[Fordham Urban Law Journal](https://ir.lawnet.fordham.edu/ulj)

Volume 48
Number 5 *A Taxing War on Poverty: Opportunity Zones and The Promise of Investment and Economic Development*

Article 2

2021

Supporting Small Businesses in Place

Edward W. De Barbieri

Recommended Citation

Edward W. De Barbieri, *Supporting Small Businesses in Place*, 48 Fordham Urb. L.J. 1107 (2021).
Available at: https://ir.lawnet.fordham.edu/ulj/vol48/iss5/2

SUPPORTING SMALL BUSINESSES IN PLACE

Edward W. De Barbieri[*]

How do lawmakers support small businesses most deserving of assistance in places most in need of governmental support? As a means for approaching this question, this Essay examines two recent laws — the Paycheck Protection Program and the Opportunity Zone tax incentive. The Paycheck Protection Program was the cornerstone of the CARES Act, designed to keep employees on payroll during the worst parts of the COVID-19 pandemic. The Opportunity Zone incentive was implemented to provide economic development stimulus to neighborhoods in need of capital investment following the Great Recession.

Both laws purported to support small businesses. However, in practice, both failed to deliver promised capital to the most marginalized business owners in places most in need. In the case of the Paycheck Protection Program, larger businesses, including those with access to capital from non-governmental sources, were able to access initial rounds of federal funds because of their close relationship with Small Business Administration-certified lenders. In the case of the Opportunity Zone incentive, although there is no official reporting, voluntarily collected data indicates that most investments are flowing into large commercial real estate developments instead of small businesses.

There are a number of implications and research questions arising from analysis of these laws. This Essay seeks to draw out additional similarities and differences between the two. It aims to both offer a critique of the Biden Administration's proposals with respect to economic development interventions supporting small businesses in

---

[*] Associate Professor of Law; Director, Community Economic Development Clinic, Albany Law School. Thanks to Tracy Kaye, Michelle D. Layser, Blaine Saito, and Brandon Weiss for comments on earlier drafts. Thank you to the editors of the *Fordham Urban Law Journal* for including this Essay in this special issue on the Opportunity Zone incentive, as well as for their numerous useful comments and suggestions on this Essay. Any errors or omissions are the Author's alone.

places in need and suggest improvements to the laws analyzed, as well as future ones.

INTRODUCTION

When elected officials seek to intervene in the economies of particular industries, or particular places, there are several tools available. At the federal level, the Small Business Administration, for instance, was created to serve the needs of small businesses following the proliferation of large retail chain stores.[1] The Small Business Administration provides capital assistance — grants and loans — to eligible borrowers presumably denied credit at affordable prices in private markets.[2]

The need for federal action to support small businesses as a deserving group of private industry is indicative of popular support and

1. As early as the 1920s and 1930s, Congress enacted legislation to support small businesses. *See, e.g.*, Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13-13b, 21a). The Small Business Administration was created in the early 1950s. Small Business Act of 1953, Pub. L. No. 83-163, §§ 201–02, 67 Stat. 232 ("The essence of . . . private enterprise free competition.").

2. *See* Small Business Act, Pub. L. 85-536, § 7(a), 72 Stat. 384, 387–88 (1958); 13 C.F.R. § 123.300(b) (2011).

acknowledgment of the important role small employers play in the economy. Small businesses comprise and develop local economies. One goal of the federal government's form of capital access intervention is ensuring strong small businesses and thriving local economies. Recently, the White House has announced efforts to invest in businesses owned by marginalized individuals as a way to address the racial wealth gap.

In June 2021, on the 100th anniversary of the Tulsa Race Riot,[3] for instance, President Biden announced plans to reduce the racial wealth gap by, among other policy tools, investing $100 billion in federal contracts to so-called small disadvantaged businesses.[4] This commitment amounts to a 50% increase in contracting with small disadvantaged businesses.[5] However, it is noteworthy that the President is already required by statute to set annual procurement goals for the federal government to purchase goods and services from small disadvantaged businesses.[6]

The Biden Administration did not release details on how exactly it would achieve this goal in increasing procurement dollars to businesses owned by marginalized individuals.[7] What is more, it can be costly for the government to provide data sufficient to survive strict scrutiny review of race-based preferences in procurement.[8] One southwestern city, for example, planned to spend up to $250,000 obtaining an update to a prior disparity study.[9] A major U.S. city defines the term "disparity

3. *See* SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921 7 (1982) (placing the Tulsa Race Riot in the context of violent race relations throughout the history of the United States).

4. *See* Caroline Downey, *Biden to Direct $100 Billion in Federal Contracts to 'Disadvantaged' Businesses to Shrink Racial Wealth Gap*, NAT'L REV. (June 1, 2021, 8:41 AM), https://www.nationalreview.com/news/biden-to-direct-100-billion-in-federal-contracts-to-disadvantaged-businesses-to-shrink-racial-wealth-gap/ [https://perma.cc/PKH4-AU6C].

5. *See Fact Sheet: Biden-Harris Administration Announces New Actions to Build Black Wealth and Narrow the Racial Wealth Gap*, WHITE HOUSE (June 1, 2021) [hereinafter *White House Fact Sheet, Build Black Wealth*], https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/01/fact-sheet-biden-harris-administration-announces-new-actions-to-build-black-wealth-and-narrow-the-racial-wealth-gap/ [https://perma.cc/7PVR-6T6S] ("Use the federal government's purchasing power to grow federal contracting with small disadvantaged businesses by 50 percent, translating to an additional $100 billion over five years, and helping more Americans realize their entrepreneurial dreams.").

6. *See* 15 U.S.C. § 644(g)(1)(A).

7. *See White House Fact Sheet, Build Black Wealth*, *supra* note 5.

8. The U.S. Supreme Court in *Adarand Constructors, Inc. v. Peña* held that race-based procurement preferences are subject to strict scrutiny. 515 U.S. 200, 239 (1995).

9. *See* Yuhua Qiao, Khi V. Thai & Glenn Cummings, *State and Local Procurement Preferences: A Survey*, 9 J. PUB. PROCUREMENT 371, 381 (2009).

study" as a tool that determines whether a governmental entity is engaging or has engaged in exclusionary procurement practices in failing to contract with minority-owned, women-owned, and disadvantaged businesses.[10] Other studies suggest that disparity studies themselves lack efficacy and may play a greater role in increasing, not resolving, governmental ability to remedy economic inequality and inclusion.[11]

Another significant economic development lever available to government at all levels is the tax code. While the types and rates of taxes are frequently studied because of their connections to social movements,[12] tax abatements and incentives are the main drivers of social and economic policy.[13] In particular, the lengthiest section of the Internal Revenue Code covers the issuance of the Low-Income Housing Tax Credit — the country's most successful affordable housing construction finance tool.[14]

During economic and other disasters, democratically-responsive government actors use capital allocation and tax incentives to influence industrial policy.[15] For instance, during the height of the pandemic

10. *See* Office of Business Opportunity, *Disparity Study Frequently Asked Questions*, CITY HOUS., TEX., https://www.houstontx.gov/obo/disparity_study_faq.html#:~:text=Question%3A%20What%20is%20a%20Disparity,disadvantaged%20business%20enterprises%20(MWDBEs) [https://perma.cc/KM2A-KB3M] (last visited Sept. 25, 2021).

