

4. *See* Michael Novogradac, *Novogradac Opportunity Funds List Surpasses $12 Billion in Investment*, NOVOGRADAC (Sept. 1, 2020), https://www.novoco.com/notes-from-novogradac/novogradac-opportunity-funds-list-surpasses-12-billion-investment [https://perma.cc/6PL7-N5FU].

5. *Compare* STAFF OF JOINT COMM. ON TAXATION, 115TH CONG., ESTIMATED REVENUE EFFECTS OF THE "TAX CUTS AND JOBS ACT," AS PASSED BY THE SENATE ON DECEMBER 2, 2017, JCX-63-17, at 6 (2017) (estimating a cost of $6.6 billion for the years 2019–2022, or approximately $1.65 billion per year), *and* STAFF OF JOINT COMM. ON TAXATION, 115TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2018–2022, JCX-81-18, at 27 (2018) (estimating a cost of $7.9 billion for the years 2019–2022, or approximately $1.98 billion per year), *with* STAFF OF JOINT COMM. ON TAXATION, 116TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2019–2023, JCX-55-19, at 26 (2019) [hereinafter 2019 JCT TAX EXPENDITURES ESTIMATES] (estimating a cost of $13.7 billion for the years 2019–2022, or approximately $3.43 billion per year).

6. For example, in late October 2020, Van Jones, former Special Advisor on Green Jobs to President Obama, could be seen on CNN praising Trump for Opportunity Zones as evidence that he has done "good stuff for the [B]lack community." *See* Anthony Leonardi, *Van Jones: Trump's 'Incendiary' Messaging on Race Prevents Him from Getting Credit for 'Good Stuff' He's Done for Black Community*, WASH. EXAM'R (Oct. 23, 2020), https://www.washingtonexaminer.com/news/van-jones-trumps-incendiary-messaging-on-race-prevents-him-from-getting-credit-for-good-stuff-hes-done-for-black-community [https://perma.cc/Y7Y4-JV6T].

7. At an April 2019 meeting of the newly constituted White House Opportunity and Revitalization Council, Trump stated:

> The Council will focus its efforts on economically distressed communities across the country,

homeless African-American veteran, to the 2020 State of the Union Address.[8] Rankins received a rousing standing ovation for reportedly turning around a life mired in drug addiction as a result of finding a construction job created by the Opportunity Zone program.[9] Subsequent reporting revealed that Rankins had in fact started the job four months before Opportunity Zones were designated and that the location of his employment fell outside of any Opportunity Zone.[10]

Anecdotal fudging, however, is not what is most problematic about the Opportunity Zone program. Nor is the primary problem the rampant instances of fraud, abuse, political favors, and lack of oversight and accountability that have plagued the program, as will be highlighted herein.[11] This is not a story of bad apples. Rather, the core problem is that the Opportunity Zone program is based on a deeply flawed yet enduring notion that mere proximity of capital to low-income neighborhoods alone will solve deeply entrenched issues of poverty and racial inequity. In reality, the legacy of Opportunity Zones is likely to be one of accelerated neighborhood gentrification with little public value gained in exchange for significant taxpayer windfalls.

I argue that at root the Opportunity Zone program is less akin to an effective anti-poverty strategy and rather shares a fundamental DNA with another provision of the Internal Revenue Code: § 1031 "like-kind exchanges."[12] This one hundred-year-old feature of the tax code allows a taxpayer to defer

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> including Opportunity Zones—which are, as you know, up and running and doing incredibly well, beyond expectation—which we are [*sic*] designated by our nation's governors under a crucial provision of our new tax cuts. That was a part of what we got approved with the tax cut. And I don't know that people talk about it, but it was very important.
>
> We're providing massive tax incentives for private investment in these areas to create jobs and opportunities where they are needed the most. This is all throughout the country. . . .
>
> Our actions will directly improve the lives of countless low-income Americans. It's pretty much aimed at that.
>
> Together we can lift up every forgotten community. And we talked about the forgotten men and women. And a lot of people were forgotten in this country. No longer. And unleash the boundless potential of our people.

Donald Trump, U.S. President, Remarks by President Trump at the White House Opportunity and Revitalization Council Meeting (Apr. 4, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-white-house-opportunity-revitalization-council-meeting/ [https://perma.cc/J6NB-6M79].

8. *See* Bernard Condon, *Trump's Story About Veteran's Comeback Was Not Quite True*, ASSOCIATED PRESS (Feb. 13, 2020), https://apnews.com/article/donald-trump-us-news-ap-top-news-weekend-reads-oh-state-wire-2722fe07cc220914f6772272e15b0c6d [https://perma.cc/FNP2-8JJW]. Trump's introduction of Rankins: "Opportunity Zones are helping Americans like Army veteran Tony Rankins from Cincinnati, Ohio. After struggling with drug addiction, Tony lost his job, his house and his family. He was homeless. But then Tony found a construction company that invests in Opportunity Zones. He is now a top tradesman, drug-free, reunited with his family, and he is here tonight." *Full Transcript: Trump's 2020 State of the Union Address*, N.Y. TIMES (Feb. 5, 2020), https://www.nytimes.com/2020/02/05/us/politics/state-of-union-transcript.html [https://perma.cc/XDD5-9RPC].

9. *See* Condon, *supra* note 8.

10. *See id.*

11. *See infra* Part I.B.

12. 26 U.S.C. § 1031.

recognition of gains associated with the exchange of real property for other real property of "like kind."[13] A side-by-side comparison of Opportunity Zones and § 1031 exchanges is revealing. While adorned in the ornamental language of economic development, the Opportunity Zone program is in many respects simply a dressed-up cousin of the § 1031 provision: a tax shelter with various economic pros and cons to be analyzed by the taxpayer. Nothing in this analysis, or in the resulting investment, requires the creation of any local jobs, the involvement or support of any community-based organizations or disadvantaged businesses, or the development of any needed community assets.

Unlike Opportunity Zones, § 1031 is not explicitly justified as an anti-poverty tool. Instead, the law has been supported using four competing rationales related to: (1) challenges of measuring gain in exchange transactions, (2) administrative costs, (3) investor liquidity issues, and (4) the goal of promoting economic activity.[14] I argue that each of these rationales is lacking. In many cases, they have been diminished by amendments made to § 1031 over time that, for example, now allow for non-simultaneous exchanges or that limited the provision to cover only real property transactions. Even the economic activity rationale, the most formidable, does not apply to a wide variety of § 1031 transactions, overlooks other features of the tax code that already provide significant investment incentives, and pays insufficient attention to the fundamental nature of the federal income tax structure that attempts to balance economic activity with other important public values.

In this Article, I consider one of those other public values—namely, the need for decent and affordable housing. The COVID-19 global pandemic, and associated concerns about housing instability left in its wake, has merely magnified a reality that existed well before the virus arrived: that millions of U.S. households are severely cost-burdened, struggling to afford housing in an economy in which wages have not kept pace with increasing rents—a reality even more severe for low-income households and households of color.[15] While short-term interventions are necessary to stem the fallout from the pandemic, longer-term structural changes are necessary to address these underlying housing challenges.

One proposal that has garnered significant support in recent years, including from President Biden, is to expand coverage of the "Section 8" Housing Choice Voucher program, currently the primary federal rental assistance program, to all eligible "extremely low-income households."[16] While

13. *Id.* § 1031(a)(1).
14. *See infra* Part II.C for a discussion of each of these rationales.
15. *See infra* Part III.A.
16. *See infra* Part III.B.1.

the voucher program is far from perfect,[17] it currently ensures the availability of 2.5 million units of affordable housing to more than five million residents every year.[18] Based on calculations drawn from data available through the U.S. Department of Housing and Urban Development (HUD), I estimate that redirecting the value of the Opportunity Zone and § 1031 exchange tax expenditures to the Housing Choice Voucher program could roughly double the number of vouchers available to extremely low-income households.[19] By some estimates, this would be nearly sufficient to cover all such households in need.[20]

While vouchers emphasize a people- rather than place-based approach to economic development, research described herein has found evidence that vouchers, when utilized to provide access to "high-opportunity neighborhoods," are correlated with significantly improved economic outcomes.[21] Given that 50 percent of housing voucher holders have a Black head of household,[22] this holds important implications for racial equity. While the goals of Opportunity Zones and housing vouchers are not identical, Trump has touted the former primarily on the basis of its expansion of economic opportunity for households of color. Here, I do not attempt to settle the long-held debate over the relative merits of people- versus place-based economic development interventions.[23] Rather, I argue that when considering these specific programs, an expansion of housing vouchers would better serve many of the ends ascribed to Opportunity Zones.

Though such a proposal to redirect the value of these tax expenditures would no doubt face serious political opposition from, among others, certain real estate industry advocacy groups,[24] recent debate around § 1031 shows that movement is possible. In July 2020, then-candidate Biden laid out a tax plan that would eliminate § 1031 exchanges for investors with annual incomes above $400,000.[25] Meanwhile, the renewed Black Lives Matter demonstrations in the

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17. *See, e.g.*, PHILIP TEGELER, POVERTY & RACE RSCH. ACTION COUNCIL, HOUSING CHOICE VOUCHER REFORM: A PRIMER FOR 2021 AND BEYOND (2020), https://prrac.org/pdf/housing-choice-voucher-reform-agenda.pdf [https://perma.cc/E8WV-6DLZ] (noting limitations of the Housing Choice Voucher program including discrimination by landlords against voucher holders, rent caps limiting where households can live, and barriers to inter-jurisdictional use).

18. OFF. OF POL'Y RSCH. & DEV., U.S. DEP'T OF HOUS. & URB. DEV., ASSISTED HOUSING: NATIONAL AND LOCAL: PICTURE OF SUBSIDIZED HOUSEHOLDS (2020) [hereinafter PICTURE OF SUBSIDIZED HOUSEHOLDS 2020], https://www.huduser.gov/portal/datasets/assthsg.html [https://perma.cc/A6YN-QWBZ].

19. *See infra* Part III.B.1.

20. *See infra* Part III.B.1.

21. *See infra* Part III.B.1.

22. PICTURE OF SUBSIDIZED HOUSEHOLDS 2020, *supra* note 18.

23. *See, e.g.*, Michelle D. Layser, *The Pro-Gentrification Origins of Place-Based Investment Tax Incentives and a Path Toward Community Oriented Reform*, 2019 WIS. L. REV. 745, 785–86 (2019) (discussing the historical distinction made between people-based and place-based strategies).

24. *See infra* Part III.B.2.

25. *See* Patrick Clark, John Gittelsohn & Noah Buhayar, *What Is the Like-Kind Exchange Rule That Biden Wants Dead*, WASH. POST (July 27, 2020),

wake of the police killings of George Floyd and Breonna Taylor, among others, have galvanized organizing around campaigns to redirect resources toward social goods and services like housing assistance.

Such a proposal will also face certain challenges related to deeply ingrained psychological human tendencies to hold individuals responsible for situational outcomes, and to defend and rationalize the status quo, even by those it disadvantages.[26] Overcoming such challenges will require raising awareness and empathic understanding of the ways in which, though less visible, a large swath of society already lived under highly constrained circumstances even pre-pandemic. While perhaps not as psychologically satisfying, direct aid, for example to those with disabilities or the elderly, is a necessary complement to economic development initiatives aimed at leveraging market forces to foster job growth.

This Article proceeds as follows: Part I provides an overview and a critique of the Opportunity Zone program through exploration of its underlying ideology and of various proposals to reform the program. Part II examines the § 1031 like-kind exchange provision, draws a comparison with the Opportunity Zone program, and argues against the four primary rationales used to justify the tax expenditure. Part III analyzes housing affordability challenges, proposes redirecting the cost of Opportunity Zones and § 1031 exchanges to expand the Housing Choice Voucher program to cover all extremely low-income households, and considers the political and psychological challenges to adopting this proposal.

Each of these three primary Parts is connected to one another, though in a different manner and for differing purposes. Parts I and II provide a juxtaposition of two real estate-related tax expenditures—Opportunity Zones and § 1031—for the purpose of revealing insights about the former's fundamental tax shelter orientation. Parts I and III combine to show how a major expansion of federal rental assistance would better serve the Opportunity Zone program's purported poverty alleviation goals, particularly for households of color. And Parts II and III demonstrate one method of feasibly funding such an expansion in a manner that is cost neutral to the federal government—namely, targeting § 1031, a tax expenditure large enough to cover the cost of the proposal—in a fashion not unlike prior housing advocacy campaigns.[27] This last move is offered in part as

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https://www.washingtonpost.com/business/what-isthe-like-kind-exchange-rule-that-biden-wants-dead/2020/07/24/daf373bc-cddd-11ea-99b0-8426e26d203b_story.html [https://perma.cc/XA9L-JF9U] ("Former Vice President Joe Biden, who is challenging Trump for the presidency in November, has proposed eliminating the [§ 1031] loophole.").

26. *See infra* Part III.B.3.

27. *See, e.g.*, UNITED FOR HOMES, NAT'L LOW INCOME HOUS. COAL., REFORMING THE MORTGAGE INTEREST DEDUCTION: HOW TAX REFORM CAN HELP END HOMELESSNESS AND HOUSING POVERTY (2017), https://nlihc.org/sites/default/files/MID-Report_0817.pdf [https://perma.cc/K7J3-DMEJ] (arguing for limits to the home mortgage interest deduction in order to help fund, for example, the National Housing Trust Fund).

an actual substantive policy proposal and in part simply as one example of how low-income housing advocacy groups might leverage additional resources by paying greater attention to the tax code.

I.
THE OPPORTUNITY ZONE PROGRAM

A. Basic Mechanics

The Opportunity Zone program provides three distinct federal tax incentives for investors with capital gains to invest those gains in a Qualified Opportunity Fund (QOF).[28] The first is a tax deferral mechanism. It allows investments in QOFs to be excluded from gross income until the earlier of the taxable year in which the investment is sold or 2026.[29] This allows the investor to defer payment of capital gains tax and thus bestows a time value of money advantage.

The second incentive is a direct reduction in capital gains tax owed. If the investment in the QOF is held for at least five years, then the basis in the investment is increased by 10 percent of the amount of deferred gain.[30] For example, if an investor transfers $1 million in capital gains into a QOF and holds the investment for at least five years, then only $900,000 of gains ultimately are recognized for tax purposes. A separate provision allows for an additional 5 percent basis increase, for a total of 15 percent, if the investment is held for at least seven years.[31]

The third incentive allows investors the ability to avoid paying capital gains taxes altogether on the appreciation in value of the QOF investment.[32] The investment must be held for ten years in order to take advantage of this benefit.[33] So if an investor holds a $1 million QOF investment for ten years and the value of that investment increases by 60 percent, the investor ultimately would avoid paying any capital gains taxes on the additional $600,000.

Combining these three federal tax benefits in a single investment can impact rates of return enough to influence investor behavior. Consider the following two scenarios. In June 2019, Investor A sold $1.5 million in stocks with a basis of $500,000 for a capital gain of $1 million. Investor A did not invest

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28. *See generally* 26 U.S.C. § 1400Z-2(d).

29. *Id.* § 1400Z-2(a)(1), (b).

30. *Id.* § 1400Z-2(b)(2)(B)(iii).

31. *Id.* § 1400Z-2(b)(2)(B)(iv). Note that to take full advantage of this provision, the investment must have been made by December 31, 2019, in order to be able to have held the investment for seven years by December 31, 2026. There has been some discussion of extending this deadline. *See, e.g.*, Opportunity Zone Extension Act of 2021, H.R. 970, 117th Cong. (2021) (proposing an extension of the realization deferral date to December 31, 2028); H.R. 6513, 116th Cong. (2020) (proposing an extension to December 31, 2030).

32. *See* 26 U.S.C. § 1400Z-2(c).

33. *Id.*

the gains in a QOF, so the gains will be included in gross income for taxable year 2019 and Investor A will owe federal capital gains tax.[34] Applying the long-term capital gains rate of 23.8 percent,[35] Investor A will pay $238,000, leaving $762,000 in gains. Assume Investor A reinvests those gains in new stocks that appreciate by 5 percent every year and holds the investment for ten years.[36] At the ten-year mark, the investment will be worth approximately $1.24 million. Upon a sale, Investor A will pay capital gains tax on the appreciation in value, resulting in after-tax proceeds from the sale of approximately $1.13 million. In ten years, Investor A profited $130,000 on $1 million, a total return of 13 percent.

