

8-8-2012

The Hidden Limits of the Charitable Deduction: An Introduction to Hypersalience

Lilian Faulhaber

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Tax Law Commons](#)

Recommended Citation

Lilian Faulhaber, *The Hidden Limits of the Charitable Deduction: An Introduction to Hypersalience*, 92 Boston University Law Review 1307 (2012).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/82

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



**THE HIDDEN LIMITS OF THE CHARITABLE DEDUCTION:
AN INTRODUCTION TO HYPERSALIENCE**

92 Boston University Law Review 1307 (2012)
Boston University School of Law Paper No. 12-02
(January 12, 2012)
Revision of August 8, 2012 (FINAL)

Lilian V. Faulhaber
Boston University School of Law

This paper can be downloaded without charge at:

<http://www.bu.edu/law/faculty/scholarship/workingpapers/2012.html>

ARTICLE

THE HIDDEN LIMITS OF THE CHARITABLE DEDUCTION: AN INTRODUCTION TO HYPERSALIENCE

LILIAN V. FAULHABER*

INTRODUCTION	1307
I. AN INTRODUCTION TO HYPERSALIENCE	1311
II. THE CHARITABLE DEDUCTION: A HIGH SALIENCE TAX PROVISION WITH LOW SALIENCE LIMITATIONS.....	1318
III. THE IMPLICATIONS OF HYPERSALIENCE.....	1328
A. <i>Third-Party Marketing</i>	1328
B. <i>Policy Implications</i>	1330
C. <i>Increased Consumption</i>	1336
IV. HYPERSALIENCE: TO EXPAND OR CURTAIL?.....	1339
A. <i>The Costs and Benefits of Hypersalience</i>	1339
B. <i>How to Curtail Hypersalience</i>	1344
CONCLUSION.....	1347

INTRODUCTION

In the last several years, the concept of salience, which originated in cognitive psychology literature and made its way into behavioral economics, has been mentioned in almost every conceivable field of study. Salience refers to the prominence of an item: the more salient something is, the more aware individuals are of its effect. Budget-conscious shoppers are advised to pay with cash because it makes their purchases more salient to them;¹ stores have

* Associate Professor of Law, Boston University School of Law. For comments on previous drafts, I am grateful to John R. Brooks II, Alan Feld, David Gamage, Daniel Halperin, Benjamin Leff, Stephanie McMahon, Eloise Pasachoff, Diane Ring, Theodore Sims, Matthew Stephenson, David Walker, Alvin Warren, and Diana Winters, as well as the participants in the Boston University School of Law Faculty Workshop and the Sixth Annual Junior Tax Scholars Workshop at University of California – Irvine. Thanks to Greg N. Corbin, Ashley Mahoney, Brandon J. Owens, and Sapna N. Patel for excellent research assistance and to Danielle Papa for administrative assistance. All errors remain my own.

¹ See Donna Rosato, *Life Without Plastic*, MONEY, June 17, 2008, http://money.cnn.com/2008/06/16/pf/without_plastic.money/index.htm?postversion=2008061713 (reporting on a study that consumers who pay cash spend less than consumers who use

taken to printing customer savings on receipts to make the benefits of shopping with them more salient to those same shoppers.² Economists have discussed salience in a variety of areas, ranging from highway tolls that become less salient as more drivers enroll in EZ-Pass programs³ to sales taxes that become more salient when posted prices are rewritten to include them.⁴

In the area of income tax policy, salience has become an increasingly popular topic. Starting with McCaffery in the 1990s and continuing today, many tax scholars have discussed the prominence of specific tax provisions and the tax system as a whole in the mind of taxpayers. Underlying these discussions is the idea that, as a tax becomes less salient, taxpayers become less conscious of the effect of that tax. In response, they oftentimes become more willing to pay that tax, and there is less behavioral distortion to avoid that particular tax.

This general introduction to low salience – or “hidden” – taxes ignores the normative implications of taxpayers becoming more willing (or less opposed) to pay a tax when they are less aware of it. Some commentators argue that this lack of awareness is inherently a problem: taxpayer confusion or misguidance is objectively wrong, and policymakers should never take advantage of this confusion.⁵ Others argue that this confusion creates an opportunity for policymakers to raise revenue for needed policies without facing the wrath of the taxpaying citizenry.⁶

This Article argues that, to date, the literature has essentially ignored a significant aspect of salience. The vast majority of articles addressing taxpayer awareness focus on provisions that increase the tax burden of taxpayers – what this Article refers to as “revenue-raising tax provisions.” They debate whether or not taxes should be hidden, the implications of hidden taxes, how taxes become hidden, and how to respond to the consequences of hidden taxes.⁷ What they generally do not discuss is the salience of provisions that decrease the tax burden of taxpayers – deductions, exclusions, and credits. In the

credit or debit cards).

