

## PEDALING TOWARD A MORE EQUITABLE TAX-RIDE FOR CYCLISTS

### INTRODUCTION

With the beginning of each new decade comes a time for reflection on the past and speculation about the future. As we look back over the last ten years, wrought with turbulence and conflict, it is tempting to feel angst about what will come. Our country—its heart and stability—was challenged in an unparalleled way. From feelings of despair and anger after 9/11 and helplessness after the stock market collapsed, to feelings of frustration caused by the heated debate over climate change and the global energy crisis, as a nation, we were forced to redefine who we are and what values we hold dear. In time, we emerged from the rubble of the Twin Towers and rallied around our troops, vowed to hold our peers accountable and rebuild Wall Street, and joined together to develop alternative energy sources. Bred from that passion and loyalty we committed not only to dealing with the present, but also to preparing for the future—our country’s future. So instead of merely looking to the future with angst, we may also look with optimism because, above all, we remain united.

One of the most comprehensive examples of our collective efforts to rebuild the nation is the Emergency Economic Stabilization Act of 2008 (the Bailout Bill), which President George W. Bush signed into law on October 3, 2008.<sup>1</sup> The purpose of the Bailout Bill was to provide stability to the economy through federal acquisition of assets and to promote energy production and tax relief through amendments to the Internal Revenue Code (the Tax Code).<sup>2</sup> One of the Bailout Bill’s amendments to the Tax Code extended a tax incentive to employees who elect to ride a bicycle to work.<sup>3</sup> Section 211 made certain

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1. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified in scattered sections of the U.S.C.).

2. *Id.* The Act’s stated purpose was:

To provide authority for the Federal Government to purchase and insure certain types of troubled assets for the purposes of providing stability to and preventing disruption in the economy and financial system and protecting taxpayers, to amend the Internal Revenue Code of 1986 to provide incentives for energy production and conservation, to extend certain expiring provisions, to provide individual income tax relief, and for other purposes.

*Id.*

3. *Id.* § 211, 122 Stat. at 3840–41.

reimbursements from employers to employees for expenses incurred commuting from home to work by bicycle nontaxable.<sup>4</sup> Reimbursements by employers to employees for the purchase, maintenance, and storage bicycles were all included.<sup>5</sup> No such benefit was provided to employees prior to the Bailout Bill; thus, the amendment was met with relief and optimism by bicycle advocates who had been attempting to implement such a provision for years.<sup>6</sup> Andy Thornley, the program director for the San Francisco Bicycle Coalition, stated that this amendment “significantly legitimize[d] bicycling and elevate[d] it to a credible commute mode, like riding a bus or train.”<sup>7</sup>

Despite the initial excitement, some cyclists have expressed concern that the maximum nontaxable reimbursement will not cover their actual bicycle-related commuting expenses.<sup>8</sup> Such concern is well founded. The National Bicycle Dealers Association reported that the average price for bicycles sold in 2009 was \$500;<sup>9</sup> however, the maximum excludable nontaxable reimbursement is \$20/month (or \$240/year).<sup>10</sup> Another concern with the current provision is that employees are not permitted to concurrently receive nontaxable reimbursements for bicycle commuting expenses and nontaxable reimbursements for other similar commuting expenses.<sup>11</sup> Specifically, employees are prohibited from receiving nontaxable reimbursements for commuting by bicycle *and* nontaxable reimbursements for using mass transit (such as bus or light-rail systems) or nontaxable reimbursements for commuting by bicycle *and* nontaxable reimbursements for carpooling.<sup>12</sup> For example, if Phil rode his bike to the subway and then took the subway to work,

4. *Id.*

5. *Id.*

6. Rachel Gordon, *Bailout Gives Cyclists a Leg Up; As of January, Bike Commuters Can Get \$20-a-month, Tax-free Reimbursement*, S.F. CHRON., Oct. 9, 2008, at B1.

7. *Id.*

8. *Id.*

9. *Industry Overview 2009*, NAT’L BICYCLE DEALERS ASS’N, <http://nbda.com/articles/industry-overview-2009-pg34.htm> (last visited Apr. 12, 2011).

10. I.R.C. § 132(f)(5)(F)(ii) (Supp. II 2009) (“The term ‘applicable annual limitation’ means, with respect to any employee for any calendar year, the product of \$20 multiplied by the number of qualified bicycle commuting months during such year.”).

11. *Id.* § 132(f)(2).

The amount of the fringe benefits which are provided by an employer to any employee and which may be excluded from gross income under subsection (a)(5) shall not exceed—  
(A) \$100 per month *in the case of* the aggregate of [transportation in a commuter highway vehicle and any transit pass], (B) \$175 per month *in the case of* qualified parking, and (C) the applicable limitation *in the case of* any qualified bicycle commuting reimbursement.

*Id.* (emphasis added).

12. *Id.* § 132(f)(5)(F)(iii)(II) (stating that bicycle reimbursements may only be excluded when no other qualified transportation benefit is received by the employee). *See infra* text accompanying notes 69–70 (explaining the definitions of “commuter highway vehicles” and “mass transit” benefits).

Phil could not receive nontaxable reimbursements from his employer for the costs he incurred for the bicycle *and* the subway ticket. Similarly, if Phil rode his bike in good weather and carpoled in bad weather, Phil could not receive nontaxable reimbursements from his employer for the costs incurred for the bicycle *and* for carpooling expenses.

In response to these concerns, on July 21, 2009, Representative Edward Blumenauer proposed House Resolution 3271 (the Green Routes to Work Act), which would expand the current benefits available to employees commuting by bicycle.<sup>13</sup> Under the proposed Green Routes to Work Act, employees would be permitted to exclude bicycle commuting reimbursements *and* mass transit benefits.<sup>14</sup> Using the example from above, if Phil rode his bike to the subway and then took the subway to work, Phil could receive nontaxable reimbursements from his employer for the costs incurred for the bicycle *and* for his subway ticket.

However, the proposed Green Routes to Work Act is not without flaws. Notably, the proposed Green Routes to Work Act would not increase the maximum amount of nontaxable reimbursements for bicycle commuting expenses an employee can receive. Nor would the proposed bill allow employees to receive nontaxable reimbursements for bicycle commuting expenses *and* carpooling expenses.<sup>15</sup> So under the proposed Green Routes to Work Act, Phil could receive nontaxable reimbursements for riding his bike to the subway and taking the subway to work but not for riding his bike to a friend's house and then carpooling to work.

Although the income tax system exists foremost to produce revenue for the federal government, it also is used to promote social and economic goals.<sup>16</sup> By electing to tax some activities and not others, Congress creates monetary incentives and disincentives that encourage or discourage taxpayers to engage in those activities.<sup>17</sup> Thus, Congress makes “fundamental social and economic

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13. Green Routes to Work Act, H.R. Res. 3271, 111th Cong. (2009).

14. *Id.* § 9(a) (“Subclause (II) of section 132(f)(5)(F)(iii) of the Internal Revenue Code of 1986 (defining qualified bicycling month) is amended by striking ‘, (B),’.”).

15. *See id.* § 9(a)–(d). *See also id.* § 2(a) (“Paragraph (2) of section 132(f) of the Internal Revenue Code of 1986 (relating to limitation on exclusion) is amended—(1) by striking ‘\$100’ in subparagraph (A) and inserting ‘\$230’, and (2) by striking ‘\$175’ in subparagraph (B) and inserting ‘\$230.’”); I.R.C. § 132(f)(5)(F)(ii) (“The term ‘applicable annual limitation’ means, with respect to any employee for any calendar year, the product of \$20 multiplied by the number of qualified bicycle commuting months during such year.”).

16. Roberta F. Mann, *On the Road Again: How Tax Policy Drives Transportation Choice*, 24 VA. TAX REV. 587, 620 (2005). *See also* Maureen B. Cavanaugh, *On the Road to Incoherence: Congress, Economics, and Taxes*, 49 UCLA L. REV. 685, 687 (2002) (explaining taxes may be seen as a means of generating revenue or achieving policy goals).

17. Tsilly Dagan, *Commuting*, 26 VA. TAX REV. 185, 187 (2006). *See also* Cavanaugh, *supra* note 16, at 687 (“[G]overnments generally (and Congress in particular), have frequently used both tax incentives and disincentives in an effort to address important social problems.”).

judgments” when deciding which activities should be taxed.<sup>18</sup> Which activities are encouraged and discouraged within our tax code reveals “a certain vision of the self and the way in which that self is situated in various contexts” which reflects the way we perceive “our families, communities, and workplaces.”<sup>19</sup> As a result, the changes the Bailout Bill made to the Tax Code and the proposed changes within the Green Routes to Work Act are important not only from a political perspective looking at how such legislation will affect tax law and our economy directly, but they are also important from a sociological perspective because “our income tax rules reflect and shape the society in which we live and the nature of the communities we prefer.”<sup>20</sup>

One of the fundamental purposes of the Bailout Bill was to provide incentives for energy conservation.<sup>21</sup> This purpose was arguably an attempt to mitigate the global energy crisis, but at the very least embodies the “green” trend. “[G]reen is everywhere these days—in the news, politics, fashion, and even technology.”<sup>22</sup> By making certain reimbursements from employers to employees for expenses incurred commuting from home to work by bicycle nontaxable, Congress created a financial incentive to encourage employees to ride their bicycles to work which, in a sense, reflects our society’s “green” trends.

Nonetheless, historically Congress has been criticized for attempting to advance social policy through the tax system.<sup>23</sup> These critics argue that using the tax system to promote social goals distorts the marketplace and disproportionately benefits taxpayers with higher incomes.<sup>24</sup> Both the amendments to the Tax Code within the Bailout Bill and the proposed amendments contained in the Green Routes to Work Act are vulnerable to such attacks. However, I argue that incentivizing bicycle transportation through the Tax Code is not subject to the same criticisms as are other policy initiatives and, in fact, should be aggressively expanded and afforded more equitable tax

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18. MICHAEL J. GRAETZ & DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 1 (6th ed. 2009).

19. Dagan, *supra* note 17, at 188.

20. *Id.*

21. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008) (codified in scattered sections of the U.S.C.); *see also supra* note 2.

22. *How to Go Green: Why to Go Green*, PLANETGREEN.COM, <http://planetgreen.discovery.com/go-green/ultimate-go-green/> (last visited Apr. 12, 2011).

23. Cavanaugh, *supra* note 16, at 712–13.

24. *Id.* *See also* Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 719–25 (1970) (arguing tax incentives provide windfalls for activities taxpayers would engage in anyway, are inequitable because they disproportionately benefit higher taxpayers, and distort the marketplace).

treatment in comparison to other similar nontaxable transportation benefits within the Tax Code.

Part I describes the tax treatment of bicycle commuting expenses within the Tax Code and draws distinctions between this and other similar benefit categories. By reflecting on relevant legislation and interpretation of the Tax Code by the courts, Part II chronicles the thirty-year progression that has resulted in the present inequitable tax treatment for bicycle reimbursements. This explanation serves as the foundation for my argument that these benefits should be expanded and equalized with similar nontaxable benefits within the Tax Code. Finally, Part III addresses many of the common arguments against using the Tax Code as a means to advance social policy initiatives. In this Section, by highlighting sociological empirical data, I attempt to reconcile concerns about tax expenditures in general, with bicycle tax incentives specifically, and concurrently advocate their expansion within the Tax Code.