Alternatively, assume Investor B similarly gained $1 million on the sale of stock in June 2019. Rather than buying more stocks, however, Investor B invests the proceeds in a QOF within 180 days of the sale.[37] Investor B would pay no tax on the gain in 2019. In taxable year 2026, Investor B would be forced to recognize the deferred capital gains. However, having held the investment for seven years, the gain would receive a 15 percent step-up in basis. The long-term capital gains rate would be applied to only $850,000 of the original gain, for a tax liability of $202,300.[38] Assume again that the investment in the QOF appreciates 5 percent every year and that the investment is held for ten years.[39] Unlike in the prior scenario, Investor B would pay no federal capital gains tax on the appreciation of the investment. A sale of the QOF investment in 2029 would result in proceeds of approximately $1.63 million. Deducting the taxes paid for taxable year 2026 yields a total return of roughly $1.43 million, or 43 percent over the original $1 million invested: 30 percent higher than in the prior scenario.[40]

These examples demonstrate that investing in a QOF can significantly enhance an investor's after-tax returns. Furthermore, given the appreciation exclusion mechanism, the magnitude of difference in returns between Investors A and B increases the higher the annual rate of return or the longer the holding period of the investment. The implementing regulations of the program allow an

34. This assumes no other available deferral options.

35. This calculation uses the capital gains rate of 20 percent for individuals with annual income greater than the inflation-adjusted $425,800. *See* 26 U.S.C. § 1(h). In addition, the calculation includes the 3.8 percent net investment tax paid by many individuals with a modified adjusted gross income of greater than $200,000. *See* 26 U.S.C. § 1411(a).

36. For purposes of simplicity, this assumes annual compound growth.

37. The Opportunity Zone program requires investment in a QOF within 180 days of the sale or exchange generating the gain. *See* 26 U.S.C. § 1400Z-2(a)(1)(A).

38. Note that in the intervening seven years, this $202,300 has been appreciating, bestowing the time value of money advantage of the tax deferral incentive.

39. Note that this assumes the investor had other funds to use to pay the taxable year 2026 owed taxes and thus did not need to cash out the QOF investment.

40. These examples ignore any other applicable taxes.

investor to hold an investment in a QOF until 2047 and avoid paying capital gains tax on any appreciation that occurs through the end of that year.[41]

So what does the public receive in exchange for conferring these valuable economic incentives? The answer relates to what QOFs can do with money invested in them. Specifically, QOFs must invest in Qualified Opportunity Zones (QOZs)—certain census tracts designated as low-income communities (LICs). The program draws on the definition for LICs used by the New Markets Tax Credit program, another place-based economic development program.[42] In order to be deemed a LIC, the census tract must either (1) have a poverty rate of at least 20 percent or (2) have a median family income below 80 percent of the statewide and the metropolitan median family income.[43] In addition to LICs, the program allows certain non-LIC tracts to be deemed QOZs so long as they are contiguous with a QOZ-designated LIC and do not exceed 125 percent of the contiguous QOZ-designated LIC's median family income.[44]

Drawing upon 2011–2015 American Community Survey (ACS) 5-Year data from the Census Bureau, the U.S. Treasury Department released a list of more than forty thousand census tracts eligible for potential QOZ status.[45] Only 25 percent of the eligible tracts in a given state could be designated as QOZs, and of those, only 5 percent could consist of contiguous non-LIC tracts.[46] The program empowered governors to nominate which of the eligible tracts in their state would be designated as QOZs. Nominations were due by March 21, 2018, for certification by the Treasury Department. In all, Treasury certified 8,764 census tracts as QOZs.[47]

Not every investment in a QOZ is eligible to receive preferential tax treatment under the Opportunity Zone program. Rather, the program sets forth specific parameters for what sorts of investments qualify. Recall that investors with capital gains do not invest directly in QOZs, but rather invest in a Qualified Opportunity Fund. Such funds operate as investment vehicles organized for the purpose of investing in, and holding 90 percent of their assets in, Qualified Opportunity Zone Property (QOZP).[48] QOZP comes in one of two varieties: (1) certain tangible property used in the trade or business of a QOF ("QOZ Business

41. *See* 26 C.F.R. § 1.1400Z2(c)-1(c) (2020) (specifying that an election to take advantage of this incentive can be made for disposition occurring through December 31, 2047).

42. *See* 26 U.S.C. § 45D(e).

43. *Id.* § 45D(e)(1)(A)–(B). With respect to the second option, if the census tract is not located in a metropolitan area, then the median family income only need not exceed 80 percent of the statewide median income. *Id.* § 45d(e)(1)(B)(i).

44. 26 U.S.C. § 1400Z-1(e)(1)(B).

45. *See* Rev. Proc. 2018-16, 2018-9 I.R.B. 383, 384 § 3.01.

46. *Id.* at 383–84 § 2.09(1), (3). The rules provided a floor of twenty-five tracts per state. *Id.* at 384 § 2.09(2).

47. Data spreadsheet downloaded from CMTY. DEV. FIN. INSTS. FUND, U.S. DEP'T OF TREASURY, OPPORTUNITY ZONE RESOURCES: LIST OF DESIGNATED QUALIFIED OPPORTUNITY ZONES (2018), https://www.cdfifund.gov/opportunity-zones [https://perma.cc/ZX2L-A366].

48. 26 U.S.C. § 1400Z-2(d)(1).

Property") or (2) equity interests (stock or partnership interests) in certain businesses located in a QOZ ("QOZ Business").[49]

With respect to the former, a property must meet certain requirements to qualify as QOZ Business Property. The tangible property must have been purchased after December 31, 2017,[50] the first use of the property in the QOZ must be made by the QOF or the QOF must substantially improve the property,[51] and "during substantially all of the [QOF's] holding period for such property, substantially all of the use of such property [must be] in a [QOZ]."[52] These rules are aimed at ensuring that the investment is bringing new resources into the area.

For investments in QOZ Businesses, the rules build on those for investments in QOZ Business Property. The equity interest must have been acquired with cash after December 31, 2017.[53] At the time the interest was acquired and for the substantial part of the fund's holding of the interest, the entity must qualify as a QOZ Business.[54] In order to qualify, substantially all of the tangible property owned by the business must be QOZ Business Property.[55] The entity must derive a minimum of 50 percent of its gross income from the active conduct of the business.[56] In addition, a number of typical "sin businesses" are excluded from eligibility.[57]

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49. *Id.* § 1400Z-2(d)(2)(A).

50. *Id.* § 1400Z-2 (d)(2)(D)(i)(I).

51. *Id.* § 1400Z-2(d)(2)(D)(i)(II). Property is considered "substantially improved" if "during any 30-month period beginning after the date of acquisition of such property, additions to basis with respect to such property in the hands of the qualified opportunity fund exceed an amount equal to the adjusted basis of such property at the beginning of such 30-month period in the hands of the qualified opportunity fund." *Id.* § 1400Z-2(d)(2)(D)(ii). In other words, roughly speaking, a QOF must invest at least as much money in improving the property as the cost of acquisition. The regulations clarified that unimproved land is largely exempt from the substantial improvement requirement. *See* 26 C.F.R. § 1.1400Z2(d)-2(b)(4)(iv)(B) (2020). For acquisitions of buildings located in QOZs, the underlying land acquisition costs are not included in the substantial improvement test calculation. *Id.* § 1.1400Z2(d)-2(b)(4)(iv)(A).

52. 26 U.S.C. § 1400Z-2(d)(2)(D)(i)(III). The regulations state that "substantially all" of the holding period means 90 percent. 26 C.F.R. § 1.1400Z2(a)-1(b)(6) (2020). The regulations state that "substantially all" of the use of the property means 70 percent. *Id.* § 1.1400Z2(a)-1(b)(3).

53. 26 U.S.C. § 1400Z-2(d)(2)(B)(i)(I) (for stock in a domestic corporation) and 26 U.S.C. § 1400Z-2(d)(2)(C)(i) (for partnership interests).

54. 26 U.S.C. § 1400Z-2(d)(2)(B)(i)(II)–(III) (for stock in a domestic corporation) and 26 U.S.C. § 1400Z-2(d)(2)(C)(ii)-(iii) (for partnership interests). The regulations state that "substantially all" of the holding period means 90 percent. 26 C.F.R. § 1.1400Z2(a)-1(b)(5) (2020).

55. 26 U.S.C. § 1400Z-2(d)(3)(A)(i). The regulations state that "substantially all" of the tangible property means 70 percent. 26 C.F.R. § 1.1400Z2(a)-1(b)(2) (2020).

56. 26 U.S.C. § 1400Z-2(d)(3)(A)(ii) (by reference to the Enterprise Zone statute at 26 U.S.C. § 1397C(b)(2)). The rules also require that "a substantial portion of the intangible property of such entity is used in the active conduct of [the] business." 26 U.S.C. § 1400Z-2(d)(3)(A)(ii) (by reference to 26 U.S.C. § 1397C(b)(2)). The regulations state that a "substantial portion" of the intangible property means 40 percent. 26 C.F.R. § 1.1400Z2(d)-1(d)(3)(ii) (2020).

57. 26 U.S.C. § 1400Z-2(d)(3)(A)(iii) (by reference to 26 U.S.C. § 144(c)(6)(B), excluding "any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises").

QOFs that meet these requirements must annually self-certify to the IRS.[58] Certain penalties accrue for failure to meet the above requirements.[59] After publishing several rounds of proposed regulations, the IRS promulgated final regulations implementing the program and clarifying a wide variety of technical issues.[60] Among the clarifications contained in the regulations is a provision stating that ownership and operation of real property qualify as actively conducting a trade or business.[61]

So here's how the program might work as envisioned by its proponents: a number of investors pool their capital gains and collectively invest $50 million in a Qualified Opportunity Fund. The QOF purchases real property like hotels, office buildings, or mixed-use residential/retail developments located in relatively lower-income census tracts that have been certified by the Treasury Department as a Qualified Opportunity Zone. The QOF substantially improves the properties,[62] investing significantly in rehabilitating and upgrading the portfolio. Presumably, the improvement spurs job growth as local construction workers and tradespeople, among others (architects, lawyers, accountants), are required for the work. As the real property is improved, this has spillover effects on the surrounding community as the enhanced properties draw higher-income workers and residents with enhanced purchasing power to the area, which in turn draw additional investment to the area. Property values rise, and, iteratively, the cycle of investment, job growth, development, and luring of new resources continues. The original QOF investors ultimately walk away with tax breaks as compensation for carrying the risk of investing in perceived "riskier" low-income communities and the formerly low-income communities enjoy new economic vibrancy.

Or at least that's how the program was sold in 2017.

B. Critiques

The reality of the Opportunity Zone program has, in many respects, deviated significantly from the vision originally presented by its proponents. Stories of outright fraud and abuse have filled the headlines of major news outlets. Among them: *A Trump Tax Break to Help the Poor Went to a Rich GOP Donor's Superyacht Marina*;[63] *Welcome to the Greenbrier, the Governor-*

58. 26 C.F.R. § 1.1400Z2(d)-1(a)(1) (2020).

59. *See, e.g.*, 26 U.S.C. § 1400Z-2(f) (imposing a penalty on QOFs that fail to meet the requirement of holding 90 percent of assets in QOZP).

60. *See* 26 C.F.R. §§ 1.1400Z2(a)-1 to 1.1400Z2(f)-1 (released Dec. 19, 2019, effective Mar. 13, 2020).

61. *Id.* § 1.1400Z2(d)-1(d)(3)(iii)(A); Rev. Rul. 2018-29, 2018-45 I.R.B. 765.

62. *See supra* note 51 for a definition of "substantial improvement."

63. Justin Elliot, Jeff Ernsthausen & Kyle Edwards, *A Trump Tax Break to Help the Poor Went to a Rich GOP Donor's Superyacht Marina*, PRO PUBLICA (Nov. 14, 2019), https://www.propublica.org/article/superyacht-marina-west-palm-beach-opportunity-zone-trump-tax-

Owned Luxury Resort Filled with Conflicts of Interest;[64] *Symbol of '80s Greed Stands to Profit from Trump Tax Break for Poor Areas*;[65] and *Sununu 'Opportunity Zone' Picks Cause Stir*.[66] The articles detail governors politicizing the choice of Opportunity Zone locations, favoring census tracts with heavy investments by political allies, or in the case of the last article, a ski resort owned by the governor's own family. Billionaires reap windfalls for real estate investments that were already planned or located in or near affluent neighborhoods.[67]

Of course, outright fraud and abuse are easy targets of critique. In January 2020, the Inspector General of the U.S. Treasury Department launched an official inquiry into the program on the heels of reports of fraud.[68] Commentators

break-to-help-the-poor-went-to-a-rich-gop-donor [https://perma.cc/YCC5-SRVY] (detailing how an area including a marina owned by Wayne Huizenga Jr. was designated as an Opportunity Zone following Huizenga's direct appeal to Florida Governor Rick Scott). The article notes that Huizenga had been a major donor to Governor Scott and discusses Huizenga's long-held plans to build luxury apartments on the site, which also services superyachts, described as "floating mansions that can stretch more than 300 feet and cost over $100 million." *Id.*

64. Ken Ward Jr., *Welcome to the Greenbrier, the Governor-Owned Luxury Resort Filled with Conflicts of Interest*, PRO PUBLICA (Aug. 15, 2019), https://www.propublica.org/article/west-virginia-greenbrier-governor-jim-justice-little-trump [https://perma.cc/EZ8V-48N3] (describing how West Virginia Governor Jim Justice designated White Sulphur Springs an Opportunity Zone, a city that included the Greenbrier, a "palatial resort" owned by Governor Justice).

65. Eric Lipton & Jesse Drucker, *Symbol of '80s 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/R78F-97MF] (describing how Michael Milken lobbied his long-time friend, U.S. Treasury Secretary Steven Mnuchin, to personally intervene in the Opportunity Zone designation process to ensure that Milken's investments in two major real estate projects were covered, and outlining how Milken's think tank, The Milken Institute, was a "leading proponent" of the original effort to enact the Opportunity Zone program). For another article by the same authors that received significant attention, see Eric Lipton & Jesse Drucker, *How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich*, N.Y. TIMES (Sept. 27, 2020), https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html [https://perma.cc/ED7Q-3XKM] (detailing, among other things, how "Sean Parker, an early backer of Facebook, helped come up with the idea" of Opportunity Zones, which then drew support from Senators Cory Booker and Tim Scott).

66. Ethan DeWitt, *Sununu 'Opportunity Zone' Picks Cause Stir*, CONCORD MONITOR (Dec. 14, 2019), https://www.concordmonitor.com/Capital-Beat-New-Hampshire-Gov-Chris-Sununu-opportunity-zone-picks-cause-stir-31263127 [https://perma.cc/X5XC-FYKW] (describing how New Hampshire Governor Chris Sununu designated an Opportunity Zone area that included a ski resort owned by his family).

67. *See* Howard Gleckman, *Opportunity Zones May Someday Help Poor Communities. They Are Already a Tax Shelter for High-Income Investors*, TAX POL'Y CTR. (Sept. 5, 2019), https://www.taxpolicycenter.org/taxvox/opportunity-zones-may-someday-help-poor-communities-they-already-are-tax-shelter-high-income [https://perma.cc/Q8AA-2P2P] ("Opportunity Zones commit one of the most egregious, and common, sins of tax policy. They provide incentives to encourage people to do things they would have done anyway.").