² See Aradhna Krishna & Joel Slemrod, *Behavioral Public Finance: Tax Design as Price Presentation*, 10 INT’L TAX & PUB. FIN. 189, 192 (2003).

³ Amy Finkelstein, *E-Z Tax: Tax Salience and Tax Rates*, 2009 Q.J. ECON. 969.

⁴ Raj Chetty, Adam Looney & Kory Kroft, *Salience and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145 (2009).

⁵ See Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1933-37 (1994).

⁶ See Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253, 310 (2011).

⁷ See, e.g., Brian Galle, *Hidden Taxes*, 87 WASH. U. L. REV. 59 (2009); McCaffery, *supra* note 5, at 1874-1926; David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX L. REV. 19 (2011); Schenk, *supra* note 6, at 281.

following discussion, this Article will refer to these provisions collectively as “revenue-reducing tax provisions.”

This Article begins to fill that gap and argues that revenue-reducing tax provisions raise new issues to consider when discussing salience. Because deductions, exclusions, and credits are in many ways the mirror image of revenue-raising tax provisions, taxpayer awareness of these provisions often acts in the reverse direction of provisions that increase tax payments. While taxpayers arguably underestimate their tax liability as provisions that increase that liability become *less* salient, the opposite is true for many revenue-reducing tax provisions. For taxpayers to underestimate their tax burden – or overestimate the reduction in their tax burden – as a result of the effect of deductions, exclusions, and credits, those tax provisions must become *more* salient. Although commentators have alluded to the high salience of certain revenue-reducing tax provisions,⁸ they have not discussed the market salience of these provisions in detail. This Article expands on that aspect of salience and discusses its implications.

As a way of explaining the salience of certain revenue-reducing tax provisions, this Article introduces the concept of hypersalience. Hypersalience occurs when a tax provision is fully – or almost fully – salient, but the limits restricting that provision’s application are hidden, or less salient. When revenue-reducing tax provisions are hypersalient, they have a similar effect to hidden taxes: taxpayers inaccurately underestimate their tax burden and thus possibly over-distort their behavior in order to take greater advantage of a tax provision that does not actually provide the benefit they believe it provides. Hypersalience thus rests on the economic equivalence of hidden taxes and hidden limits. The effect of a restriction on a revenue-reducing tax provision being hidden is similar to the effect of a revenue-raising tax provision itself being hidden. Both situations lead taxpayers to perceive that they are subject to less taxation than they in fact are.

This Article illustrates hypersalience by way of the charitable deduction. Several factors make the charitable deduction a relevant example. First, it may provide the most extreme version of salience of any deduction. The deductibility of charitable donations is one of the most well-known aspects of our tax system.⁹ The deduction’s extreme salience is tied to the fact that charitable organizations, ranging from homeless shelters and museums to symphonies and child welfare organizations, alert potential donors that donations are tax deductible. This deduction, however, is not merely highly salient – it is hypersalient. Such hypersalience results because the same level

⁸ In his reference to cognitive theory and deductions, McCaffery wrote that “the framing effect of being able to make a ‘fully tax deductible’ gift” likely affects taxpayers’ willingness to give. McCaffery, *supra* note 5, at 1913.

⁹ Such a contention requires empirical support, and, while this Article does not provide empirical support for the salience of the charitable deduction, it welcomes further research in this area.

of awareness does not extend to the limitations of the deduction; the charitable organizations contributing to its salience do not market the fact that fewer than half of all taxpayers can actually take this deduction. The charitable deduction can thus be seen as a model (or a warning, depending on the reader's normative view of the salience of this deduction) for policymakers and academics considering hypersalience. Second, the charitable deduction has existed in the Internal Revenue Code since early in the Code's history, and its general parameters have remained fairly constant through that time. Therefore, discussion of the charitable deduction is not hampered by its short existence or varying provisions. Finally, the charitable deduction is unlikely to disappear in the near future. Although all provisions of the Code are open to modification, the majority of proposed amendments to the charitable deduction are to expand its reach rather than to eliminate it.¹⁰

After introducing and illustrating hypersalience, this Article outlines why the concept of hypersalience matters. By expanding the hidden tax discussion to include the hidden limits of highly salient revenue-reducing tax provisions, hypersalience adds several new considerations to the tax policy literature. First, the hypersalience of the charitable deduction highlights the role that parties other than the government can play in increasing taxpayer awareness of certain tax provisions. Both the prominence of the charitable deduction and the hidden nature of its limits may partly result from advertising by the charitable organizations that are the third-party beneficiaries of the deduction. Such third-party marketing by non-governmental actors raises concerns about the prominence of such provisions. Second, hypersalience suggests that models on which policymakers base their decisions may not accurately account for taxpayer behavior. In the context of the charitable deduction, hypersalience suggests that models of price elasticity of giving underestimate taxpayer response to changes in tax rates and that the charitable deduction may in fact be more treasury efficient than previously thought. Third, hypersalience suggests that taxpayers may consume more of certain goods in response to the mistaken belief that they will receive tax benefits as a result of such consumption. While the "consumption" that results from the charitable deduction – i.e., greater giving to charitable organizations – may not seem problematic for some readers, consumption warranting more concern may

