Changing Lanes: Tax Relief for Commuters

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CHANGING LANES: TAX RELIEF FOR COMMUTERS

Hayes R. Holderness

Tax law reaches all parts of life, and societal expectations about life’s activities often affect how the law is applied. As those expectations change, application of the law should be expected to change in turn. This essay highlights changing societal views about commuting, particularly as a result of the COVID-19 pandemic, to demonstrate how even long-standing positions under the tax law can be quickly uprooted. Specifically, as working from home becomes standard, taxpayers should be afforded tax relief when required to commute into the workplace, despite the fact that the tax law traditionally has rejected such relief.

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I. INTRODUCTION

Tax law reaches to all parts of life, and to apply the law in an equitable manner, legal authorities must often consult societal expectations about certain activities. As those expectations change — even they change rapidly — so should the application of the tax law. The COVID-19 pandemic has forced an astonishing number of workers out of the workplace and into their homes, heralding in new views about how necessary — or perhaps more accurately, how unnecessary — commuting is for a job. The irony of these changing views is that as commuting becomes less necessary for work, the expenses commuters incur become more likely to qualify for tax relief as business motivated expenses. The tax law must respond to this “new normal” and should do so by providing tax credits to those taxpayers, such as essential workers, whose employers require them to commute in the age of working from home.

Societal expectations about life’s activities can be critical to a fundamental area of income tax law: deductions from income. The federal income tax is a net income tax, meaning it respects the idiom that “you have to spend money to make money.” Money a taxpayer spends in the pursuit of income should not be subject to tax, and those expenses typically are deducted from the income tax base. Conversely, money spent on personal things — grooming, housing, meals, etc. — is typically not deducted from the income tax base. Those personal expenses merely reflect how the taxpayer chooses to spend her income; they are not related to earning the income.

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1 See Tsilly Dagan, Commuting, 26 VA. TAX REV. 185, 188 (2006) (“[O]ur income tax rules reflect and shape the society in which we live and the nature of the communities we prefer.”).

2 See infra Part III.

3 See infra Part IV.

4 See Tsilly Dagan, Itemizing Personhood, 29 VA. TAX REV. 93, 125–26 (2009) (“The business-personal distinction [relating to deductions] is a deeply entrenched one in tax law and is widely supported as one of the fundamental elements of the income tax system.”).

5 See I.R.C. § 63 (defining taxable income).

6 Technically, because that money represents income that the taxpayer already has, the money is subject to tax at the time when it is earned. Taxing net income ensures that the money is not subject to a second layer of income tax when it is used to earn additional income.

7 See I.R.C. §§ 162, 212 (allowing deductions for business expenses and for expenses in the pursuit of income). Under current law, the deduction under section 212, which is categorized as a miscellaneous itemized deduction, is disallowed. See I.R.C. § 67(g) (“[N]o miscellaneous itemized deduction shall be allowed for any taxable year beginning after December 31, 2017, and before January 1, 2026.”).

8 See I.R.C. § 262 (allowing no deduction for personal expenses).
Life does not always lend itself to clean categorization, and taxpayers often have both business and personal motives for their expenditures. For instance, one must eat to survive but also to work — how should a business lunch be treated under the tax law? To answer the question, judges and tax administrators have turned to societal views about the mixed motive activities rather than engaging in the fraught exercise of trying to unpack each individual’s personal motives. The authorities attempt to uncover what society expects people to do in the ordinary course of their lives under the circumstances. Where the business does not actively require a deviation from those expectations, the expense is deemed primary personally motivated and not eligible for tax relief.

Commuting expenses are a type of mixed motive expense: one must travel to get to work and earn income, but the travel is also the result of the personal decision about where to live. Societal expectations about commuting have guided courts and tax administrators to disallow deductions for the expenses. Those authorities have understood commuting to be an ordinary part of life not actively required by the business; thus, the expenses result more from personal decisions about where to live than from the requirement of an income-producing behavior. In contrast, when the employer requires the worker to travel away from home — i.e., to spend a night out-of-town — the travel expenses deviate from normal expectations and thus are deemed to be driven by the business.

There are strong policy arguments for denying a tax deduction for commuting expenses that help highlight the personal motive behind the expenses. Allowing a full deduction for commuting expenses would effectively subsidize people who live further from work. The further away a
taxpayer lives from work, the greater the commuting costs the taxpayer would incur, but she would also receive a greater tax benefit. Where there is some expectation about how far people should reasonably live from work, providing a deduction for commuting expenses beyond that distance would subsidize personal decisions. Additionally, deductions provide more of a tax benefit to higher-income individuals, increasing the disparity in tax relief between taxpayers commuting from affluent suburban neighborhoods and taxpayers commuting from poorer urban neighborhoods. Given that income has little to do with base commuting expenses — a gallon of gas or a bus ticket costs the same no matter who buys it — providing a greater benefit to higher-income individuals because of their personal decisions about how and from where to commute makes little policy sense.

As the COVID-19 pandemic continues to disrupt the lives of workers and expectations about work, it also shepherds in the time to reconsider the arguments in favor of denying tax relief for commuting expenses. As employers become more flexible in allowing workers to work from home, commuting expenses are being eliminated, particularly for higher-income individuals. Others, namely essential workers, must continue to incur such expenses, despite the fact that society has quickly changed its views about the nature of commuting — at least during a crisis such as the pandemic — and is on a trajectory to expect working from home to become standard. When the business is expected to bring the workplace to the worker, required commuting becomes more business motivated than personally motivated, and the tax law must adapt to these changing circumstances or risk treating required commuters, such as essential workers, inequitably. It is coming time to change lanes and provide tax relief for commuting expenses.

In Part II, this essay highlights how the tax law approaches mixed motive expenses, focusing on commuting expenses, and offers a frame for determining whether the business motives or personal motives of the expenses are predominant. Relying on the view that taxpayers are people first

15 Given the increasing costs of living in metropolitan areas, some taxpayers may not be able to afford living close to work. See, e.g., Steve Lopez, Column: Her Six-Hour Commute Each Day Seems Crazy, but Her Affordable Rent Is Not, L.A. TIMES (Dec. 16, 2017), https://www.latimes.com/local/california/la-me-lopez-commute-cherry-20171216-story.html. In these cases, subsidies for commuting expenses may be the preferred policy. Cf. Dagan, supra note 1, at 220 n.73 (observing that “poor minority workers . . . spend significantly more time commuting to work than do more affluent white workers”).