68. *See* Laura Strickler, *Treasury's Internal Watchdog Is Probing the Trump Administration's Opportunity Zone Program*, NBC NEWS (Jan. 15, 2020), https://www.nbcnews.com/politics/donald-trump/treasury-s-internal-watchdog-probing-trump-administration-opportunity-zone-program-n1116716?cid=sm_npd_nn_tw_ma [https://perma.cc/3HML-L8MB].

have called for additional transparency.[69] As initially enacted, the Opportunity Zone program did not contain any explicit mechanisms for gathering or sharing data regarding what projects and businesses investors were using to claim the tax incentives.[70] This has led to legislative proposals for enhanced oversight and control mechanisms.[71]

In many respects, however, the program has worked exactly as planned. Pointing to particularly egregious examples and calling for greater oversight to weed out the bad apples carries the implicit message that the foundation upon which the program is built is fundamentally sound. And yet, it is not deviations from the original vision that are the root problem. Rather, it is the fact that the Opportunity Zone program is based on a deeply flawed, yet enduring, notion: that mere proximity of capital alone will solve deeply entrenched issues of poverty and racial inequity.

This notion is not unique to Republican administrations. Prior programs developed and enacted by the Clinton administration, such as the New Markets Tax Credit, which served as a model for certain features of the Opportunity Zone program, were committed to a similar approach to poverty reduction.[72] An assortment of federal and state interventions by both Republican and Democratic administrations over the past several decades has utilized the same basic approach: place-based economic incentives to support business growth and development in low-income communities.[73]

This model is based on an ideology that saw its most distilled explication in the work of Harvard Business School professor Michael Porter in the 1990s.[74]

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69. *See, e.g.*, Edward W. De Barbieri, *Opportunism Zones*, 39 YALE L. & POL'Y REV. 82 (2020) (arguing for annual reporting requirements among other amendments to the Opportunity Zone program); Victoria Lee, *Opportunity Without Reach: The Problems with the Opportunity Zone Program and the Need for Clarification, Oversight, and Regulation*, 47 FORDHAM URB. L.J. 117 (2019) (arguing that the U.S. Treasury Department should implement monitoring systems and data collection).

70. The original Opportunity Zone bill would have required annual reporting commencing upon the fifth year of enactment; however, this provision was not included in the version of the bill that Congress passed. *See* De Barbieri, *supra* note 69, at 95 n.48.

71. *See, e.g.*, Improving and Reinstating the Monitoring, Prevention, Accountability, Certification, and Transparency Provisions of Opportunity Zones Act, S. 2994, 116th Cong. (2019) (introduced by Senator Tim Scott).

72. *See, e.g.*, Scott Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 428–29 (2001) ("In addition, as part of a broader market-based CED policy initiative, Congress passed Clinton's New Markets Tax Credit, which was designed to spur private sector equity investments in low-income community businesses. These programs underscored Clinton's effort to align antipoverty policies with his neoliberal economic agenda and marked the culmination of a two-decade-long ideological shift in favor of market-based antipoverty strategies." (internal citations omitted)).

73. *See, e.g.*, Layser, *supra* note 23 (discussing a variety of such programs, including Enterprise Zones, Empowerment Zones and Enterprise Communities, Hope VI, Low-Income Housing Tax Credits, and New Markets Tax Credits).

74. *See* Michael E. Porter, *The Competitive Advantage of the Inner City,* HARV. BUS. REV., May–June 1995, at 55.

Building on his research about the importance of clusters[75] as a driver of economic development, Porter foregrounded business development in geographically discrete locations as the key to solving the "economic distress of America's inner cities."[76] The solution, according to Porter, was to leverage certain competitive advantages of central cities (i.e., central location, purchasing power, local workforce, and proximity to other nearby economic activity) to spur the growth of local business.[77] This in turn would presumably fuel local job growth and reduce other "crippling social problems."[78] The role of the private sector was a simple one in Porter's view: "The most important contribution companies can make to inner cities is simply to do business there."[79] Government was relegated to the secondary role of supporting the private sector through infrastructure, transportation, environmental remediation, and crime prevention.[80]

Unfortunately, in the intervening years since Porter's writings, it has become clear that stimulating local economic activity and solving entrenched issues of poverty and racial inequity are not equivalent. This reality is at the core of the conversation around gentrification that has been unfolding over the past several decades in cities across the United States, as local advocates wrestle with a central dilemma: how to ensure that the spoils of enhanced economic activity accrue to the benefit of current residents.[81] Sensitive to the history of past practices like redlining, which cut off credit to communities of color, commentators are clear that some forms of investment and development must be welcomed.[82] On the other hand, unbridled economic activity is equally

75. *See id.* at 57 (defining "clusters" as representing "critical masses of skill, information, relationship, and infrastructure in a given field").

76. *Id.* at 55.

77. *Id.* at 57–62.

78. *Id.* at 55 (highlighting drug abuse and crime in particular).

79. *Id.* at 65.

80. *Id.* at 67–69.

81. For an early piece on gentrification, see Peter Marcuse, *Gentrification, Abandonment, and Displacement: Connections, Causes, and Policy Responses in New York City*, 28 WASH. U. J. URB. & CONTEMP. L. 195, 198–99 (1985) (defining gentrification as "when new residents—who disproportionately are young, [W]hite, professional, technical, and managerial workers with higher education and income levels—replace older residents—who disproportionately are low-income, working-class and poor, minority and ethnic group members, and elderly—from older and previously deteriorated inner-city housing in a spatially concentrated manner, that is, to a degree differing substantially from the general level of change in the community or region as a whole"). For a discussion of modern questions in the gentrification literature, see Derek Hyra, *Commentary: Causes and Consequences of Gentrification and the Future of Equitable Development Policy*, 18 CITYSCAPE 169, 171, 173 (2016) (noting research indicating high in- and out-migration rates of low-income residents both in gentrifying and non-gentrifying neighborhoods, but emphasizing the specific relationship between gentrification and a "shrinking supply of affordable housing," as well as the cultural and political displacement effects of gentrification).

82. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (reviewing in detail the racist underwriting

understood to pose a threat as, for example, rising property values may lead to higher rents for homes and local small businesses.

Meanwhile, it has also become clear that local government can effectively play its assigned role of helping to create local conditions most conducive to enhanced business growth. It is not difficult to "beautify" an area through, for example, the establishment of central business districts or enforcement of punitive regimes criminalizing the homeless, which have become a fixture in many cities around the country.[83] But if the result is an economically viable district that has simply displaced marginalized populations, it forces one to pause and ask the question: what exactly was the original purpose of the effort?

As a program that embraces Porter's core ideology in relatively pure form, it is unsurprising that the Opportunity Zone program has run into exactly these questions. The program takes the central page out of Porter's playbook and provides significant economic incentives for businesses to simply do business, or as it is primarily playing out in this instance, purchase real estate, in low-income communities. Unlike other place-based economic incentive programs, and aside from the limitation on "sin businesses," there are essentially no content-specific restrictions. The program does not require the production of affordable housing or other needed goods or services.[84] The program does not encourage the participation of any particular category of stewards in the community, for example mission-driven community-based organizations.[85] Rather, any taxpayer that meets the requisite criteria can claim the tax benefits. The program does not require that any jobs actually be created or that businesses hire locally or engage in business with other pre-existing local businesses.[86] Nor

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practices of the Home Owner's Loan Corporation (HOLC) and Federal Housing Administration (FHA) in home mortgage lending and its long-term impact on residential racial segregation in the United States); KEVIN FOX GOTHAM, RACE, REAL ESTATE, AND UNEVEN DEVELOPMENT: THE KANSAS CITY EXPERIENCE, 1900–2010 (2014) (using Kansas City as a case study to describe a similar set of policies and explore the "racialization of space").

83. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2019), https://homelesslaw.org/wp-content/uploads/2019/12/housing-not-handcuffs-2019-final.pdf [https://perma.cc/H7GV-V5C4] (surveying 187 cities and finding high and increasing incidences of ordinances criminally punishing certain behavior, such as sitting and lying down in public, loitering or loafing, living in a vehicle, begging, or food sharing).

84. Some might argue that to the extent investment is made in market-rate residential real estate, it would have some beneficial "trickle down" impact on housing prices for low-income residents along the lines predicted by the much-contested "filtering theory" of housing. *See* Note, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835 (1988) (featuring Duncan Kennedy and Karl Case's rent control proposal, which complicates classic filtering theory by considering neighborhood dynamics in a gentrifying market).

85. By contrast, the Low-Income Housing Tax Credit program includes a 10 percent set-aside for non-profit developers. *See* 26 U.S.C. § 42(h)(5).

86. Compare this with the HUD Section 3 program, which "requires that recipients of certain HUD financial assistance, to the greatest extent possible, provide training, employment, contracting and other economic opportunities to low- and very low-income persons, especially recipients of government

does the program give any preference to economically-disadvantaged, minority, or women-owned business enterprises.[87]

Given the permissive nature of the program rules, there are legitimate concerns about (1) the efficacy of the program in promoting economic development of the sort that might help alleviate poverty and (2) the potential of the program to do more harm than good. To the former concern, so long as a Qualified Opportunity Fund complies with the metrics relating to holding periods, substantiality of use and improvement, derivation of income, and so on, then investors can fold up shop in five, seven, or ten years and claim the tax benefits. The fact that census tracts can encompass a broad spectrum of neighborhoods, coupled with the allowance for certain contiguous non-LIC tracts, means that the investment need not even be in a low-income neighborhood. While in some cases these investments may translate into economic benefits for residents of the local community, it is possible to receive all of the economic incentives of the Opportunity Zone program without creating a single local job or producing anything of significant value to the local community.[88]

Early analysis of the new program has already yielded at least some indication of its inability to substantially further programmatic goals of "spur[ring] economic development and job creation in distressed communities."[89] Preliminary findings from one early study that examined job postings and salaries in zip codes with and without Opportunity Zones found

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assistance for housing, and to businesses that provide economic opportunities to low- and very low-income persons." *Section 3 - Economic Opportunities*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/section3 [https://perma.cc/S924-JB4L].

87. *See* Edward W. De Barbieri, *Excluding Disadvantaged Businesses*, 28 GEO. MASON L. REV. 901 (2021) (discussing the history and current landscape with respect to state and federal preferences for minority- and women-owned business enterprises).

88. *See* Matthew Rossman, *Opportunity Knocking? Are Opportunity Zones a Model for a Smarter Federal Homeowner Subsidy?*, 81 U. PITT. L. REV. 103, 119 (2019) (noting that "advocates for economically distressed communities wonder if the jobs created in Opportunity Zones will actually fit the skill sets of those who live in them and/or if the products and services the businesses offer match the needs of QOZ residents"). This is not to argue that all Opportunity Zone investments would never provide some economic boost to the local economy that is of benefit to local residents. For an example of a description of a successful project that received opportunity zone financing, see Tracy A. Kaye, *Ogden Commons Case Study: A Comparative Look at the Low-Income Housing Tax Credit and Opportunity Zone Tax Incentive Programs*, 48 FORDHAM URB. L.J. 1067 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3895855 [https://perma.cc/Z22X-FU5K] (describing a successful mixed-use project in the North Lawndale neighborhood of Chicago, though also noting a variety of other financing sources, describing the active involvement of the Chicago Housing Authority, and questioning whether the Opportunity Zone incentives are strong enough to induce investment in such mission-driven projects).

89. *Opportunity Zones Frequently Asked Questions*, INTERNAL REVENUE SERV. (Dec. 15, 2020), https://www.irs.gov/credits-deductions/opportunity-zones-frequently-asked-questions [https://perma.cc/CQ72-8FJJ] ("Q4. What is the purpose of QOZs? A4. QOZs are an economic development tool—that is, they are designed to spur economic development and job creation in distressed communities.").

"limited effect on employment outcomes."[90] Further analysis has concluded that while the program has had the positive effect of bringing new investor stakeholders into the field of community development,[91] approximately 96 percent of the funds were dedicated to real estate projects rather than investment in operating businesses.[92] Brett Theodos, senior fellow at the Urban Institute and author of one of the studies, noted that "[r]eal estate means construction jobs in the short term, but . . . creating longer-term employment for local residents requires starting businesses that produce goods and services."[93]

Beyond simple inefficacy, there are legitimate concerns that the program could in fact do damage to the communities the program is ostensibly designed to help. Commentators have raised the specter of increased gentrification and displacement.[94] Michelle Layser has written about the pro-gentrification roots of place-based tax benefits like the Opportunity Zone program and has argued that

90. *See* Rachel M. B. Atkins, Pablo Hernández-Lagos, Cristian Jara-Figueroa & Robert Seamans, What is the Impact of Opportunity Zones on Employment? 12 (July 31, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3673986 [https://perma.cc/6B5V-38WJ]; *see also* Erick Trickey, *The Surprisingly Limited Success of Trump's Signature Anti-Poverty Program*, POLITICO MAG. (Sept. 29, 2020), https://www.politico.com/news/magazine/2020/09/29/cleveland-opportunity-zones-422728 [https://perma.cc/9CAE-UPTF] (discussing the limited impact on job creation in Cleveland, Ohio).

91. *See* BRETT THEODOS, ERIC HANGEN, JORGE GONZÁLEZ & BRADY MEIXELL, URB. INST., AN EARLY ASSESSMENT OF OPPORTUNITY ZONES FOR EQUITABLE DEVELOPMENT 5–10 (2020), https://www.urban.org/sites/default/files/publication/102348/early-assessment-of-opportunity-zones-for-equitable-development-projects.pdf [https://perma.cc/KX4Q-Q2FZ] (noting that "the OZ incentive has attracted interest from actors across the country" and in some cases had catalyzed coordination and alignment of incentives for investors who traditionally had not been engaged in community development).

92. *See* NOVOGRADAC, *supra* note 4 (noting $17.89 billion raised in the residential, commercial, and hospitality categories, as compared to only $442.2 million for operating businesses and $320.4 million for "renewables"; note that some of the funds are invested in multiple categories).

93. Laura Strickler & Blayne Alexander, *Trump Is Touting Opportunity Zones as a Huge Success with No Proof*, NBC NEWS (Sept. 25, 2020), https://www.nbcnews.com/business/economy/trump-touting-opportunity-zones-huge-success-no-proof-n1231546 [https://perma.cc/CGC3-4UHH] (reporting on an interview with Theodos).

94. *See* Dan Weil, *The Trump Administration Said These Tax Breaks Would Help Distressed Neighborhoods. Who's Actually Benefiting?*, WASH. POST (June 6, 2019), https://www.washingtonpost.com/realestate/opportunity-zones-are-loaded-with-tax-benefits-but-will-they-actually-help-residents/2019/06/05/0f80e1c6-7e68-11e9-8bb7-0fc796cf2ec0_story.html?noredirect=on&utm_term=.a4a8f66c96a8 [https://perma.cc/D9D4-J4T4] (quoting Brett Theodos) ("The opportunity-zone incentive is most attractive [to investors] where assets are appreciating most. . . . Where is that happening? It's in zones approaching gentrification. It could be that the lion's share of investment goes to a minority of zones."); *see also* Adam Looney, *Will Opportunity Zones Help Distressed Residents or Be a Tax Cut for Gentrification?*, BROOKINGS (Feb. 26, 2018), https://www.brookings.edu/blog/up-front/2018/02/26/will-opportunity-zones-help-distressed-residents-or-be-a-tax-cut-for-gentrification [https://perma.cc/AY4T-YW8R] ("[A] state's Opportunity Zones could . . . serve as a subsidy for displacing local residents in favor of higher-income professionals and the businesses that cater to them—a subsidy for gentrification.").

rather than being a flaw, gentrification is actually an intended feature.[95] Others have written about the program's "fail[ure] to incentivize community engagement" or "mitigate against displacement."[96] The economic incentives are such that investment may be most likely to occur in those neighborhoods that are already showing signs of gentrification.[97] One particularly onerous concern relates to the recent trend of large corporations buying up single-family homes from homeowners, converting them to rentals, and engaging in a variety of exploitative practices to maximize return on investment.[98] Some worry that the Opportunity Zone program could potentially fuel such speculation.[99] The upshot:

95. *See* Layser, *supra* note 23, at 788–89 ("Even the newest example of spatially oriented indirect tax incentives—Opportunity Zones—is best understood as having progentrification origins. At the time when the tax law was introduced, the Trump Administration's primary focus was on creating a favorable, pro-growth business environment. Given this political context, even some members of the development community were skeptical of the program's objectives. One Maryland-based architect was quoted by a trade news outlet saying, '[My] concern [is] that this strategy will result in gentrification on steroids . . . .The guidelines and regulations thus far show little concern for the effects of new development on the existing blighted community. Focus should be on raising the quality of life for the existing population of the blighted area through new development and also through the improvement of consumer goods, and services where government falls short. Addressing social impact needs to be in the guidelines.'" (internal citations omitted)). Layser notes, "Most legal scholarship regards gentrification as an unintended, regrettable consequence of place-based policies, not the hidden motivator. Nevertheless, the rise of place-based investment tax incentives can be explained as a natural outgrowth of state policies in support of private industry efforts to profit through gentrification." *Id.* at 772.