¹⁰ See, e.g., JOEL FRIEDMAN & ROBERT GREENSTEIN, CTR. ON BUDGET & POL'Y PRIORITIES, CHARITABLE DEDUCTION FOR TAXPAYERS WHO DO NOT ITEMIZE: PROPOSAL RAISES CONCERNS ABOUT EFFECTIVENESS AND COST (2002), *available at* <http://www.cbpp.org/archiveSite/3-21-02tax.pdf> (discussing a 2002 proposal by Senators Lieberman and Santorum to allow non-itemizers to deduct their charitable contributions up to a limited amount). *But see* NAT'L COMM'N ON FISCAL RESPONSIBILITY & REFORM, CO-CHAIR'S PROPOSAL (2010), *available at* http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/CoChair_Draft.pdf (asserting that one of three proposals to cut the federal deficit would eliminate the deduction, while the other two would limit its applicability).

result from other revenue-reducing tax provisions. One such provision is the home mortgage interest deduction, which illustrates the possibly unintended policy consequences of hypersalience.

Although the greater treasury efficiency of certain provisions could be seen as a positive consequence of hypersalience, this Article advocates curtailing hypersalience in the charitable deduction and other revenue-reducing tax provisions. This normative stance is based on the fact that hypersalience rests on taxpayer ignorance or misunderstanding, as well as the role of private third-party beneficiaries and the potential increased consumption of goods that results from this misunderstanding.

Part I of this Article introduces the concept of hypersalience with a brief overview of relevant behavioral economics and tax policy literature. Part II then uses the charitable deduction as an illustration of the concept. Part III discusses the implications of hypersalience. Part IV builds on this discussion to assess the costs and benefits of hypersalience and then presents proposals for curtailing hypersalience. This Article concludes with a call for further research.

I. AN INTRODUCTION TO HYPERALIENANCE

In the last several years, behavioral economics has entered into tax policy discussions with a vengeance. As contrasted with more traditional economic analysis, which is posited on a rational actor optimizing her utility, behavioral economics employs the lessons of cognitive psychology¹¹ to consider how actual economic actors, rather than the idealized rational actor, make decisions and otherwise behave.¹² Unlike traditional models that depend on rational behavior,¹³ behavioral economics highlights that individuals often rely on mental shortcuts, known in the literature as biases and heuristics, to make economic decisions.¹⁴ These mental shortcuts may lead economic actors – or

¹¹ Behavioral economics builds on cognitive psychology along with behavioral research and probability theory. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 640 (1999).

¹² See, e.g., Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1654 (1998) (“[B]ehavioral’ in ‘behavioral law and economics’ is about infusing law and economics with insights into actual (rather than hypothesized) human behavior.”); McCaffery, *supra* note 5, at 1868-69 (referring to expected utility theory as the “chief foil for cognitive theory”).

¹³ Edward J. McCaffery & Jonathan Baron, *Thinking About Tax*, 12 PSYCHOL. PUB. POL’Y & L. 106, 108 (2006) (stating that cognitive psychology “has shown that individuals deviate, often systematically, from ideal precepts of rationality, including consistency”).

¹⁴ Joshua D. Blank & Daniel Z. Levin, *When Is Tax Enforcement Publicized?*, 30 VA. TAX REV. 1, 23 (2010); McCaffery & Baron, *supra* note 13, at 109 (defining “overgeneralized heuristics” to “include extensions of principles that serve good purposes most of the time to inappropriate situations” and “judgment biases” to include “a class of general distortions of numerical judgment”). Among the many cognitive shortcuts used by

at least boundedly rational actors¹⁵ – to act illogically or against their interests instead of rationally maximizing their own economic utility.¹⁶

One fundamental aspect of behavioral economics that has garnered attention in the area of tax is the concept of salience. As McCaffery and Baron stated in 2006, “[S]ubjects focus on one especially salient aspect of a choice or evaluation problem and ignore or fail to integrate other less salient items. They make decisions in isolation, as if with blinders on, of logically relevant data.”¹⁷ In other words, the aggregate effect of various biases and heuristics is that individuals generally focus on what is most salient, ignoring other relevant information and acting on each decision essentially in isolation.

Salience, also sometimes referred to as prominence or vividness,¹⁸ generally refers to individuals’ practices of placing greater importance on “highly visible or easily recallable events or facts.”¹⁹ In terms of tax policy, salience generally refers to a tax provision itself being prominent. If a tax is salient, taxpayers are fully aware of the cost of the tax to them. If a tax is less salient, taxpayers are less aware of its impact.