#### I. WHAT ARE NONTAXABLE BICYCLE COMMUTING REIMBURSEMENTS?

In general, unless the Tax Code provides an exception, an individual must pay taxes on everything they receive of monetary value, whether it is cash, services, or goods.<sup>25</sup> So generally, whenever an employee receives money from an employer, the employee must pay taxes on that money because it constitutes “gross income” under the Tax Code. The Tax Code defines “gross income” as the taxable income a taxpayer accrues over the course of the year from “whatever source derived.”<sup>26</sup> For example, wages, commissions, dividends, alimony payments, and lottery winnings all constitute taxable income.<sup>27</sup> The aggregate of such receipts forms the taxpayer’s “gross income.”<sup>28</sup>

The Bailout Bill provided an exception to the general rule for reimbursements from employers to employees for bicycle commuting expenses.<sup>29</sup> Now, when an employer reimburses their employee for certain bicycle expenses, the employee does not have to pay taxes on that money. At the macro level, the exception for bicycle transportation reimbursements is a tax expenditure. At the micro level, the exception is defined as a qualified transportation fringe benefit. An explanation of bicycle transportation reimbursements as a tax expenditure and a qualified transportation fringe

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25. I.R.C. § 61(a) (2006).

26. *Id.* (“Except as otherwise provided in this subtitle, gross income means all income from whatever source derived.”).

27. GRAETZ & SCHENK, *supra* note 18, at 23. *See also* I.R.C. § 61(a)(1) (explaining some of the receipts of income that are included in the calculation of an employee’s gross income).

28. I.R.C. § 61(a).

29. *See* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 211, 122 Stat. 3765, 3840–41 (codified at 26 U.S.C. § 132(f)).

benefit is essential to understanding why the current treatment of bicycle reimbursements is inequitable and forms the foundation for why I argue for their expansion throughout this Comment.

#### A. *Tax Expenditures*

The Congressional Joint Committee on Taxation defines “tax expenditures” as “revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.”<sup>30</sup> In other words, tax expenditures are reductions in tax liability from special provisions or regulations that provide benefits to taxpayers.<sup>31</sup>

Because of their classification as nontaxable income, thereby receiving them from their general duty to pay tax on such income, bicycle reimbursements can be categorized as a tax expenditure. However, nontaxable income in the form of an exclusion<sup>32</sup> is only one type of tax expenditure. Deductions and credits are also forms of tax expenditures that constitute exceptions to the general rule that any income generated is taxable income.<sup>33</sup> Although exclusions, deductions, and credits are all tax expenditures that play a role in the calculation of a taxpayer’s total annual tax liability, they are very different from each other.<sup>34</sup>

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30. STAFF OF J. COMM. ON TAX’N, 110TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2008–2012 (J. Comm. Print 2008) [hereinafter 2008–2012 ESTIMATES]. The Joint Committee on Taxation prepares estimates of Federal Tax Expenditures for the House Committee on Ways and Means and the Senate Committee on Finance. *Id.* at 1. *See also* Congressional Budget and Employment Act of 1974, Pub. L. No. 93-344, § 3, 88 Stat. 937, 938 (codified at 31 U.S.C. § 1302) (defining a tax expenditure as “revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.”).

31. STAFF OF J. COMM. ON TAX’N, 109TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2007–2011 (J. Comm. Print 2008), *reprinted in* GRAETZ & SCHENK, *supra* note 18, at 41. The Joint Committee on Taxation was established in 1926 and is comprised of members from both houses. GRAETZ & SCHENK, *supra* note 18, at 68. The Joint Committee on Taxation meets about three times per year and is intended to provide assistance to the House Ways and Means Committee and the Senate Finance Committee. *Id.* The Joint Committee on Taxation “is responsible for estimating the revenue effects of legislative proposals and enacted legislation for the Congress.” *Id.*

32. *See infra* Part I.A.3.

33. 2008–2012 ESTIMATES, *supra* note 30, at 3.

34. *See generally* I.R.C. Subtitle A, Chapter 1, Subchapter B (discussing the computation of taxable income).

## 1. Deductions

Tax deductions are beneficial to the taxpayer because they constitute sums of money that may be subtracted (i.e., deducted) from their gross income or adjusted gross income when calculating the total sum that will determine the taxpayer's annual liability.<sup>35</sup> There are many rules and restrictions governing deductions that limit which expenses paid out by a taxpayer during a year may be subtracted from the calculation of their annual gross income.<sup>36</sup>

Deductions are only beneficial up to the total amount of an individual's taxable income.<sup>37</sup> For example, if a taxpayer has a gross income of \$100 and \$150 worth of eligible deductions, after the deductions are subtracted from the taxpayer's gross income, the taxpayer's adjusted gross income<sup>38</sup> would be \$0, which means the taxpayer cannot take advantage of the remaining \$50 of deductions. Essentially, the eligible deductions that exceed the taxpayer's gross income are worthless.

In addition, categorizing an expense as a deduction does not automatically benefit all taxpayers. While some deductions are automatically deductible from an employee's gross income,<sup>39</sup> others, called "itemized deductions," are only subtracted from an employee's gross income if they are greater than the taxpayer's standard deduction.<sup>40</sup> Thus, a deduction does not always lower a taxpayer's taxable income, so it does not *necessarily* benefit the taxpayer.

## 2. Credits

In contrast, a tax credit is applied against a taxpayer's tax liability as determined based on their adjusted gross income.<sup>41</sup> Some tax credits are refundable and others are not.<sup>42</sup> Refundable credits benefit all taxpayers regardless of their taxable income.<sup>43</sup> If a taxpayer's tax liability is less than the applicable refundable credits, then the taxpayer will receive a check (i.e., cash)

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35. I.R.C. § 62(a) (2006). *See also* GRAETZ & SCHENK, *supra* note 18, at 228 (explaining deductions in general).

36. I.R.C. § 62(a). *See also* GRAETZ & SCHENK, *supra* note 18, at 228.

37. GRAETZ & SCHENK, *supra* note 18, at 229.

38. I.R.C. § 62.

39. GRAETZ & SCHENK, *supra* note 18, at 228.

40. I.R.C. § 63(c); *see* 2008–2012 ESTIMATES, *supra* note 30, at 37. *See also* GRAETZ & SCHENK, *supra* note 18, at 24 (explaining the difference between itemized and standard deductions). "The standard deduction is a flat amount specified by the Code that varies with marital status, which the taxpayer may deduct regardless of actual expenses." *Id.*

41. *See* I.R.C. §§ 21–54AA (listing available tax credits).

42. GRAETZ & SCHENK, *supra* note 18, at 229. *Compare* I.R.C. § 21 (describing the nonrefundable credit for "[e]xpenses for household and dependent care services necessary for gainful employment"), *with* I.R.C. § 32 (describing the refundable credit for "[e]arned income").

43. GRAETZ & SCHENK, *supra* note 18, at 229. *See also* I.R.C. §§ 32–54AA (codifying tax credits).

for the difference.<sup>44</sup> On the other hand, nonrefundable credits are only beneficial up to the amount of a taxpayer's tax liability.<sup>45</sup> A taxpayer does not receive a refund when his nonrefundable credit(s) are larger than his tax liability.<sup>46</sup> Thus, the maximum benefit a taxpayer will receive from a nonrefundable credit will be a total tax liability of \$0.

### 3. Exclusions

Finally, exclusions like the one for bicycle transportation reimbursements, are different than both refunds and credits because they are taken into consideration when determining a taxpayer's initial gross income.<sup>47</sup> When an item is defined as an exclusion, the amount of the item's worth is not considered income for purposes of calculating a taxpayer's gross income.<sup>48</sup> Because of the limits described above on deductions, taxpayers generally prefer exclusions over deductions.<sup>49</sup>

As stated earlier, the Bailout Bill provided an exception to the general rule that all income is taxable. Specifically, the Bailout Bill amended the Tax Code so that some reimbursements from employers to employees for bicycle commuting expenses would not constitute taxable income.<sup>50</sup> In other words, the income would be excluded from the calculation of the employee's gross income. Without the Bailout Bill provision, if an employer reimbursed employees for bicycle expenses, the employees would have to pay tax on that reimbursement.

#### B. *Qualified Transportation Fringe Benefits*

In addition to being defined as an exclusion under the Tax Code, nontaxable bicycle commuting reimbursements and other similar commuting reimbursements are also defined as qualified transportation fringe benefits.<sup>51</sup> All qualified transportation fringe benefits are also considered "tax

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44. GRAETZ & SCHENK, *supra* note 18, at 229.

45. *Id.* See also I.R.C. §§ 21–26 (codifying nonrefundable personal tax credits).

46. GRAETZ & SCHENK, *supra* note 18, at 229.

47. See generally I.R.C. §§ 101–803 (codifying exclusions from gross income).

48. STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 93 (1973) ("The device of *exclusion from gross income*—the amount involved simply need not be counted as income of the taxpayer in the computation of his gross income—is used for all of the tax expenditure items benefiting the *individual as wage or salary earner*." (emphasis in original)).

49. GRAETZ & SCHENK, *supra* note 18, at 228. There are very technical rules defining which deductions are allowable and in what circumstances. See *id.* Such differences will not be addressed in this paper.

50. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 211, 122 Stat. 3765, 3840–41 (codified at 26 U.S.C. § 132(f)).

51. I.R.C. § 132(f)(1) (Supp. II 2009).

expenditures.”<sup>52</sup> But in order to fully understand the interplay between bicycle commuting reimbursements and other similar (and more favorably treated) commuting benefits, a more thorough analysis of the definition of qualified transportation fringe benefits is required.

### 1. Fringe Benefits Generally

The Oxford English Dictionary defines “fringe benefit” as “a perquisite or benefit of some kind provided by an employer to supplement a money wage or salary.”<sup>53</sup> Other common examples of fringe benefits to employees include employee discounts for products or services and retirement plans.<sup>54</sup>

Most fringe benefits constitute receipts of taxable income because, in general, fringe benefits from employers constitute gross income and are, therefore, taxable as part of an employee’s gross income.<sup>55</sup> Congress carved out the following exceptions to the general rule (including qualified transportation fringe benefits) that employees may exclude from their gross income: 1) no-additional-cost services;<sup>56</sup> 2) qualified employee discounts;<sup>57</sup> 3) working condition fringe;<sup>58</sup> 4) de minimis fringe;<sup>59</sup> 5) qualified transportation fringe;<sup>60</sup> 6) qualified moving expense reimbursements;<sup>61</sup> 7) qualified retirement planning services;<sup>62</sup> and 8) qualified military base realignment and closure fringe.<sup>63</sup> Bicycle commuting reimbursements, in addition to commuter highway vehicle, transit pass, and parking nontaxable benefits, are defined as qualified transportation fringe benefits.<sup>64</sup>

52. See I.R.C. § 132(a) (2006) (explaining which fringe benefits are excluded from gross income); 2008–2012 ESTIMATES, *supra* note 30, at 38.

53. Wayne M. Gazur, *Assessing Internal Revenue Code Section 132 After Twenty Years*, 25 VA. TAX REV. 977, 980–81 (2006) (quoting THE OXFORD ENGLISH DICTIONARY 200 (2d ed. 1989)).