11. *See* Christopher L. Atkinson, Clifford McCue & Jesse Saginor, *The Best Disparity, or Lack Thereof, That Money Can Buy*, 48 REV. BLACK POL. ECON. 228–30 (2021).

12. For instance, a federal income tax made prohibition possible. *See* Donald J. Boudreaux, *Alcohol, Prohibition, and the Revenuers*, FOUND. ECON. EDUC. (Jan. 1, 2008), https://fee.org/articles/alcohol-prohibition-and-the-revenuers/?itm_source=parsely-api [https://perma.cc/39AL-8FMW] ("The income tax proved a viable alternative to liquor taxation for raising revenue, making Prohibition politically possible.").

13. This is overwhelmingly true in the context of place-based economic development strategies. The New Markets Tax Credit, for instance, offers a tax credit for developing particular commercial real estate projects in areas of the United States that lack capital investment. *See New Markets Tax Credit Program*, CMTY. DEV. FIN. INST. FUND, https://www.cdfifund.gov/sites/cdfi/files/documents/nmtc-fact-sheet-english-16sept2020-final.pdf [https://perma.cc/HZ9V-WXJX] (last visited Sept. 25, 2021) (offering a tax credit for developing particular commercial real estate projects in areas of the United States that lack capital investment).

14. The Low-Income Housing Tax Credit happens to be drafted as the longest section of the Internal Revenue Code and also places affordable housing construction under the regulation of the Internal Revenue Service and the Department of the Treasury instead of the Department of Housing and Urban Development. *See* Jeanne L. Peterson, *The Low-Income Housing Tax Credit*, 73 MICH. BAR J. 1154, 1154 (1994).

15. *See, e.g.*, Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); *see also* Greg Brown & Arzu Ozoguz, *Who*

shutdown, Congress turned to a little-known Small Business Administration loan program to quickly disburse funding to assist businesses in keeping their workers on the payroll.[16] Similarly, following the Great Recession, when particular urban and rural places were left without the recovery that much of the overall economy enjoyed, Congress turned to the tax code to offer a capital gains tax cut and other tax incentives for investors who located funds in designated zones.[17]

Both the Paycheck Protection Program and the Opportunity Zone incentive faced and continue to face problems. The Author has offered his own critiques of each law in previous works.[18] With respect to the Paycheck Protection Program, small businesses, including those owned by marginalized owners, faced significant obstacles in terms of accessing government funds. In some cases, businesses lacked relationships with financial institutions that could connect to the Small Business Administration's portal.[19] In other cases, businesses owned by individuals with certain criminal backgrounds were excluded from accessing funds.[20] Ultimately, however, recent evidence suggests that

---

CARES? Assessing the Impact of the CARES Act, KENAN INST. PRIV. ENTER. (July 15, 2020), https://kenaninstitute.unc.edu/kenan-insight/who-cares-assessing-the-impact-of-the-cares-act/ [https://perma.cc/7S6J-XKCA] ("[T]he CARES Act intended to throw a lifeline to small- and medium-sized businesses was in the form of a Paycheck Protection Program (PPP). Initially set at $349 billion, PPP aimed at keeping workers employed by providing small businesses with government-guaranteed, forgivable loans.").

16. *See* CARES Act § 1102(a)(2) (codified at 15 U.S.C. § 636(a)(36)); *id.* § 1102(b)(1).

17. *See* I.R.C. § 1400Z-1.

18. *See, e.g.*, Edward W. De Barbieri, *Opportunism Zones*, 39 YALE L. & POL'Y REV. 82 (2020) [hereinafter De Barbieri, *Opportunism Zones*] (proposing a tripartite use-transparency-participation framework for analyzing the success or shortcomings and need for reform of the Opportunity Zone); Edward W. De Barbieri, *Excluding Disadvantaged Businesses*, 28 GEO. MASON L. REV. 901 (2021) [hereinafter De Barbieri, *Excluding Disadvantaged Businesses*] (discussing how otherwise well-intentioned laws designed to support small businesses exclude the most disadvantaged ones).

19. *See* Ruth Simon & Peter Rudegeair, *In Race for Small-Business Loans, Winning Hinged on Where Firms Bank*, WALL ST. J. (Apr. 20, 2020, 7:32 PM), https://www.wsj.com/articles/in-race-for-small-business-loans-winning-hinged-on-where-firms-bank-11587410421 [https://perma.cc/BP3A-RYQM].

20. *See Paycheck Protection Program Application Form*, U.S. SMALL BUS. ADMIN. (2020), [https://perma.cc/93AS-FAP6] (listing as Question 5 an inquiry into an applicant's criminal history). The connection between race and criminal justice system involvement is well documented in the literature. *See, e.g.*, DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2008). The Biden Administration worked to eliminate an exclusionary provision that prevented businesses with owners that had any felonies in the year prior to application. *See Fact*

for Black business owners, recovery from the financial crisis brought on by the COVID-19 pandemic was significantly limited because of the pre-existing business environment and existing inequality.[21] In particular, a recent National Community Reinvestment Coalition report concluded that Black America was in economic crisis pre-pandemic, the growth in Black entrepreneurship was not corresponding to increased economic growth, and that additional public and private funds should flow to Black-owned businesses.[22]

In the case of Opportunity Zones, the growing evidence suggests that spatial inequality is only increasing in light of the new tax incentive. For instance, a recent paper presenting electronically filed tax return data indicates that only 16%, or less than one in five, of designated Opportunity Zones received any investment.[23] In other words, greater than every four out of five designated Opportunity Zones have received no additional capital investment.[24] The authors of this study suggest high levels of capital investment in very spatially concentrated areas. Specifically, areas experiencing Opportunity Zone fund investment are areas with relatively higher incomes, greater property values, and better-educated populations, and are already experiencing income and population growth.[25] Such findings lead one to question the value of an incentive that is driving capital to neighborhoods where capital is already flowing.[26]

Sheet: Biden-Harris Administration Increases Lending to Small Businesses in Need, Announces Changes to PPP to Further Promote Equitable Access to Relief, WHITE HOUSE (Feb. 22, 2021) [hereinafter *White House Fact Sheet, Equitable Access*], https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/22/fact-sheet-biden-harris-administration-increases-lending-to-small-businesses-in-need-announces-changes-to-ppp-to-further-promote-equitable-access-to-relief/ [https://perma.cc/7SQR-KHAA].

21. *See* DEDRICK ASANTE-MUHAMMAD ET AL., NAT'L CMTY. REINVESTMENT COAL., BLACK ENTREPRENEURSHIP'S LETHAL PRE-EXISTING CONDITION: THE RACIAL WEALTH DIVIDE DURING THE COVID CRISIS 3 (2021) (on file with author).

22. *See id.*

23. Patrick Kennedy & Harrison Wheeler, *Neighborhood-Level Investment from the U.S. Opportunity Zone Program: Early Evidence* 3 (U.S. Cong. Joint Comm. on Tax'n, Working Paper, 2021).

24. *See id.*

25. *See id.* at 9 ("Overall, the data show that OZ investment is highly spatially concentrated, is directed toward the real estate and construction sectors, and gravitates toward tracts with relatively higher educational attainment, income, density, and pre-existing upward income and population growth trends.").