Much of the literature on salience considers all types of salience under the same rubric.²⁰ Two recent additions to the literature, however, have highlighted that this approach is misleading and that salience in fact has two

individuals in making economic decisions are the availability heuristic, the anchoring effect, framing, and loss aversion. For more of an introduction to behavioral economics and cognitive theory, see McCaffery, *supra* note 5; for discussions of a wide variety of biases and heuristics, see Hanson & Kysar, *supra* note 11, at 643-87.

¹⁵ Note that the concept of rational actors is not entirely rejected by behavioral economics. Instead, many authors have focused on how the actions of boundedly rational actors differ from fully rational actors, who may still exist in the economic sphere. See, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PENN. L. REV. 1211, 1247-50 (2003) (proposing policies that affect boundedly rational actors and fully rational actors differently); Jolls, *supra* note 12, at 1676-81 (describing the difference between boundedly rational actors and fully rational actors); cf. Hanson & Kysar, *supra* note 11, at 633 (stating that these “cognitive illusions . . . are not limited to the uneducated or unintelligent. . . . Instead, they affect us all with uncanny consistency and unflappable persistence.”).

¹⁶ Edward J. McCaffery & Jonathan Baron, *Tax Policy in an Era of Rising Inequality: The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745, 1748 (2005) (stating that behavioral economics “has long demonstrated that people do not always perceive economic and other matters in a logically consistent fashion”); Camerer, *supra* note 15, at 107 (“[A] large part of behavioral economics describes ways people sometimes fail to behave in their own best interests.”).

¹⁷ McCaffery & Baron, *supra* note 13, at 109 (citations omitted).

¹⁸ McCaffery, *supra* note 5, at 1886.

¹⁹ *Id.* at 1886-87.

²⁰ See Gamage & Shanske, *supra* note 7, at 24, 54 (asserting that “there are multiple dimensions to tax salience” but also mentioning that “many commentators – in particular tax-legal scholars – persist in viewing tax salience primarily as a unitary concept”).

components: (1) market – or economic – salience and (2) political salience.²¹ Under the division proposed by Gamage and Shanske, market salience addresses “how tax presentation affects market decisions and economic activity,”²² while political salience addresses “how tax presentation affects voting behavior and political outcomes.”²³ Schenk similarly proposes that there are two types of behavioral responses to salience. The first, which responds to what she refers to as economic salience, is “a change in economic decisionmaking.”²⁴ The second, which responds to what she refers to as political salience, is “a political response to government action.”²⁵ This Article focuses entirely on market, or economic, salience. In other words, all arguments about the salience of revenue-reducing tax provisions in this Article are focused purely on how taxpayers respond in the market to the prominence of these tax provisions; this Article does not address how the prominence of the provisions affects the voting behavior of taxpayers.

Many articles on tax salience build off of McCaffery’s 1994 article in which he proposed applying cognitive psychology to taxation.²⁶ The general takeaway from this literature is that salience, in the words of McCaffery, helps to explain “why citizens fail to notice, or otherwise under-react to, certain types of taxes and tax changes.”²⁷ As these articles explain, some taxes are salient – but some are less so. The latter taxes are referred to as hidden taxes. Much of the literature on the salience of the tax system has focused on those taxes that are particularly hidden or that have low salience. One of the major consequences of a tax being hidden is that it does not create the same behavioral distortions that would be expected of the same tax were it fully salient.

As many have noted, taxes are associated with inefficiency and deadweight loss in that they induce behavioral distortions in taxpayers trying to avoid or minimize tax payments.²⁸ If a taxpayer is unaware of the effect – or at least of the full effect – of a tax, that taxpayer is less likely to change her behavior to the full extent required to avoid the tax.²⁹

²¹ See generally *id.*; Schenk, *supra* note 6, at 272.

²² Gamage & Shanske, *supra* note 7, at 20.

²³ *Id.*

²⁴ Schenk, *supra* note 6, at 272.

²⁵ *Id.*

²⁶ See, e.g., Galle, *supra* note 7; David Gamage & Darien Shanske, *supra* note 7; Susan Cleary Morse, *Using Salience and Influence to Narrow the Tax Gap*, 40 LOY. U. CHI. L.J. 483 (2009). See generally McCaffery, *supra* note 5.

²⁷ *Id.* at 1887.

²⁸ See, e.g., Emmanuel Saez, Joel Slemrod & Seth H. Giertz, *The Elasticity of Taxable Income with Respect to Marginal Tax Rates: A Critical Review*, 50 J. ECON. LIT. 3 (2012) (explaining that all behavioral responses to income tax rate changes represent some form of inefficiency).