16 See Dagan, supra note 1, at 219–24 (surveying evidence about the distribution of commuting expenses).


18 See infra Part III.

19 See Edward J. McCaffery, Tax’s Empire, 85 GEO. L.J. 71, 93 (1996) (describing how societal views about gender roles from earlier generations worked into the tax law have been allowed to “fester” by not reexamining the law in light of changing views).
and workers second, this frame requires understanding what society expects people to do in their daily lives and when a business actively requires a taxpayer to do something outside of those expectations. Only then should the mixed motive expense be considered primarily driven by business motives.

Part III then picks up the example of commuting expenses to illustrate how changed social expectations can disrupt even long-settled areas of tax law. Expectations about commuting have changed during the COVID-19 pandemic and can be expected to change more permanently in the future as working from home becomes more accepted. When working from home becomes the norm, those workers that must travel to the workplace — essential workers in the pandemic, and others in the future — travel not by personal choice, but for the business.

To ensure their equitable treatment under the tax law, those workers required to commute should be provided tax relief for their commuting expenses. As detailed in Part IV, a tax credit is the most equitable way to provide such relief immediately to essential workers and in the future to required commuters.

II. THE TRADITIONAL NONDEDUCIBILITY OF COMMUTING EXPENSES

Forget baseball and apple pie, one of the most American things to do is the daily commute. Most workers in the United States do not live at the workplace, and thus undertake some expense to make their way to work each day, whether by public transit or private vehicle. Commuting is rarely described as a pleasant experience, with some of the worst horror stories coming from major metropolitan areas like Los Angeles and Atlanta. The natural inclination, then, might not be to think of commuting as a personal, rather than a business, expense. After all, who would choose to subject themselves to such torture but for the need to get to work?

Courts and tax administrators have long taken the opposite position, finding that commuting reflects inherently personal decisions about where to live. Employers, the argument goes, do not require workers to live

20 See Dagan, supra note 1, at 237–39 (advocating a normative view of the taxpayer as not dependent in the first instance on the taxpayer’s work).


22 See, e.g., Treas. Reg. § 1.162-2(e) (1960) ("Commuters' fares are not considered as business expenses and are not deductible."); Treas. Reg. § 1.262-1(b)(5) (2014) ("The taxpayer's costs of commuting to his place of business or employment are personal expenses and do not qualify as deductible expenses."); Commissioner v. Flowers, 326 U.S. 465, 473 (1946) ("Had his post of duty been in that city the cost of maintaining his home there and of commuting or driving to work concededly would be non-deductible living and personal expenses lacking the necessary direct relation to the prosecution of the business."); Dahood v. United States, 747 F.2d 46, 48 (1st Cir. 1984) ([The non-deductibility of commuting expenses] is based on the assumption that people will choose to live near their place of
anywhere, so workers’ choices in that regard are personal, not business, choices. After all, the commuter would not commute but for the choice to live away from the workplace. Thus, the need to commute is at least as much the result of personal decisions as business decisions, if not more.\textsuperscript{23}

The presence of this personal motive for commuting expenses is important because it makes tax deductions for those expenses difficult, if not impossible, for taxpayers to get. The federal income tax code allows a deduction for business expenses,\textsuperscript{24} but once those expenses become mixed with personal expenses, the taxpayer faces a high burden to claiming a tax deduction.\textsuperscript{25} The tax law has often struggled with how to approach such mixed motive expenses, and commuting is no different. However, by adopting the appropriate framing for analyzing mixed motive expenses — a frame focused on when the business forces the taxpayer to act outside of social expectations — this struggle can be alleviated.

\section*{A. Mixed Motive Expenses}

The federal income tax adopts a net income measure for its tax base, meaning that a taxpayer’s expenses incurred to generate income are deducted from the taxpayer’s gross amount of income earned.\textsuperscript{26} This result is achieved primarily through sections 162 and 212 of the Internal Revenue Code (Code): section 162 permits deductions for expenses incurred in the pursuit of a trade or business,\textsuperscript{27} and section 212 permits deductions for expenses incurred in the production of income.\textsuperscript{28} Having no relation to the production of income,
personal expenses are generally denied, as explicitly recognized by section 262 of the Code.\(^{29}\)

The treatments of business expenses and personal expenses under the Code come to clash because expenses often do not fit neatly into one category or the other.\(^{30}\) For instance, one must eat to survive (a personal motive) but also to work (a business motive).\(^{31}\) The federal income tax law offers a rigid response to these clashes: generally speaking, there is no middle ground under the law; an expense is classified as either personal or business. This response creates normative hazards for the federal income tax law: classifying personal expenses as business expenses and allowing them to be deducted would inappropriately narrow the tax base for some taxpayers, while classifying business expenses as personal expenses and denying a deduction would inappropriately expand the tax base for some taxpayers. However, the administrative difficulty of determining the particular balance of motives for an expense counsels against a middle ground in most cases.\(^{32}\)

As a technical matter, the tax law attempts to weigh the personal and business aspects of a mixed motive expense to determine the expense’s deductibility. If the business motive outweighs the personal motive, the expense is deductible; if not, the expense is not deductible.\(^{33}\) Practically speaking, however, the tax law is weighted against deductibility for mixed motive expenses. Recognizing the difficulty of teasing out an individual taxpayer's motives behind a particular expense, the law treats business expenses with apparent personal motives as nondeductible in the first instance.\(^{34}\) Taxpayers are afforded the opportunity to demonstrate that the business motive to the expense outweighed the personal motive and thus to render the expense deductible, though the burden to do so is heavy.\(^{35}\)

\(^{29}\) I.R.C. § 262(a) ("Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.").

\(^{30}\) See, e.g., Moss v. Commissioner, 80 T.C. 1073, 1076 (1983) ("The boundary line dividing personal expenses from business expenses, often obscurely marked, has been a fertile field of battle."); Dagan, \(supra\) note 1, at 193 ("But the business-personal distinction . . . is not very helpful in sorting out complex cases.").

\(^{31}\) See, e.g., Moss, 80 T.C. at 1076–77 (noting the dual nature of business lunches).

\(^{32}\) See United States v. Correll, 389 U.S. 299, 301 n.6 (1967) (noting administrative difficulties with an old approach towards uncovering the particular motives for expenditures for meals while on business travel).