26. Professor Michelle D. Layser has made similar observations about how incentives that direct capital to already gentrifying areas likely do not reflect the most efficient use of taxpayer subsidies for development. *See* Michelle D. Layser, *Subsidizing Gentrification: A Spatial Analysis of Place-Based Tax Incentives*, 12 U.C. IRVINE L. REV. (forthcoming 2021) (using spatial analysis of New Markets Tax Credit

Kresge Foundation's Aaron Seybert, among others, has continued to offer positive proposals for Opportunity Zone reform. "Nothing good grows in the dark," Seybert wrote in a June 10, 2021 piece, "especially as it relates to low-income people and communities."[27] He went on to write, "[The] O[pportunity] Z[one] is just the latest example of policymakers and investors doing something *to* low-income communities rather than *with* them."[28] Seybert's critique of the Opportunity Zone as lacking transparency and participation is a criticism that the Biden Administration will need to respond to.

While different and designed to respond to different crises, this Essay argues that there is value in making a head-to-head comparison between the Paycheck Protection Program and the Opportunity Zone incentive. In each case, Congress legislated a national economic development mandate. Such bills brought the possibility of a consistent application of economic development law across all states.[29] And where each law falls short, perhaps there is room to learn from the other's successes and strengths.

This research has implications for state and local government scholars, lawmakers, and policy advocates for two reasons. First, with respect to the COVID-19 pandemic response, states and cities have in many instances supplemented Paycheck Protection Program funds with their own grants or loan programs.[30] State and local elected officials and policymakers can benefit from an understanding of how

---

Projects to show how tax subsidies tend to flow to already gentrifying areas to the exclusion of those areas most in need of capital).

27. Aaron Seybert, *Mission, Money & Markets: Is 2021 a Turning Point for the Opportunity Zones Incentive?*, KRESGE FOUND. (June 10, 2021), https://kresge.org/news-views/mission-money-markets-is-2021-a-turning-point-for-the-opportunity-zones-incentive/ [https://perma.cc/M6L4-S3RB].

28. *Id.*

29. In many cases, states have supplemented both the Paycheck Protection Program and the Opportunity Zone incentive with their own state-level laws. *See* U.S. DEP'T OF HOUS. & DEV., OPPORTUNITY ZONES BEST PRACTICES REPORT TO THE PRESIDENT FROM THE WHITE HOUSE OPPORTUNITY AND REVITALIZATION COUNCIL 15–20 (2020), https://opportunityzones.hud.gov/sites/opportunityzones.hud.gov/files/documents/OZ_Best_Practices_Report.pdf [https://perma.cc/L96K-4A2N]. Also, it is worth noting that in the case of the Opportunity Zone, much power and action is delegated both to states and private actors. *See id.* at 21–36. Whether and to what extent there even is a consistent federal approach is a subject for further research and scholarly discussion.

30. *See, e.g.*, *COVID-19 Grants for Massachusetts Small Businesses*, MASS GROWTH CAP. CORP., https://www.empoweringsmallbusiness.org/covid-19-response/covid-19-grants-massachusetts-small-businesses-0 [https://perma.cc/5DU9-V4DR] (last visited July 15, 2021).

they can design such capital interventions to reach the most disadvantaged businesses in the most hard-hit areas.

Second, with respect to the Opportunity Zone incentive, a movement is afoot for states to limit the state tax benefits of the federal incentive. For example, a number of states have "decoupled" the federal benefits of the Opportunity Zone incentive from their state, and in some cases local, income and capital gains tax laws.[31] The process of tax decoupling is when a state protects particular aspects of its tax laws from lost revenue caused by a change in federal law.[32] Currently, five states have decoupled their state personal income taxes from federal Opportunity Zone incentives.[33] It is too early to tell if this effort to limit state tax benefits may or may not be effective in crafting incentives to reach disadvantaged businesses in core urban and rural areas of high poverty.

This Essay contributes to the growing Paycheck Protection Program and Opportunity Zone literature by offering an additional layer of critique and comparison not previously explored.[34] Specifically, it

---

31. *See Opportunity Zones Resource Center, State Tax Conformity — Personal Income*, NOVOGRADAC, https://www.novoco.com/resource-centers/opportunity-zone-resource-center/guidance/state-tax-code-conformity-personal-income [https://perma.cc/4HKT-QGSW] (last visited July 15, 2021).

32. Elizabeth McNichol, *Many States are Decoupling from the Federal Estate Tax Cut*, CTR. ON BUDGET & POL'Y PRIORITIES (May 23, 2002), https://www.cbpp.org/research/many-states-are-decoupling-from-the-federal-estate-tax-cut#:~:text=Decoupling%20means%20protecting%20the%20relevant%20parts%20of%20their,retained%20their%20estate%20taxes%20after%20the%20federal%20changes [https://perma.cc/8L8A-BQVV] (discussing how 17 states had decoupled from federal estate taxes changes thereby retaining the existing state-level taxes following changes to the federal tax law).

33. *Id.* Nine states lack a state income tax and generally do not tax capital gains. John Waggoner, *9 States That Don't Have an Income Tax*, AARP (Apr. 8, 2021), https://www.aarp.org/money/taxes/info-2020/states-without-an-income-tax.html [https://perma.cc/B2UM-7A56] (listing Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington and Wyoming as states without an income tax); *see also Capital Gains Tax by State 2021*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/capital-gains-tax-by-state [https://perma.cc/6EVL-7PYY] (last visited Sept. 26, 2021) (listing the same nine states as states without a capital gains tax).

34. *See, e.g.*, Imene Benlagha & Bichchau Michelle Nguyen, *Impact of the Paycheck Protection Program on Dermatology Practices During the COVID-19 Pandemic*, 84 J. AM. ACAD. DERMATOLOGY 775 (2021); R. Glenn Hubbard & Michael R. Strain, *Has the Paycheck Protection Program Succeeded?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28032, 2020); Ilya Beylin, The Ignominious Life of the Paycheck Protection Program (July 26, 2020) (unpublished manuscript); Emily Ryder Perlmeter, *Who Benefitted from the Paycheck Protection Program? Our Texas Analysis Offers an Early Look*, FED. RSRV. BANK DALL. (Sept. 4, 2020), https://www.dallasfed.org/cd/communities/2020/0904.aspx [https://perma.cc/QJJ9-

extends the analysis of place-based and people-based programs to current efforts to boost the economy during the COVID-19 pandemic and improve economic life in areas that failed to recover following the Great Recession.

Further, it adds to the legal academic discussion about place-based and people-based economic development strategies. Generally, place-based strategies direct capital and resources to locales through a selection or designation process. On the other hand, people-based strategies involve establishing criteria for eligible individuals and families. A central framework implemented in this Essay is that both place-based and people-based strategies have merit and their respective strengths ought to be evaluated and implemented by lawmakers.

This Essay is organized in the following way. First, it discusses the need for government intervention in the economy both in periods of market failure and in times of crisis. Next, it explores the specific problems that government intervention attempts to solve both through people-based and place-based economic development laws. Finally, it suggests ways that government can combine both place-based and people-based strategies to achieve economic development success for industries and places that most lack access to capital.

I. DEFINING THE NEED FOR GOVERNMENT INTERVENTION

There are short-, mid-, and long-term socio-economic challenges that lawmakers often argue can be solved by government intervention. During the first year of the Biden Administration, inchoate critiques are emerging about a shift back to large-scale governmental interventions to spur the economy.[35] Size of the intervention aside, both major political parties have agreed about the need for government response in times of market failures and in times of crisis.