²⁹ See Schenk, *supra* note 6, at 263 (“A salient tax (or tax provision) is predicted to affect

The literature varies in its views of hidden taxes. Some commentators argue that these taxes are more efficient than less hidden taxes³⁰ because they lead to fewer behavioral distortions than do fully salient taxes.³¹ Other commentators argue that this efficiency is itself problematic because taxpayers are not as aware of the taxes being imposed on them.³² Another group argues that perhaps the reduced salience of hidden taxes is a positive development.³³ And still a fourth group of commentators argues that we do not understand enough about certain types of salience to know whether or not hidden taxes are a positive or a negative development.³⁴ Some recent commentators have charged that the very term “hidden taxes” encapsulates a normative judgment and should thus be avoided.³⁵ Since this Article focuses on the opposite of hidden taxes, it uses that term only to highlight the fact that prior discussions of low-salience taxes focused on the extent to which taxpayers underestimate their effect.

A more recent addition to the literature on tax salience is made up of empirical studies determining the actual salience of specific tax provisions.³⁶ One empirical study focused on the salience of highway tolls before and after the widespread adoption of electronic toll collection technology.³⁷ In terms of market salience, drivers were hypothesized to be less aware of the actual cost of highway travel after the adoption of electronic toll collection technology; after drivers had adopted an EZ-Pass or similar system, the cost of tolls appears to have become less salient than it had been when they had to search for exact change.³⁸

taxpayer behavior; conversely, a low-salience tax (or provision) predictably would change behavior less or not at all. If taxpayers are unaware of the tax or provision, then they cannot respond to it; if the tax or provision is not prominent, they will under-react.”).

³⁰ Galle, *supra* note 7, at 62.

³¹ *Id.* at 77-78.

³² McCaffery, *supra* note 5, at 1943.

³³ Gamage & Shanske, *supra* note 7, at 21 (arguing “for a general presumption in favor of reducing market salience”); Schenk, *supra* note 6, at 281 (stating that “[t]he consensus [of other articles] is that legislators should not take advantage of cognitive biases in designing taxes” but asserting “that there are circumstances where it is appropriate for legislators to do so”).

³⁴ Gamage & Shanske, *supra* note 7, at 21 (highlighting lack of knowledge of the effects of political salience); Galle, *supra* note 7, at 112 (“It remains theoretically uncertain whether hidden taxes can increase welfare.”).

³⁵ See Gamage & Shanske, *supra* note 7, at 24 (avoiding the term and calling it “emotion laden” and “potentially misleading”); Schenk, *supra* note 6, at 262-63 (stating that “‘hidden tax’ is a misnomer”).

³⁶ While the articles cited here are not the only empirical studies of salience, they are the ones that have been most often discussed in the income tax literature.

³⁷ Finkelstein, *supra* note 3.

³⁸ *Id.* at 972 (“I present survey evidence . . . that is consistent with the assumption that [electronic toll collection] reduces the salience of tolls.”).

Another study of the salience of specific taxes or analogous fees involved changing the posted prices in a store such that they included the sales tax.³⁹ Although consumers were aware of the sales tax that applied to their purchases when asked,⁴⁰ the increased salience of the sales tax when consumers did not have to calculate it themselves led to distorted behavior.⁴¹ In other words, consumers bought less when the price explicitly included sales taxes.⁴² The study's authors interpreted this to mean that consumers also underreacted when the sales tax was less salient⁴³ and concluded that "salience matters: individuals know about taxes when their attention is drawn to the subject, but do not pay attention to taxes that are not transparent while deciding what to buy."⁴⁴

The above articles focused primarily on the salience of revenue-raising tax provisions and on how taxpayer behavior changes when taxes become more or less hidden. While some articles have looked at the other side of the coin and considered the salience of revenue-reducing tax provisions, the majority of these articles focused on the political salience of such provisions rather than their market salience.⁴⁵ Likewise, while some commentators have mentioned the market salience of tax expenditures in passing, few have delved into this issue in detail.⁴⁶ A recent addition to this area is an article based on survey

³⁹ Chetty, *supra* note 4.

⁴⁰ *Id.* at 1165 ("[M]ost consumers are well informed about commodity tax rates when their attention is drawn to the subject.").

⁴¹ *Id.* at 1154.

⁴² *Id.*

⁴³ *See id.* at 1165.

⁴⁴ *Id.* (emphasis omitted).

⁴⁵ *See* Marjorie E. Kornhauser, *Cognitive Theory and the Delivery of Welfare Benefits*, 40 LOY. U. CHI. L.J. 253, 264 (2009) ("[T]he hidden nature of tax expenditures . . . makes it easier to enact, and maintain, policies that might not weather scrutiny if enacted as direct spending programs."); David Gamage, Professor, U.C. Berkley Sch. of Law, Tax Salience and Tax Expenditures (Jan. 14, 2011) (a copy of the PowerPoint presentation accompanying Professor Gamage's speech at the Loyola Law School Los Angeles Conference, Starving the Beast, is available at <http://events.lls.edu/taxpolicy/documents/PANEL1GAMAGEtaxsalienceandtaxexpendituresfinal01-11-11.pdf>); Deborah H. Schenk, Professor, N.Y.U. Sch. of Law, The Salience of Tax Expenditures and Implications for Reform (Jan. 14, 2011) (a copy of the PowerPoint presentation accompanying Professor Schenk's speech at the Loyola Law School Los Angeles Conference, Starving the Beast, is available at <http://events.lls.edu/taxpolicy/documents/PANEL1SCHENKpowerpointfinal01-05-11.pdf>). These sources focus specifically on tax expenditures. The term "tax expenditures" refers to tax provisions that allow taxpayers not to pay taxes that normally would be due. JOINT COMM. ON TAXATION, A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS 2 (2008).