96. Bre Jordan, *Denouncing the Myth of Place-Based Subsidies as the Solution for Economically Distressed Communities: An Analysis of Opportunity Zones as a Subsidy for Low-Income Displacement*, 10 COLUM. J. RACE & L. 65, 66, 68 (2020) ("Unfortunately, wealthy investors are likely to be the predominant beneficiaries of this legislation, and at the expense of low-income, minority residents.").

97. *See* Lee, *supra* note 69, at 141 ("Even now, there is evidence that some designated Opportunity Zones may already be on the road to gentrification and thus, may not require or benefit from supplemental funding as much as other zones."); *see also* Weil, *supra* note 94; *Hearing on the 2017 Tax Bill and Who It Left Behind: Hearing Before H. Comm. on Ways and Means*, 116th Cong. 44 (2019) (statement of Professor Nancy Abramowitz, American University Washington College of Law) ("[E]arly reports in the news and in industry suggest that some investment in [O]pportunity [Z]ones is going into areas that are already gentrified, areas that may not benefit those who we would like to see benefitted, and it may be a real challenge trying to target that investment properly."). It is of course the case that gentrification is not of equal concern across all regions or across all neighborhoods within a particular metropolitan area.

98. *See* Francesca Mari, *A $60 Billion Housing Grab by Wall Street*, N.Y. TIMES MAG. (Mar. 5, 2020), https://www.nytimes.com/2020/03/04/magazine/wall-street-landlords.html [https://perma.cc/X2SC-6QP6] ("By 2016, 95 percent of the distressed mortgages on Fannie Mae and Freddie Mac's books were auctioned off to Wall Street investors without any meaningful stipulations, and private-equity firms had acquired more than 200,000 homes in desirable cities and middle-class suburban neighborhoods, creating a tantalizing new asset class: the single-family-rental home. The companies would make money on rising home values while tenants covered the mortgages.").

99. *See* E-mail from National Consumer Law Center to Brandon M. Weiss (Oct. 31, 2019, 09:40 CST) (on file with author) (noting concerns about the potential for Opportunity Zones to "incentiviz[e] predatory home equity theft").

merely parking capital near poverty will not solve, and may exacerbate, deeply entrenched social issues of poverty and racial inequity.[100]

But if not the Opportunity Zone program in its current form, then what? Ted De Barbieri has argued persuasively for a number of reforms that would improve the program, such as requirements ensuring greater transparency, community participation in determining which projects are funded and in which neighborhoods, and "use value" benefits to local residents.[101] Regarding the latter, a bill by Senator Ron Wyden would impose certain use restrictions on Opportunity Zone incentives—for example, disallowing housing projects that do not incorporate certain rent and income limits.[102]

Layser has proposed entirely replacing "spatially oriented investment tax incentives," like the Opportunity Zone program, with a "community oriented investment tax incentive."[103] Such tax incentives would attempt to ensure that local residents benefit, for example, by providing incentives to businesses that prioritize local hiring, make donations to area nonprofits that provide important local services, engage in projects with community benefits agreements (CBAs),[104] and involve local participation in project development.[105]

Rashmi Dyal-Chand's book on "collaborative capitalism" argued for, among other interventions, greater support for grassroots social enterprises and local businesses.[106] Matt Rossman has proposed using the Opportunity Zone program as a model for a direct tax credit to homeowners.[107] Others have made similar arguments regarding the need for a closer connection between community development incentives and the communities they are intended to serve.[108]

These important proposals are all helpful contributions. To critique Opportunity Zones is not to critique any place-based strategy or any strategy that

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100. Another relevant concern is that Opportunity Zone investments may pull capital away from other more beneficial investments that banks might otherwise have made to comply with Community Reinvestment Act requirements.

101. *See* De Barbieri, *supra* note 69, at 127–31, 134–42.

102. *See* Opportunity Zone Reporting and Reform Act, S. 2787, 116th Cong. (2019).

103. *See* Layser, *supra* note 23, at 760 ("Thus, in addition to being categorized as direct or indirect tax subsidies, place-based investment tax incentives can also be categorized as *community oriented* (if they contain features to benefit local residents) or *spatially oriented* (if they do not). At minimum, a community oriented investment tax incentive must include some safeguard to prevent poor residents from being harmed, while spatially oriented investment tax incentives lack such safeguards.").

104. *See* Benjamin S. Beach, *Strategies and Lessons from the Los Angeles Community Benefits Experience*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 77 (2008).

105. *See* Layser, *supra* note 23, at 804–15.

106. *See* RASHMI DYAL-CHAND, COLLABORATIVE CAPITALISM IN AMERICAN CITIES: REFORMING URBAN MARKET REGULATIONS (2018).

107. *See* Rossman, *supra* note 88.

108. *See, e.g.*, 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, 271 ("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.").

attempts to channel market forces for the purpose of economic development and poverty alleviation; to the contrary, such approaches are critically important. As a complementary strategy, however, the current moment appears to be crying out for more direct and immediate intervention, as will be taken up in Part III.B.

II.
SECTION 1031 LIKE-KIND EXCHANGES

A. Basic Mechanics

By the end of 2026, the bulk of the financial incentives provided by the Opportunity Zone program will have sunset.[109] Yet lurking within the Internal Revenue Code is a not so unrelated tax deferral mechanism, commonly known as the § 1031 "like-kind exchange" provision.[110] Like the Opportunity Zone program, § 1031 provides a tax deferral mechanism for certain gains. Unlike the Opportunity Zone program, § 1031 is a permanent feature of the tax code—the concept dates back to a provision passed as early as 1921,[111] only eight years after ratification of the Sixteenth Amendment.[112] And though there is some uncertainty regarding the ultimate cost of the Opportunity Zone program, § 1031 is by most estimates a significantly larger tax expenditure; at an approximate cost of $14 billion per year, it has been found by the Joint Committee on Taxation to be the second largest corporate tax expenditure.[113]

Section 1031 operates as an exception to baseline principles of tax law. Gain, for example from appreciation of stocks or a piece of real property, would typically be considered "realized" for tax purposes upon sale or the exchange of one investment for another.[114] Standard tax principles call for the gain to be

109. This assumes no extensions, like the one mentioned in note 31, are enacted. And the ability to avoid paying taxes on the appreciation of the investment in the QOZ will be available for dispositions made all the way until December 31, 2047. *See* 26 C.F.R. § 1.1400Z2(c)-1(c) (2020).

110. *See* 26 U.S.C. § 1031.

111. *See* Revenue Act of 1921, Pub. L. No. 67-98, § 202(c)(1), 42. Stat. 227, 230.

112. U.S. CONST. amend. XVI ("The Congress shall have 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.").

113. *See* STAFF OF JOINT COMM. ON TAXATION, 114TH CONG., BACKGROUND INFORMATION ON TAX EXPENDITURE ANALYSIS AND HISTORICAL SURVEY OF TAX EXPENDITURE ESTIMATES, JCX-18-15, at 28 (2015) [hereinafter 2015 JCT TAX EXPENDITURE ESTIMATES] (estimating a cost of $68 billion for the years 2014–2018, or $13.6 billion per year, and listing it second after only the deferral of active income of controlled foreign corporations on the list of largest corporate tax expenditures).

114. *See* WILLIAM D. POPKIN, INTRODUCTION TO TAXATION 48 (6th ed. 2013) ("A taxpayer who retains appreciating property does not (under the statute) 'realize' gain as the property appreciates. This paradigm suggests the following policies requiring realization as a statutory condition for imposing tax: (1) Appreciation generates no cash to pay the tax. . . . (2) The taxpayer has not changed his investment. (3) Valuation will be administratively difficult. All three ideas cluster together to make up the theme of realization, but no one idea by itself is sufficient to prevent taxing gain. For example, a taxpayer who exchanges a farm for a residence pays tax, even though it is difficult to value the assets and there is no cash received. Realization does not usually occur, however, if the taxpayer retains the investment. This

recognized and included in taxable income upon realization.[115] Section 1031, however, allows a taxpayer to defer recognition of gains associated with the exchange of property for other property of "like kind."[116] The Tax Cuts and Jobs Act of 2017 limited the set of property eligible for this favorable treatment to real property.[117] While there is no definitive rule, most real property is considered to be of "like kind" with other real property; for example, the provision covers exchanges of unimproved property for improved property.[118]

In order to qualify for the tax deferral provided by § 1031, both the original and replacement real property must be "held for productive use in a trade or business or for investment" and not held primarily for sale.[119] The IRS formerly took the position that the exchange of property had to be simultaneous in order to qualify as a § 1031 exchange.[120] However, in *Starker v. United States*, the Ninth Circuit held against the IRS on that point.[121] In the wake of *Starker*,

suggests that the strongest of the policies which make up the realization requirement is the idea that it is economically undesirable or in some sense, unfair to disturb ownership by taxing it, if the taxpayer doesn't want to change ownership."); *see also* Helvering v. Bruun, 309 U.S. 461, 469 (1940) ("While it is true that economic gain is not always taxable as income, it is settled that the realization of gain need not be in cash derived from the sale of an asset. Gain may occur as a result of exchange of property . . . or other profit realized from the completion of a transaction. The fact that the gain is a portion of the value of property received by the taxpayer in the transaction does not negative its realization." (internal citation omitted)).

115. *See* 26 U.S.C. § 1001(a) ("The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis . . . .").

116. *See id.* § 1031(a)(1) ("No gain or loss shall be recognized on the exchange of real property held for productive use in a trade or business or for investment if such real property is exchanged solely for real property of like kind which is to be held either for productive use in a trade or business or for investment.").

117. *See* Pub. L. No. 115-97, § 13303, 131 Stat. 2123 (striking the term "property" throughout and replacing it with "real property"); *see also* Press Release, Internal Revenue Service, Like-Kind Exchanges Now Limited to Real Property (Nov. 19, 2018), https://www.irs.gov/newsroom/like-kind-exchanges-now-limited-to-real-property [https://perma.cc/M24U-99KE] ("Effective Jan. 1, 2018, exchanges of personal or intangible property such as machinery, equipment, vehicles, artwork, collectibles, patents, and other intellectual property generally do not qualify for nonrecognition of gain or loss as like-kind exchanges.").

118. *See* Forrest David Milder, *A Brief Introduction to Like-Kind Exchanges of Real Estate Under § 1031*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 179, 185 (2008) ("Most real estate is like-kind in relation to other real estate. For example, improved and unimproved real estate are like-kind. The IRS and the courts have found a wide range of interests in property to be real estate, including the exchange of interests in city real estate for a ranch or farm and exchanges where one or both of the properties were cooperative housing corporations, conservation easements, condominiums, or water rights. . . . A lease of a fee interest with thirty or more years to run is like-kind with a fee interest in real estate. Interestingly, one court has held that the exchange of a fee interest in property already subject to a ninety-nine-year lease could be exchanged like-kind for a fee interest." (internal citations omitted)).

119. 26 U.S.C. § 1031(a)(1)–(2).

120. *See* Milder, *supra* note 118, at 181.

121. Starker v. U.S., 602 F.2d 1341 (9th Cir. 1979) (holding that an exchange qualified under § 1031 where the property to be received could be designated by the transferor for up to five years after the transaction, and even though the transferor could have potentially in the end received cash instead of like-kind property).

Congress incorporated a specific statutory timing framework into § 1031.[122] The current statute requires a taxpayer to have identified the replacement property within forty-five days of transferring the relinquished property[123] and to have received the new property within 180 days of transferring the relinquished property.[124] Thus, the direct exchange of one property for another is no longer necessary to take advantage of the provision—rather, "deferred" or "non-simultaneous" exchanges are allowed so long as a taxpayer reinvests the proceeds of a sale of real property into another piece of real property within the required timeframe.[125]

The tax code addresses other relevant mechanics. The taxpayer's basis in the acquired property is equal to the basis of the exchanged property, less cash received as part of the transaction.[126] Transfers between related parties are not prohibited but trigger additional rules.[127] And exchanges of domestic real property for real property outside of the United States are explicitly excluded.[128]

A basic example of how the deferral mechanism works is instructive. Suppose Taxpayer A buys a piece of unimproved raw land (Property 1) as an

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122. *See* STAFF OF JOINT COMM. ON TAXATION, 98TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, JCX-41-84, at 244–45 (1984) (discussing the policy rationale at length).

> Congress was concerned that like-kind treatment of non-simultaneous exchanges had given rise to unintended results as well as administrative problems. These concerns extended to the underlying policy of the like-kind exchange rule.
>
> The special treatment of like-kind exchanges has been justified on the grounds that a taxpayer making a like-kind exchange has received property similar to the property relinquished and therefore has not effectively "realized" a profit on the transaction. This rationale is less applicable in the case of deferred exchanges. To the extent that the taxpayer is able to defer completion of the transaction—often retaining the right to designate the property to be received at some future point—the transaction begins to resemble less of a like-kind exchange and more a sale of one property followed, at some future point, by a purchase of a second property or properties. This is particularly true when (as was the case in *Starker v. United States*) the taxpayer might have received like-kind or non-like-kind property in the future. Congress believed that like-kind exchange treatment is inappropriate in such situations and that the general rule requiring recognition of gain on sales or exchanges of property should apply to these cases.
>
> The special treatment of like-kind exchanges has also been justified from an administrative standpoint because of the difficulty of valuing property which is exchanged solely or primarily for similar property. This rationale also is less applicable to deferred like-kind exchanges, in particular exchanges which are 'left open' until the taxpayer has selected a suitable exchange property. In such cases, the transferred property must be valued at a specific or near-specific dollar amount in order to determine the aggregate value of the properties that the taxpayer may receive in the future. Thus, the taxpayer's gain may be measured with reasonable accuracy in the year of the original transfer. *Id.*

123. 26 U.S.C. § 1031(a)(3)(A).

124. *Id.* § 1031(a)(3)(B)(i).

125. The implementing regulations for deferred exchanges establish certain safe harbors where a "qualified intermediary" is used to hold money or other property before the taxpayer receives the like-kind replacement property. *See* 26 C.F.R. § 1.1031(k)-1 (2020) ("Treatment of deferred exchanges."). As a result, a cottage industry of "exchange accommodators" has developed that regularly helps facilitate modern deferred 1031 transactions. *See infra* note 146.

126. § 1031(d).

127. *Id.* § 1031(f).

128. *Id.* § 1031(h).

investment property in 2000 for $4 million. By 2020, the land has appreciated in value to $10 million. Under baseline tax principles, the taxpayer would have a basis in the property of $4 million and $6 million of unrealized gain. Suppose Taxpayer A wants to transfer Property 1 for another investment property (Property 2), an office building valued at $10 million. Taxpayer A would be forced to recognize the $6 million in gain upon the transfer of Property 1 for Property 2 and pay federal income tax of more than $1.4 million.[129] However, taking advantage of § 1031, Taxpayer A could defer payment of the taxes and instead carry the $4 million basis over to Property 2. The provision thus clearly offers a significant time value of money advantage to Taxpayer A—rather than immediately paying $1.4 million to the federal government, the value of that money, as captured within the $10 million valuation of Property 2, is allowed to continue to appreciate to the benefit of Taxpayer A.

Section 1031 rules place no limit on the number of times capital gains can be deferred using 1031 exchanges.[130] A developer can invest in Property A, five years later roll those gains over into Property B, and so on to Property Z fifty years later. One might think that eventually the gain would be recognized when Property Z is cashed out. That would be correct but for a separate provision in the tax code: the step-up in basis afforded to taxpayers at death.[131] This separate provision reduces the taxes owed by parties that inherit such property by "stepping up" their basis to fair market value, thus eliminating any taxable gain. Thus, the actual strategy made available by our modern tax code is to avoid paying federal capital gains taxes altogether.