A. Market Failures

In recent decades, both major political parties have supported government interventions to drive growth amid failures in particular

2YR8]. For examples of the growing Opportunity Zone literature, see Michelle D. Layser, *How Place-Based Tax Incentives Can Reduce Geographic Inequality*, TAX L. REV. (forthcoming 2021), and other contributions to this special issue of the *Fordham Urban Law Journal*.

35. *See, e.g.*, Jacob M. Schlesinger & Andrew Restuccia, *Behind Biden's Pig Plans: Belief That Government Can Drive Growth*, WALL ST. J. (Mar. 30, 2021, 11:37 AM), https://www.wsj.com/articles/behind-bidens-big-plans-belief-that-government-can-drive-growth-11617118656 [https://perma.cc/VA5S-H6HF].

markets. The Low-Income Housing Tax Credit, for instance, was adopted in the 1986 tax reform to create affordable housing units in areas where affordable housing was unavailable.[36] At the state level, legislators regularly allocate more than $80 billion per year to attract and retain employers,[37] a practice that can generally be understood as intervening in industrial policy to supplement market forces, arguably in response to market failures.[38]

In other instances, federal government policy interventions have attempted to remedy the spatial mismatch between places in need of economic growth and the markers of economic growth: capital investment and population flows. The New Markets Tax Credit, first passed by Congress in the 1990s, advanced economic growth in capital-starved places through the assistance and intervention of Community Development Entities.[39] The U.S. Treasury classifies certain firms that demonstrate a commitment to serving low-income communities as Community Development Entities.[40] Community Development

---

36. For a discussion of the purpose, structure, and history of the Low-Income Housing Tax Credit, see Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871, 883 (1993) (presenting and analyzing the Low-Income Housing Tax Credit).

37. Louise Story, Tiff Fehr & Derek Watkins, *United States of Subsidies: Explore the Data*, N.Y. TIMES, http://archive.nytimes.com/www.nytimes.com/interactive/2012/12/01/us/government-incentives.html#home [https://perma.cc/A8ZA-ZQ8R] (last visited Sept. 26, 2021).

38. As the Author writes this in July 2021, current media attention on the successful Virgin Galactic spaceflight has centered attention on the state of New Mexico allocating $225 million to build the spaceport from which the spacecraft was launched. Kent Walz, *The Long, Rocky Countdown to Sunday's Historic Launch*, ALBUQUERQUE J. (July 10, 2021, 4:09 PM), https://www.abqjournal.com/2408280/the-long-and-rocky-countdown-to-sundays-launch.html [https://perma.cc/RW7V-4UMQ]. Governor Bill Richardson discussed the "gamble" the state had taken by building the spaceport "to build another industry for New Mexico." *Id.* This example shows efforts some elected officials will take to grow new markets and industry to replace or augment other industries. Arguably, such activities protect against the ups and downs caused by market cycles, including market failures.

39. A recent study indicates that a majority of New Markets Tax Credits have been allocated to Community Development Financial Institutions and other mission-driven lenders (as opposed to privately-held, for-profit entities). BRETT THEODOS ET AL., URB. INST., WHICH COMMUNITY DEVELOPMENT ENTITIES RECEIVE NMTC FUNDING: EVALUATING THE NEW MARKETS TAX PROGRAM? 4 (2021); *see also* Carol Steinbach, *The CDC Tax Credit: An Effective Tool For Attracting Private Resources to Community Economic Development*, BROOKINGS INST. (Aug. 1, 1998), https://www.brookings.edu/research/the-cdc-tax-credit-an-effective-tool-for-attracting-private-resources-to-community-economic-development/ [https://perma.cc/G7A9-7X8C].

40. BRETT THEODOS ET AL., *supra* note 39, at 2.

Entities can be granted tax exemption by the Internal Revenue Service.[41]

Recent studies tell slightly different stories with respect to the uses and location of New Markets Tax Credits projects. In one study, analysis indicates that the location of New Markets Tax Credit investments tends to be in poorer communities, but also central commercial areas with higher jobs and lower rates of home ownership.[42] In another, spatial analysis indicates that New Markets Tax Credit projects may disproportionately flow to gentrifying census tracts.[43] With respect to market failures, the Opportunity Zone was adopted to remedy economic inequality for places that were still struggling following the recovery after the Great Recession.[44]

Of course, market failures and economic crises, which are discussed below in Section I.B.ii, can interrelate and compound when occurring at the same time. Problems stemming from market failures and concurrent crises can affect particular communities, places, and groups. Also, simultaneous market failures and economic crises can lead law and policymakers to act.

Some ways that market failures and economic crises are similar are illustrated in the behavior and actions not only of government but also private companies to address such problems. Netflix, for instance, in response to growing gaps in both racial health and wealth invested $25 million with Local Initiatives Support Corporation in June 2020.[45] The investment, part of an effort to allocate $100 million to support capital access among Black entrepreneurs, shifted 2% of Netflix's cash holdings from global banks to support Black-owned lenders and businesses, which will then expand capital access and opportunity in Black communities.[46] Part market failure, part economic crisis, Black businesses can benefit from private companies making similar investments in lenders that are mission-driven to increase capital access.

---

41. Steinbach, *supra* note 39.

42. BRETT THEODOS ET AL., WHERE DO NEW MARKETS TAX CREDIT PROJECTS GO? 10 (2021) ("This indicates that NMTC projects tend to be disproportionately located in commercial areas that people travel to from outside of the neighborhood for work.").

43. *See* Layser, *supra* note 26, at 16–17.

44. JARED BERNSTEIN & KEVIN A. HASSETT, UNLOCKING PRIVATE CAPITAL TO FACILITATE ECONOMIC GROWTH IN DISTRESSED AREAS 16 (2015).

45. *Netflix, LISC Partner on $25M for Black-owned Banks, Communities*, LISC (June 30, 2021), https://www.lisc.org/our-stories/story/netflix-lisc-partner-25m-black-owned-banks-communities/ [https://perma.cc/W3PD-H7S6].

46. *Id.*

B. Crises

i. Public Health

The consequences of the economic shutdown following the start of the global COVID-19 pandemic are truly shocking. Small businesses — including restaurants, hospitality, travel, and other sectors — saw their sales and revenue plummet as state laws, exercising police power, forced them to close.[47] Federal stimulus spending following stay-at-home orders was unprecedented in U.S. history.[48] Particular policies geared to support small businesses during this time emerged to mixed results.[49]

In particular sectors of the restaurant industry, for instance, the harm was especially shocking. The decline was particularly severe for Chinese restaurants facing a backlash due to scapegoating.[50] An April 2020 report indicated that roughly half of Chinese restaurants had closed nationwide, resulting in part from prejudice and consumer misperception about the origins of the virus.[51] Many of these

---

47. *See, e.g.*, Exec. Order N-33-20 (2020) (California) (California was the first state to issue a stay-at-home order on March 19, 2020, due to the public health crisis caused by the COVID-19 pandemic.); FED. RSRV. BANK OF ATLANTA ET AL., SMALL BUSINESS CREDIT SURVEY: 2021 REPORT ON EMPLOYER FIRMS 4 (2021) [hereinafter SMALL BUSINESS CREDIT SURVEY].