⁴⁶ Edward McCaffery is the author who has mentioned this the most, particularly in his earlier work introducing tax scholars to cognitive theory. He has suggested that taxpayers are overly aware of the tax benefits for home ownership. McCaffery, *supra* note 6, at 1920-23. He also posited that taxpayers overvalue the charitable deduction. *Id.* at 1906

data suggesting that certain revenue-reducing tax provisions, such as the charitable deduction, are not highly salient.⁴⁷ Although this study adds valuable empirical data to the salience discussion, it focuses only on taxpayers who are aware of their itemization status. Accordingly, it does not reach many of the taxpayers who are the focus of this Article.⁴⁸

As summarized above, the existing tax salience literature focuses primarily on revenue-raising provisions and on the distinction between fully-salient taxes and hidden taxes. The salience literature has thus not fully addressed a fundamental concept: hypersalience.

An assumption shared by many earlier articles is that, generally, taxes are either fully salient or less than salient. If a tax is fully salient, a taxpayer is fully cognizant of how that tax will affect her. If the salient item at issue is a revenue-raising tax provision – i.e., it is a requirement for the taxpayer to pay a certain amount – a fully salient provision means that a taxpayer fully understands how much she owes. So if this provision requires the taxpayer to pay \$1000 when she engages in a certain activity, she will expect to be \$1000 poorer if she engages in that activity. In comparison, if a tax is less than fully salient, a taxpayer is less aware – if aware at all – of how that tax will affect her. The general thrust of the literature is that a less salient – or hidden – tax is one where the taxpayer thinks she is going to pay *less* in tax than she actually will pay. Taxpayers underestimate their tax burden under hidden taxes. If the aforementioned \$1000 tax were less than fully salient, the taxpayer would expect to pay less than \$1000 if she engages in the activity. To summarize the literature very broadly, a fully salient tax means that a taxpayer correctly predicts the amount that she will owe in taxes. A less salient tax means that a taxpayer incorrectly predicts that she will pay *less* than the actual amount that she will eventually owe.

The discussions found in earlier articles ignore the full spectrum of salience. An aspect of taxation that has heretofore not been discussed in detail is that it is possible for taxpayers to *overestimate* how a part of the tax system will affect them. In fact, to achieve the same result as is achieved by hidden taxes,

(predicting that individuals will generally “overvalue nontaxable benefits [and] overestimate the tax deductible component of charitable gifts”); *see also id.* at 1911 (“The idea is that the tax deductibility of each is an added feature of its attractiveness, such that many taxpayers will over-adjust, or otherwise fail to be precise, in taking account of the relevance of the deduction.”).

⁴⁷ *See* Jacob Goldin & Yair Listokin, Tax Expenditure Salience (unpublished manuscript) (on file with the author).

⁴⁸ *See id.* (“Respondents who answered that they did not know their filing status were excluded from the analysis.”). Although Goldin and Listokin find that many taxpayers *underestimate* the impact of revenue-reducing tax provisions, this finding does not address the concept of hypersalience directly in that the taxpayers who wrongly underestimate the effect of such provisions are those who also claim to itemize. Furthermore, Goldin and Listokin also find that a number of taxpayers who do not itemize believe they get a benefit from revenue-reducing tax provisions, which itself is evidence of hypersalience. *See id.*

a provision that reduces a taxpayer's tax liability *must* be overestimated.⁴⁹ Consider again the \$1000 tax provision that will apply if the taxpayer engages in an activity. If that is a revenue-raising tax provision, the only way for a taxpayer to mistakenly believe that she will owe less than \$1000 if she engages in the activity is to underestimate the tax. If the \$1000 is instead a deduction, credit, or exclusion, the calculation is reversed. For the taxpayer to again mistakenly believe that she will owe less on her taxes, she must overestimate the effect of that provision. She must believe either that the revenue-reducing tax provision will apply to her when it will not or that it will apply to a greater degree than it in fact will. In other words, the provision must be more than merely not hidden and more than fully salient: it must be hypersalient.

Hypersalience is thus the phenomenon by which the prominence of a tax provision leads taxpayers to overestimate its incidence. Depending on how one defines salience, hypersalience can be broken out into two separate parts: for a revenue-reducing tax provision to be hypersalient, the provision itself must be close to fully salient and its limitations or exclusions must be less salient. Some readers may conceive of hypersalience as the combination of a highly salient provision and low-salience limitations. Others may conceive of it as a situation in which salience and accuracy are mutually exclusive. Still others may conceive of hypersalience as the combination of salient benefits and complex limitations.⁵⁰ Regardless of how it is understood, hypersalience results in the tax benefits of a tax provision being overvalued because the restrictions on those benefits are themselves undervalued. Rather than a tax itself being hidden, as is the case with low-salience, revenue-raising provisions, the limitations are the hidden element in hypersalient revenue-reducing provisions.