\(^{34}\) E.g., Sharon v. Commissioner, 66 T.C. 515, 522–23 (1976) ("Section 262, falling within part IX of subchapter B, thus carves out exceptions to what might otherwise be deductible expenses under section 162. The Supreme Court has recently recognized that the provisions in part IX take precedence over the provisions in part VI. Commissioner v. Idaho Power Co., 418 U.S. 1, 17 (1974); see also Bodzin v. Commissioner, 509 F.2d at 681.").

\(^{35}\) See, e.g., Moss, 80 T.C. at 1076 ("The taxpayer bears the burden in these skirmishes."); Heuer v. Commissioner, 32 T.C. 947, 953 (1959) ("[W]e are satisfied that the petitioner is entitled to some deduction, and as stated in Cohan v. Commissioner, (C.A. 2) 39 F.2d 540, an approximation should be made even though it may be necessary to bear heavily upon the petitioner who has the burden of proof.").
Workers’ commuting expenses are an example of mixed motive expenses, and the general approach of decisionmakers in determining the deductibility of commuting expenses has been to latch onto the personal motive behind the expenses and deny any deductions for the expenses. Reading the authorities might even lead one to believe that, at least in the eyes of the courts and tax administrators, commuting expenses are not mixed motive expenses at all. For example, an early case described, and adopted, the Commissioner’s position with respect to commuting expenses:

Obviously an individual is free to fix his residence wherever he chooses. He fixes it according to his personal convenience and inclinations, as a matter separate and apart from business. Any expense, therefore, incident to such residence as fixed by the individual is a matter personal to him. If he prefers, [sic] for personal reasons, to live in a different city from that in which his business or employment is located, any expense incident to so doing is the result of decision based upon personal convenience and preference, and it is not the result of anything undertaken for business purposes and, therefore, is not a business expense.

However, exceptions to the general approach demonstrate that legal authorities are aware that commuting expenses are mixed motive expenses in most contexts. As explained by the Tax Court in Bogue v. Commissioner, there are three generally recognized exceptions to the baseline approach. First, “expenses incurred traveling between a taxpayer’s residence and a place of business are deductible if the residence is the taxpayer’s principal place of business (home office exception).” Second, “travel expenses between a taxpayer’s residence and temporary work locations outside of the metropolitan area where the taxpayer lives and normally works are deductible

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36 See, e.g., Moss, 80 T.C. at 1080. The federal income tax code provides tax relief for some employer-provided commuting benefits. I.R.C. § 132(a)(5), (f). The tax relief provided is an exclusion from gross income for the taxpayer who receives the benefits, meaning the taxpayer does not have to include the value of the benefits in her tax base. Functionally, this relief operates like a deduction, but it is only available when employers provide the means for commuting. This essay argues for tax relief for commuting expenses incurred by the taxpayer herself.

37 See supra note 22.

38 Sullivan v. Commissioner, 1 B.T.A. 93, 95 (1924).

39 In addition to the exceptions to the nondeductibility of commuting expenses under sections 162 and 212, the Code provides some tax relief to certain commuters that travel through employer-arranged transportation, allowing the value of that transportation to be excluded from taxable income up to $175 a month. I.R.C. § 132(a)(5), (f)(1)(a), (f)(2)(a).


41 Bogue, 102 T.C.M. (CCH) at *16.
(temporary distant worksite exception)."³⁴² Third, "travel expenses between a taxpayer's residence and temporary work locations, regardless of the distance, are deductible if the taxpayer also has one or more regular work locations away from the taxpayer's residence (regular work location exception)."³⁴³ Finally, in outlier cases, commuting expenses have been allowed to be deducted when there is an additional business motive other than simply transporting the taxpayer to the workplace.³⁴⁴

At the core of these exceptions are proxies for determining when the business requires the taxpayer to do something that the taxpayer would not normally do.³⁴⁵ When the taxpayer has a home office, the personal motive is to stay at home and not incur commuting expenses; therefore, those expenses relating to traveling to another place of business are driven by business motives. Similarly, the temporary distant worksite exception and the regular work location exception recognize that the personal motive to commute is limited to the normal expected travel costs; the additional costs imposed by having to go to other worksites are derived from business motives. Finally, in the outlier cases, the business requires some additional expense for the taxpayer beyond those normal expected travel costs. Enhancing the business motive by introducing a business requirement to do something above normal expectations is what flips commuting expenses from nondeductible to deductible. The balance between the mixed motives is altered.

C. The Force of Business

As the exceptions to the general rule of nondeductibility for commuting expense indicate, to understand when a mixed motive expense should be deductible, it is helpful to think in terms of coercion. More specifically, one should think in terms of when the business actively forces personal consumption different from expected personal consumption. If the business does so, then the expense should be deductible. This framing relies on the assumption that taxpayers are people first — with a range of interests and

³⁴² Id. at *16-17.
³⁴³ Id. at *17.
³⁴⁴ See, e.g., Fausner v. Commissioner, 413 U.S. 838, 839 (1973) ("Additional expenses may at times be incurred for transporting job-required tools and material to and from work. Then an allocation of costs between 'personal' and 'business' expenses may be feasible."); Green v. Commissioner, 74 T.C. 1229 (1980) (allowing a deduction for commuting expenses when the taxpayer in the business of selling her own blood plasma transported that blood plasma (in her body) to a laboratory where it was extracted); Rev. Rul. 75-380, 1975-2 C.B. 59 (permitting the deduction of expenses, over and above ordinary commuting expenses, related to transporting necessary work instruments to the workplace).
³⁴⁵ Dagan describes the problem with the test for the deductibility of commuting expenses as being that the test relies on an assumption of where the taxpayer should live. See Dagan, supra note 1, at 205-06. In line with the point about the exceptions to the nondeductibility of commuting expenses, if it is assumed that a taxpayer should live close to work, but work requires the taxpayer to travel from that place, then the taxpayer is not doing something that the taxpayer would normally be expected to do, and a deduction is appropriate for those extra expenses.
identities — and workers second, thereby respecting the default position under existing tax law that personal motives for mixed motive expenses outweigh the business motives and recognizing that the business motive becomes stronger when the business actively intrudes into personal decisions.

There are two central concepts to this framing. First, expectations about how people live their lives, and second, the active nature of the business' intrusion into the taxpayer’s life. These concepts are perhaps more related than it would seem at first glance; it is not relevant to the analysis if the business actively requires the taxpayer to do something that society expects the taxpayer to do. The goal, then, is to determine when the business requires the taxpayer to act out of the ordinary. To do so, one must understand what is expected of people and when the business acts to disrupt those expectations.