B. Comparison of Opportunity Zones and Section 1031

On their face, the Opportunity Zone program and the § 1031 like-kind exchange provision appear very different. The former is held out to be a place-based economic development tool intended to help those living in economically distressed communities, whereas the latter makes no such claim. Yet placing the two side by side reveals how, in reality, these two provisions sitting not far from each other in the U.S. tax code share a number of similarities.

Both provisions allow real estate investors to defer payment of taxation due on gain upon the sale of real property.[132] Both require that proceeds from a sale be reinvested within 180 days. Both provisions can be used not only to defer taxation but, in certain circumstances, to avoid paying taxes on the gain altogether. And, as discussed below, certain real estate industry advocacy groups support § 1031 on grounds that, not unlike the Opportunity Zone program, it will

129. For assumptions regarding the capital gains rate and net investment tax, see *supra* note 35.
130. *See generally* 26 U.S.C. § 1031.
131. *See id.* § 1014(a)(1).
132. Note that in both cases the gains can come from commercial or residential real estate.

have positive spillover effects with respect to bolstering employment and other local economic factors.[133]

Below these broad thematic similarities lie differences between Opportunity Zones and § 1031 that are more technical in nature. The Opportunity Zone program is narrower and broader than § 1031 in certain respects. It is narrower in that the investment of course must be made in a census tract designated as a Qualified Opportunity Zone, whereas under § 1031 there is no general geographic limitation within the United States. The Opportunity Zone program is broader in that capital gains need not have come from real estate, but rather may have been generated from any number of assets—e.g., stocks, bonds, artwork or other collectibles, etc.—so long as the gains are treated as capital. And those gains need not be rolled into real estate, but can be reinvested in a variety of other qualified property or businesses located in QOZs, even though real estate has thus far come to dominate the field. For § 1031, it must be a real estate-to-real estate exchange.

How would a taxpayer decide whether to roll gains over using the Opportunity Zone program versus a § 1031 exchange? The Opportunity Zone program might be favored if the taxpayer (1) has capital gains that are not from real estate, (2) has not identified a § 1031 exchange piece of real estate within the required forty-five-day period, (3) affirmatively wants to make an investment in an asset other than real estate, (4) prefers to receive the near-term (five-year or seven-year) step-up in basis rather than waiting until death for a complete step-up in basis, (5) prefers the structure of investing in a Qualified Opportunity Fund rather than directly in real estate, or (6) sees an investment opportunity with significant upside in an Opportunity Zone and wants to take advantage of the exclusion of all future appreciation.

By contrast, a taxpayer with a piece of appreciated real estate might favor a § 1031 exchange over an Opportunity Zone investment if the taxpayer (1) does not want to be bound by the geographic limitation of investing in a census tract designated as an Opportunity Zone, (2) does not want to be forced to realize at least 85 percent of the deferred gain by no later than the end of 2026, and/or (3) does not want to invest in a new construction or significant rehabilitation project of the sort typically selected in order to meet the "original use" or "substantial improvement" requirements for buildings under the Opportunity Zone program.[134]

These mechanical differences are described to demonstrate how a typical taxpayer likely would analyze these two options—as alternative approaches to tax avoidance with various pros and cons. Noticeably absent from the analysis: what sort of investment might produce the most local jobs? What sort of investments will benefit local, community-based organizations or disadvantaged

133. *See infra* Part II.C for discussion of the "economic rationale" for § 1031.
134. *See supra* note 51.

business enterprises? What sort of community assets are most needed—affordable housing, a grocery store, a recreation facility? The Opportunity Zone program and the § 1031 exclusion share a fundamental nature: first and foremost, they are simply tax shelters.

C. Policy Rationales & Critiques

What are the policy rationales for allowing taxpayers to defer recognition of gains for § 1031 like-kind exchanges? Unlike the Opportunity Zone program, economic development in low-income communities is not typically an explicit rationale. Yet at least four others have been advanced, which I shall refer to as: (1) the measurement rationale, (2) the administrability rationale, (3) the liquidity rationale, and (4) the economic rationale. I will address each in turn.

One possible justification for § 1031 is the difficulty of accurately measuring the amount of gain when an investment has not been "cashed out," but rather merely exchanged for similar property.[135] If no specific dollar amount has been received for a piece of exchanged property, how would the taxpayer or the IRS know how much tax is due? Yet as far back as the original 1921 like-kind exchange provision, Congress allowed taxpayers to take advantage of the tax deferral regardless of whether the property had a "readily realizable market value."[136] If the measurement rationale were the lone operative justification, at a minimum § 1031 would be overbroad since the provision covers like-kind transactions in which valuation is clear.[137] In the context of a modern real estate transaction, this would be the great majority of cases given, for example, the

135. A corollary to this rationale is a related fairness argument—that it is not fair to tax mere "pencil on paper" gains, the true magnitude of which is not certain. *See* Jordan Marsh Co. v. Comm'r of Internal Revenue, 269 F.2d 453, 456 (2d Cir. 1959) (discussing the Congressional intent of § 1031, noting that "Congress was primarily concerned with inequity, in the case of an exchange, of forcing a taxpayer to recognize a paper gain which was still tied up in a continuing investment of the same sort"). Often such arguments reduce to claims related to measurement and illiquidity.

136. *See* Revenue Act of 1921, Pub. L. No. 67-98, § 202(c), 42. Stat. 227, 230 ("For the purposes of this title, on an exchange of property, real, personal or mixed, for any other such property, no gain or loss shall be recognized unless the property received in exchange has a readily realizable market value; but even if the property received in exchange has a readily realizable market value, no gain or loss shall be recognized (1) When any such property held for investment, or for productive use in trade or business (not including stock-in-trade or other property held primarily for sale), is exchanged for property of a like kind or use . . . .").

137. The 2017 revenue proposals under the Obama administration, which sought to curtail § 1031, made a similar point: "Historically, section 1031 deferral has been justified on the basis that valuing exchanged property is difficult. However, for the exchange of one property for another of equal value to occur, taxpayers must be able to value the properties. In addition, many, if not most, exchanges affected by this proposal are facilitated by qualified intermediaries who help satisfy the exchange requirement by selling the exchanged property and acquiring the replacement property. These complex three-party exchanges were not contemplated when the provision was enacted. They highlight the fact that valuation of exchanged property is not the hurdle it was when the provision was originally enacted." U.S. DEP'T OF TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2017 REVENUE PROPOSALS 107 (2016) [hereinafter 2017 REVENUE PROPOSAL GENERAL EXPLANATIONS], https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2017.pdf [https://perma.cc/C3L2-QVZV].

availability of appraisals. Non-simultaneous exchanges typically involve two purchase and sale agreements, listing a price for the sold and acquired property, respectively. Furthermore, § 1031 itself necessitates the valuation of the exchanged property in many transactions; exchanges that involve the transfer of cash in addition to like-kind property, for example, require valuing properties since some partial gain may be recognized up to the amount of cash received.[138] Thus, the valuation rationale fails to explain the full reach of § 1031.

A House Report several years after passage of the original nonrecognition provision for like-kind exchanges indicates that a related concern of administrability was among the key justifications for the provision:

> The Treasury Department states that its experience indicates that this provision does not in fact result in tax avoidance. If all exchanges were made taxable, it would be necessary to evaluate the property received in exchange in thousands of horse trades and similar barter transactions each year, and for the time being, at least, claims for theoretical losses would probably exceed any profits which could be established. The committee does not believe that the net revenue which could thereby be collected, particularly in these years, would justify the additional administrative expense. Consequently, the exchange provisions have not been changed.[139]

Given that the modern provision is limited to exchanges of real property, this concern about "thousands of horse trades" would seem less relevant. This argument was developed in the context of informal barter transactions of personal property; taxing each exchange could have added significant complexity to filing a tax return. As discussed above, exchanges of real property are typically formal transactions, subject to the statute of frauds, in which a variety of valuations are made. They involve recording and other formalities that build a certain amount of administrative burden into the basic fabric of the transaction. Requiring the recognition of gains in the context of real estate exchanges certainly poses no more administrative burden than in the context of personal property exchanges—such as the horse trades mentioned in the passage above—the gains from which now must be recognized immediately per the 2017 amendment to § 1031 limiting its scope to real property. Much of the force of the administrability rationale disappeared when Congress limited the scope of § 1031 to real property.[140]

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138. *See* Starker v. U.S., 602 F.2d 1341, 1352 (9th Cir. 1979) ("But this valuation rationale also has its limits. So long as a single dollar in cash or other non-like-kind property ('boot') is received by the taxpayer along with like-kind property, valuation of both properties in the exchange becomes necessary.").

139. H.R. REP. NO. 73-704, at 13 (1934), *as reprinted in* 1939-1 C.B. pt. 2, at 564.

140. *See* FED'N OF EXCH. ACCOMMODATORS, LEGISLATIVE HISTORY OF TAX POLICIES SUPPORTING IRC SECTION 1031 2 [hereinafter FEA LEGISLATIVE HISTORY], https://www.1031taxreform.com/wp-content/uploads/FEA-Legislative-History-of-1031-Final-9-1-19.pdf [https://perma.cc/GDA3-BQVF] (arguing that the administrative convenience rationale has been "irrelevant since [§ 1031's] inception").

The *Starker* court considered a third alternative rationale: liquidity. "Congress appeared to be concerned that taxpayers would not have the cash to pay a tax on the capital gain if the exchange triggered recognition."[141] After all, if a taxpayer simultaneously exchanges one property for another of equal value, then the taxpayer may lack alternative funds with which to pay any tax liability. Yet exchanges of non-like-kind property regularly pose the same problem, as do exchanges of non-real estate like-kind property. More importantly, given the modern use of § 1031 in the context of non-simultaneous exchanges, it is somewhat of a misnomer to say that the taxpayer lacks liquidity. The original property in fact has been sold for cash, and that cash is simply being held for reinvestment in a different piece of real estate of similar value. The cash is available; payment of taxes would simply prevent the taxpayer from acquiring as valuable a replacement property if the IRS collected. While there may be certain economic reasons to defer recognition, in most modern § 1031 transactions, liquidity is not one of them. As such, the *Starker* court concluded, "[T]he 'underlying purpose' of section 1031 is not entirely clear."[142]

Yet there is a fourth, more formidable rationale—the economic rationale—that cannot be so readily set aside. It dates back to passage of the earliest like-kind exchange provision. The Congressional Record contains a reference from Oregon Representative Willis C. Hawley regarding the original 1921 law, supporting it on the basis that it would "promote[] such exchanges of property."[143] This notion of promoting exchanges of like-kind property is at the heart of modern efforts to defend § 1031. The basic argument is that deferring payment of taxes on like-kind exchanges will encourage transactions, a contention that seems relatively incontrovertible. This incentive helps to avoid a "lock-in" effect whereby taxpayers leave capital tied up in current investments to avoid incurring tax liability, rather than transfer them to alternative more attractive investments.[144] The argument is that § 1031 mitigates this distortive effect of taxation and thus improves economic efficiency.

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141. *Starker*, 602 F.2d at 1352.

142. *Id.*

143. 67 Cong. Rec. 5201 (Aug. 18, 1921) ("[P]rovision is made for the exchange of property, where no gain or loss is recognized. Under the present law this has caused the Treasury a very great deal of difficulty. Two men exchange a farm, one practically as valuable as the other. Men have exchanged stocks and bonds in order to consolidate their holdings of a particular kind or kinds of securities in which there was no gain or loss recognized. The amendment liberalizes the law in the interest of the taxpayer and provides explicit rules for determining whether any gain or loss has resulted. It also relieves such transactions from delay, simplifies the tax return, and *promotes such exchanges of property*.") (emphasis added).

144. *See* POPKIN *supra* note 114, at 53 ("The economic impact is often referred to as the 'lock-in' effect. A taxpayer might not dispose of an asset because realized gain is taxed (that is, the taxpayer is 'locked-in'), even though the amount equal to the asset's value could be more efficiently invested elsewhere or the taxpayer might prefer to use that value for personal consumption. The economic implications seem more serious when the taxpayer foregoes an alternative investment."); FEA LEGISLATIVE HISTORY, *supra* note 140.

Various attempts have been made in recent years to reform or eliminate § 1031.[145] In each instance, certain real estate industry advocacy groups have responded by deploying the economic rationale. The Federation of Exchange Accommodators (FEA), which bills itself as "The Voice of the 1031 Industry,"[146] has been a particularly vociferous defender, both in advancing the basic economic rationale and in drawing out its implications.[147] These groups contend not only that the elimination of § 1031 would reduce the number of real estate transactions, but it would also have a number of spillover effects: reduced real estate values, loss of employment in real estate and related industries, loss of certain tax revenue, and, ultimately, an overall smaller economy.[148] A report by Ernst & Young contended that elimination of § 1031 for residential and non-residential real estate would lead to a total reduction in annual GDP of $9.3 billion.[149]

The economic rationale is vaguely reminiscent of Porter's argument about how to redress poverty: allow business to do business. Here, however, the § 1031 program is not specifically a poverty alleviation program—the economic

145. See *infra* Part III.B.2 for a discussion of reform efforts.

146. *The FEA Association*, FED'N EXCH. ACCOMMODATORS, https://www.1031.org/FEA/About_Us/AboutFEA/FEA/About.aspx?hkey=c4436b9c-a930-4e95-93c4-58dabb07486c [https://perma.cc/9KDW-9JX2] ("The Federation of Exchange Accommodators (FEA) is the only national trade association organized to represent professionals who conduct like-kind exchanges under Internal Revenue Code § 1031. Members include Qualified Intermediaries (QIs), their primary tax and legal counsel, and affiliated industries (TIC sponsors, banks, real estate brokers, title companies, settlement/escrow agents, etc.).").

147. *See* Letter from Federation of Exchange Accommodators to Center for American Progress 3 (Oct. 7, 2014), https://www.1031taxreform.com/wp-content/uploads/FEA-Response-to-CAP-Growing-Consensus-to-Improve-Tax-Code-10-7-14.pdf [https://perma.cc/2XQS-UNG5] ("Section 1031 exchanges contribute to the velocity of the economy by stimulating a broad spectrum of transactions which, in turn, generate jobs and taxable income through business profits, wages, commissions, insurance premiums, financial services, and discretionary spending by gainfully employed workers. This transactional activity raises state, local and federal tax revenue through transfer, sales and use taxes and increased property taxes. The loss of this economic stimulus would be costly to the U.S. economy, creating a chilling effect on real estate transactions, reduced demand for manufactured goods, and job loss as many transactions will be abandoned or delayed by taxpayers unwilling or unable to withstand an effective tax on their working cash flow."); *see also* FED'N EXCH. ACCOMMODATORS, RECENT THREATS TO IRC § 1031 LIKE-KIND EXCHANGES (on file with author) [hereinafter FEA RECENT THREATS TO § 1031] ("Like-kind exchanges benefit millions of American investors and businesses every year. Section 1031 encourages businesses to expand and keep dollars moving in the U.S. economy. Industry studies report that without the § 1031 tax-deferral benefit, small and medium sized businesses would not be able to reinvest in their business, real estate values would decline, the U.S. economy would suffer, and enterprises of all sizes would forgo opportunities to increase capital investment and grow their businesses.").

148. *See* FEA RECENT THREATS TO § 1031, *supra* note 147.

149. ERNST & YOUNG, ECONOMIC IMPACT OF REPEALING LIKE-KIND EXCHANGE RULES, at iv (2015), https://www.1031taxreform.com/wp-content/uploads/EY-Report-for-LKE-Coalition-on-macroeconomic-impact-of-repealing-LKE-rules-revised-2015-11-18.pdf [https://perma.cc/VZG4-8QM2]. Query whether this is a compelling argument for a tax expenditure estimated to cost approximately $14 billion annually. *See* 2015 JCT TAX EXPENDITURE ESTIMATES, *supra* note 113, at 28.

rationale supports allowing § 1031 exchanges for real property located *anywhere* because such exchanges are good for productivity.