Hypersalience thus refers to the quality of being overly – and erroneously – prominent. While a revenue-raising tax provision can potentially be hypersalient – it is possible that certain tax provisions highlighted by anti-tax protesters fit this bill⁵¹ – this Article focuses on the hypersalience of revenue-reducing tax provisions. The hypersalience of such provisions is in many ways the opposite side of the hidden tax coin. Therefore, if hidden taxes lead taxpayers to feel the burdens of the Internal Revenue Code less acutely, then hypersalient deductions, exemptions, and credits lead taxpayers to believe that they are ultimately paying less in taxes than they actually are.

Hypersalience requires that the restrictions or limits on revenue-reducing tax provisions be hidden. Since revenue-reducing tax provisions can be thought of in economic terms as subsidies, limits on these subsidies are the economic equivalent of revenue-raising tax provisions. Hypersalience is not, however,

⁴⁹ Some commentators have alluded to the need for tax incentives, at a minimum, to be more salient than taxes themselves. *See, e.g.*, Schenk, *supra* note 6, at 276 n.101.

⁵⁰ *See id.* at 261 (discussing the difference between salience and complexity).

⁵¹ Examples may include the estate tax and the difference between certain preferential rates – such as the current rate on capital gains – and ordinary rates.

just a term for hidden limits. Instead, it refers to the combination of a highly salient tax provision *and* a complicated, misunderstood, or low salience set of restrictions. Because this term encompasses both the prominence of the revenue-reducing tax provision itself and taxpayer awareness of the limits that apply to that provision, hypersalience touches on accuracy and awareness as well as pure salience.

II. THE CHARITABLE DEDUCTION: A HIGH SALIENCE TAX PROVISION WITH LOW SALIENCE LIMITATIONS

The previous discussion outlined the general contours of hypersalience. This Part fills those contours with an example familiar to many readers. The charitable deduction, currently provided in section 170 of the Internal Revenue Code, allows taxpayers to deduct from gross income their contributions to certain tax-exempt organizations.⁵² The charitable deduction, as with many deductions, is a tax expenditure; the government foregoes revenue that it otherwise would have raised through taxes, with this foregone revenue directed toward non-profit institutions chosen by individual taxpayers.⁵³ As highlighted by many commentators, starting with Surrey, the effect of this deduction is that it is an upside-down subsidy: the higher a taxpayer's marginal tax rate, the more benefit the taxpayer receives from the charitable deduction.⁵⁴ While a taxpayer with a 10% rate pays \$0.90 after taxes for a \$1.00 donation, a taxpayer with a 35% rate only pays \$0.65 after taxes for the same \$1.00 donation.

The charitable deduction was first enacted in 1917,⁵⁵ and it has been an accepted part of the Internal Revenue Code ever since.⁵⁶ For a tax donation to be deductible, it must be made to a church, a cemetery company, a veterans' organization, certain small nonprofits, or an organization defined in

⁵² I.R.C. § 170(c) (2006). This Article also does not address tax treatments of charitable contributions outside of the income tax, such as the estate tax or excise taxes.

⁵³ See JOINT COMM. ON TAXATION, *supra* note 45, at 2.

⁵⁴ STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 134-36 (1973).

⁵⁵ War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917). When the charitable deduction was first enacted, very few households were required to file tax returns. CONG. BUDGET OFFICE, *EFFECTS OF ALLOWING NONITEMIZERS TO DEDUCT CHARITABLE CONTRIBUTIONS* 3 (2002) (stating that "only about 5 percent of households had to file tax returns" in 1917). The charitable deduction for corporations was not enacted until 1935. Revenue Act of 1935, ch. 829, § 102(r), 49 Stat. 1014, 1016 (1935) (extending charitable deductions to corporations and allowing corporate taxpayers to deduct up to five percent of their net income).

⁵⁶ See, e.g., David E. Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 533 (2006) (stating that the deduction, "despite facing repeated attacks in Congress and the media, has only been strengthened over time").