Uncovering expectations of personal consumption can be an intensive undertaking, as decisionmakers must consult societal views to determine what people are expected to do in their daily lives. As poetically expressed

46 See supra note 20.
47 See, e.g., Cavanaugh v. Commissioner, 104 T.C.M. (CCH) 1, 4 (2012) ("[T]he origin-of-the-claim standard requires an examination of all the facts and circumstances such as ‘the issues involved, the nature and objectives of the litigation, the defenses asserted, the purpose for which the claimed deductions were expended, the background of the litigation, and all facts pertaining to the controversy."); see also Dagan, supra note 4, at 95 ("This Article argues that many of these notoriously puzzling distinctions are expressions of a set of closely related commitments to distinguish the market from nonmarket realms. . . . Nonmarket interactions include friendship, affection, altruistic behavior, a sense of commitment or belongingness, and family ties."); Alex Raskolnikov, The Cost of Norms: Tax Effects of Tacit Understandings, 74 U. CHI. L. REV. 601, 611–12 (2007) (discussing the relevance of social norms to how commercial dealings are treated under the tax law); Boris I. Bittker, Federal Income Taxation and the Family, 27 STAN. L. REV. 1389, 1391–92 (1975) (noting how “society’s assumptions about the role of marriage and the family” impact how the tax code treats certain expenses and filing statuses); Grace Blumberg, Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers, 21 BUFF. L. REV. 49, 66 (1971) (“Highly particularized expenses might be disallowed because they arise from the taxpayer’s unusual or unique circumstances rather than from any common socially predictable pattern of living.”).
48 See, e.g., Amend Co. v. Commissioner, 55 T.C. 320, 325–27 (1970) (wrestling with the personal versus business nature of consultations by a religious official with a corporate officer, and settling the matter by considering the underlying expectations of personal interactions with religious officials). Language from the Amend case highlights the difficulties in these determinations, which must rely on the decisionmaker’s understanding of business norms and personal norms:

Although it is clear that some expenditures which are helpful to an executive in the fulfillment of his corporate duties are deductible, it is also clear that where a corporation is merely the incidental beneficiary of corporate expenditures designed to further ends primarily personal to one of its executives, the deductibility of such expenditures will be disallowed. Accordingly, the crucial question, as we see it, is whether within the realm of “commercial reality,” the expenditures incurred were not only “sufficiently related to [petitioner’s] business to qualify as true business expenses,” but were also so nonpersonal in nature as to avoid the far-reaching proscription of section 262.
by the Supreme Court in a related context, "[l]ife in all its fullness must supply the answer to the riddle." Though this approach might be criticized as rudderless, various rules and heuristics have developed over time to offer clearer and more even-handed analysis. These developments are also lauded for smoothing the administrability of the tax law, an important policy consideration for any approach to the law.

This approach to applying the tax law is not without hazards. Principally, the search for societal expectations and the proxies that come to be relied upon may be based on outdated or misunderstood societal views. Some

Id. at 325; see also Dagan, supra note 1, at 198–201 (describing the importance of the “perception of a taxpayer” to determining the treatment of various activities under the tax law). Decisionmakers are also tasked with inquiring into norms in the determination of whether an expense is “ordinary” for the business, as required by section 162. See Amend, 55 T.C. at 324–25 (“To characterize as vexatious the task of determining whether an expenditure is ‘ordinary and necessary’ to a taxpayer’s business is to define in mild terms a problem as convoluted as the scope of human experience is wide.”).

49 Welch v. Helvering, 290 U.S. 111, 115 (1933). The Court offered this language when describing the standard for determining whether a business expense was “ordinary” within the meaning of section 162. As the Court further explained:

Now, what is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstance. Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. . . . [T]he expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack. The situation is unique in the life of the individual affected, but not in the life of the group, the community, of which he is a part. At such times there are norms of conduct that help to stabilize our judgment, and make it certain and objective.

Id. at 113–14. Business expenses must also be necessary in order to be deducted; the standard for necessary asks only if the taxpayer, in good faith, believed the expense proper for the income-producing activity. See id. at 113 (“We may assume that the payments to creditors of the Welch Company were necessary for the development of the petitioner’s business, at least in the sense that they were appropriate and helpful. He certainly thought they were, and we should be slow to override his judgment.”).

50 See, e.g., Dagan, supra note 4, at 95; McCaffery, supra note 53, at 1009.

51 See, e.g., Treas. Reg. § 31.262-1 (describing certain expenses as personal); Commissioner v. Soliman, 506 U.S. 168, 173–78 (1993) (analyzing how to determine the deductibility of home office expenses); United States v. Correll, 389 U.S. 299, 302–07 (1967) (describing the “sleep or rest rule” for determining when a taxpayer is “away from home” on business such that travel expenses are deductible); Moss v. Commissioner, 80 T.C. 1073, 1077–80 (1983) (surveying approaches to business meals for employees).

52 See Correll, 389 U.S. at 302 (describing the administrative benefits of the bright-line Rest Rule); Folkman v. United States, 433 F. Supp. 2d 1022, 1030 (D. Nev. 1977) (“The controlling decisions in U.S. v. Correll, 389 U.S. 299 (1967) and Sanders v. C.I.R., 439 F.2d 296 (9th Cir. 1971), teach that in this difficult area of deductibility of food and lodging as business expenses, logic must give way to reasonable certainty in the administration of the tax laws and regulations.”).

53 See, e.g., Nancy C. Staudt, Taxing Housework, 84 GEO. L.J. 1571, 1571–75 (1996) (critiquing the federal income tax law for relying on certain assumptions about gender roles in
taxpayers may be marginalized and punished by the views of dominant groups in society whose lived experiences and views do not reflect consensus.\(^{54}\) To ensure that proxies and precedent do not become static over time and risk these harms, tax authorities must reevaluate the law in light of changing societal views.