The premise that § 1031 has positive spillover effects on the broader economy in the manner that the FEA suggests is simply false with respect to a wide variety of covered transactions. An investor who trades one piece of appreciated raw land for another and lets the latter remain undeveloped enjoys the same tax deferral as one who puts exchanged land to productive use. This is not to argue that § 1031 does not result in economic gains to trade among the exchanging parties, but such gains are regularly taxed in other contexts. Nor is it to argue that § 1031 exchanges never promote activity that is beneficial to individuals beyond the exchanging parties.[150] But if the justification is to promote transactions that enhance economic activity in a manner that generates positive externalities for others, the provision is not especially narrowly tailored.

Furthermore, the tax code already provides a large tax benefit to encourage real estate investment—*the capital gains rate itself*. When employee Taxpayer J earns a marginal dollar of income, the top marginal tax rate is significantly higher than when real estate investor Taxpayer K gains a marginal dollar from the sale of an investment in real estate.[151] The fact that built into the structure of the tax code itself is a preferential rate for capital gains already does to some degree what the economic rationale promotes.[152] The question then would seemingly not be should the tax code provide preferential treatment for real estate-related capital gains, but rather should the tax code provide a second layer of preferential treatment in the form of § 1031 exchanges.

Most broadly, the economic argument, if taken to its logical conclusion, proves too much. It would support not only § 1031 exchanges, but any tax preference that promotes business activity.[153] Of course allowing a real estate developer to defer payment of capital gains tax leaves more money available to reinvest in new real estate projects. So would eliminating all tax on non-like-kind exchanges or, for that matter, all capital gains taxes entirely. However, in a nation that has decided to adopt a tax structure to raise funds for other public

150. Consider two real estate developers with skills more specialized to develop the land held by the other. Section 1031 clearly provides an incentive to generate the beneficial economic activity that would result from an exchange.

151. For taxable year 2021, the top marginal rate for individual ordinary income is 37 percent. *See* 26 U.S.C. § 1. The comparable rate for long-term capital gains is 20 percent. *Id.* Adding the 3.8 percent net investment tax paid by many individuals with a modified adjusted gross income of greater than $200,000 yields a total rate of 23.8 percent. *See* 26 U.S.C. § 1411(a).

152. This is not to make any specific claims regarding the precise level of investment induced by the capital gains rate alone but merely to suggest that the tax code already contains significant incentives that serve the ends of the economic rationale.

153. Of course, some would support a massive overhaul of our current tax structure. *See, e.g.*, Mitchell L. Engler, *Progressive Consumption Taxes*, 57 HASTINGS L.J. 55 (2005) (discussing the long-standing debate over whether certain versions of a consumption tax could produce a more efficient and equitable tax structure). Consideration of broader proposals to overhaul the basic U.S. income tax system is beyond the scope of this Article.

priorities, a particular deviation from that structure should argue more than just that refraining from collecting taxes would leave more money in the taxpayer's hands for investment.

Those who would defend § 1031 might argue that, unlike the Opportunity Zone program that allows for certain partial exclusions of tax liability entirely,[154] the § 1031 exchange program merely defers recognition of gain, and that tax must be paid eventually when the real estate is sold in a non-like-kind transaction. However, that argument obfuscates how, as described above, modern real estate developers can use successive § 1031 transactions until the step-up in basis at death to avoid paying tax altogether.[155] The step-up in basis provision is based at least in part on an avoidance of double taxation rationale: that the government will obtain its due via the estate tax. But particularly given recent adjustments, the estate tax does not serve as a failsafe because of the large exemption from taxation that covers many estates.[156]

In sum, § 1031 allows real estate investors to defer, and in many cases entirely avoid, paying tax on the income produced by their investment. The provision promotes real estate transactions that may in some cases have positive spillover effects. But the United States has adopted a tax code that taxes income—including investment income—to meet other pressing public policy needs. The economic rationale for applying preferential treatment to real estate-related capital gains, beyond the advantage already afforded by the capital gains rate itself, is ultimately unsatisfying.

III.
UNIVERSAL HOUSING VOUCHERS

A. Housing Affordability Challenges

What are those other pressing public policy needs that could be funded were the IRS to collect the foregone tax revenue of the Opportunity Zone program and § 1031? Housing assistance for the most vulnerable families in the nation is a candidate worthy of consideration. A "decent home and suitable living

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154. *See supra* notes 30, 31, and accompanying text.

155. *See supra* note 131 and accompanying text. A May 2020 letter from the Federation of Exchange Accommodators, a lobbying group that supports § 1031, to President Biden suggested that successive 1031 exchange transactions occur relatively infrequently. *See* Letter from Federation of Exchange Accommodators to The Honorable Joseph R. Biden, Jr. (May 5, 2020), https://www.1031.org/FEAPdfs/Advocacy/FEA-ltr_to_Biden_Campaign-5%275%2720.pdf [https://perma.cc/4T73-HVZN] (referencing data suggesting "that an overwhelming majority (88%) of replacement properties acquired in a Section 1031 exchange were ultimately disposed through a taxable sale, rather than through a subsequent exchange or other non-recognition transfer.").

156. *See* INTERNAL REVENUE SERV., ESTATE TAX, https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax (last visited Aug. 30, 2020) [https://perma.cc/JY78-P28E] (noting an individual exemption for estates up to $11,580,000 in 2020, and explaining that spouses may pass any unused amount of the exemption on to a surviving spouse, effectively bringing the exemption for married couples to more than $23 million).

environment for every American family" has been stated as the national housing objective in the United States for decades.[157] Yet we continue to fall well short of this goal.

The COVID-19 global pandemic has significantly raised the profile of this issue, as the housing implications of the public health crisis have regularly graced the pages of major news outlets.[158] As the U.S. unemployment rate skyrocketed to levels unseen since the Great Depression,[159] attention quickly focused on what would happen to those unable to keep up with mortgage or rent payments. A report prepared for the National Council of State Housing Agencies put the estimated back rent owed by January 2021 at $34 billion.[160]

Yet, like many crises do, the current pandemic has only brought into mainstream consciousness phenomena that existed well before this virus landed in the United States. Nearly 50 percent of all renter households were already cost-burdened, paying more than the federally defined "affordable" 30 percent of income on housing.[161] Moreover, 10.8 million renter households and 7.4 million homeowners were severely cost-burdened, paying more than 50 percent of income on housing costs.[162] These households were already regularly forced

157. Housing Act of 1949, Pub. L. No. 81-171, § 2, 63 Stat. 413, 413 (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.).

158. *See, e.g.*, Annie Nova, *Looming Evictions May Soon Make 28 Million Homeless in U.S., Expert Says*, CNBC (July 11, 2020), https://www.cnbc.com/2020/07/10/looming-evictions-may-soon-make-28-million-homeless-expert-says.html [https://perma.cc/6MQE-TZL7] (quoting Emily Benfer) ("We have never seen this extent of eviction in such a truncated amount of time in our history. We can expect this to increase dramatically in the coming weeks and months, especially as the limited support and intervention measures that are in place start to expire. About 10 million people, over a period of years, were displaced from their homes following the foreclosure crisis in 2008. We're looking at 20 million to 28 million people in this moment, between now and September, facing eviction."); Dartunorro Clark, *'Eviction Crisis': Housing Advocates Fear Waves of Homelessness as Moratoriums Expire*, NBC NEWS (July 4, 2020), https://www.nbcnews.com/politics/politics-news/eviction-crisis-housing-advocates-fear-waves-homelessness-moratoriums-expire-n1232846 [https://perma.cc/LJ82-532C] (discussing the "crippling economic effects" of the pandemic that could "force a wave of evictions" across the United States); Caitlin Dickerson, *Sleeping Outside in a Pandemic: Vulnerable Renters Face Evictions*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/07/04/us/coronavirus-evictions-renters-immigrants.html [https://perma.cc/KT56-2QRW] (discussing the expiration of eviction moratoria and the likely widespread impact, particularly on immigrant households).

159. *See* Heather Long & Andrew Van Dam, *U.S. Unemployment Rate Soars to 14.7 Percent, the Worst Since the Depression Era*, WASH. POST (May 8, 2020), https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report/ [https://perma.cc/TXQ7-CDNN].

160. *See* STOUT, ANALYSIS OF CURRENT AND EXPECTED RENTAL SHORTFALL AND POTENTIAL EVICTION FILINGS IN THE U.S. 5 (2020), https://www.ncsha.org/wp-content/uploads/Analysis-of-Current-and-Expected-Rental-Shortfall-and-Potential-Evictions-in-the-US_Stout_FINAL.pdf [https://perma.cc/4K2A-45DSc].

161. *See* JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 2019, at 4 (2019), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_of_the_Nations_Housing_2019%20%281%29.pdf [https://perma.cc/MGG7-8ZX9] (noting that 47.4 percent of all U.S. renter households are cost-burdened).

162. *Id.*

to make difficult tradeoffs between necessities like housing, food, transportation, and healthcare.[163]

Housing challenges are of course more severe for those with the lowest incomes. There are approximately eleven million "extremely low-income U.S. households," defined as earning no more than 30 percent of the local area median income.[164] Roughly 85 percent of such households are cost-burdened and 70 percent are severely cost-burdened.[165] There are only thirty-seven units of affordable and available housing for every one hundred extremely low-income renter households.[166] This number increases to fifty-eight affordable and available units for every one hundred "very low-income households" earning no more than 50 percent of the local area median income.[167]

These housing challenges disproportionately affect households of color. Black renters suffer the highest levels of housing cost burdens, whether renting or owning a home.[168] In 2019, nationally 567,715 people experienced homelessness[169]—40 percent of them Black, even though Black residents made up only 13 percent of the U.S. population.[170]

The unprecedented scale of the housing crisis looming in the wake of COVID-19 will require dramatic federal action. The Coronavirus Aid, Relief, and Economic Security Act,[171] coupled with a patchwork of state and local

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163. *See id.* at 32 ("Compared with households with housing they could afford, moderately cost-burdened households in the lowest expenditure quartile spent 13 percent less on food, 40 percent less on healthcare, and 23 percent less on transportation in 2017. The differences are even starker for severely burdened households, who spent 37 percent less on food, 77 percent less on healthcare, and 60 percent less on transportation.").

164. *Id.* at 33.

165. *See* ANDREW AURAND, DAN EMMANUEL, IKRA RAFI, DAN THREET & DIANE YENTEL, NAT'L LOW INCOME HOUS. COAL., OUT OF REACH: THE HIGH COST OF HOUSING 8 (2021), https://nlihc.org/sites/default/files/oor/2021/Out-of-Reach_2021.pdf [https://perma.cc/GW79-XQE2].

166. *See* 2019 JCHS REPORT, *supra* note 161, at 33.

167. *Id.*

168. *See id.* at 32 ("The cost-burdened share is highest among [B]lack renters at 54.9 percent, followed closely by [Latinx/Hispanic renters] at 53.5 percent. The rates for Asians and other minorities are noticeably lower at 45.7 percent, but still above the [W]hite share of 42.6 percent."). While the term "Hispanic" refers to all "persons of Spanish-speaking origin or ancestry," the term "Latinx" refers to "anyone of Latin American origin or ancestry." NAT'L ASS'N OF HISPANIC JOURNALISTS, CULTURAL COMPETENCE HANDBOOK 7 (2021), https://nahj.org/wp-content/uploads/2021/03/NAHJ-Cultural-Compliance-Handbook-Revised-12-20-2.pdf [https://perma.cc/W3MT-KTFT]. Though the report uses the term "Hispanic," the author and editors have substituted the term "Latinx/Hispanic" here in recognition that, in the absence of evidence to the contrary, it appears the report oversimplified the census data upon which it is based. "Latinx/Hispanic" is used here to avoid the Eurocentric reliance on the term "Hispanic" and to more accurately represent the underlying data.

169. NAT'L ALLIANCE TO END HOMELESSNESS, STATE OF HOMELESSNESS: 2020 Edition, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2020/ [https://perma.cc/9TX5-BBK8].

170. AURAND et al., *supra* note 165, at 1.

171. Pub. L. No. 116-136, §§ 4022–24, 134 Stat. 281, 490–94 (2020) (providing for a 120-day eviction moratorium for tenants in certain federally backed housing and a thirty-day notice period prior to eviction upon expiration of the moratorium).

eviction moratoria,[172] and the subsequent Centers for Disease Control and Prevention (CDC) national eviction moratorium,[173] provided some initial relief to stave off the worst of the fallout. By March 2021, Congress had allocated $46.5 billion in emergency rental aid.[174]

While much needed, these stopgap measures do not address the underlying and persistent housing affordability challenges that existed long before the pandemic arrived. These challenges arise from enduring structural features of the modern U.S. economy, including the fact that wages have not kept pace with housing costs. Median real rents went up by 13 percent between 2001 and 2018 while median real incomes declined.[175] The average minimum wage worker with children would be forced to work nearly ninety-seven hours per week to afford a modest two-bedroom apartment.[176] Work simply does not pay for a large swath of U.S. households.[177] Solving this problem will require more than sporadic interventions at times of visible and dramatic rupture. Rather, it will require making long-term changes to priorities regarding scarce federal resources.

172. For a comprehensive analysis of state and local eviction moratoria, see Michelle D. Layser, Edward W. De Barbieri, Andrew J. Greenlee, Tracy A. Kaye & Blaine G. Saito, *Mitigating Housing Instability During a Pandemic*, 99 OR. L. REV. 445 (2021).

173. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (Sept. 4, 2020) (temporarily preventing evictions, but not providing for any rent relief). On his first day in office, President Biden extended the CDC eviction moratorium through the end of March 2021. *See* Lisa Rowan, *CDC Extends Renters' Eviction Moratorium Through March. Is More Rent Relief Next?*, FORBES (Feb. 3, 2021), https://www.forbes.com/advisor/personal-finance/eviction-moratorium-extended-to-end-of-march/ [https://perma.cc/BY3N-CXSA]. Note that the Biden administration would go on to extend the moratorium multiple times. *See, e.g.*, Glenn Thrush, *The Biden Administration Plans to Extend the Federal Moratorium on Evictions for Another Month*, N.Y. TIMES (July 31, 2021), https://www.nytimes.com/2021/06/23/us/politics/cdc-eviction-moratorium-extended.html [https://perma.cc/JZJ9-9SYU].

174. Jason DeParle, *Biden Administration Moves to Speed Aid to Renters*, N.Y. TIMES (May 7, 2021), https://www.nytimes.com/2021/05/07/us/politics/renters-aid-biden-pandemic.html?referringSource=articleShare [https://perma.cc/P7NA-PDPC] (discussing the $25 billion allocation in December 2020 and the $21.5 billion allocation in March 2021).

175. *See* CTR. ON BUDGET & POL'Y PRIORITIES, FEDERAL RENTAL ASSISTANCE FACT SHEETS 2 (2021), https://www.cbpp.org/sites/default/files/atoms/files/12-10-19hous-factsheet-us.pdf [https://perma.cc/5V7V-UKZL].

176. AURAND et al., *supra* note 165, at 2.

177. The proposal discussed in this Article to expand housing voucher coverage to all extremely low-income households shares certain features with another intervention that has gained traction in recent policy conversations—namely, a variety of proposals related to providing a universal basic income (UBI). *See* Benjamin M. Leff, *EITC for All: A Universal Basic Income Compromise Proposal*, 26 WASH. & LEE J. C.R. & SOC. JUST. 85 (2019) (comparing UBI with the Earned Income Tax Credit (EITC) and offering four proposals to make the EITC more like UBI). For consideration of the much-debated relative merits of cash versus in-kind transfers, which is beyond the scope of this Article, see Miranda Perry Fleischer & Daniel Hemel, *Atlas Nods: The Libertarian Case for a Basic Income*, 2017 WIS. L. REV. 1189 (2017). In this Article, I express no opinion on the relative tradeoffs of housing assistance versus income support.