54. I.R.C. § 132(c), (m) (2006).

55. *Id.* § 61(a)(1); 2008–2012 ESTIMATES, *supra* note 30, at 15.

56. I.R.C. § 132(a)(1).

57. *Id.* § 132(a)(2).

58. *Id.* § 132(a)(3).

59. *Id.* § 132(a)(4).

60. *Id.* § 132(a)(5).

61. I.R.C. § 132(a)(6).

62. *Id.* § 132(a)(7).

63. *Id.* § 132(a)(8).

64. I.R.C. § 132(f)(1)(D) (Supp. II 2009).

For purposes of this section, the term “qualified transportation fringe” means any of the following provided by an employer to an employee: (A) Transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee’s residence and place of employment. (B) Any transit pass. (C) Qualified parking. (D) Any qualified bicycle commuting reimbursement.

*Id.* § 132(f)(1)(A)–(D).

## 2. Qualified Transportation Fringe Benefits Specifically

Prior to the Bailout Bill,<sup>65</sup> which added the bicycle commuting reimbursement, there were only three types of qualified transportation fringe benefits: 1) transportation in commuter highway vehicles (carpooling),<sup>66</sup> 2) transit passes,<sup>67</sup> and 3) qualified parking.<sup>68</sup> First, commuter highway vehicles seat at least six adults (not including the driver) and are used primarily for carpooling employees between their residence and place of employment.<sup>69</sup> Second, transit passes consist of “any pass, token, farecard, voucher, or similar item” for transportation on mass transit facilities.<sup>70</sup> Third, qualified parking must be located on or near either the business premises or the location where the employee connects with mass transit or carpool.<sup>71</sup> Finally, bicycle commuting reimbursements constitute any employer reimbursement to the employee for “the purchase of a bicycle and bicycle improvements, repair, and storage, if such bicycle is regularly used for travel between the employee’s residence and place of employment.”<sup>72</sup>

## 3. The Bicycle Commuting Reimbursement

Despite their recent addition to the category of excludable qualified transportation fringe benefits, the limitations on eligible bicycle commuting reimbursements are much stricter than those for other types of qualified transportation fringe benefits.

Under the current statute, employees are very limited by the types of transportation benefits that may be concurrently excluded and the maximum exclusions for each. Only *commuter highway vehicle* and *transit pass benefits* may be combined and excluded.<sup>73</sup> Thus, employees may exclude: commuter highway vehicle *and* transit pass benefits *or* parking benefits *or* bicycle

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65. *See supra* notes 1–5 and accompanying text (discussing the Bailout Bill).

66. I.R.C. § 132(f)(1)(A) (2006).

67. *Id.* § 132(f)(1)(B).

68. *Id.* § 132(f)(1)(C).

69. *Id.* § 132(f)(5)(B). At least 80% of the vehicle’s mileage must be acquired “for purposes of transporting employees in connection with travel between their residences and their place of employment, and on trips during which the number of employees transported for such purposes is at least ½ of the adult seating capacity of such vehicle (not including the driver).” *Id.* § 132(f)(5)(B)(ii).

70. *Id.* § 132(f)(5)(A). Such mass transportation facilities may be either private or publicly owned. *Id.* § 132(f)(5)(A)(i).

71. I.R.C. § 132(f)(5)(C).

72. I.R.C. § 132(f)(5)(F)(i) (Supp. II 2009).

73. I.R.C. §§ 132(f)(1), 132(f)(2)(A) (2006).

reimbursements.<sup>74</sup> In addition, within the categories of excludable transportation reimbursements, there is a great disparity between the categories based on their maximum exclusions.<sup>75</sup> As articulated in Section 132(f) of the Tax Code, employees may exclude up to \$2,100/year (\$175/month) in parking benefits<sup>76</sup> or \$1,200/year (\$100/month) in commuter highway vehicle and transit pass benefits,<sup>77</sup> whereas employees are only permitted to exclude \$240/year (\$20/month) in bicycle reimbursement benefits.<sup>78</sup>

Although the American Recovery and Reinvestment Tax Act of 2009 temporarily increased and equalized the maximum excludable transportation fringe benefit for parking and the combination of commuter highway vehicle and transit passes to \$2,760/year, bicycle reimbursements were casually ignored.<sup>79</sup>

When juxtaposed against the other choices for eligible exclusions, employees are likely to be discouraged from choosing to exclude bicycle transportation reimbursements instead of parking or transit pass or commuter highway vehicle benefits. Why would a taxpayer turn down a more convenient parking benefit worth \$2,100/year or a transit benefit worth \$1,200/year, for a bicycle benefit worth \$240/year? I argue that employees should be able to concurrently exclude commuter highway vehicle and transit pass and bicycle reimbursements, and at a minimum, the aggregate exclusion should be equal to the maximum exclusion for parking benefits.

74. See I.R.C. § 132(f)(2) (Supp. II 2009) (describing the three categories of exclusions); *id.* § 132(f)(5)(F)(iii)(II) (stating bicycle reimbursements may only be excluded when no other transportation benefit is received by the employee).

75. Compare I.R.C. § 132(f)(2)(A) (2006) (describing the maximum exclusion for commuter highway vehicle and transit pass benefits) and *id.* § 132(f)(2)(B) (describing the maximum exclusion for parking benefits), with I.R.C. § 132(f)(5)(F)(ii) (Supp. II 2009) (describing the maximum exclusion for bicycle reimbursements).

76. I.R.C. § 132(f)(2)(B) (Supp. II 2009) (“The amount of the fringe benefits which are provided by an employer to any employee and which may be excluded from gross income under subsection (a)(5) shall not exceed . . . \$175 per month in the case of qualified parking.”).

77. I.R.C. § 132(f)(2)(A) (2006).

The amount of the fringe benefits which are provided by an employer to any employee and which may be excluded from gross income under subsection (a)(5) shall not exceed \$100 per month in the case of the aggregate of the benefits described in subparagraphs (A) and (B) of paragraph (1).

Subparagraphs (A) and (B) of paragraph (1) describe transportation in a commuter highway vehicle and transit passes, respectively. *Id.* § 132(f)(1)(A)–(B).

78. I.R.C. § 132(f)(5)(F)(ii) (Supp. II 2009) (“The term ‘applicable annual limitation’ means, with respect to any employee for any calendar year, the product of \$20 multiplied by the number of qualified bicycle commuting months during such year.”).

79. American Recovery and Reinvestment Tax Act of 2009, Pub L. No. 111-5, § 1151(a), 123 Stat. 115, 333 (codified at 26 U.S.C. § 132).

## II. HISTORICAL TREATMENT OF COMMUTING EXPENSES

As stated in the introduction, the Tax Code has been a means of raising revenue for the federal government and a means of encouraging certain social policy objectives.<sup>80</sup> A brief summary of how the courts, legislators, and the Internal Revenue Service have historically defined employee commuting expenses is necessary to understand why I argue that the bicycle reimbursement should receive favorable tax treatment and the exclusion should be expanded.

### A. *Commuting Expenses Generally Not Deductible*

Historically, expenses incurred by an individual as a result of traveling from his home to work have been considered a personal expense that is not deductible<sup>81</sup> from an employee's gross income.<sup>82</sup> The basis of this policy is that commuting expenses should not be considered deductible business expenses because "an employee does not incur such expenses in the direct pursuit of his employer's trade or business."<sup>83</sup> Rather, commuting expenses should be codified as "personal, living, or family expenses"<sup>84</sup> because they reflect a taxpayer's individual choice of where to live in relation to where they work.<sup>85</sup>

In *Commissioner of Internal Revenue v. Flowers*, the Supreme Court upheld the lower Tax Court's finding that expenses incurred when traveling from home to work constituted living and personal expenses, as opposed to traveling expenses in pursuit of trade or business; therefore, such expenses were not deductible from an employee's gross income.<sup>86</sup> The Court explained that an employee's business-travel expenses are distinct from an employee's

80. Cavanaugh, *supra* note 16, at 687.

81. Emphasizing deductible as opposed to excludable.

82. I.R.C. § 262(a) (2006); Wendy Gerzog Shaller, *Limit Deductions for Mixed Personal/Business Expenses: Curb Current Abuses and Restore Some Progressivity Into the Tax Code*, 41 CATH. U. L. REV. 581, 591 (1992).

83. I.R.C. § 162(a) (defining ordinary business expenses); William P. Kratzke, *The (Im)balance of Externalities in Employment-Based Exclusions from Gross Income*, 60 TAX LAW. 1, 46 (2006) (citing *Comm'r v. Flowers*, 326 U.S. 465, 473 (1946)).

84. I.R.C. § 262(a); *see also* *United States v. Tauffer*, 407 F.2d 243, 246 (10th Cir. 1969) ("Such travels are expenses within section 262 as 'personal, living or family expenses' whether in an urban, suburban, or rural setting. They are not ordinary business expenses under section 162(a).").

85. Dagan, *supra* note 17, at 202; Kratzke, *supra* note 83, at 46.

86. *Flowers*, 326 U.S. at 471–72. Section 23(a)(1)(A) is now codified in Section 162 pertaining to trade or business expenses. *See* I.R.C. § 162. *See also* *Sullivan v. Comm'r*, 1 B.T.A. 93, 93 (1924) ("The cost of transportation paid by an individual living at a distance from his place of business, in going to and returning from such place of business, is not deductible as a business expense. The operating cost, including depreciation, of an automobile so used by an individual is not deductible as a business expense.").

daily transportation expenses because “[t]he exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors” for the travel.<sup>87</sup> In other words, an employee’s expenses for having to travel from their home office located in St. Louis, Missouri to New York, New York for a convention are different than an employee’s daily commuting expenses from their home in St. Charles, Missouri to their office located in downtown St. Louis, Missouri.

Both the Internal Revenue Service and the courts have strictly interpreted the Tax Code in their recognition of travel expenses as inherently personal.<sup>88</sup> For example, neither a taxpayer’s special circumstances due to physical impairments necessitating alternative transportation arrangements like a taxicab<sup>89</sup> or a specially designed automobile,<sup>90</sup> nor circumstances prohibiting the taxpayer to live on or near the premises<sup>91</sup> have been sanctioned as a deductible travel expense.<sup>92</sup>

The Internal Revenue Service’s and the Supreme Court’s seemingly concrete stance on the tax treatment of commuting expenses appears at odds with my argument that not only should certain commuting expenses be treated *favorably*, but that they should be treated *more favorably* than deductions by being treated as an exclusion. Such juxtaposition may be reconciled when considering the evolution of the tax on commuting expenses following the

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87. *Flowers*, 326 U.S. at 474. The regulations to the Code explain “[i]f the trip is undertaken for other than business purposes, the travel fares and expenses incident to travel are personal expenses and the meals and lodging are living expenses.” 26 C.F.R. § 1.162-2 (2010).