Once societal expectations about personal activities are established, the decisionmaker can analyze whether the business actively required the taxpayer to deviate from the expectations. By definition, a mixed motive expense has some relationship to the business, but when that relationship is passive, the business motive cannot overcome the personal motive.\(^{55}\) That is to say, a taxpayer is a person first, and when expected personal consumption benefits the business as well, that benefit is incidental. A business certainly requires that the taxpayer be of good health, have some education, and so on, but the business generally does not infringe on the taxpayer’s ability to decide how to achieve such personal wellbeing. The business must actively require the taxpayer to engage in abnormal consumption for the business motive to overcome the personal motive because at that point, the business is directing the consumption, even if the consumption contributes to the taxpayer’s wellbeing.\(^{56}\)

Commuting expenses fit within this framework. The general rule denying the deductibility of commuting expenses relies on societal society, observing that “[m]any features of the Federal Income Tax Code reflect the assumption that our society is composed of heterosexual married couples, with men occupying the ‘public’ sphere and women occupying the ‘private’ domestic sphere”); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 987–88 (“Major, structural aspects of the tax laws were put in place at a time when traditional families — meaning households with men working outside, and women working inside, the home — were dominant. These aspects persist to this day, serving as an anchor against the emergence of more modern and flexible family models”)

\(^{54}\) Consider the example of denying same-sex couples the right to marry. Such couples were marginalized by the tax authorities, and in some cases penalized for not being able to file their taxes jointly. See generally Margot L. Crandall-Hollick, Carol A. Pettit, & Molly F. Sherlock, *The Federal Tax Treatment of Married Same Sex Couples*, CONG. RES. SERV. (July 30, 2015), https://fas.org/sgp/crs/misc/R43157.pdf; Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 L. & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 97 (1991).

\(^{55}\) See supra notes 32–33.

\(^{56}\) Expenses incurred for food and lodging while traveling away from home on business offer an example of when a business actively forces the taxpayer’s consumption, rendering the mixed motive expenses deductible. See I.R.C. § 162(a)(2) (permitting a deduction for non-lavish “traveling expenses . . . while away from home in the pursuit of a trade or business”). The logic behind this rule is that when the taxpayer is traveling away from home on business, the business prevents the taxpayer from sleeping in her own bed or making her own meals while also requiring her to purchase lodging and meals. These additional expenses are deductible because society does not expect the taxpayer to have incurred the expenses otherwise. See, e.g., Correll, 389 U.S. at 304–05 (“Ordinarily, at least, only the taxpayer who finds it necessary to stop for sleep or rest incurs significantly higher living expenses as a direct result of his business travel . . . ”); James v. United States, 308 F.2d 204, 206 (9th Cir. 1962) (“When we are required to travel for business purposes, the cost of our food and shelter is increased: continuing costs incurred at a permanent place of abode are duplicated, and we are compelled, in addition, to pay higher prices for our food and shelter than we would pay if not traveling. This increased cost is clearly attributable to the exigencies of business.”).
expectations about the workplace, namely that traveling to the workplace is expected as a normal part of life. The business benefits from the taxpayer meeting this expectation, but it does not take an active role in requiring it. The importance of societal expectations about commuting is evident in language describing the exceptions to the general rule of nondeductibility. In discussing the temporary distant worksite exception, the First Circuit Court of Appeals explained that “[t]he exception has been deemed necessary because ‘it is not reasonable to expect people to move to a distant location when a job is foreseeably of limited duration.’” The court made this observation in the context of denying that commuting expenses related to travel to nearby work should be deductible, while admitting that it would violate expectations to require someone to move for temporary work that is far away. As noted earlier, the business’ active role in requiring the taxpayer to travel differently than expected is also evident in the exceptions.

The next Part highlights how the COVID-19 pandemic has ushered in new societal expectations around commuting, which are expected to continue past this immediate crisis. As working from home becomes the norm, commuting becomes less necessary. When commuting is not the expectation, businesses can take an active role in requiring it, changing the treatment of commuting expenses under the tax law.

III. COMMUTING DURING COVID-19 AND BEYOND

The COVID-19 pandemic has changed the way that people in the United States work. Masses of workers are now working from home — telecommuting — and as a result, are no longer engaging in the daily commute. The expectation that workers must travel to the workplace as a normal matter is being torn down.

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57 See Klein, supra note 12, at 885 (detailing the problem of determining the deductibility of commuting expenses and observing that “the answer will depend upon our attitudes and assumptions about the choices available to the commuting employee”).


59 Id.

60 See supra note 45 and accompanying text.

61 Bick et al., supra note 17 (finding that “of all workers commuting daily in February, only 43.7 percent continued doing so in May” and that “[a]mong workers who switched from daily commuting in February to working from home, almost 70 percent did not commute to work at all in May”); Brennan Klein et al., Reshaping a Nation: Mobility, Commuting, and Contact Patterns during the COVID-19 Outbreak, NETWORK SCI. INST. (May 11, 2020) [hereinafter Klein et al., Reshaping a Nation], https://www.mobslab.org/uploads/6/7/8/7/6787877/covid19mobility_report2.pdf (“In general, by May 9, 2020, the average commuting volume—the total number of commutes within 24 hours in a given county—across United States has been reduced by approximately 65% of the typical daily values.”); Nicholas Bloom, The Bright Future of Working From Home, STAN. INST. FOR ECON. POL’Y RESEARCH (May 2020), https://siepr.stanford.edu/research/publications/bright-future-working-home (finding that working from home is becoming more popular and is likely to remain so); Erik Brynjolfsson et al., COVID-19 and Remote Work: An Early Look at US Data, (Nat’l Bureau of Econ. Research, Working Paper No. 27344, 2020), https://www.nber.org/papers/w27344 (“The fraction of workers who switched to working
However, there is a distinct set of workers who have not been afforded the luxury of telecommuting and have been required to come into work despite risks to their health. These are the “essential” workers. As part of their efforts to limit the spread of COVID-19, states and localities issued general shut-down or stay-at-home orders demanding, in part, that individuals not travel to work. However, those orders deemed certain industries “essential” and exempted those industries from restrictions on travel to work. Employers in those industries made the decisions about whether workers must come into work or not. And those decisions were made against the backdrop of changing societal expectations about commuting.

A. Changing Expectations about Commuting

The COVID-19 pandemic has highlighted that commuting is not necessary in many industries. During the pandemic, the number of commuters has sharply decreased. This decrease is partially the result of rising unemployment, but it is also the result of workers working from home.

from home is about 34.1%. In addition, 14.6% reporting they were already working from home pre-COVID-19. This suggests nearly half the workforce is now working from home . . . .”); Brennan Klein et al., Assessing Changes in Commuting and Individual Mobility in Major Metropolitan Areas in the United States during the COVID-19 Outbreak, NETWORK SCI. INST. (Mar. 31, 2020) [hereinafter, Klein et al., Assessing Changes], https://www.networkscienceinstitute.org/publications/assessing-changes-in-commuting-and-individual-mobility-in-major-metropolitan-areas-in-the-united-states-during-the-covid-19-outbreak (estimating that major metropolitan areas in the United States experienced on average a 50% reduction in typical commutes, on par with the reduction seen a typical snow day or holiday).