B. A Universal Housing Voucher for Extremely Low-Income Renters

1. Funding a Universal Voucher

One approach to addressing the most severe housing challenges would be to dramatically expand the program that currently provides the most rental assistance to households in need: the "Section 8" Housing Choice Voucher program. Under the voucher program, income-qualifying households find a rental housing unit on the private market and enter into a lease with the landlord. The tenant pays roughly 30 percent of income as rent and, assuming the housing meets certain physical quality standards and costs no more than certain HUD-established rent levels, the federal government, in partnership with local housing authorities, pays the balance.

In 2019, the Housing Choice Voucher program made 2,556,270 units of housing affordable and available, ensuring that 5,248,994 low-income people had a roof over their head.[178] Notably, per HUD data, 50 percent of these voucher holders have a Black head of household.[179] Recent scholarship has found that housing vouchers utilized in "high-opportunity" neighborhoods can have significant positive economic impacts. In one study, children moving to lower-poverty areas at age thirteen or younger resulted in future annual income of 31 percent higher than a control group.[180] By one estimate, moving to a high-opportunity neighborhood can result in an approximately $210,000 increase in lifetime income.[181] Research has also found that utilizing housing vouchers in high-opportunity areas can significantly improve safety, subjective sense of

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178. PICTURE OF SUBSIDIZED HOUSEHOLDS, *supra* note 18.

179. *Id.* The other race or ethnicity categories tracked by HUD with respect to voucher utilization include White (non-Latinx/Hispanic) at 30 percent, Latinx/Hispanic at 18 percent (including 2 percent Black and Latinx/Hispanic), Asian or Pacific Islander (non-Latinx/Hispanic) at 3 percent, and Native American (non-Latinx/Hispanic) at 1 percent. *Id.* While the HUD report used the term "Hispanic," the author and editors have substituted the term "Latinx/Hispanic" here in recognition that including "Latinx" as a category would have likely yielded more accurate data. *See supra* note 168 (explaining the difference between the two terms).

180. 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, 873 (2016) (reviewing data from HUD's Moving to Opportunity experiment from the mid-1990s in which randomly selected families were offered the opportunity to move from high-poverty housing projects to lower-poverty neighborhoods). Chetty, a leading economist in this research, created the Opportunity Atlas, a mapping tool connecting location with various metrics of opportunity; Chetty also directs the Opportunity Insights project at Harvard. *See* THE OPPORTUNITY ATLAS, https://www.opportunityatlas.org [https://perma.cc/9DC8-C5TU]; OPPORTUNITY INSIGHTS, https://opportunityinsights.org/ [https://perma.cc/68L9-ALZH].

181. *See* Dylan Matthews, *America Has a Housing Segregation Problem. Seattle May Just Have the Solution*, VOX (Aug. 4, 2019), https://www.vox.com/future-perfect/2019/8/4/20726427/raj-chetty-segregation-moving-opportunity-seattle-experiment [https://perma.cc/W95V-WS5H] (interviewing Harvard economist Nathaniel Hendren who estimates an 8.1 percent lifetime earnings increase for a newborn child to move from a low-opportunity to a high-opportunity neighborhood).

well-being, and health.[182] Voluntarily choosing to move to a high-opportunity neighborhood with a voucher thus carries the promise of a variety of economic and other household benefits. This is to say nothing of the advantages, including economic, that vouchers are likely to provide simply by making households less housing insecure, whether or not they are utilized in a high-opportunity neighborhood.

Despite the magnitude and potential of the Housing Choice Voucher program, participation is not an entitlement; not all income-eligible households receive a voucher. Given perennial funding shortfalls, roughly only one in four eligible households receives a voucher.[183] The remaining three-quarters of eligible households languish, often for many years, on housing authority waitlists. In October 2017, Los Angeles, which had closed its Section 8 waitlist for being oversubscribed, reopened the list for the first time in thirteen years.[184]

The Housing Choice Voucher program is far from perfect. Tenants encounter increased difficulty using vouchers in neighborhoods with low vacancy rates.[185] Despite progress, in most jurisdictions landlords can still refuse to lease to voucher tenants.[186] Other challenges of the program include barriers to inter-jurisdictional collaboration and inflexible payment standards that overpay in some areas and underpay in others, resulting in a poor use of resources and further limiting tenant mobility.[187]

Some efforts are underway to address these challenges. For example, HUD has experimented in recent years with "Small Area Fair Market Rents," setting

182. *See, e.g.*, Jens Ludwig, Jeffrey B. Liebman, Jeffrey R. Kling, Greg J. Duncan, Lawrence F. Katz, Ronald C. Kessler & Lisa Sanbonmatsu, *What Can We Learn About Neighborhood Effects from the Moving to Opportunity Experiment?*, 114 AM. J. SOCIO. 144 (2008) (noting significant mental health improvements from HUD's Moving to Opportunity Experiment); *see also* Chetty et al., *supra* note 180, at 856 (referencing prior studies of Moving to Opportunity data).

183. *See* JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 2014, at 30 (2014), https://www.jchs.harvard.edu/sites/default/files/media/imp/sonhr14-color-full_0.pdf [https://perma.cc/2F8X-8XRV].

184. *See* Aaron Schrank, *It's a Long Wait for Section 8 Housing in U.S. Cities*, MARKETPLACE (Jan. 3, 2018), https://www.marketplace.org/2018/01/03/its-long-wait-section-8-housing-us-cities/ [https://perma.cc/F3G9-EFV4].

185. *See* CTR. ON BUDGET & POL'Y PRIORITIES, HOUSING VOUCHER SUCCESS AND UTILIZATION INDICATORS, AND UNDERSTANDING UTILIZATION DATA 2–3 (2019), https://www.cbpp.org/sites/default/files/atoms/files/3-4-19hous-appendix.pdf [https://perma.cc/MU2M-48FU].

186. *See* ALISON BELL, BARBARA SARD & BECKY KOEPNICK, CTR. ON BUDGET & POL'Y PRIORITIES, PROHIBITING DISCRIMINATION AGAINST RENTERS USING HOUSING VOUCHERS IMPROVES RESULTS: LESSONS FROM CITIES AND STATES THAT HAVE ENACTED SOURCE OF INCOME LAWS 1 (2018), https://www.cbpp.org/sites/default/files/atoms/files/10-10-18hous.pdf [https://perma.cc/4XBB-E2PV] (noting that only one in three voucher households is covered by a source of income protection law).

187. *See, e.g.*, TEGELER, *supra* note 17, at 6, 14–16.

program rent limits at the neighborhood rather than the metropolitan level.[188] An increasing number of jurisdictions are passing source of income protection laws that make it illegal to discriminate on the basis of Section 8 status.[189] The Yes In My Backyard (or YIMBY) movement is galvanizing energy around reducing regulatory barriers at the state and local levels to new housing supply that could help ease vacancy rates in the future.[190] Commentators have developed a host of other ideas that would improve the Housing Choice Voucher program, including recent increased interest in supporting households in accessing high-opportunity neighborhoods.[191]

These advances, however, will take time, and even with them, the program will not solve all low-income housing challenges. For example, for households with severe physical or mental disabilities, permanent supportive housing with on-site health and social services has proven to be an effective intervention.[192] Such onsite care is not as easily available, or economically feasible, in a model that relies on individual households renting dispersed units from the private market. A toolkit approach to our housing policy is best, which includes construction of new subsidized units, and elsewhere I have argued for how to improve so-called "supply-side" programs, like the Low-Income Housing Tax Credit and Public Housing programs.[193]

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188. *Small Area Fair Market Rents*, HUD EXCHANGE, https://www.hudexchange.info/programs/public-housing/small-area-fair-market-rents/ [https://perma.cc/ZR5P-3HJ3] (describing the final HUD rule allowing certain metropolitan areas to use small area fair market rents calculated by zip codes rather than across entire metropolitan jurisdictions).

189. *See* MOLLY M. SCOTT, MARY CUNNINGHAM, JENNIFER BIESS, JENNIFER LEE O'NEIL, PHIL TEGELER, EBONY GAYLES & BARBARA SARD, POVERTY & RACE RSCH. ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM app. B (2013), https://prrac.org/pdf/AppendixB.pdf [https://perma.cc/5GAP-6BBH] (listing in an updated appendix more than one hundred state and local governments with such laws as of March 2021).

190. *See, e.g.*, John Infranca, *The New State Zoning: Land Use Preemption amid a Housing Crisis*, 60 B.C. L. REV. 823 (2019) (describing increased state intervention in local land use regulations in response to affordable housing shortages).

191. *See* TEGELER, *supra* note 17 (advocating for extending permitted housing search times, security deposit assistance, and enhanced "portability" of vouchers making it easier to move from one public housing authority jurisdiction to another, among other interventions).

192. *See* Maria C. Raven, Matthew J. Niedzwiecki & Margot Kushel, *A Randomized Trial of Permanent Supportive Housing for Chronically Homeless Persons with High Use of Publicly Funded Services*, 55 HEALTH SERV. RSCH. 797 (2020) (finding that chronically homeless individuals who received a unit of permanent supportive housing had reduced psychiatric emergency department visits and increased outpatient mental health care).

193. *See, e.g.*, Brandon M. Weiss, *Residual Value Capture in Subsidized Housing*, 10 HARV. L. & POL'Y REV. 521 (2016) (arguing for a nonprofit developer preference in Low-Income Housing Tax Credit allocations); Brandon M. Weiss, *Locating Affordable Housing: The Legal System's Misallocation of Subsidized Housing Incentives*, 70 HASTINGS L.J. 215 (2018) (arguing for a revision to state housing credit allocation rules to ensure affordable housing project rents are below market); Brandon M. Weiss, *Narrowly-Tailored Privatization*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 79 (2017) (evaluating the Rental Assistance Demonstration approach to recapitalizing the Public Housing stock). For the purposes of this Article, I am less concerned with settling decades-long debates regarding which precise

Yet proposals to significantly expand the Housing Choice Voucher program have gained political momentum in recent years.[194] Matthew Desmond proposed a universal voucher for extremely low-income households in his Pulitzer Prize-winning book, *Evicted: Poverty and Profit in the American City*.[195] Democratic candidates for President in the 2020 election, including now-President Joe Biden, picked up on the idea of providing vouchers to all eligible households.[196] My aim in this Article is of relatively modest ambition—to consider one approach to how, via shifting federal tax priorities, we might fund such a proposal that, unlike the Opportunity Zone program, would clearly have positive economic effects for low-income households.

What would it cost to expand the Housing Choice Voucher program to cover all extremely low-income households as Desmond proposed? He

assortment of federal housing policy interventions is best and instead am focused on a more modest pursuit—how we could fund an idea that has gained some significant political momentum in recent years and that would clearly help many low-income households. For background on the broader supply-side versus demand-side debate, see William C. Apgar, Jr., *Which Housing Policy is Best?*, 1 HOUS. POL'Y DEBATE 1 (1990).

194. Of course, calls to increase housing vouchers to help households access low-poverty neighborhoods have existed for decades. *See, e.g.*, Alexander Polikoff, *Racial Inequality and the Black Ghetto*, 1 NW. J.L. & SOC. POL'Y 1, 11 (2006) (considering the impact of making fifty thousand incremental vouchers available every year for ten years for "inner-city" families to move to "non-poor neighborhoods").

195. *See* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 308–11 (2016). "Extremely low-income households," as discussed above, are typically defined as households earning no more than 30 percent of the local area median income. *See* AURAND et al., *supra* note 165, at 281.

196. *See The Biden Plan for Investing in our Communities Through Housing*, JOEBIDEN.COM (July 29, 2020), https://joebiden.com/housing/ [https://perma.cc/EZU3-FQ3D] ("Provide Section 8 housing vouchers to every eligible family so that no one has to pay more than 30% of their income for rental housing. Roughly three in four households eligible for Section 8 rental assistance do not receive housing assistance because the program is underfunded. Biden's approach is straightforward: the Section 8 rental housing assistance program should be fully funded so that everyone eligible gets the assistance they need to pay their rent for a safe home. Biden will devote resources to both voucher-based rental assistance and the project-based program. Over time, this approach will provide assistance to at least 17 million low-income families. And, as part of the Homeowner and Renter Bill of Rights, Biden will enact a law prohibiting landlords from discriminating against renters receiving federal housing benefits."). Biden's first proposed budget requested funding for an additional 200,000 vouchers. *See* Glenn Thrush, *Biden Proposes a Massive Expansion of Housing Programs for the Poor, Signaling a Big Shift in Poverty Policy*, N.Y. TIMES (Apr. 9, 2021), https://www.nytimes.com/2021/04/09/us/housing-biden-budget.html [https://perma.cc/E34G-SKMF].

suggested that the price tag would be $22.5 billion.[197] This essentially would be a doubling of the current funding, which in FY 2020 was $23.87 billion.[198]

Where might Congress start to look for such funds? Eliminating § 1031 exchanges altogether would be a good place to start. The tax expenditure costs the federal government approximately $13.6 billion annually.[199] According to a database maintained by HUD, the average cost to the government of a voucher is $807 per month, or roughly $10,000 ($9,684) per year.[200] If $13.6 billion were available to the federal treasury through the elimination of § 1031, those savings could be used to fund roughly 1.4 million new vouchers per year. Assuming a 2.3:1 ratio of occupants per unit,[201] that would bring housing security to more than 3.2 million additional U.S. residents on an annual basis. Add the annual $3.4 billion estimated cost of the Opportunity Zone program[202] and the available total would increase to approximately $17 billion. That is nearly all the money necessary to fund Desmond's proposal—funds for approximately 1.8 million new vouchers to house more than 4 million additional extremely low-income residents.

2. *Political Challenges*

Any attempt to redirect the value of the § 1031 tax expenditure will no doubt be met with fierce political opposition. As discussed above, some version of the provision for nonrecognition of gain for like-kind exchanges dates back a hundred years. The longevity of the provision is attributable to widespread support from industry over the years. The Federation of Exchange Accommodators, described above, has been a particularly staunch defender of

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197. DESMOND, *supra* note 195, at 311 (referencing a 2013 study by the Bipartisan Policy Center). By comparison, Trump's fiscal year 2021 budget requested $740.5 billion for national defense, nearly thirty-three times this amount. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, A BUDGET FOR AMERICA'S FUTURE, FISCAL YEAR 2021 2 (2020), https://www.govinfo.gov/content/pkg/BUDGET-2021-BUD/pdf/BUDGET-2021-BUD.pdf [https://perma.cc/A4SR-7EKK]. The same budget requested $47.9 billion in total gross discretionary spending for the U.S. Department of Housing and Urban Development. *Id.* at 59.

198. *See* NAT'L LOW INCOME HOUS. COAL., FY21 BUDGET CHART FOR SELECTED HUD AND USDA PROGRAMS (2020), https://nlihc.org/sites/default/files/NLIHC_HUD-USDA_Budget-Chart.pdf [https://perma.cc/JRP2-AQFD] (showing the FY 2020 final appropriation for tenant-based rental assistance at $23.874 billion). Another study found that to cover all eligible households, including very low-income households in addition to extremely low-income households, the cost would be $62 billion per year. Mary K. Cunningham, *It's Time to Reinforce the Housing Safety Net by Adopting Universal Vouchers for Low-Income Renters*, URB. WIRE (Apr. 7, 2020), https://www.urban.org/urban-wire/its-time-reinforce-housing-safety-net-adopting-universal-vouchers-low-income-renters [https://perma.cc/VCS5-BUQM]. "Very low-income households," as described above, are typically defined as households earning no more than 50 percent of the local area median income. *See* AURAND et al., *supra* note 165, at 281.

199. *See* 2015 JCT TAX EXPENDITURE ESTIMATES, *supra* note 113, at 28.

200. PICTURE OF SUBSIDIZED HOUSEHOLDS, *supra* note 18. Note that increased administrative costs associated with expanding the program could affect the actual number.