88. See *Coombs v. Comm’r*, 608 F.2d 1269, 1278–79 (9th Cir. 1979); *Sanders v. Comm’r*, 439 F.2d 296, 299 (9th Cir. 1971); *Tauferner*, 407 F.2d at 246–47; *Donnelly v. Comm’r*, 262 F.2d 411, 412 (2d Cir. 1959); *Bruton v. Comm’r*, 9 T.C. 882, 886 (1947). However, transportation expenses incurred in going from home to work will be deductible if: 1) The taxpayer is commuting between his home and a temporary work location outside the metropolitan area where the taxpayer lives and normally works; 2) The taxpayer has one or more regular locations away from the taxpayer’s home, the taxpayer may deduct the expenses of commuting between their home and a temporary work location in the same trade or business; or 3) The taxpayer’s home is his principal place of business. Rev. Rul. 99-7, 1999-5 C.B. 361.

89. See *Bruton*, 9 T.C. at 886.

90. See *Donnelly*, 262 F.2d at 412.

91. *Coombs*, 608 F.2d at 1276–77; *Sanders*, 439 F.2d at 297; *Tauferner*, 407 F.2d at 246–47.

92. See *Coombs*, 608 F.2d at 1278–79; *Sanders*, 439 F.2d at 299; *Tauferner*, 407 F.2d at 246–47; *Donnelly*, 262 F.2d at 412; *Bruton*, 9 T.C. at 886. See also *Brown v. Comm’r*, 47 T.C.M. (P-H) 3032, 3033 (1983) (holding that racial discrimination forcing a taxpayer to live farther away from his place of employment did not justify the taxpayer being treated differently than “any other taxpayers similarly situated with respect to deductibility of commuting expenses”); *Kratzke*, *supra* note 83, at 47 (“Employees may incur commuting expenses for personal reasons, but they are nevertheless an expense of establishing or maintaining a particular employment relationship.”).

Deficit Reduction Act of 1984, which categorically changed the tax treatment of some transportation expenses under the Tax Code.<sup>93</sup>

*B. Carving Out the First Exception for Employee Commuting Expenses*

Not too unlike the purpose of the Bailout Bill, the purpose of the Deficit Reduction Act of 1984 (the 1984 Act) was to provide tax reform and reduce the federal deficit.<sup>94</sup> One substantial provision of the 1984 Act constituted the first action by Congress that established a means by which employers could relieve employees of some of their commuting expenses.<sup>95</sup> The 1984 Act made some employer reimbursements for commuting expenses nontaxable.<sup>96</sup>

In addition to establishing the general rule that fringe benefits constitute taxable income, this comprehensive legislation laid out four categories of benefits employers could provide to employees that would constitute nontaxable income.<sup>97</sup> These categories were excluded for the purpose of administrative convenience to employers.<sup>98</sup> Any fringe benefit not explicitly listed as an exception within the 1984 Act is deemed taxable and, thus, must be included in an employee's gross income.<sup>99</sup> The amount included in an employee's gross income for non-excludable fringe benefits is equal to the fair market value of the fringe benefit.<sup>100</sup>

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93. See *infra* Part II.B.

94. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1, 98 Stat. 494, 494 (codified in scattered sections of 26 U.S.C.); see *supra* notes 1–2 and accompanying text for description of the purpose of the Bailout Bill.

95. See Deficit Reduction Act of 1984 § 531, 98 Stat. at 877 (codified at I.R.C. § 132(h)(4)); Shaller, *supra* note 82, at 600. The Deficit Reduction Act of 1984 is divided into two sections: the Tax Reform Act of 1984 and the Spending Reduction Act of 1984. Deficit Reduction Act of 1984 §1(b), 98 Stat. at 494. Accordingly, some scholars have referred to legislation mentioned within this section as the Tax Reform Act of 1984. See, e.g., Gazur, *supra* note 53, at 978.

96. Deficit Reduction Act of 1984 § 531, 98 Stat. at 878 (codified at I.R.C. § 132(h)(4)).

97. *Id.* § 531(a), 98 Stat. at 878 (amending I.R.C. § 132); *Id.* § 531(c), 98 Stat. at 884 (amending I.R.C. § 61(a)(1)).

98. Cavanaugh, *supra* note 16, at 707 (citing H.R. REP. NO. 98-432, pt. 2, at 1591–92 (1984)) (explaining the close relationship these benefits have with the employer's business and the potential undue burden upon employers that would result from requiring valuation and reporting of these benefits).

99. Deficit Reduction Act of 1984 § 531(c), 98 Stat. at 884 (amending I.R.C. § 61(a)(1)); Shaller, *supra* note 82, at 600–01. *But see* Cavanaugh, *supra* note 16, at 708 n.97 (“Parking provided at or near an employer's business premises was excludable, regardless of its cost, as a working condition fringe benefit. An employee's commuting cost whether by transit pass, vouchers, or cash reimbursement by the employer up to twenty-one dollars per month was excluded as a *de minimis* fringe benefit.”) (emphasis in original).

100. 26 C.F.R. § 1.61-21(b) (2009) (“[T]he fair market value of a fringe benefit is the amount that an individual would have to pay for the particular fringe benefit in an arm's-length transaction.”).

Under the 1984 Act, the four categories of benefits considered nontaxable were: 1) no-additional cost services;<sup>101</sup> 2) qualified employee discounts;<sup>102</sup> 3) working condition fringe;<sup>103</sup> and 4) de minimis fringe.<sup>104</sup> The 1984 Act categorized transit passes and parking benefits differently than their current treatment as transportation fringe benefits.<sup>105</sup> Employee parking was considered a “working condition fringe.”<sup>106</sup> The value of employee parking was excludable from the employee’s gross income as a working condition fringe benefit, so long as the parking facility was located on or near the business premises.<sup>107</sup> In contrast, an employee’s commuting costs, which were reimbursed by an employer in the form of transit passes, vouchers, or cash reimbursements, were considered de minimis fringe benefits.<sup>108</sup> While employees were permitted to exclude the total amount of parking benefits, regardless of their cost, employees were limited to excluding only \$21/month in transit passes, vouchers, or cash reimbursements.<sup>109</sup> With this initial categorical distinction created by the 1984 Act, the inequitable tax treatment of transportation benefits began.

### C. *Creating the Category of Qualified Transportation Fringe Benefits*

In 1992, Congress passed the Energy Policy Act (the 1992 Act).<sup>110</sup> The purpose of the 1992 Act was to enact laws that would improve energy efficiency.<sup>111</sup> As part of the 1992 Act, Congress added qualified transportation fringe benefits to the category of nontaxable employer-provided benefits excludable from an employee’s gross income.<sup>112</sup> This addition changed the former categorizations of employee parking as a working condition fringe benefit and transit benefits as de minimis fringe benefits.<sup>113</sup>

Instead, the new category of qualified transportation fringe benefits included transportation provided by the employer by means of a commuter

101. Deficit Reduction Act of 1984 § 531(a)(1), 98 Stat. at 878 (codified at I.R.C. § 132(a)(1)).

102. *Id.* (codified at I.R.C. § 132(a)(2)).

103. *Id.* (codified at I.R.C. § 132(a)(3)).

104. *Id.* (codified at I.R.C. § 132(a)(4)).

105. Compare I.R.C. § 132(f) (2006), with Deficit Reduction Act of 1984 § 531(a), 98 Stat. at 880 (codified at I.R.C. § 132(h)(4)).

106. Deficit Reduction Act § 531(a), 98 Stat. at 880 (codified at I.R.C. § 132(h)(4)).

107. *Id.*; ERNST & WHINNEY, THE TAX REFORM ACT OF 1984: AN ANALYSIS OF SIGNIFICANT PROVISIONS 16 (1984).

108. Cavanaugh, *supra* note 16, at 708 n.97.

109. *Id.*

110. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2276 (1992).

111. *Id.*

112. See *id.* § 1911(b), 106 Stat. at 3012–13 (codified at I.R.C. § 132(a), (f)).

113. See *id.*

highway vehicle, a transit pass, or qualified parking.<sup>114</sup> By creating a new category of benefits that grouped these similar types of transportation benefits together, Congress was able to cap the excludable parking benefit while increasing the tax incentive to use mass transit or commuter highway vehicles.<sup>115</sup>

Employees were permitted to combine and exclude commuter highway vehicle *and* transit pass benefits.<sup>116</sup> However, employees had to choose between excluding the combination of commuter highway vehicle *and* transit pass benefits *or* parking benefits.<sup>117</sup> Employees could exclude up to \$60/month in commuter highway vehicle *and* transit pass benefits *or* \$155/month in parking benefits.<sup>118</sup> Although Congress took a great step towards equalizing the treatment of similar types of benefits by reducing the disparity in the maximum amount of excludable reimbursements from employers from \$20/month for transit passes and unlimited parking benefits, Congress still perpetuated the disparity between the value of parking benefits and other forms of transportation benefits.<sup>119</sup>

#### D. *Creating Severe Inequities between Qualified Transportation Fringe Benefits*

The Taxpayer Relief Act of 1997 (the 1997 Act) included one of the most controversial amendments to the employee fringe benefit provision.<sup>120</sup> This amendment made parking benefits in lieu of cash compensation nontaxable as a qualified employee fringe benefit.<sup>121</sup> In other words, an employer could offer employees a choice between a cash payment and a qualified parking benefit.<sup>122</sup>

Prior to the 1997 Act, if an employer offered an employee a choice between \$150 and free parking, the parking—in lieu of compensation—would

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114. *Id.* § 1911(b), 106 Stat. at 3012–13; Cavanaugh, *supra* note 16, at 708 n.96; Kratzke, *supra* note 83, at 46 (citing I.R.C. §§ 132(a)(5), 132(f)(1)(A)–(B)). A transit pass includes any pass, token, farecard, voucher, or similar item entitling a person to transportation if such transportation is on mass transit facilities. I.R.C. § 132(f)(5)(A)(i).

115. Cavanaugh, *supra* note 16, at 708.

116. *See* Energy Policy Act of 1992 § 1911(a), 106 Stat. at 3012.

117. *Id.* § 1911(b), 106 Stat. at 3012–13.

118. *Id.*

119. *Compare id.* § 1911(b), 106 Stat. at 3012–13, with I.R.C. § 132(f) (raising the excludable amounts to \$100 per month in commuter highway vehicle *and* transit pass benefits *or* \$175 per month in parking benefits).

120. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1072, 111 Stat. 788, 948 (codified at I.R.C. § 132(f)(4)). *See also infra* text accompanying notes 131–32 (discussing criticisms of this amendment).

121. Taxpayer Relief Act of 1997 § 1072, 111 Stat. at 948.

122. *Id.*

constitute taxable income, as opposed to a nontaxable fringe benefit.<sup>123</sup> If the employee elected to receive the free parking, the employee would have to include the fair market value of such parking in the calculation of his gross income.<sup>124</sup> In contrast, after the 1997 Act, the opposite was true.<sup>125</sup> The Internal Revenue Service explained in a Private Letter Ruling that, where the employer offered employees \$150 or free parking, the parking constituted a nontaxable fringe benefit.<sup>126</sup> Thus, if an employee elected to receive the free parking in lieu of the \$150, the employee would not have to include the fair market value of such parking in the calculation of his gross income.<sup>127</sup>

For example, prior to the 1997 Act, if Phil's employer offered him free parking or an extra \$150 each paycheck, and Phil chose the free parking, he would have to include the fair market value of the parking as income received. But after the 1997 Act, if Phil's employer offered him free parking or an extra \$150 each paycheck, and Phil chose the free parking, he would not have to include the fair market value of the parking as income received. Or, because of the 1992 Act, if Phil paid \$150 for parking each month, and then his employer paid him back, Phil would not have to include those reimbursements in the calculation of his gross income.<sup>128</sup>

Congress believed this amendment would convince employees to use their cars less because they would prefer cash over the alternative of the parking fringe benefit.<sup>129</sup> In addition, the Joint Committee on Taxation's General Explanation of Tax Legislation believed that the predicted preference by employees of cash over the parking benefit would result in environmental benefits due to the reduced automobile transportation.<sup>130</sup> Thus, Congress attempted to create a disincentive to drive to work by creating an incentive to receive a nontaxable lump sum payment. Contrary to the purpose of the 1997 Act, however, employees overwhelmingly chose the parking benefit over the

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123. See Energy Policy Act of 1992, Pub. L. No. 102-486, § 1911, 106 Stat. 2276, 3012 (1992).