62 See infra note 65; see also Thomas M. Selden & Terceira A. Berdahl, COVID-19 And Racial/Ethnic Disparities In Health Risk, Employment, And Household Composition, 39 HEALTH AFF. 1624, 1624-25 (2020) (“[C]ompared to White workers, Black and Hispanic workers are more likely to work in jobs that have a higher risk for exposure to infectious disease, and that have, in many cases, been deemed essential during the pandemic. Blacks and Hispanics are also less likely to be able to work from home.”); Olga Khazan, How the Coronavirus Could Create a New Working Class, ATLANTIC (Apr. 15, 2020) (reporting that “[t]he low-income workers who do still have jobs . . . are likely to be stuck in close quarters with other humans. For example, grocery-store clerks face some of the greatest exposure to the coronavirus, aside from health-care workers. ‘Essential’ businesses—grocery stores, pharmacies—are about the only places Americans are still permitted to go, and their cashiers stand less than an arm’s length from hundreds of people a day.”).

63 See authorities cited supra note 61.


66 See Bick et al., supra note 17 (reporting information about the prevalence of working from home in various industries).

67 See authorities cited supra note 61.
when given the option.\textsuperscript{68} An overwhelming 71.7 percent of workers who were given the choice to work from home or to work at the workplace during the pandemic chose to work from home.\textsuperscript{69} It stands to reason that if they had jobs where working from home was an option, essential workers would also overwhelmingly choose to work from home.\textsuperscript{70}

The pandemic has not only shifted expectations about the location of work in the immediate term, but it has also shifted expectations about telecommuting in the future.\textsuperscript{71} Researchers have found that currently 37 percent of jobs in the United States could be performed entirely at home.\textsuperscript{72} However, that percentage should increase over time, as an increasing percentage of workers prefer to work from home after the pandemic and as employers are increasingly embracing work from home models.\textsuperscript{73} Thus, at

\textsuperscript{68} See Bick et al., supra note 17 ("The increase in telecommuting among those employed in May explains just over half (52.7\%) of the overall reduction in commuting volume, with reductions in labor supply explaining the remainder"); Klein et al., Reshaping a Nation, supra note 61 (observing that both factors impact the amount of commuting during the pandemic); Brynjolfsson et al., supra note 61 (same); Klein et al., Assessing Changes, supra note 61 (same).

\textsuperscript{69} See Bick et al., supra note 17 ("[W]e find that the ratio of effective to potential home-based workers was 71.7 percent in May. This suggests that the majority of US workers that could work from home did so in May.").


\textsuperscript{71} See, e.g., Adriana Dahik et al., What 12,000 Employees Have to Say About the Future of Remote Work, Bos. Consulting Group (Aug. 11, 2020), https://www.bcg.com/publications/2020/valuable-productivity-gains-covid-19 (finding that employees and employers increasing expect remote working models to be adopted); Deborah Lovich, Caroline Kreatle, Allison Bailey, Julie Kilmann, Derek Kennedy, Prateek Roogta, Felix Schuler, Leo Tomlin, and John Wenstrup; David Altig et al., Firms Expect Working from Home to Triple, FED. RES. BANK ATLANTA (May 28, 2020), https://www.frbatlanta.org/blogs/macroblog/2020/05/28/firms-expect-working-from-home-to-triple ("To summarize, our survey indicates that, compared to before the pandemic, the share of working days spent at home by full-time workers will triple after the pandemic. Our results also say that this shift will happen across major industry sectors."); Olga Khazan, Work From Home Is Here to Stay, ATLANTIC (May 4, 2020) (reporting on future expectations for telecommuting); Courtney Connley, Why Many Employees Are Hoping To Work from Home Even After the Pandemic Is Over, CNBC (May 4 2020), https://www.cnbc.com/2020/05/04/why-many-employees-are-hoping-to-work-from-home-even-after-the-pandemic-is-over.html ("[N]early 43\% of full-time American employees say they want to work remotely more often even after the economy has reopened, according to a survey released by business publishing company get Abstract."); Megan Brenan, U.S. Workers Discovering Affinity for Remote Work, GALLUP (Apr. 3, 2020), https://news.gallup.com/poll/306695/workers-discovering-affinity-remote-work.aspx ("Three in five U.S. workers who have been doing their jobs from home during the coronavirus pandemic would prefer to continue to work remotely as much as possible, once public health restrictions are lifted.").


\textsuperscript{73} See authorities cited supra note 71.
the moment and potentially in the future, society expects the workplace to come to workers when possible rather than workers traveling to the workplace as traditionally expected.

In short, the traditional expectation that workers travel to the workplace is changing and rather quickly under the circumstances of the pandemic. The irony of these changes is that when commuting is not viewed as necessary for a job, it is more likely to be deductible as business-motivated if the business actively requires it. Reflecting these new circumstances, modern proxies for when commuting expenses are motivated primarily by business should be developed.

1. Commuting for the Business

The changing societal expectations about commuting present a question to be asked of commuting: is the worker commuting because her job requires her to be at the workplace, or is she going into the workplace because she wants to? Against the new backdrop of expecting workers to work from home, the goal is to distinguish between when the business is accommodating the wishes of the worker to come into the workplace and when the business is compelling the worker to do so. The answer to this question shines light on the nature of commuting both during the pandemic and in the future as telecommuting becomes more prevalent and opens the door to new proxies for when commuting expenses are primarily business motivated.

In the immediate term, stay-at-home orders indicate the danger to personal and public health of individuals leaving their homes on a frequent basis. Assuming people are rational and law-abiding, most workers would not choose to leave their homes to commute into the workplace.74 Indeed, with most workplaces closed, commuting is not an option for many workers.75 When an employer remains open because it operates in an essential industry and requires workers to come to the workplace, those workers are required to commute by the business — the worker could not provide her services without being at the workplace. Thus, essential workers who commute should be deemed to commute for predominately business motives.