48. Lawrence Delevingne & Howard Schneider, *U.S. Stimulus Package Is Biggest Ever, but May Not Be Big Enough*, REUTERS (Mar. 30, 2020, 1:06 AM), https://www.reuters.com/article/us-health-coronavirus-fed-stimulus-analy/u-s-stimulus-package-is-biggest-ever-but-may-not-be-big-enough-idUSKBN21H0E7 [https://perma.cc/749A-T392].

49. *See* SMALL BUSINESS CREDIT SURVEY, *supra* note 47, at 13 (noting that despite government assistance, small business owners still had concerns about keeping their businesses solvent as the pandemic progressed).

50. In one case, the Chinese dining chain P.F. Chang's received a Paycheck Protection Program loan, yet many less well capitalized restaurants closed. *See* Joyce M. Rosenberg, *Small Business Program Scrutinized for Loans to Big Firms*, WASH. POST (July 7, 2020), https://www.washingtonpost.com/business/small-business-program-scrutinized-for-loans-to-big-firms/2020/07/07/9dd274e4-c08e-11ea-8908-68a2b9eae9e0_story.html [https://perma.cc/9NXJ-JGPP]; *see also* The Journal, *An Asian-American Business Owner on a Challenging Year*, WALL ST. J., at 08:12 (Mar. 24, 2021, 4:41 PM), https://www.wsj.com/podcasts/the-journal/an-asian-american-business-owner-on-a-challenging-year/02df5619-607b-46d6-8242-53fbd9219526 [https://perma.cc/3ELE-ADTH].

51. Peter Romeo, *Half the Nation's Chinese Restaurants Have Closed, Study Finds*, REST. BUS. (Apr. 13, 2020), https://www.restaurantbusinessonline.com/operations/half-nations-chinese-restaurants-have-closed-study-finds#:~:text=Roughly%20half%20the%20Chinese%20restaurants,according%20to%20a%20new%20study [https://perma.cc/N4UE-LVY4] (reporting credit card processing data indicating that 51% of Chinese restaurants closed during the first week

businesses closed before federal assistance through the Paycheck Protection Program was available.

A nuanced discussion about when it is appropriate for government to intervene to support businesses in a public health crisis was largely avoided. Congress intended to distribute dollars to (1) keep workers employed to the extent possible and (2), to the extent workers were laid off, to provide unemployment insurance and stimulus funds to support individual and family economic stability.[52] The failure of the government's response to provide financial support to the most disadvantaged businesses indicates overcaution and need for further attention and study.[53]

ii. Economic

When is it appropriate for government to intervene to support small businesses in particular places during times of economic crisis? A working hypothesis in answering this question likely starts with the following: it depends on the nature of the economic crisis and particular industries most affected. During the Great Recession, for instance, housing-related programs, including efforts to keep homeowners in their homes by avoiding foreclosure, increased.[54] In the case of the Great Depression, it is difficult to identify with specificity the causes, nature, and particular impacts of the economic crisis.[55] Rather than offer extensive data here about the appropriateness of government interventions, the Author intends to present questions to frame the current discussion in this Essay and offer ideas to pursue in future research.

In summary, government intervention in economies of particular places is necessary both in times of market failures and in times of

---

of April 2020 compared to only 19% of restaurants with heavy off-premises sales nationally).

52. For a discussion of the impact of the CARES Act on housing instability, see Michelle D. Layser et al., *Mitigating Housing Instability During a Pandemic*, 99 OR. L. REV. 445 (2021) (describing how housing instability continued following the COVID-19 pandemic relief response).

53. For a more comprehensive discussion about ways that government support for small businesses often excludes the most disadvantaged ones, please see De Barbieri, *Excluding Disadvantaged Businesses*, *supra* note 18, at 919.

54. *See, e.g.*, *Troubled Assets Relief Program (TARP)*, U.S. DEP'T TREASURY, https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/hamp.aspx [https://perma.cc/RQ8J-6WNF] (last visited Sept. 26, 2021).

55. The cause of the Great Depression is of much debate among economists, historians, and polical scientists. *See* PETER TEMIN, LESSONS FROM THE GREAT DEPRESSION 1 (1991).

crisis. Crises that involve public health, as well as crises that are purely economic in nature, are ripe for government response. The next Part defines the problem to be solved through place-based and people-based strategies for economic development.

II. GOVERNMENT INTERVENTION TO SOLVE GEOGRAPHIC INEQUALITY AMONG SMALL BUSINESS OWNERS

A functional problem all elected officials face is the need to at least appear to constituents that they are delivering jobs to local economies.[56] This is true for federal elected officials — those in Congress and the president — but even more so at the local level. Such forces create so-called "incentives to pander" to industry.[57] Political problems aside, it is important to note underlying factors that influence law and policy in the sphere of economic development.

There are both people-based and place-based strategies to engage in economic development.[58] People-based strategies relate to interventions to support individuals and families. Place-based interventions focus on geographic inequality in particular.[59] This Part frames the problem of creating economic development using people-based and place-based strategies. Thus, it enters into the debate about how best can people-based and place-based economic development strategies lead to economic development.

A. People-Based Strategies for Economic Development

People-based strategies for economic development focus on individual and family support. The economic problems people-based

56. It is difficult to conclusively prove that politicians actually deliver jobs to local areas. In Washington State, for instance, aerospace manufacturer Boeing moved more net jobs out of the state following a $9 billion tax package passed by the state government, the largest tax incentive offered to a private company. *See* Reid Wilson, *Washington Just Awarded the Largest State Tax Subsidy in U.S. History*, WASH. POST (Nov. 12, 2013), https://www.washingtonpost.com/blogs/govbeat/wp/2013/11/12/washington-just-awarded-the-largest-state-tax-subsidy-in-u-s-history/ [https://perma.cc/5N6W-6BRV]. For a discussion of how states and cities influence business location decisions, see Edward W. De Barbieri, *Lawmakers as Job Buyers*, 88 FORDHAM L. REV. 15, 19 (2019).

57. *See* NATHAN M. JENSEN & EDMUND J. MALESKY, INCENTIVES TO PANDER: HOW POLITICIANS USE CORPORATE WELFARE FOR POLITICAL GAIN 5 (2018).

58. For a discussion of people-based and placed-based strategies in the context of housing and community development in particular, see Nestor M. Davidson, *Reconciling People and Place in Housing and Community Development Policy,* 16 GEO J. ON POVERTY L. & POL'Y 1, 1 (2009).

59. For a deep dive into this point, see Layser, *supra* note 34 (manuscript at 1).

strategies seek to remedy are typically those directly related to poverty, homelessness, hunger, and other social and economic needs that result from market failures and crises. The Earned Income Tax Credit, for instance, provides income in the form of a refundable tax credit to individuals and families with a certain amount of income from employment.[60]

Some people-based strategies are designed to bring people to certain cities or states. While the tools mentioned below are tied to particular places, they benefit people throughout the given jurisdiction, and not just those people living in a designated census tract. It is often the case with place-based tools that laws lead to granular census tract level selections or designations.

Topeka, Kansas, for instance, will contribute up to $15,000 to employees who are hired and stay in the city for over a year.[61] Maine, in an effort to attract recent college graduates with student loan debt, covers a portion of college student debt payments for new arrivals.[62] Alaska pays a dividend based on oil production to residents.[63] Such programs indicate the variety of people-based support strategies implemented by states and local governments.