124. See *id.* “[T]he fair market value of a fringe benefit is the amount that an individual would have to pay for the particular fringe benefit in an arm’s-length transaction.” Treas. Reg. § 1.61-21(b) (1992).

125. See Taxpayer Relief Act of 1997 § 1072, 111 Stat. at 948.

126. I.R.S. Priv. Ltr. Rul. 200347003 (Nov. 21, 2003); see Taxpayer Relief Act of 1997 § 1072, 111 Stat. at 948. A Private Letter Ruling is a “written statement issued to a taxpayer by the IRS National Office that interprets and applies the tax laws to a specific set of facts.” GRAETZ & SCHENK, *supra* note 18, at 73.

127. I.R.S. Priv. Ltr. Rul. 200347003; see also Taxpayer Relief Act of 1997 § 1072, 111 Stat. at 948.

128. See *supra* text accompanying note 118.

129. Cavanaugh, *supra* note 16, at 721 (citing S. REP. NO. 105-33, at 198 (1997)); Kratzke, *supra* note 83, at 47.

130. Cavanaugh, *supra* note 16, at 721–22 (citing S. REP. NO. 105-33, at 198 (1997)).

cash payment, and thus, the congestion problem was only exacerbated.<sup>131</sup> This provision surprisingly was never removed from the Code and remains controversial.<sup>132</sup>

*E. Mitigating the Current Disparity through the Green Routes to Work Act*

Although the Bailout Bill added bicycle transportation to qualified transportation fringe benefits, it did so inequitably.<sup>133</sup> Under the current provision, employees are not permitted to exclude reimbursements for bicycle commuting expenses in addition to reimbursements for other alternative modes of transportation.<sup>134</sup> Further, employees may exclude up to \$2,100/year (\$175/month) in parking benefits<sup>135</sup> or \$1,200/year (\$100/month) in commuter highway vehicle *and* transit pass benefits,<sup>136</sup> whereas employees are only permitted to exclude \$240/year (\$20/month) in bicycle reimbursements.<sup>137</sup> Thus, employees who elect to receive the parking benefit may receive an additional \$900 of tax-free benefit per year over those who use transit or \$1,860 over those who receive bicycle reimbursements. As stated earlier, under the 1992 Act, Congress allowed taxpayers to exclude both mass transit and carpooling benefits for the purpose of improving energy efficiency,<sup>138</sup> so why would Congress exclude bicycle reimbursements from similar favorable treatment?

As seen in this section, over the last several decades Congress has sought to alter transportation choices of employees through incentives within the Tax Code. Both the 1992 Act and the 1997 Act were intended to reduce energy consumption and vehicle transportation, yet neither actually implemented

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131. *Id.* at 722; Kratzke, *supra* note 83, at 47.

132. *See, e.g.*, Kratzke, *supra* note 83, at 47. *See also* I.R.C. § 132(f)(4) (Supp. II 2009).

133. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 211, 122 Stat. 3765, 3840 (codified in scattered sections of the U.S.C.).

134. I.R.C. § 132(f)(2) (Supp. II 2009).

135. *Id.* § 132(f)(2)(B) (“The amount of the fringe benefits which are provided by an employer to any employee and which may be excluded from gross income under subsection (a)(5) shall not exceed . . . \$175 per month in the case of qualified parking.”).

136. *Id.* § 132(f)(2)(A).

The amount of the fringe benefits which are provided by an employer to any employee and which may be excluded from gross income under subsection (a)(5) shall not exceed . . . \$100 per month in the case of the aggregate of benefits described in subparagraphs (A) and (B) of paragraph (1). Subparagraphs (A) and (B) of paragraph (1) describe transportation in a commuter highway vehicle and transit passes, respectively.

*Id.* § 132(f)(1)(A)–(B).

137. *Id.* § 132(f)(5)(F)(ii) (“The term ‘applicable annual limitation’ means, with respect to any employee for any calendar year, the product of \$20 multiplied by the number of qualified bicycle commuting months during such year.”).

138. Energy Policy Act of 1992, Pub. L. No. 102-486, § 1911(b), 106 Stat. 2276, 3012–13 (1992).

equal benefits for alternative modes of transportation. And although the Bailout Bill successfully added bicycle transportation to the list of eligible qualified transportation benefits, the actual benefit to employees is trivial at best.

The proposed Green Routes to Work Act would reduce some of the taxpayer bias toward parking benefits by increasing tax incentives to use alternative means of transportation.<sup>139</sup> This Act would equalize the maximum amount excludable for the permitted combinations of alternative transportation methods and parking benefits to \$230.<sup>140</sup> Under the proposed Green Routes to Work Act, employees would be allowed to exclude reimbursements for both transit passes *and* bicycle expenses in the same month.<sup>141</sup> Unfortunately, however, the proposed Green Routes to Work Act would not permit employees to exclude reimbursements for both carpooling *and* bicycle expenses, nor would it permit employees to exclude reimbursements for mass transit *and* carpooling *and* bicycle expenses. I argue, however, that the proposed Green Routes to Work Act does not completely eliminate the inequity between the current treatment of other qualified transportation fringe benefits and bicycle transportation reimbursements. I believe bicycle transportation benefits should be given the same treatment as mass transit and carpooling benefits under the Tax Code.

### III. TAX EXPENDITURE ANALYSIS

As explained earlier, tax deductions, exclusions, and credits are “tax expenditures.”<sup>142</sup> It is important to consider the exclusion for bicycle commuting reimbursements in the context of a tax expenditure analysis because, as a doctrine, the tax expenditure analysis has been very influential in the legislative process.<sup>143</sup> In fact, the tax “expenditure concept has been enshrined in federal law and [has] become part of the daily discourse of the national budget process.”<sup>144</sup>

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139. Green Routes to Work Act, H.R. Res. 3271, 111th Cong. (2009).

140. *Id.* § 2(a). Wendy Gerzog Shaller proposes that Congress should eliminate the parking exclusion all together. Shaller, *supra* note 82, at 615. Or, at the very least, Shaller proposes subjecting the benefit to nondiscrimination requirements. *Id.* Employers choosing to offer such a program would be required to provide the benefit to all employees, not just those who are highly compensated. *Id.*

141. Green Routes to Work Act, §§ 2(a), 9.

142. *See supra* Part I.A.

143. Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165 (1993), reprinted in FEDERAL INCOME TAX ANTHOLOGY, at 67, 67 (Paul L. Caron et al. eds., 1997) (“Few academic doctrines can claim the intellectual and political success of tax expenditure analysis.”).

144. *Id.* at 68.

Historically, the Congressional Joint Committee on Taxation (Joint Committee) has been heavily influenced by former Assistant Secretary for Tax Policy Stanley Surrey's scholarship on tax expenditures.<sup>145</sup> Surrey first used the phrase "tax expenditures" in a 1967 speech and described them as "those special provisions of the federal income tax system which represent government expenditures made through that system to achieve various social and economic objectives."<sup>146</sup> These expenditures provide financial assistance by giving a tax reduction rather than direct aid.<sup>147</sup> Consequently, tax reductions make certain behavior more attractive, which in turn, motivates taxpayers to engage in the desired behavior.<sup>148</sup>

The Joint Committee has explained that examining these financial incentives through a tax expenditure analysis may shed light on how certain government funds are spent and what policy implications may subsequently arise.<sup>149</sup> While it would be nearly impossible to predict all the ways expanding the current exclusion for bicycle transportation reimbursements would affect taxpayer behavior, nevertheless, it is worthwhile to consider their expansion simultaneously with some of the general arguments for and against tax expenditures. By addressing common tax expenditure analysis themes, while incorporating the historical treatment of similar benefit categories and the current inequitable tax treatment for bicycle transportation reimbursements, I argue that expansion of these tax incentives is socially and economically desirable.

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145. See 2008–2012 ESTIMATES, *supra* note 30, at 3–4.

146. SURREY, *supra* note 48, at vii; Surrey, *supra* note 24, at 706.

The federal income tax system consists really of two parts: one part comprises the structural provisions necessary to implement the income tax on individual and corporate net income; the second part comprises a system of tax expenditures under which Governmental financial assistance programs are carried out through special tax provisions rather than through direct Government expenditures. This second system is grafted on the structure of the income tax proper; it has no basic relation to that structure and is not necessary to its operation. Instead, the system of tax expenditures provides a vast subsidy apparatus that uses the mechanics of the income tax as a method of paying the subsidies.

SURREY, *supra* note 48, at 6.

147. SURREY, *supra* note 48, at vii.

148. Surrey, *supra* note 24, at 711, 713. See also Cavanaugh, *supra* note 16, at 711 ("Tax preferences induce taxpayers to engage in an activity by making it less costly, just as penalties are designed to discourage activities by making them more costly.").

149. 2008–2012 ESTIMATES, *supra* note 30, at 1 (The "[t]ax expenditure analysis can help both policymakers and the public to understand the actual size of government, the uses to which government resources are put, and the tax and economic policy consequences that follow from the implicit or explicit choices made in fashioning legislation.").

### A. General Criticism of Tax Expenditures

In general, tax incentives have been justified based on the assumption that taxpayers would not engage in the desired activity absent a financial incentive.<sup>150</sup> Because of the purported importance of the desired activity, the government is unwilling to allow the free market to control the success or failure of certain policy considerations.<sup>151</sup> This motivation can be seen in the Bailout Bill.<sup>152</sup> The stated purpose of the Bailout Bill explains that Congress sought to provide stability, prevent disruption, protect taxpayers, and notably, “provide incentives for energy production and conservation.”<sup>153</sup>

Consistent with the purpose of the Bailout Bill, Representative Blumenauer argues that it makes environmental, public health, and economic sense for Congress to expand the current incentives to employees for using alternative methods of transportation, like bicycles.<sup>154</sup> Several statistics support Representative Blumenauer’s argument. Specifically, employees who commute to work by bicycle save on average \$1,825 on automobile-related expenses, use 145 fewer gallons of gas, and spend 50 fewer hours in traffic each year than those who drive.<sup>155</sup> Numbers like these support the notion that, by encouraging more employees to ride bicycles to work through tax incentives, the federal government may be able to reduce taxpayers’ dependence on oil and ease traffic congestion in heavily populated areas.