In the longer term, the growing normalcy of telecommuting will mean that the personal choice of where to live has less bearing on the motive for incurring commuting expenses.76 When the employer is expected to bring the workplace to the worker, requiring the worker to come into the workplace

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74 See supra note 70 and accompanying text.
75 See authorities cited supra note 61.
76 Cf. Courtney Conley, Why Many Employees Are Hoping To Work from Home Even After the Pandemic Is Over, CNBC (May 4, 2020), https://www.cnbc.com/2020/05/04/why-many-employees-are-hoping-to-work-from-home-even-after-the-pandemic-is-over.html (reporting anecdotal evidence that individuals are using the time not spent on commuting for personal activities like interacting with their families).
makes commuting a business necessity. Under these circumstances, it does not matter if working from home is a realistic possibility for a job or not; either way, the business is actively requiring something that goes against expectations. Alternatively, where the employer does not require workers to come into the workplace, then any worker that does so would be doing so for personal reasons.

Contrary to their current treatment, commuting expenses during a crisis like the COVID-19 pandemic and in the future when working from home is expected should be characterized as having principally business motives. Normally, this characterization would result in a tax deduction for the taxpayer, but concerns with providing such a deduction exist and are addressed in the next Part, which proposes that a tax credit be offered in lieu of the deduction.

IV. A COMMUTING TAX CREDIT

As recounted above, commuting expenses are mixed motive expenses — where one works is important but so is where one lives. Because employers do not require workers to live in any particular place, under current law the personal motive for commuting expenses outweighs the business motive, and the expenses are not deductible. However, as societal expectations around commuting change, so should the tax treatment of commuting expenses. Commuting expenses for essential workers during the pandemic and for others in the future who are required to commute should be deductible as the business motives for the expenses come to outweigh the personal motives.

That these expenses should be deductible does not mean that a deduction is the best instrument to deliver the appropriate tax relief. Some problems exist with allowing a deduction. Enacting a tax credit in lieu of a deduction for commuting expenses can solve these problems. First, normatively, commuting remains a mixed motive expense; there is some personal motive to it that should not result in tax relief. Though the tax law often rigidly approaches mixed motive expenses, it need not do so with respect to commuting expenses. A tax credit can be tailored to provide a specific tax benefit: legislators or administrators could decide what a reasonable amount of commuting expenses is and allow a tax credit to give tax relief equivalent

77 Dagan, supra note 1, at 206 (arguing that “if we assume that people just live wherever they do and frame commuting as the costs of getting to work, they are an income-producing expense.”). Likewise, if we assume that work is not a set location and can be done wherever people live, then any expenses for required business travel, including commuting, should be viewed as income-producing expenses.

78 See supra Part II.

79 See authorities cited supra note 22.

80 See supra Part III.

81 Dagan, supra note 1, at 239–44 (proposing a similar mechanism for providing tax relief for commuting expenses, though the primary policy behind his credit is to permit taxpayers to form personal identities separate from work and to foster communities).
to a deduction for those expenses. This approach would allow the law to reflect the mixed motive nature of commuting expenses without taking an all or nothing approach to the tax relief associated with the expenses.

The tax law already takes this approach with another type of mixed motive expenses: expenses relating to child or dependent care. Child and dependent care expenses are quintessential mixed motive expenses; caring for family members is clearly personal but also necessary for working parents or guardians to hold their jobs. Section 21 of the Code grants a tax credit to a taxpayer that incurs certain expenses for child or dependent care in the pursuit of gainful employment. The statute tailors the credit in a number of ways, including the total amount of the credit, the expenses that qualify, and various other ways to address the concerns of Congress. These limitations reflect an attempt to apportion the expenses between those with a business motive and those with a personal motive. The same could be done for commuting expenses.

The rules defining a tax credit for commuting could be based on a reasonable approximation of typical or average commuting costs for a certain distance. Research has demonstrated that, on average, commuters in the United States spend between $2,000 and $5,000 a year on commuting expenses. Congress appears to have recognized this average — at least indirectly — by excluding from a taxpayer’s gross income up to $175 a month ($2,100 a year if fully claimed each month) of employer-provided commuting benefits.

If the tax credit for commuting relied on these averages, it is reasonable to assume that the tax credit would provide individual tax relief on the scale of the child and dependent care tax credit, which allows the consideration of $3,000 or $6,000 in expenses depending on the number of dependents.

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82 Supra note 39 (Indeed, the Code already provides tax relief on up to $175 a month of certain employer-provided commuting benefits.).


84 See, e.g., Carroll v. Commissioner 418 F.2d 91, 95 (1969) (“Many expenses, such as the cost of . . . a babysitter for a working mother, are related and even necessary to an individual’s occupation or employment, but may not be deducted under § 162(a) since they are essentially personal expenditures.”); Zoltan v. Commissioner, 79 T.C. 490, 498–99 (1982) (discussing the motives underlying child care expenses for a working parent); see also, e.g., Blumberg, supra note 47, at 63–66 (critiquing the tax treatment of child care expenses and recognizing their mixed motive nature).

85 I.R.C. § 21(a), (c), (d).

86 I.R.C. § 21(b).

87 I.R.C. § 21(e).


89 See supra note 36.

90 See I.R.C. § 21(c). The child and dependent care tax credit does contain a mechanism to reduce the value of the credit based on the income of the taxpayer, which would change the individual tax relief provided in a way that might not track to a commuter tax credit. See I.R.C. § 21(a). The federal Joint Committee on Taxation estimates that the credit will provide
However, the commuting tax credit need not allow all of the average expenses. Any expenses above the allowed costs could continue to be recognized as personal in nature, while the expenses below those costs would reflect the necessity of traveling to work for those that are required to do so. These calculations would be both under- and over-inclusive in particular cases, but, as noted earlier, administrative ease legitimizes this sort of uniform approach.91

Rules structured in this way would prevent taxpayers from having to maintain records of their commuting expenses throughout the year, something essential workers may not have done for most of 2020 and may have difficulty doing in the future. Instead, all a taxpayer would need to do is demonstrate that she was employed in an essential industry during the pandemic in the immediate term or that she was not offered the option to telecommute in the future. Importantly and implicit in this discussion, the rules could ensure appropriately targeted eligibility requirements.