Using people-based strategies to develop and support small businesses is common too. The Small Business Administration's 7(a) loan program guarantees repayment of funds borrowed to grow or expand small businesses.[64] The Paycheck Protection Program drastically expanded the funds available through the 7(a) program during the COVID-19 pandemic response.[65]

---

60. *See* MICHELLE LYON DRUMBL, TAX CREDITS FOR THE WORKING POOR: A CALL FOR REFORM 2–3 (2019). The Earned Income Tax Credit was expanded under the American Rescue Plan. *See* MOLLY F. SHERLOCK, MARGOT L. CRANDALL-HOLLICK & JANE G. GRAVELLE., CONG. RSCH. SERV., R46680, THE AMERICAN RESCUE PLAN ACT OF 2021 (ARPA; P.L. 117-2): TITLE IX, SUBTITLE G — TAX PROVISIONS RELATED TO PROMOTING ECONOMIC SECURITY (2021).

61. *See* CHOOSE TOPEKA, https://choosetopeka.com/apply [https://perma.cc/RD38-8E74] (last visited Aug. 8, 2021) (inviting prospective relocators to apply for Topeka's program that pays new residents who stay at least one year up to $15,000 in conjunction with employers who hire those workers).

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

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

64. *See* *Types of 7(a) Loans*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/partners/lenders/7a-loan-program/types-7a-loans [https://perma.cc/8YML-HYYE] (last visited Aug. 9, 2021).

65. *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286–87 (2020).

Such tools have limitations. As discussed above, the Paycheck Protection Program has not solved small business owner challenges during the COVID-19 pandemic. Small landlords are struggling to collect rents from tenants during the pandemic and are unable to evict tenants due to federal and state eviction moratoriums.[66] Campaigns have been launched to support Chinese restaurant businesses, which closed during the COVID-19 outbreak and were unable to access Paycheck Protection Program funds in time.[67]

B. Place-Based Strategies for Economic Development

Other laws, such as the Opportunity Zone incentive, the New Markets Tax Credit, among other tools, use a place-based strategy for economic development.[68] The theory underlying place-based economic development strategies is that certain areas defined by geographic boundaries — census tracts, streets, and neighborhoods — where capital and people have fled need governmental intervention. A neoliberal ideology undergirds recent place-based economic development strategies.[69]

Yet, critiques of place-based economic development strategies, including the Opportunity Zone incentive, are legion. Scholarly critiques focus on the spatial mismatch between where Opportunity Zones create incentives to invest and the needs of residents in accessing jobs and other infrastructure.[70] Not only are the uses of funds invested

---

66. *See, e.g.*, Eli Saslow, *The Battle for 1042 Cutler Street*, WASH. POST (May 1, 2021), https://www.washingtonpost.com/nation/2021/05/01/landlord-tenant-eviction-moratorium-pandemic/ [https://perma.cc/3BA6-7FSZ]. In one extreme case, a landlord kidnapped tenants, zip-tied their hands, and left them in a cemetery 30 miles away from the tenants' apartment. Brendan J. Lyons, *Police: Albany Landlord Tied Up, 'Evicted' Sleeping Tenants, Dumping Them in Cemetery*, TIMES UNION (Feb. 26, 2021, 8:53 AM), https://www.timesunion.com/news/article/Albany-landlord-tied-up-evicted-sleeping-15972981.php [https://perma.cc/G65Y-SJ9X].

67. *See, e.g.*, Cathy Erway, *'This Is the Critical Moment' Inside New Efforts to Save Chinatown's Imperiled Businesses*, GRUB ST. (Apr. 9, 2020), https://www.grubstreet.com/2020/04/activists-launch-new-efforts-to-save-chinatown-businesses.html [https://perma.cc/5FMB-265R].

68. For a discussion of the New Markets Tax Credit and its differences with the Opportunity Zone, see Michelle D. Layser, *Nonprofit Participation in Place-Based Tax Incentive Transactions*, 48 FORDHAM URB. L.J. (forthcoming Oct. 2021).

69. *See* TIMOTHY P. R. WEAVER, BLAZING THE NEOLIBERAL TRAIL: URBAN POLITICAL DEVELOPMENT IN THE UNITED STATES AND THE UNITED KINGDOM 202 (2015) (discussing the emergence of market-based, neoliberal ideology in shifts to place-based tax incentive tools for economic development); *see also* 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, 787–88 (2019).

70. *See* Layser, *supra* note 34 (manuscript at 16).

in Opportunity Zones largely unregulated, but there are also no requirements that local residents or community-based organizations participate in project planning.[71] Finally, the Opportunity Zone law lacks transparency and reporting measures to determine the success or failure of the tool.[72]

A problem to be solved through place-based economic development strategies is how to bring capital and people to places where capital and people have fled. The problem in implementing such tools and strategies is that states and cities often fail at regulating industrial policy because of power imbalances between well-resourced employers and localities that have little to offer in terms of a competitive advantage.[73] Congress missed the mark in delivering capital through place-based economic development strategies, such as the Opportunity Zone incentive, to the localities that need it most.[74]

III. APPROACHING GOVERNMENT ECONOMIC DEVELOPMENT THROUGH PLACE-BASED AND PEOPLE-BASED STRATEGIES

What might a place-based and people-based approach to supporting small businesses look like? Challenges exist in crafting legislation to spur economic drivers — including support to marginalized business owners — in particular areas. Also, lessons can be learned from Opportunity Zone projects — and from proposals to improve the Opportunity Zone incentive — to make funds reach deeper into communities that need it. And finally, there are lessons to be learned from the Paycheck Protection Program, with respect to addressing geographic inequality.

71. *See* De Barbieri, *Opportunism Zones*, *supra* note 18, at 141.

72. *Id.* at 135.

73. For instance, although there were 238 proposals in North America from cities and states to attract Amazon's second headquarters, perhaps unsurprisingly, the company selected two of the largest metropolitan areas — New York City, and Northern Virginia/Washington, D.C. — as its second and third headquarters. *See* Mary Hanbury, *What Amazon's HQ2 Finalists Have Proposed*, Bus. INSIDER (Oct. 19, 2018, 11:58 AM), https://www.businessinsider.com/amazon-hq2-20-finalist-cities-revealed-2018-1?op=1 [https://perma.cc/WL36-CJRN]. The backlash to the Amazon HQ2 included a request that companies highlight local assets including the education of their workforce and the level of tax incentives they would provide. *See* Joseph Parilla, *Amazon HQ2: How Did We Get Here? What Comes Next?*, BROOKINGS INST. (Aug. 28, 2018), https://www.brookings.edu/research/amazon-hq2-how-did-we-get-here-what-comes-next/ [https://perma.cc/77B7-JZ7C].

74. *See* Kennedy & Wheeler, *supra* note 23 (presenting data indicating how only a small percentage of Opportunity Zones are receiving any capital investment).