Despite arguments like Representative Blumenauer’s in favor of tax expenditures, critics argue that this, and similar government subsidies, are generally inefficient and inequitable.<sup>156</sup> Other commentators have gone so far as to call tax expenditures “loopholes that need to be closed.”<sup>157</sup>

One of Stanley Surrey’s main criticisms of tax expenditures is that they are generally less desirable than direct subsidies, as a means of achieving goals.<sup>158</sup> Surrey argues that it is inefficient to provide financial benefits through an indirect means, such as an exclusion through the Tax Code, instead of direct financial compensation—cash—for engaging in the desired behavior.

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150. Cavanaugh, *supra* note 16, at 711.

151. *Id.*

152. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified in scattered sections of the U.S.C.).

153. *Id.*

154. 155 CONG. REC. E1858 (daily ed. July 21, 2009) (statement of Rep. Blumenauer) (stating that “[i]f more Americans commute using alternative modes of transportation, we will see improvements in the economy, workplace productivity, and quality of life”).

155. *Id.* at E1858–E1859.

156. Cavanaugh, *supra* note 16, at 713.

157. Rosanne Altshuler & Robert D. Dietz, *Reconsidering Tax Expenditure Estimation: Challenges and Reforms 1* (Rutgers Univ., Dep’t. of Econ., Working Paper No. 200804, 2008), available at <http://ideas.repec.org/p/rut/rutres/200804.html>.

158. Surrey, *supra* note 24, at 734–35.

However, I argue there are inherent benefits in approaching environmental goals, like encouraging bicycle transportation, through a tax expenditure offered through employers rather than a direct expenditure given straight to employees.

As explained earlier in this Comment, the concept of tax subsidies distributed through employers to employees is not foreign.<sup>159</sup> “Through the Internal Revenue Code, Congress implicitly defines, by design or by accident, what the nature of the employment relationship is, or can be.”<sup>160</sup> Recently, this interaction between the tax code and employment relationships has come into the spotlight, and concerns have been raised about the economic effects of these subsidies.<sup>161</sup> While some subsidies, like those for parking benefits, are particularly vulnerable to criticism, I argue employers may be better suited to address the transportation issue and encourage alternative methods of transportation, such as bicycles, for three reasons.<sup>162</sup>

First, employers are in a better position than employees to lobby the government for improvements within the transportation system with less organizational cost than individual employees.<sup>163</sup> From a purely bureaucratic standpoint, a single individual is much less likely to be able to achieve broad policies affecting national transportation issues than an employer, who is more likely to have the educational, financial, and political resources that are necessary to influence legislative decisions. In other words, a single taxpayer lobbying for a tax incentive for them to ride their bicycle to work is hardly as persuasive as a single employer who can lobby on behalf of dozens, hundreds, or thousands of employees.

Second, by subsidizing benefits, Congress encourages the creation of more employment relationships.<sup>164</sup> For employees, regardless of what transportation method employees choose, the expense incurred for that transportation is considered “an expense of establishing or maintaining” that employment relationship.<sup>165</sup> By providing tax incentives within these employer/employee relationships, Congress effectively reduces the costs for employees to enter and

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159. *See supra* Part I.B.

160. Kratzke, *supra* note 83, at 1.

161. Cavanaugh, *supra* note 16, at 734.

162. Craig N. Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141, 197–98 (1998).

163. *Id.* at 198.

164. *Id.*

165. Kratzke, *supra* note 83, at 47. “However, tax subsidization of more expensive forms of transportation [like automobile transportation through parking subsidies] from which a taxpayer derives increased personal (as opposed to trade or business) benefits suggests a substitution of a more costly benefit for another without actually facilitating creation of an employment relationship.” *Id.*

maintain such relationships.<sup>166</sup> For employers, subsidized benefits can help reduce employee turnover rates.<sup>167</sup>

Third, Craig Oren suggests that another benefit of the employer/employee relationship is that the social atmosphere of the work environment may lend itself to encouraging transportation preferences based on the decisions of those around you.<sup>168</sup> Thus, if many of your coworkers opt to take advantage of the exclusion for transit pass or bicycle reimbursement, you may be more likely to engage in similar behavior. Oren explains:

If I saw others successfully carpooling or using transit to get to work, I might well be influenced to do the same, just as my choice of car is affected by the preferences of my colleagues and neighbors. The workplace—one of a declining number of arenas in which people meet—is an apt location for this kind of influence to take place.<sup>169</sup>

But, in order to encourage businesses to participate in social programs, the “[g]overnment must be willing to meet business half way.”<sup>170</sup> The proposed Green Routes to Work Act provides for significant employer incentives to promote and accommodate employee bicycle transportation.<sup>171</sup>

Therefore, because of the unique nature of the employer/employee relationship, funneling financial incentives for environmental and transportation goals through employers is an efficient way of accomplishing those goals.

#### B. *Specific Criticisms of Tax Expenditures*

Aside from the general notion that tax incentives are less desirable than direct subsidies, Surrey argues there are four main defects with tax incentives: 1) They provide windfalls for taxpayers who would engage in the activity anyway; 2) They are inequitable because they are worth more to high-income taxpayers; 3) They distort choices in the marketplace; and 4) They keep tax

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166. Oren, *supra* note 162, at 198.

167. Cavanaugh, *supra* note 16, at 691.

168. Oren, *supra* note 162, at 198.

169. *Id.*

170. Surrey, *supra* note 24, at 716 (citing 115 CONG. REC. S5329, S5330 (daily ed. May 16, 1969) (statement of Sen. Percy)). *But see id.* (countering Sen. Percy’s statement by arguing that the policy does not support the use of a tax incentive as opposed to a direct expenditure because it is focused on the need for government assistance in a particular area).

171. Green Routes to Work Act, H.R. Res. 3271, 111th Cong. § 8(a) (2009) (explaining that employers would be given a tax credit for “expenditures to provide bicycle access” in “an amount equal to 50 percent of so much of the eligible bicycle access expenditures for the taxable year as exceed \$250 but do not exceed \$10,250.”); *id.* § 10(a) (explaining expenses to remove “architectural and transportation barriers” to bicycle access may be treated as a deduction from gross income).

rates high because of reduced revenue.<sup>172</sup> However, Surrey is careful to note that his disapproval of tax expenditures over direct expenditures is merely a general analysis, and thus, there may be particular cases in which direct expenditure programs “do not apply because special considerations are involved.”<sup>173</sup>

In order to accurately determine whether a direct expenditure or a tax incentive is more desirable, a “cost-benefit and cost-effectiveness” analysis must be conducted.<sup>174</sup> This section addresses each of Surrey’s four primary criticisms of tax expenditures and presents my argument for why the current favorable treatment of bicycle reimbursements within the Tax Code and the proposed Green Routes to Work Act fit within Surrey’s narrow exception to his general disfavor of tax expenditures. I argue that these criticisms of tax expenditures in general are not applicable to the exclusion for bicycle commuting reimbursements. Also, the social policy benefits support the current treatment of bicycle reimbursements as an exclusion rather than a deduction and even support extending the exclusion further.

#### 1. Response to the Concern of Creating a Windfall to Taxpayers

Surrey’s first specific criticism of tax expenditures is that they create windfalls to taxpayers who would engage in certain behaviors absent a tax incentive.<sup>175</sup> Beyond creating windfalls, Surrey argues these expenditures are also a waste of government funds.<sup>176</sup> In response to the concern that the recent amendments provided by the Bailout Bill and the proposed amendment within the Green Routes to Work Act create windfalls to taxpayers, I argue that such a windfall does not exist. Furthermore, these provisions may have the effect of mitigating the existing windfall created by the current exclusion for parking benefits created by the 1992 Act and subsidized employer parking under the 1997 Act.<sup>177</sup>

There is little doubt that commuting to work is a necessary part of employment for many employees.<sup>178</sup> The way that employees choose to commute, however, is their choice. Under the current tax regime, employees

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172. Surrey, *supra* note 24, at 719–26.

173. *Id.* at 735.

174. *Id.* at 714–15.

175. *Id.* at 719 (arguing tax incentives can be pleasant for people who would have engaged in the incentivized behavior regardless of whether or not there was an incentive to do so). *See also* Cavanaugh, *supra* note 16, at 714.

176. Surrey, *supra* note 24, at 719. *See also* Part III.B.4 for a discussion about the criticism that tax expenditures result in reduced revenue for the federal government.

177. *See supra* Parts II.C–D.

178. Cavanaugh, *supra* note 16, at 723.

choose to drive to work. Almost 80% of commuters drive to work alone.<sup>179</sup> Arguably, driving to work is an activity and/or expense that employees are likely to engage in without a tax incentive.<sup>180</sup> By excluding employer reimbursements for parking expenses from taxable income and allowing employers to provide tax-free parking to employees, the 1992 and 1997 Acts reduced the expenses incurred by employees driving to work.<sup>181</sup> Contrary to the purpose of tax expenditures—encouraging socially desirable behavior that taxpayers would not engage in absent a financial incentive<sup>182</sup>—the parking subsidy creates “significant windfalls” for those taxpayers who would drive to work and pay for parking without any tax incentive.<sup>183</sup>

In contrast to driving, less than 5% of trips to work are made using public transit,<sup>184</sup> and less than 10% of all daily trips are made by walking or bicycling.<sup>185</sup> Thus, current incentives for carpooling, mass transit, and bicycle commuting transportation do not create windfalls for a large percentage of employees commuting to work because employees generally do not utilize alternative transportation methods. Moreover, in the context of another alternative mode of transportation, carpooling, studies show that commuters in general are more likely to carpool when there are incentives for them to do so.<sup>186</sup>

Thus, contrary to Surrey’s general argument, proposed expansion of the present benefits would not necessarily have a windfall effect. Increasing the benefits afforded to employees who commute to work by bicycle could directly reduce traffic congestion, if the incentives or disincentives for driving are substantial enough. But even if taxpayers were to receive a windfall for alternative transportation methods, unlike the parking subsidy, such windfalls would still support positive social activities.<sup>187</sup>

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179. Mann, *supra* note 16, at 588 (citing U.S. CENSUS BUREAU, MEANS OF TRANSPORTATION TO WORK FOR WORKERS 16 YEARS AND OVER, 2002 AMERICAN COMMUNITY SURVEY (2002), available at <http://factfinder.census.gov>).

180. Cavanaugh, *supra* note 16, at 723.

181. *See supra* notes 118–19, 126–27 and accompanying text.

182. *See supra* note 150 and accompanying text.

183. Cavanaugh, *supra* note 16, at 723.

184. Mann, *supra* note 16, at 613 (citing John Pucher & John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, *TRANSP. Q.*, Summer 2003, at 49, 49).

185. *Id.* at 616 (citing Pucher & Renne, *supra* note 184, at 51).

186. Sharon Sarmiento, *Household, Gender, and Travel*, in U.S. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., OFFICE OF HIGHWAY INFO. MGMT., *WOMEN’S TRAVEL ISSUES: PROCEEDINGS FROM THE SECOND NATIONAL CONFERENCE*, FHWA-PL-97-024, at 37, 44 (1996), available at <http://www.fhwa.dot.gov/ohim/womens/wtipage.htm>.

187. *See infra* Part III.B.3 (discussing social benefits of bicycle incentives).