A capped deduction could also be used to provide tax relief for a reasonable amount of commuting expenses,92 but a tax credit remains the more powerful tool because of the second major problem with a deduction. Because deductions reduce a taxpayer’s tax base, the value of a deduction is dependent on the taxpayer’s tax bracket, resulting in an “upside-down” subsidy that benefits higher-income individuals more than lower-income individuals.93 Some lower-income individuals might not earn enough income to have a tax liability to begin with,94 making a deduction practically worthless. This discussion has assumed a deduction for commuting expenses taxpayers with $4.7 billion of tax relief in each of the years 2020 to 2023 and $4.8 billion of relief in 2024. J. COMM. TAX’N, ESTIMATES OF FED. TAX EXPENDITURES FOR FISCAL YEARS 2020-2024, at 32 (Nov. 5, 2020), https://www.jct.gov/publications/2020/jcx-23-20/. Francine Lipman and James E. Williamson provide a helpful overview of design issues associated with the Child Tax Credit of Internal Revenue Code section 24 (which is separate from the child and dependent care tax credit) and caution that earned income requirements in particular can quickly derail tax relief for low-income individuals. Francine J. Lipman & James E. Williamson, Child Tax Credit Redux, 165 TAX NOTES FED. 1303 (2019). These design issues should be considered when drafting a commuting tax credit.

91 See supra note 52.

92 For an example of a capped deduction, see I.R.C. § 164(b)(6) (capping the federal deduction for state and local taxes).

93 See, e.g., STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 36–37 (Harv. Univ. Press 1973) (discussing the upside-down subsidy created by tax deductions). The following example illuminates the upside-down subsidy. A $100 deduction for a taxpayer reduces that taxpayer’s income by $100. That income will then be subject to tax at whatever rate the taxpayer’s bracket dictates. Therefore, if the taxpayer is in a hypothetical 35% tax bracket, the deduction reduces her tax liability by $35 ($100 * 35%), but if the tax payer is in a hypothetical 10% tax bracket, the same $100 deduction only reduces her tax liability by $10 ($100 * 10%). In a progressive rate structure, where higher-income individuals are subject to higher tax rates than lower-income individuals, deductions provide those higher-income individuals with greater absolute values.

94 For instance, a taxpayer that earns less than the standard deduction — currently $12,000 for a single taxpayer, I.R.C. § 63(c)(7)(A)(ii) — would have a federal income tax base of $0, making the benefit of a tax deduction for commuting expenses worthless to that taxpayer.
would be an above-the-line business deduction, but if it were offered as an itemized below-the-line deduction, the majority of taxpayers would not benefit from it because they claim the standard deduction instead of itemizing.\textsuperscript{95} In short, allowing a deduction for commuting expenses, even if capped, would disproportionately subsidize higher-income taxpayers. This result creates a problem because it would not reasonably reflect the personal and business motives behind commuting expenses.

Providing equal benefits for commuting expenses regardless of the commuter’s income is important if the goal is to reasonably reflect the mixed motive nature of the commuting expense. The personal side of the commuting expense reflects the taxpayer’s decision about where to live and how to get to work; the business side of the commuting expense reflects the simple need to get to the workplace — how much does it cost to travel a certain distance? In this context, distance has little to do with income because the cost to travel a mile does not change based on one’s income; a gallon of gas costs the same amount of money regardless of one’s wealth, as does a bus ticket. A higher-income individual might refuse to take the bus or might drive a car that requires premium gasoline, increasing commuting costs, but those choices are personal and should not be subsidized by the tax law.

To provide an equitable reflection of the business side of a taxpayer’s commuting expenses, a tax credit that is not impacted by the taxpayer’s income is the best option — a deduction will not do. Tax credits easily provide a benefit to taxpayers that is not dependent on their tax brackets because tax credits reduce the tax liability owed; they apply after the tax rate, not before. Therefore, a tax credit for commuting expenses would not subsidize higher-income individuals more than lower-income individuals because each group would be entitled to the same dollar benefit.\textsuperscript{96} Of course, the lowest-income individuals, those without federal income tax liability, would not benefit from a tax credit unless the credit were refundable or able to be carried forward to future tax liabilities.\textsuperscript{97}

In any event, providing tax relief for commuting expenses is the appropriate course of action given changing societal expectations about the nature of commuting. The speed with which those expectations have changed, at least with respect to the immediate crisis, requires the tax law to sprint to catch up. However, as has long been recognized in the context of

\textsuperscript{95} In calculating taxable income, the federal income tax offers taxpayers the option to claim a uniform standard deduction or to deduct their itemized expenses. I.R.C. § 63. As noted supra note 94, the standard deduction is currently $12,000 for a single taxpayer. Researchers have estimated that approximately 14% of taxpayers, mostly higher-income individuals, itemize their deductions rather than claim the standard deduction. See Scott Eastman, \textit{How Many Taxpayers Itemize Under Current Law?}, TAX FOUND. (Sept. 12, 2019), https://taxfoundation.org/standard-deduction-itemized-deductions-current-law-2019/.

\textsuperscript{96} See Lily L. Batchelder, Fred T. Goldberg Jr., & Peter R. Orzag, \textit{Efficiency and Tax Incentives: The Case for Refundable Tax Credits}, 59 STAN. L. REV. 23, 24 (2006) (“Unlike other forms of tax incentives, a uniform refundable credit is not related to a household’s marginal tax rate and provides cash payments to qualifying households even if they owe no income tax.”).

\textsuperscript{97} Id.
commuting, precedent interpreting the law in light of old societal views is likely to weigh down judicial efforts to change the application of the law quickly, making it imperative that legislators or administrators take action to clarify the application of the law to commuting expenses to avoid treating required commuters inequitably.98

V. CONCLUSION

The COVID-19 pandemic has not only changed the way that people in the United States work, it has also changed the way that people expect to work. Masses of workers have worked from home during the pandemic and except to be able to continue doing so in the future. However, some workers were required to report to the workplace during the pandemic at risk to their own well-being. These essential workers were driven by their jobs to commute into the workplace despite the changing societal expectations regarding working from home.

The experience of essential workers demonstrates that the traditional tax approach to commuting expenses must change with the times. Commuting expenses have been treated as predominately personal in nature, and thus not deserving of tax relief, because society expected people to have to travel to the workplace; businesses did not actively require it. However, as working from home is normalized, businesses have the opportunity to actively require their workers to commute. When businesses do so, a worker's commuting expenses should be deemed primarily business motivated and entitled to the tax relief that accompanies other business motivated expenses. Otherwise, people like essential workers will be treated inequitably. It is time to change lanes with respect to commuting expenses and to provide required commuters with appropriate tax relief.

98 See Klein, supra note 12, at 874 ("Since the nondeductibility of pure and simple commuting expenses rests on long and firmly established legal doctrine, any suggestions emerging from the discussion of such expenses should be addressed to Congress.").