A. Supporting Small Businesses in Place

A legislative attempt to aid particular small business owners in particular places most likely would begin with carefully crafted definitions. For example, a law may aid businesses with under a certain number of employees, say 20, in particular zip codes or census tracts. A law may also include a requirement that a business attest to a particular need caused by a market failure or crisis. A challenge to this approach, however, is to exclude businesses that do not necessarily need support but will take it if offered at a less-than-market cost.[75]

Analysis by the Dallas Federal Reserve indicates that assessing how businesses fared in accessing Paycheck Protection Program funds is mixed.[76] Only 11% of borrowers in Texas self-reported the race of the borrower.[77] About a quarter, or 24%, reported borrower gender.[78] This makes assessing the impact of the Paycheck Protection Program across race and gender a difficult proposition.[79] Separately, with respect to the geographic location where Paycheck Protection Program borrowers reside, the Small Business Administration's reports indicate that across the country 27% of loans went to low- and moderate-income areas.[80]

B. Implementing the Opportunity Zone Incentive and Paycheck Protection Program to Reduce Small Business Geographic Inequality

Among funds distributed through the Paycheck Protection Program, data suggest there was a slight positive relationship between Paycheck Protection Program loan receipts per business and the minority share of the population.[81] However, evidence also suggested that funds from

---

75. Evidence from the Paycheck Protection Program, for instance, indicates that hospitality and healthcare sectors, which faced significant declines in business due to lockdowns and social distancing, had a high proportion of Paycheck Protection Loans in some states. *See* Perlmeter, *supra* note 34.

76. *See id.*

77. *Id.*

78. *Id.*

79. *See id.*

80. Press Release, U.S. Small Bus. Admin., SBA Achieves Historic Small Business Lending for Fiscal Year 2020 (Oct. 28, 2020), https://www.sba.gov/article/2020/oct/28/sba-achieves-historic-small-business-lending-fiscal-year-2020 [https://perma.cc/JW8P-JKHW].

81. Robert W. Fairlie & Frank Fossen, *Did the $660 Billion Paycheck Protection Program and $220 Billion Economic Injury Disaster Loan Program Get Disbursed to Minority Communities in the Early Stages of COVID-19?* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28321, 2021),

the first round of the Paycheck Protection Program went disproportionately to non-minority business owners.[82] It was not until the second round of Paycheck Protection Program funds were issued that a disproportionate share of funds went to minority business owners[83] This is relevant because businesses owned by marginalized owners in general did not receive funds until later on in the pandemic after they had already suffered during the early and most challenging phase of the crisis.

Much of the analysis of Paycheck Protection Program data with respect to race was limited since only 10% of borrowers and lenders reported racial data.[84] Robert Fairlie and Frank Fossen point out that more research needs to address the lack of racial data among Paycheck Protection Program borrowers and lenders.[85] Another data point missing is demographic information about borrowers who were denied Paycheck Protection Program funds.[86] Nevertheless, a significant takeaway from the Paycheck Protection Program experiment is that *how* the government distributes funds is as important as the fact that the government *is* distributing funds.[87]

Congress and the President have taken steps to direct later rounds of Paycheck Protection Program funds to small businesses with greater needs for funds but which experienced difficulty accessing funds. For example, the Economic Aid Act that launched a third round of Paycheck Protection Program funds on December 27, 2020, included specific set-asides of funds for community development financial institutions, as well as a head start for these lenders.[88] In addition, in

---

https://www.nber.org/system/files/working_papers/w28321/w28321.pdf [https://perma.cc/HW5K-843Y].

82. *Id.*

83. *Id.*

84. Rachel Atkins, Lisa Cook & Robert Seamans, *Discrimination in Lending? Evidence from the Paycheck Protection Program*, SMALL BUS. ECON. (2021) ("One challenge with the PPP loan data is that race is reported for only 10% of the loans.").

85. *See* Fairlie & Fossen, *supra* note 81, at 18–19.

86. Anneliese Lederer & Sara Oros, *Lending Discrimination Within the Paycheck Protection Program*, NAT'L CMTY. INV. COAL., https://www.ncrc.org/lending-discrimination-within-the-paycheck-protection-program/ [https://perma.cc/5LU2-M73E] (last visited Sept. 26, 2021).

87. *See* Fairlie & Fossen, *supra* note 81, at 2.

88. Jim Probasco, *Third-Round Paycheck Protection Program (PPP) Funding: What Is It and How to Apply*, INVESTOPEDIA (June 22, 2021), https://www.investopedia.com/your-guide-to-the-paycheck-protection-program-ppp-and-how-to-apply-4802195 [https://perma.cc/5G65-LGXJ].

February 2021, the Biden Administration enacted a 14-day exclusive application period for small businesses with fewer than 20 employees.[89]

Further research is needed to identify the successes or failures of these changes to the Paycheck Protection Program. However, they demonstrate the policy possibilities in implementing a people-based economic development support. A focus on businesses with fewer than 20 employees is clearly an attempt to focus on very small businesses. However, some highly profitable companies have fewer than 20 employees. Hedge funds or other financial services firms may have both few employees and still earn significant revenues.[90] Ensuring that funds reach small businesses in need, perhaps through a focus on mission-based lenders like community economic development financial institutions, could go a long way to a more successful policy result.

Overlaying these lessons learned from the Paycheck Protection Program with the Opportunity Zone incentive could prove instructive. Since the Opportunity Zone incentive allows for investment in small business property, including share and percentage interest ownership, Congress could provide additional limits on the use of Opportunity Zone funds on firms with a certain number of employees.[91] Further, Congress could require the involvement of a community development financial institution to speak to the bona fides of a project at improving the lives of the people living in the Opportunity Zone, and not just outside investors.[92]

In addition to focusing borrowing on firms with fewer than 20 employees, the Biden Administration adopted a bipartisan reform from Congress that eliminated the exclusionary restriction that prevented businesses from borrowing funds if a significant owner had a felony in the past year.[93] In addition, the administration removed the limitation that borrowers delinquent on their federal student loans were ineligible from accessing funds.[94] To the extent that these reforms address exclusion, such measures ought to be explored in place-based

89. *See White House Fact Sheet, Equitable Access*, *supra* note 20.

90. Sophisticated investment management firms, family offices, and private capital firms do not necessarily need a large staff and high number of employees to manage significant resources. *Hedge Funds in the US — Employment Statistics 2003–2026*, IBIS WORLD (June 25, 2020), https://www.ibisworld.com/industry-statistics/employment/hedge-funds-united-states/ [https://perma.cc/9A86-VSQD] ("The average Hedge Funds business in the US has 8.1 employees.").

91. *See* De Barbieri, *Opportunism Zones*, *supra* note 18, at 142–46.

92. *See id.* at 153.

93. *See White House Fact Sheet, Equitable Access*, *supra* note 20.

94. *See id.*

strategies, such as the Opportunity Zone incentive, to the extent that place-based strategies exclude funding for marginalized business owners. Again, placing focus on specific project uses within a specific area is not simple. But a focus on avoiding exclusion may lend itself to a simple legislative fix.

COVID-19 reforms for Opportunity Zone investors essentially doubled down on the existing program without attempting to make improvements for those experiencing harm during the pandemic. The Internal Revenue Service issued a notice extending key deadlines for Qualified Opportunity Funds to comply with deadlines.[95] Such reforms offered some certainty for investors,[96] yet offered little directly for improving the lives of residents within designated zones.