## 2. Response to the Concern of Inequity

Surrey's second specific criticism of tax expenditures is that they are inequitable.<sup>188</sup> Underlying this notion of equity are the principles of fairness, equality, and distributive justice.<sup>189</sup> Tax expenditures have been perceived as inequitable when they disproportionately benefit higher-income taxpayers.<sup>190</sup> These critics believe that tax incentives "rarely provid[e] benefits to taxpayers who do not have taxable incomes and perversely provid[e] greater benefits to taxpayers with the most income."<sup>191</sup> However, such concerns are not present with bicycle commuting reimbursements.

First, unlike some deductions, the bicycle reimbursement provision does not require taxpayers to have a minimum adjusted gross income to receive its benefits. As explained earlier in this comment, the bicycle reimbursement provision is an exclusion as opposed to a deduction.<sup>192</sup> Thus, all employees who wish to take advantage of this provision can because it is predicated on the presence of gross income, which all employees have because they receive wages from their employer. Moreover, because there are quantifiable maximum exclusions, they are less likely to disproportionately benefit a higher-income cross-section than other limitless tax expenditures.

From a sociological perspective, increasing the present incentives to utilize bicycle transportation<sup>193</sup> could have substantial benefits on certain demographics because commuting time, costs, patterns, and distances differ based on age, race, and income level.<sup>194</sup> Despite the rationale used to justify qualifying transportation expenses as inherently personal,<sup>195</sup> "[n]ot every taxpayer would agree that he has a meaningful personal choice of where to live."<sup>196</sup> Empirical data of transportation patterns support the premise that some racial groups and low income employees may be more likely to take advantage of and, thus, benefit from, the exclusion.<sup>197</sup>

For example, research indicates that women (excluding African-American women) generally work closer to home and have shorter commuting times than men.<sup>198</sup> In addition, women are more likely to commute (both short and long

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188. Surrey, *supra* note 24, at 720. See also Cavanaugh, *supra* note 16, at 713.

189. Dagan, *supra* note 17, at 219.

190. Cavanaugh, *supra* note 16, at 713.

191. *Id.*

192. See *supra* Part I.A.

193. See *infra* text accompanying notes 212–18 (discussing Pigouvian Taxation).

194. Dagan, *supra* note 17, at 220–22.

195. See *supra* text accompanying notes 81–85 (explaining that, historically, commuting expenses have been treated as inherently personal).

196. Kratzke, *supra* note 83, at 46.

197. Dagan, *supra* note 17, at 222–24.

198. *Id.* at 222 (citing Ibipo Johnston, *Location, Race, and Labor Force Participation: Implications for Women of Color*, in U.S. DEP'T OF TRANSP., *supra* note 186, at 337, 339); Sara

trips) to low-income jobs than men.<sup>199</sup> If one assumes, in general, that the closer an employee lives to their work, the more likely they are to commute to work by bicycle then, theoretically, women may be more likely to commute to work by bicycle than men.

Moreover, “individuals often trade off money for time and flexibility.”<sup>200</sup> This trade off may also create more of a financial incentive for women to utilize the bicycle transportation provision than men. Sharon Sarmiento has theorized that women may find less expensive modes of transportation more attractive because women generally have lower incomes than men.<sup>201</sup> In fact, studies show that women are more likely to use mass transit than men.<sup>202</sup> Although women may not typically be more likely than men to ride bicycles to work, when considered in the context of their shorter commuting distances and the financial incentive, women may be predisposed to take advantage of tax benefits afforded for bicycle transportation.<sup>203</sup>

Research also indicates that African-Americans may be more likely to take advantage of an expansion of the current alternative transportation method benefits. In general, minority groups have longer commute times than Caucasians.<sup>204</sup> For African-Americans, their longer commute time may be explained by the “spatial mismatch hypothesis”:

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McLafferty & Valerie Preston, *Gender, Race and Commuting Among Service Sector Workers*, 43 PROF. GEOGRAPHER 1, 7 (1991)). See also U.S. DEPT. OF COMM., JOURNEY TO WORK: 2000, at 5–6 (2004); Nicole Stelle Garnett, *The Road from Welfare to Work: Informal Transportation and the Urban Poor*, 38 HARV. J. LEGIS. 173, 188–89 (2001). The reason for the disparity has been attributed to the fact that women “generally earn lower incomes and work shorter hours, so it does not pay to commute long distances.” Sarmiento, *supra* note 186, at 41. However, marital status also contributes to the length of a woman’s commute time, as married women have shorter commutes than those who are unmarried. *Id.*

199. Dagan, *supra* note 17, at 222 (citing Johnston, *supra* note 198, at 339; McLafferty & Preston, *supra* note 198, at 7).

200. Sarmiento, *supra* note 186, at 43.

201. *Id.* See also Dagan, *supra* note 17, at 222 (citing Johnston, *supra* note 198, at 345–46) (“[W]omen are more likely than men to have ‘compromised’ and ‘constrained’ commutes (i.e., short and long trips to low-income jobs), while men are more likely than women to have either convenient (i.e., less than twenty minutes) or compensatory commutes (i.e., long commutes to high income jobs.)”).

202. Oren, *supra* note 162, at 162 (citing ALAN E. PISARSKI, URBAN LAND INST., COMMUTING IN AMERICA II: THE SECOND NATIONAL REPORT ON COMMUTING PATTERNS AND TRENDS 50, 60 (1996)).

203. *But see* Sarmiento, *supra* note 186, at 43 (explaining a woman’s choice of their mode of transportation are “varied and location-specific” because of concerns relating to domestic responsibilities). The choice depends “a lot on the transportation options available in each location.” *Id.* Also, commuters in general are more likely to carpool when they commute long distances and when incentives for doing so are available. *Id.* at 44.

204. Dagan, *supra* note 17, at 222 (citing Johnston, *supra* note 198, at 339; McLafferty & Preston, *supra* note 198, at 9).

African American inner-city residents have poorer spatial access to jobs than do other workers, because of their concentration in segregated residential areas distant from and poorly connected to major centers of employment growth. Lack of access leads to high rates of unemployment and, for persons able to overcome spatial barriers and find work, to long journeys to work.<sup>205</sup>

The longer journey to work is due, at least in part, to the fact that African-Americans depend on slower methods of transportation, like public transit.<sup>206</sup>

Based on their statistical dependence on alternative modes of transportation, increasing financial benefits afforded to alternative modes of transportation through qualified fringe benefits, could reduce the expense and hardship African-Americans face when commuting to work. Further, these statistics provide an illustration of why employees should be permitted to concurrently exclude commuter highway vehicle *and* transit pass *and* bicycle reimbursements. Because African-Americans are more likely to use public transit, they might also be more likely to take advantage of an expansion of the current bicycle commuting reimbursement benefit.

Therefore, based on the possible effects expansion of bicycle reimbursements could have on women and African Americans, and contrary to concerns under the tax expenditure analysis, adoption of the proposed Green Routes to Work Act or similar legislation and further expansion of tax benefits for alternative means of transportation to work may not disproportionately benefit higher income employees.

### 3. Response to Concern of Market Distortion

Surrey's third specific criticism about tax incentives in general is that they distort market choices.<sup>207</sup> Surrey stated that "even within the area sought to be benefited by the tax incentive, the design of the incentive may push or pull in unneutral directions, which may or may not be desirable."<sup>208</sup> Concededly, one example of the harm of distorting market choices is the 1997 Act,<sup>209</sup> which has been frequently criticized.<sup>210</sup> However, even though distortion of the market place can be viewed as a criticism of tax incentives, in the context of bicycle reimbursements, it may also be viewed as a benefit because the purpose of tax incentives is to alter current market conditions.<sup>211</sup> In this Section, I will draw

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205. Johnston, *supra* note 198, at 339.

206. *Id.* at 344.

207. Surrey, *supra* note 24, at 725.

208. *Id.*

209. *See supra* text accompanying notes 130–32 (describing the unexpected consequences of the 1997 Act).

210. *See, e.g.,* Cavanaugh, *supra* note 16, at 685 (criticizing the 1997 amendments for distorting market choices and creating unwanted side-effects like urban congestion and air pollution).

211. Surrey, *supra* note 24, at 725.

distinctions between the 1997 Act and tax expenditures to encourage alternative modes of transportation generally and the Green Routes to Work Act specifically; and ultimately, I conclude that changing the market is one of the premier benefits to expanding the current incentives for bicycle transportation.

In an article critiquing the 1997 Act,<sup>212</sup> Maureen Cavanaugh advanced the proposition that in addition to the tax expenditure analysis, Congress should also consider the principles of Pigouvian taxation when determining whether or not a particular tax incentive should be implemented.<sup>213</sup> Pigouvian taxation was advanced by A.C. Pigou and F.P. Ramsey in the twentieth century.<sup>214</sup> Under the theory of Pigouvian taxation, tax incentives and disincentives are an optimal way of either encouraging behavior that benefits society or, alternatively, discouraging behavior for which the social costs outweigh the individual benefits.<sup>215</sup> Essentially, taxes can effectively address social problems by placing a monetary valuation on behavior that has positive or negative social consequences.<sup>216</sup> On one hand, the tax code can be an effective way of mitigating the disparity between the benefit received by the taxpayer and the costs borne by society caused by a particular behavior, by reallocating the loss to the taxpayer through tax disincentives.<sup>217</sup> On the other hand, the tax code can be used to lower the cost of behavior to an individual that benefits society.<sup>218</sup>

Because of the failed attempt to address urban congestion and transportation issues through the 1997 Act, now taxpayers receive a subsidy for commuting.<sup>219</sup> Cavanaugh argues this subsidy is inconsistent with the theory of Pigouvian taxation because urban congestion and transportation costs are examples of activities in which social costs outweigh private benefits and, thus, should not be incentivized.<sup>220</sup>

Commuting contributes to “urban congestion, reduced air quality, and increased gasoline consumption.”<sup>221</sup> On any given day, 200,000,000 vehicles travel across nearly the 4,000,000 miles of roadways located in the United

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212. See *supra* Part II.D (discussing the Taxpayer Relief Act of 1997).

213. Cavanaugh, *supra* note 16, at 685–86.

214. *Id.* at 688.

215. *Id.*

216. *Id.* at 689.

217. *Id.* at 688.

218. Cavanaugh, *supra* note 16, at 688.

219. See *supra* notes 126 and accompanying text (explaining the 1997 Act).

220. Cavanaugh, *supra* note 16, at 688. Roberta Mann also argues that “[t]he transportation fringe benefit of tax-free parking exacerbates urban transportation problems.” Mann, *supra* note 16, at 637.