201. *See id.*

202. *See* 2019 JCT TAX EXPENDITURES ESTIMATES, *supra* note 5, at 26.

the tax expenditure. The FEA notes nearly one hundred other organizations that support § 1031, including the National Association of Home Builders, the National Association of Realtors, the National Apartment Association, and the U.S. Chamber of Commerce.[203]

Yet various initiatives over the past decade have attempted to eliminate or scale back § 1031, with some success. The Tax Reform Act of 2014 would have eliminated the provision entirely.[204] The Obama administration's final budget for FY 2017 would have limited the amount of capital gains that could be deferred under § 1031 to $1 million per taxpayer per year and would have eliminated preferential treatment of like-kind exchanges of certain sorts of personal property—including works of art and collectibles.[205] And, as discussed above, in a relatively dramatic change to the provision, the Tax Cuts and Jobs Act of 2017 limited the provision to real property exchanges, excluding a wide variety of other types of property that had formerly been covered.[206] It would thus seem that industry advocacy is not insurmountable.

The current political moment may be a particularly ripe one for change. Indeed, in July 2020, then-candidate Biden proposed eliminating the use of § 1031 by investors with annual incomes over $400,000.[207] In the announcement, Biden stated that if elected he intended to "[c]los[e] loopholes. Unproductive tax cuts for high-income real estate investors while ensuring high-income earners pay their tax bills."[208] During his speech at the Democratic National Convention, he again stated, "And we can pay for these investments by ending loopholes . . . . Because we don't need a tax code that rewards wealth more than it rewards work."[209] In announcing his American Families Plan, Biden reiterated his support for limiting § 1031, though the plan increased the exemption to $500,000.[210] The resurgence of the Black Lives Matter social

203. *See* FEA RECENT THREATS TO § 1031, *supra* note 147, at 2.

204. *See* STAFF OF JOINT COMM. ON TAXATION, 113TH CONG., TECHNICAL EXPLANATION OF THE TAX REFORM ACT OF 2014, A DISCUSSION DRAFT OF THE CHAIRMAN OF THE HOUSE COMMITTEE ON WAYS AND MEANS TO REFORM THE INTERNAL REVENUE CODE: TITLE II – BUSINESS TAX REFORM, JCX-14-14, at 62–64 (2014) ("The proposal repeals the provision providing for nonrecognition of gain in the case of like-kind exchanges.").

205. *See* 2017 REVENUE PROPOSAL GENERAL EXPLANATIONS, *supra* note 137, at 107.

206. *See supra* note 117 and accompanying text.

207. *See* Clark et al, *supra* note 25.

208. *See* Rich Bockmann, *Biden's Tax Plan Would "Pull the Rug Out" from Under the Real Estate Industry: Insiders*, REAL DEAL (July 21, 2020), https://therealdeal.com/2020/07/21/bidens-tax-plan-would-pull-the-rug-out-from-under-the-real-estate-industry-insiders/ [https://perma.cc/XQC7-EVNM].

209. *Fact Check: Biden's Address to the DNC, Annotated*, NPR (Aug. 20, 2020), https://www.npr.org/2020/08/20/901380014/fact-check-bidens-address-to-the-dnc-annotated [https://perma.cc/FX6P-8FEZ].

210. *See* Press Release, The White House, Fact Sheet: The American Families Plan (Apr. 28, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/ [https://perma.cc/8S8W-F6SP] ("The President would also end the special real

movement in the wake of the police killings of George Floyd and Breonna Taylor, among others—with its emphasis on redirecting scarce government resources toward social goods and services, like education, healthcare, and, prominently, affordable housing—also may contribute to a favorable political climate for such change.[211]

On the other hand, the FEA responded promptly to Biden's support for § 1031 reform, noting that it had already begun vigorous lobbying of members of Congress on the issue.[212] In March 2021, a number of real estate trade groups, including the National Association of Home Builders, the National Association of Realtors, and the National Apartment Association, sent Treasury Secretary Janet Yellen a letter arguing for the preservation of § 1031 in the face of the

estate tax break—that allows real estate investors to defer taxation when they exchange property—for gains greater than $500,000 . . . ."). The plan would raise the exemption to $1 million for married taxpayers filing jointly. *See* Lynn Mucenski Keck, *Like-Kind Exchanges to Be Limited Under Biden's Tax Proposals*, FORBES (June 30, 2021), https://www.forbes.com/sites/lynnmucenskikeck/2021/06/30/like-kind-exchanges-to-be-limited-under-bidens-tax-proposals/?sh=4c5cbabf229d [https://perma.cc/P3MR-697T].

211. *See* Francisco Pérez & Luis Feliz Leon, *Calls to Defund the Police Are Joining the Demand to Cancel Rent*, JACOBIN (Aug. 10, 2020), https://www.jacobinmag.com/2020/08/defund-the-police-cancel-rent-housing [https://perma.cc/LX93-FMBL] (discussing the relationship between policing and housing needs in New York, and quoting Michael Velarde, "a Chicano labor and community organizer" who stated, "The New York Police Department's budget is dramatically outsized when compared to [the New York City Housing Authority] . . . [and] decades of investment in the police, as well as neoliberal cuts to social spending more broadly, have resulted in over $45 billion in essential repairs owed to NYCHA residents"). For an example of recent housing organizing and advocacy that garnered widespread national attention, see Erin Baldassari & Molly Solomon, *How Moms 4 Housing Changed Laws and Inspired a Movement*, KQED (Oct. 19, 2020), https://www.kqed.org/news/11842392/how-moms-4-housing-changed-laws-and-inspired-a-movement [https://perma.cc/5EG9-C3FY] (describing how the activism of Bay Area mothers who occupied an empty home sparked a number of legislative proposals addressing the shortage of affordable housing).

212. *See* Lynn Harkin, *FEA Continues Work to Preserve Section 1031 as Biden Campaign Targets Like-Kind Exchanges*, FED'N EXCH. ACCOMMODATORS (Aug. 11, 2020), https://www.1031taxreform.com/fea-continues-work-to-preserve-section-1031-as-biden-campaign-targets-like-kind-exchanges/ [https://perma.cc/AR9D-2PQ4] ("In anticipation of this kind of announcement, FEA has been advocating for the preservation of Section 1031 with key Biden supporters in a number of ways. . . . In recent weeks, we have met virtually with key members of Congress, including key members of the Senate and House tax-writing committees to discuss the economic importance of like-kind exchanges. . . . FEA's Government Affairs Committee, along with our lobbying partners at Williams and Jensen, is working with a coalition of real estate industry associations to update the ground-breaking 2015 studies on the economic stimulus provided by Section 1031 like-kind exchanges and the negative impact to the US economy that would ensue from elimination of this important and valuable tax tool.").

Biden administration's review of the tax code.[213] It thus appears that the next round of political struggle over like-kind exchanges is underway.[214]

With respect to the Opportunity Zone program, the most immediate economic benefits of the program will naturally expire in 2026. Of course, the end of the program could be hastened. Representative Rashida Tlaib introduced legislation proposing exactly that.[215] In introducing the Repeal Opportunity Zones Act of 2019, she stated:

> The American people have been scammed by Opportunity Zones. . . . Opportunity Zones were supposed to help uplift low-income communities and those living in poverty, but instead we are seeing them benefit billionaires and their luxury projects. Our communities deserve resources and programs with proven track records to thrive – the current Opportunity Zone law fails to drive real benefits to low-income communities, instead often rewarding President Trump's donors. We must repeal them to stop yet another form of corporate greed from hurting our communities and tarnishing our democracy.[216]

Thus far, however, the Biden administration appears to be more inclined to amend rather than eliminate the program.[217]

3. *Psychological Challenges*

As a final note, it is worth pausing to reflect upon a couple psychological barriers to the proposal to massively expand direct financial assistance in the form of housing vouchers to all eligible extremely low-income households. Even for those who would disavow Porter's market-based ideology—that the "inner

213. *See* Letter from ADISA—Alt. & Direct Inv. Sec. Ass'n, Am. Farm Bureau Fed'n, Am. Hotel & Lodging Ass'n, Am. Land Title Ass'n, Am. Resort Dev. Ass'n, Asian Am. Hotel Owners Ass'n, Building Owners & Managers Ass'n (BOMA) Int'l, CCIM Inst., Com. Real Est. Fin. Council, Fed'n of Exch. Accommodators, Forest Landowners Ass'n, Inst. for Portfolio Alts., Inst. of Real Est. Mgmt., Int'l Council of Shopping Ctrs., Land Trust All., Latino Hotel Ass'n, Mortg. Bankers Ass'n, NAIOP, the Com. Real Est. Dev. Ass'n, Nareit, Nat'l Alliance of Forest Owners, Nat'l Apartment Ass'n, Nat'l Ass'n of Home Builders, Nat'l Ass'n of Black Hotel Owners, Operators and Developers, NAT'L ASS'N OF REALTORS®, Nat'l Cattlemen's Beef Ass'n, Nat'l Council of Farmer Coops., Nat'l Multifamily Hous. Council, REALTORS® Land Inst., The Conservation Fund, The Nature Conservancy, The Real Est. Roundtable to Janet L. Yellen, Sec'y of the Treasury (Mar. 16, 2021), https://www.icsc.com/uploads/t07-subpage/Coalition_Letter_to_Treasury_Secretary_Yellen.pdf [https://perma.cc/XSJ6-VKRZ].

214. *See* Joe Gose, *Investors Fret as Biden Takes Aim at a 100-Year-Old Tax Loophole*, N.Y. TIMES (June 8, 2021), https://www.nytimes.com/2021/06/08/business/like-kind-real-estate-tax-loophole.html?referringSource=articleShare [https://perma.cc/D65D-PZRF] (discussing the politics of § 1031 reform).

215. *See* H.R. 5252, 116th Cong. (2019).

216. Press Release, Rashid Tlaib, House of Representatives, Congresswoman Rashid Tlaib Introduces Bill to Repeal Controversial Opportunity Zones (Nov. 22, 2019), https://tlaib.house.gov/media/press-releases/congresswoman-rashida-tlaib-introduces-bill-repeal-controversial-opportunity [https://perma.cc/Z447-AF45].

217. *See The Biden Plan for Investing in Our Communities Through Housing*, *supra* note 196 (laying out steps to revise Opportunity Zones, including incentivizing partnering with non-profit organizations, greater Treasury Department oversight, and enhanced reporting and public disclosure).

city's crippling social problems" could be solved primarily by letting business do business—there often lingers the trace of an unspoken, yet related sentiment: that direct government aid to individuals and households in need is at best a temporary but necessary evil, and that the goal is eventually for all individuals to take personal responsibility for their own housing outcomes.

When a pandemic strikes, leading to record-breaking levels of unemployment, it is easy to see how one's circumstances prevent the ability to take personal responsibility for housing outcomes and to rationalize government intervention. But when subtle yet powerful changes to the structure of the economy occur—such that it becomes essentially impossible to afford decent housing on available wages—it takes a more discerning look to understand that one is equally constrained by the situation. In the face of natural disasters, when, for example, a family's home is blown away in a storm, we assume that disaster relief is appropriate.[218] But when one's livelihood is slowly whittled away by real wages year after year failing to keep pace with real rents, the mantra of personal responsibility is prone to reappear. Our federal housing policy thus limps along, providing woefully inadequate levels of support reflecting ambivalence about whether aid is warranted.

Attributing to the individual disposition what is more accurately causally connected with situational forces is a long-established psychological phenomenon.[219] Hopefully the lesson of COVID-19 will not be that a once-in-a-lifetime pandemic gave rise to a once-in-a-lifetime need for serious government housing assistance, but rather that the pandemic magnified and encouraged an empathic understanding of the ways in which a large swath of society already lived in seriously constrained situations.

Another barrier to significant rental assistance expansion is the psychological tendency to protect the status quo. System justification theory posits an innate human psychological motive to defend and rationalize the

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218. For a related point in the aftermath of Hurricane Katrina, see Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 454–55 (2006) ("Although seeing through the illusion of choice is uncommon, it does happen. Perceiving situational influences can sometimes even be easy—particularly when situation is salient, when acknowledging situation enhances (or at least does not threaten) our sense of ourselves or our system, or when no powerful interests have a stake in framing the matter as 'choice.' But it takes an extraordinary event indeed to pierce the veil of choice and reveal the influence of situational forces when doing so opens the possibility that something horribly unfair is afoot. A 'natural disaster' is just such an extraordinary event." (internal citations omitted)).

219. *See* Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 6 n.6 (2004) (discussing the origins of the "fundamental attribution error" in the social psychology literature and citing LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION 4 (1983) ("People's inflated belief in the importance of personality traits and dispositions, together with their failure to recognize the importance of situational factors in affecting behavior, has been termed the 'fundamental attribution error.'")).

current system, even by those it disadvantages.[220] The Opportunity Zone program strikes a deeply resonant chord in this respect in that it embodies notions about how our system is supposed to work—the notion of a largely market economy unfettered by intrusive government intervention. Porter's ideology has been so influential for its resonance with this idea.

The prospect of providing widespread rental assistance creates tension with this free-market ideology that lies at the core of the American psyche. One approach with less tension would be to keep the broad market-based structure of the Opportunity Zone program in place but to amend certain features to make it work better. As discussed in Part I.B, we might require investment in the development of more necessary community assets; incentivize partnering with local stewards, for example, mission-driven community-based organizations; insist upon local hiring requirements and preferences for disadvantaged business enterprises; demand greater transparency and governmental accountability; and tighten up the geographical requirements to ensure investments are made in low-income communities. All such reforms would be welcome—one could imagine a well-designed Opportunity Zone program that reflects the best lessons the field of community economic development has learned to date. Place-based approaches that leverage market forces to help redress poverty remain critically important and do not stand in opposition to approaches that alternatively provide individuals options for mobility.

Yet, in the current environment, with such dire housing needs—both pre- and post-pandemic—more immediate and widespread support is needed as a complementary strategy. While inclusive economic development initiatives continue to further systemic approaches to developing a more inclusive market economy, direct relief is necessary immediately. And economic development initiatives alone aimed at spurring job growth will never address all the need. Individuals with disabilities and the elderly, for example, are among the largest categories of those served by federal rental assistance.[221] Their need for assistance will not disappear even were the market economy to become more broadly inclusive.

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220. *See, e.g.*, John T. Jost, Mahzarin R. Banaji & Brian A. Nosek, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCH. 881, 887 ("We argue that there is a general (but not insurmountable) system justification motive to defend and justify the status quo and to bolster the legitimacy of the existing social order. Such a motive is not unique to members of dominant groups.").

221. *See* CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: FEDERAL RENTAL ASSISTANCE 2 (2017), https://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics-housing-1-25-13RA.pdf [https://perma.cc/8FQC-YJ45] (noting that of all households receiving federal rental assistance, 36 percent are headed by a person age sixty-two or older, and a separate 24 percent are adults with disabilities).

CONCLUSION

Contrary to former President Trump's frequent praise of the program, Opportunity Zones will not be the elixir that he claims for economically distressed communities. Bad apples aside, the program is based on an overly simplistic model that fails to ensure that valuable economic incentives accrue to the benefit of anyone other than taxpayers with capital gains to shield. Beyond mere inefficacy, the program holds the potential to accelerate harmful neighborhood change.

A comparison of Opportunity Zones with § 1031 exchanges highlights similarities between the two tax shelters and how taxpayers are likely to approach them. Yet the underlying purposes of the two provisions are different. For the former, the stated rationale is relatively clear. By contrast, a variety of shifting justifications has been used to support § 1031. Yet none of the primary ones—measurement, administrability, liquidity, or economic productivity—provides a satisfactory defense of its modern incarnation.

No doubt the U.S. tax code is riddled with tax shelters that are worthy of reexamination. Larger discussions of comprehensive tax reform will continue. The aim of this Article has been a more modest one—to consider how the value of two particular tax expenditures could be better spent elsewhere. The United States falls woefully short in providing housing assistance to income-eligible households given a lack of resources. Yet relatively modest shifts to the tax code, and the values it enshrines, could solve this problem in a manner that furthers the purported goals of the Opportunity Zone program.

A massive expansion of the Housing Choice Voucher program will not solve all U.S. housing insecurity. Broader housing policy debates have raged for decades as we continually refine the toolkit available for nuanced government intervention. Yet ensuring as a baseline that all extremely low-income households have the means to afford decent housing would be a significant step forward. Given the disproportionate housing challenges faced by low-income households and households of color, a universal voucher for extremely low-income households would be a program truly worthy of praise for helping to alleviate the ills of poverty and racial inequity.