This reform effort merely extends the opportunity to investors to earn returns that may have been reduced because of the COVID-19 pandemic.[97] It amounts to government intervention to ensure those with investments are able to earn without ensuring that residents of

95. The IRS notice extended the relief granted by a previous notice:

> For all taxpayers' whose last day of their 180-day window to invest capital gains was from April 1, 2020, to March 31, 2021, the 180-day deadline is now March 31. The 30-month substantial improvement period is now tolled from April 1, 2020, through March 31, 2021. A failure by a QOF to satisfy the 90% investment standard is considered reasonable if the last day of its first six-month period of a taxable year or last day of a taxable year falls from April 1, 2020, through June 30, 2021, and the QOF meets other requirements. All OZ businesses holding working capital assets intended to be covered by the working capital safe harbor before June 30, 2021, receive up to an additional 24 months. If a QOF's 12-month reinvestment period includes June 30, 2020, the QOF receives up to an additional 12 months to reinvest.
>
> The notice addresses many of the issues included in an Opportunity Zones Working Group letter sent to the IRS Dec. 23, 2020. "Treasury's guidance provides relief that opportunity zones stakeholders have sought and will enable the incentive to continue to provide capital in areas of need during our nation's recovery from the COVID-19 pandemic," said Michael J. Novogradac, CPA, managing partner at Novogradac.

IRS Notice Provides COVID-19 Relief to QOFs, OZ Investors, OZ Businesses, NOVOGRADAC (Jan. 19, 2021, 4:00 PM), https://www.novoco.com/news/irs-notice-provides-covid-19-relief-qofs-oz-investors-oz-businesses [https://perma.cc/X2RL-APCP].

96. Lisa M. Starczewski & Mitchell I. Horowitz, IRS Further Extends Opportunity Zone Timelines, BUCHANAN INGERSOLL ROONEY (Jan. 21, 2021), https://www.bipc.com/irs-further-extends-opportunity-zone-timelines [https://perma.cc/54T3-H599] (explaining the benefits to investors); *see also* Jimmy Atkinson, *Pros and Cons of the 180-day Opportunity Zone Deadline* Extension, OPPORTUNITY ZONE DATABASE (June 8, 2020), https://opportunitydb.com/2020/06/irs-notice-094/ [https://perma.cc/QUN5-CFJ8] ("[T]he investor now has more time to invest into an opportunity zone fund.").

97. *See supra* note 96.

Opportunity Zones benefit. Compared to the Paycheck Protection Program, the Opportunity Zone incentive misses the mark with respect to measuring impact and return potential.

CONCLUSION

This Essay has explored the question of how the government intervenes to support a particular type of market participant, the small business, in areas experiencing capital flight. Viewing interventions through the lens of the Opportunity Zone tax incentive and the Paycheck Protection Program forgivable loan, this Essay has classed interventions into both place-based and people-based economic development strategies. It has been argued that some of the reforms to the Paycheck Protection Program to avoid exclusion among borrowers could also be enacted through the Opportunity Zone incentive. Combining place-based and people-based economic development strategies can prove complex in implementation. However, such a combination holds the possibility for success and increased results, particularly in areas where capital and people have fled.

As this Essay is published in the fall of 2021, it is likely that this year is an inflection point with respect to how the federal government views economic development law and policy. Several aspects play into this change in perspective. First, the federal government is poised to make significant investments in infrastructure spending. Increased federal dollars flowing towards built environment projects in transportation and physical buildings, including affordable housing and other property improvements, have the possibility of affecting existing economic development.

How infrastructure dollars support or impede small business success in isolated rural and urban areas is one metric by which to judge the efficacy of a federal infrastructure bill. In the past, infrastructure spending — interstate highway construction for instance — led to pernicious policy outcomes, including increased racial and economic residential segregation.[98] A cautious observer will note that infrastructure spending will not automatically support disadvantaged small businesses.

Second, as mentioned above in the Introduction to this Essay, the Biden Administration has significant plans to increase procurement

98. For more about highway construction and racial equity, see Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1286–98 (2020).

among businesses owned by marginalized owners, including women, Black, and Latinx Americans.[99] Again, as mentioned above, the Biden Administration's ambitious plan includes a goal to increase preferential procurement with disadvantaged businesses by 50%.[100] Infrastructure spending, including transportation infrastructure construction, is not a bad place to seek to double procurement to small disadvantaged businesses. The U.S. Department of Transportation, for example, provides some of the most funding for states and cities to direct race- and gender-based preferential procurement.[101]

Yet, simply directing funds to preferential procurement programs will not solve the problems small businesses face while operating in particular places with scarce capital. It is costly for small businesses to win significant government contracts. By one estimate for 2015, small businesses owned by members of marginalized groups spent around $153,000 to win a federal contract, which was six percent more than white-owned companies.[102] Prime contracts, it should not come as a surprise, flow more easily to larger, more established businesses. And yes, some larger prime contractors subcontract with smaller businesses, which is one way for small businesses to access federal procurement funding. However, one should not assume that increased federal procurement will automatically benefit small businesses in places in need of additional capital investment.

Third, changes to the Paycheck Protection Program, including those implemented by the Biden Administration, came late in the pandemic response.[103] As a result, small businesses in places that often lack access to traditional capital were suffering longer than businesses in other areas and with access to a variety of capital sources.[104] Government interventions to support these businesses only came later.[105] Since Black-owned businesses were already in crisis before the

---

99. *See White House Fact Sheet, Build Black Wealth*, *supra* note 5.

100. *Id.*

101. TIM LOHRENTZ ET AL., INSIGHT CTR. FOR CMTY. ECON. DEV., STATE POLICIES AND PROGRAMS FOR MINORITY- AND WOMEN-BUSINESS DEVELOPMENT 26 (2007), http://ww1.insightcced.org/uploads/publications/assets/50%20state%20inclusive%20business%20policy%20scan.pdf [https://perma.cc/EKP5-8JPJ].

102. Carolyn M. Brown, *Cost of Doing Business with the Federal Government on the Rise*, BLACK ENTER. (Jan. 11, 2017), https://www.blackenterprise.com/cost-business-federal-government-rise/ [https://perma.cc/ET2S-5LEZ].

103. *See White House Fact Sheet, Equitable Access*, *supra* note 20.

104. *See* Fairlie & Fossen, *supra* note 81, at 10.

105. *See id.* at 9 (discussing how later rounds of Paycheck Protection Program funds were more successful at reaching marginalized business owners than the initial round of funding).

pandemic, as has been discussed above, government actors should think more broadly about interventions to support small businesses in areas in need of economic activity.

Finally, key federal economic development tools such as the Opportunity Zone incentive are failing to direct capital to small businesses in places where people and capital have fled. Congress should reform the Opportunity Zone incentive to more narrowly define what projects are suitable for investor incentives. Placing added focus on small business capital investment, and away from commercial real estate, may increase investment in businesses in areas that lack access to traditional capital sources.

This is a time, in 2021, where the federal government is reimagining its role with respect to large-scale spending. Bold law and policy interventions that direct federal interventions to ground-level small businesses might include additional funding for innovative community economic development financial institutions or other outside the box methods for delivering financial services in communities. Or perhaps it is time for an ambitious federal tool designed to create 500,000 new small business owners. Detailing the contours and design of such a new tool is beyond the scope of this Essay. In pointing out ways that existing laws have not successfully supported small businesses in places that lack access to capital, this Essay has demonstrated a need to rethink federal interventions around small business-oriented economic development.