221. Cavanaugh, *supra* note 16, at 688.

States.<sup>222</sup> In addition, commuting to work represents 26% of all household vehicle trips and 33% of total vehicle miles traveled.<sup>223</sup> These high percentages of vehicle use are also correlated with statistics indicating that trips to work are more concentrated in time and tend to produce the most traffic congestion.<sup>224</sup>

Consequences of this high volume of traffic pose serious health risks to our citizens that are often unseen.<sup>225</sup> It is no wonder that the emissions from these vehicles in cities account for 95% of carbon monoxide emissions.<sup>226</sup> Such emissions have been shown by the EPA to have shocking effects.<sup>227</sup> Each year 50% of the 1700 to 2700 cancer deaths caused by hazardous air pollutants are caused by emissions from “mobile sources such as highway vehicles.”<sup>228</sup>

Despite the failures of the 1997 Act, Cavanaugh concedes that optimal taxation may require a process of trial and error.<sup>229</sup> Thus, perhaps Congress’s error with the 1997 Act should not be viewed as an example to support the position taken by critics of tax expenditures, but should rather be viewed as an error which can be corrected. Cavanaugh suggested under Pigouvian taxation, either reducing or eliminating employer-subsidized parking would reduce “pollution and congestion while improving air quality, land use, and fuel

222. Oren, *supra* note 162, at 150–51.

223. *Id.* at 163 (citing PISARSKI, *supra* note 202, at 3). On average, “Americans drive their cars about one hour per day.” Oren, *supra* note 162, at 151 (citing TRANS. RES. BOARD, TOWARD A SUSTAINABLE FUTURE: ADDRESSING THE LONG-TERM EFFECTS OF MOTOR VEHICLE TRANSPORTATION ON CLIMATE AND ECOLOGY 1-1, 2-1 (1997) (on file with the Stanford Environmental Law Journal)). Further, some studies estimate that Americans lose the equivalent of an entire work week each year due to urban congestion and transportation. Cavanaugh, *supra* note 16, at 717 n.146.

224. Oren, *supra* note 162, at 163 (citing ANTHONY DOWNS, STRUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION 13–16 (1992)). William Kratzke believes that “[e]mployee-caused congestion suggests that there may be too much commuting in private automobiles.” Kratzke, *supra* note 83, at 47. Kratzke proposes that Congress should tax parking instead of subsidize it. *Id.*

225. See Oren, *supra* note 162, at 151 (discussing the health consequences of carbon monoxide emissions).

226. *Id.* at 151 (citing U.S. ENVTL. PROTECTION AGENCY, NATIONAL AIR QUALITY AND EMISSIONS TREND REPORT 1995, at 10 (1996)).

227. *Id.* at 152–53 (citing *Implementation and Enforcement of Clean Air Act Amendments of 1990: Hearings Before the Subcomm. on Oversight and Investigations of the H. Comm. on Commerce*, 104th Cong. 209 (1995) (statement of Mary Nichols)).

228. *Id.* at 152–53 (citing *Implementation and Enforcement of Clean Air Act Amendments of 1990: Hearings Before the Subcomm. on Oversight and Investigations of the H. Comm. on Commerce*, *supra* note 227).

229. Cavanaugh, *supra* note 16, at 717 (citing William J. Baumol, *On Taxation and the Control of Externalities*, 62 AM. ECON. REV. 307, 315 (1972)).

conservation.”<sup>230</sup> Alternatively, parking policies and subsidized transit costs could be used in combination to encourage the use of public transit.<sup>231</sup>

Another means of correcting the mistakes of the 1997 Act would be to expand the current exclusions for bicycle transportation reimbursements. In addition, increasing incentives for bicycle transportation and other alternative transportation methods may mitigate some of the negative consequences of our current “[t]ax code that favors driving and suburban life.”<sup>232</sup> Both the recent Bailout Bill amendments and the proposed Green Routes to Work Act are consistent with the theory of Pigouvian taxation.<sup>233</sup> Allowing tax benefits for those who commute by bike is a way of encouraging behavior with positive social benefits, which is consistent with the goal of Pigouvian taxation.<sup>234</sup> Bicycle riding is both pollution free and a “healthful” mode of transportation.<sup>235</sup> Representative Blumenauer argues through the Green Routes to Work Act, Congress would be supporting employees “who wish to use environmentally friendly, active transportation modes that save them money in the long run, such as public transit, carpooling, biking, walking and telecommuting.”<sup>236</sup> Moreover, by using “fiscal policy to encourage environmentally constructive activities and to discourage destructive ones, we can steer the economy in a sustainable direction.”<sup>237</sup> Our nation’s dependence on automobiles has caused environmental and social damage, but this damage can be corrected by using the federal income tax system.<sup>238</sup>

Therefore, based on the theory of Pigouvian taxation, the Green Routes to Work Act should be adopted, the current maximum excludable reimbursement

230. *Id.* at 720 (citing Donald C. Shoup, *Cashing out Free Parking*, 36 *TRANSP. Q.* 351, 354–58 (1982)).

231. *Id.* (citing David Merriman, *How Many Parking Spaces Does it Take to Create One Additional Transit Passenger?*, 28 *REG. SCI. & URB. ECON.* 565, 566 (1998)). For example, subsidized or free parking at public transit stops has been demonstrated to increase transit ridership. *Id.* (citing Merriman, *supra*, at 566).

232. Michael Lewyn, *Campaign of Sabotage: Big Government’s War Against Public Transportation*, 26 *COLUM. J. ENVTL. L.* 259, 282 (2001).

233. See Emergency Economic Stabilization Act of 2008, Pub. L. 110-343, § 211, 122 Stat. 3765, 3840; Green Routes to Work Act, H.R. Res. 3271, 111th Cong. (2009).

234. Emergency Economic Stabilization Act of 2008 § 211, 122 Stat. at 3840; Cavanaugh, *supra* note 16, at 688.

235. Mann, *supra* note 16, at 616.

236. 155 Cong. Rec. E1858 (daily ed. July 21, 2009) (statement of Rep. Blumenauer). Cf. Cavanaugh, *supra* note 16, at 711 (citing Surrey, *supra* note 24, at 713) (“Any tax preference serves as an incentive, providing a monetary benefit to make the subsidized activity more palatable to taxpayers. Tax preferences induce taxpayers to engage in an activity by making it less costly, just as penalties are designed to discourage activities by making them more costly.”).

237. Mann, *supra* note 16, at 621 (quoting LESTER R. BROWN, *ECO-ECONOMY: BUILDING AN ECONOMY FOR THE EARTH* 234–35 (2001)).

238. *Id.* at 620–21.

for bicycles should be increased, and employees should be permitted to exclude bicycle commuting reimbursements, commuter highway vehicle, *and* transit pass benefits concurrently.

#### 4. Response to Concern of Reduced Revenue

Finally, the reduction in revenue to the federal government forms the basis for Surrey's fourth specific criticism of tax expenditures.<sup>239</sup> Surrey argues that tax incentives have the effect of keeping tax rates high because they reduce revenue for the Federal Government.<sup>240</sup> Any exclusions, including those for transportation fringe benefits, result in less revenue for the government through the federal income tax.<sup>241</sup> Less revenue results in higher tax rates to account for the revenue lost because of tax benefits.<sup>242</sup>

Because most tax expenditures do not place a maximum on how much a taxpayer can earn through the expenditure, it is difficult to predict how much the particular incentive will cost the government in lost revenue.<sup>243</sup> However, unlike the tax expenditures criticized by Surrey, all qualified transportation fringe benefits have strict maximum amounts excludable from an employee's gross income.<sup>244</sup> By looking at previous filings by demographic, it is feasible to estimate the potential maximum loss by multiplying the number of taxable returns by the maximum exclusion.<sup>245</sup>

In 2006, the exclusion for qualified employee parking cost an estimated \$2.73 billion dollars.<sup>246</sup> During the same year, the exclusion of transit passes cost an estimated \$550 million dollars.<sup>247</sup> It is necessary to note that the total lost revenue due to the parking exclusion is offset a little bit by the federal fuel tax.<sup>248</sup> However, the offset is not significant enough to neutralize the other negative effects driving has on our country.<sup>249</sup> Some costs were mentioned in the previous section, but others include: the revenue spent by the federal

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239. Surrey, *supra* note 24, at 725–26.

240. *Id.* at 725–26.

241. GRAETZ & SCHENK, *supra* note 18, at 111–12.

242. *Id.*

243. Surrey, *supra* note 24, at 726.

244. I.R.C. § 132(f)(2) (2006).

245. For example, in 2007, 88,723,000 taxable returns were filed. 2008–2012 ESTIMATES, *supra* note 30, at 70.

246. Kratzke, *supra* note 83, at 46 (citing OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 2006, ANALYTICAL PERSPECTIVES 324–25 (2005)). In 2005, the exclusion for qualified employee parking cost an estimated \$2.59 billion in revenue. Gazur, *supra* note 53, at 1006–07.

247. Kratzke, *supra* note 83, at 46 (citing OFFICE OF MGMT. & BUDGET, *supra* note 246, at 324–25). In 2005, the exclusion for employer-provided transit passes cost an estimated \$550 million in revenue. Gazur, *supra* note 53, at 1007.

248. Lewyn, *supra* note 232, at 282–83.

249. *Id.*

government on highway maintenance; the costs of increased air pollution; the burden on publicly funded medical care due to car accidents; and the costs to enforce traffic and parking laws.<sup>250</sup>

The estimated total expenses for qualified transportation fringe benefits support the proposition that the bicycle commuting exclusion is an inexpensive means of achieving legitimate social policy goals.<sup>251</sup> Although the bicycle commuting exclusion could cost the Internal Revenue Service an estimated \$1 million a year, that amount is tiny in comparison to the expense incurred by the Internal Revenue Service for reimbursements for qualified parking expenses and transit passes.<sup>252</sup> Therefore, the reduction in revenue should not justify eliminating or refusing to expand current tax incentives for bicycle transportation.

Based on the preceding analysis, there are “special considerations” present in the context of bicycle reimbursements that are not present with other frequently criticized tax expenditures.<sup>253</sup> As stated earlier in this Comment, by equalizing the maximum excludable benefit for all types of transportation fringe benefits, Congress could eliminate some of the bias that acts as an incentive to encourage taxpayers to choose parking benefits over other alternative means of transportation.<sup>254</sup>

#### CONCLUSION

Through the discussion of the historical treatment of similar employee commuting benefits and the application of a tax expenditure analysis, this comment sought to highlight the inequities and negative social policies reflected in our Tax Code. After looking back at the historical treatment of similar employee commuting benefits, it is clear that as we go forward into the next decade, we must change the current treatment of transportation fringe benefits under the Tax Code.

As stated in the introduction, our tax laws reflect our vision of who we are as a society and how we perceive ourselves.<sup>255</sup> Under our current tax laws, the generous parking subsidies reward fuel consumption and pollution, while concurrently discouraging commuting by mass transit, carpools, and bicycles. To more accurately reflect our nation’s commitment to resolving the global

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250. *Id.*

251. As contrasted to the fringe benefits of health and pension benefits which are excluded from an employee’s gross income and also constitute one of the largest tax expenditures. GRAETZ & SCHENK, *supra* note 18, at 104.

252. Gordon, *supra* note 6, at B1.

253. Surrey, *supra* note 24, at 735.

254. Moreover, the government could save billions of dollars by eliminating the controversial parking subsidy altogether.

255. Dagan, *supra* note 17, at 188.

energy crisis and to reducing our nation's dependence on fuel, the Tax Code needs to be reformed. Specifically, the maximum nontaxable reimbursement for bicycle commuting expenses should be increased. Further, employees should be permitted to receive nontaxable benefits for bicycle commuting expenses *and* commuter highway vehicle *and* transit pass benefits *concurrently*. Such changes would not only eliminate the bias existing in the current code in favor of parking benefits which encourage socially undesirable behavior, but would also act as an incentive for employees to choose alternative methods of transportation.

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