501(c)(3).⁵⁷ Under 501(c)(3), organizations whose donors are eligible for the deduction range from homeless shelters, animal rescue leagues, and veterans' organizations to libraries, schools, and art museums.⁵⁸ Donations to other organizations, even those that are nonprofit and tax-exempt, are not deductible.⁵⁹

Although some donors likely give to charitable organizations solely out of altruism, studies suggest that many donors take account of the deduction when deciding to give. Andreoni, for one, found that impure altruism, wherein individuals donate for multiple reasons, is a more likely model than pure altruism and that subsidies are thus justified on these grounds.⁶⁰ Studies on the price elasticity of giving – i.e., how responsive donations are to the tax rate at which the deduction is granted – also support the idea that the charitable deduction increases the rate of giving. If the existence of the deduction did not change individuals' giving, then the price elasticity of giving would be zero – a change in the price of a donation from, say, \$0.65 per dollar of giving to \$1.00 per dollar of giving⁶¹ would make no change in the amount of money an individual donated. Although studies of the price elasticity of giving vary in their findings, they generally find an elasticity above zero – and sometimes even above one, suggesting that individuals are so responsive to changes in the price of giving that they increase their donations by more than they save as the rate changes.⁶²

⁵⁷ James R. Hines, Jr., Jill R. Horwitz & Austin Nichols, *The Attack on Nonprofit Status: A Charitable Assessment*, 108 MICH. L. REV. 1179, 1186 (2010). Section 501(c)(3) lists organizations “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or education purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals.” I.R.C. § 501(c)(3) (2006).

⁵⁸ I.R.C. § 501(c)(3). Much has been written about what organizations should be included in this group; this Article does not enter into that debate. For more on that debate, see, for example, ROB REICH ET AL., STANFORD UNIV. CTR. ON PHILANTHROPY & CIVIL SOC'Y, *ANYTHING GOES: APPROVAL OF NONPROFIT STATUS BY THE IRS* (2009).

⁵⁹ See Hines, *supra* note 57, at 1186 (providing 501(c)(4) social welfare organizations and 501(c)(6) chambers of commerce as examples of organizations that may not receive tax-deductible donations). Donations to these latter organizations may, however, be deductible as business expenses depending on the donor. *Id.*

⁶⁰ See generally James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464, 464-77 (1990).

⁶¹ This is essentially the price change that would occur if a taxpayer with a marginal rate of 35% were no longer able to deduct charitable contributions.

⁶² See, e.g., Gerald Auten et al., *The Distribution of Charitable Giving, Income and Taxes: An Analysis of Panel Data*, 92 AM. ECON. REV. 371, 380-81 (2002) (finding price elasticity of giving of between -0.79 and -1.26 for persistent changes in tax prices); William C. Randolph, *Dynamic Income, Progressive Taxes, and the Timing of Charitable Contributions*, 103 J. POL. ECON. 709, 724 (1995) (finding a weighted price elasticity of giving of between -0.51 and -1.55, depending on whether the price change was permanent).

The charitable deduction is likely one of the most salient revenue-reducing tax provisions in the Internal Revenue Code. Such a statement ultimately requires empirical research for support, and this Article welcomes such future analysis of the deduction's salience. Even without such empirical support, however, a variety of statements by other commentators support the idea that the charitable deduction is particularly salient. From conversations at family dinner tables to blog posts to newspaper articles and Miss Manners columns,⁶³ discussions of the charitable deduction abound. Furthermore, as anyone who has ever turned on a radio station during a fund drive, received a solicitation from an animal rescue league or art museum in the mail, heard a jingle about donating their car, or considered giving online to a charitable organization can attest, the salience of the deductibility of charitable donations is high.

The information that is most prominent about charitable donations is that they are, in the words of many of the organizations that receive them, "fully tax deductible."⁶⁴ If such a contention were true, and all donors were able to reduce their taxes as a result of any and all charitable contributions, then the charitable deduction would merely be highly salient. The organizations' contentions, however, are not true, and that is what transforms the charitable deduction from a prominent to a hypersalient tax provision.

Despite what many taxpayers may believe, all donors cannot deduct all donations made to charitable organizations. The charitable deduction is limited in several different ways, all of which undermine the common belief that donations are fully tax-deductible. Although the deduction is restricted by numerous limits that apply to specific donors or types of donations,⁶⁵ this

or transitory).

⁶³ See, e.g., Chris Farrell, *Well-informed Giving Should Be Part of Any Sound Financial Plan*, STAR TRIBUNE, Dec. 19, 2009, <http://www.startribune.com/business/yourmoney/79675787.html?page=all&prepage=2&c=y#continue> (stating without limit that "Uncle Sam gives you a tax benefit for your charitable giving"); Judith Martin, *Charitable Gifts Miss the Point*, CHICAGO TRIBUNE, Dec. 21, 2010, <http://www.chicagotribune.com/features/tribu/sc-fam-1221-manners-20101221,0,6320159.story> (displaying the manner in which both the advice columnist and her Gentle Reader assume that a taxpayer receives a tax deduction for a charitable donation); Janet Morrissey, *Donate – and Deduct!*, TIME, Nov. 2, 2009, *available at* http://www.time.com/time/specials/packages/article/0,28804,1933436_1933428_1933418,00.html (advising readers to "bump up the giving and watch your 2009 tax bill shrink").

⁶⁴ See *infra* Part III.A.

⁶⁵ These limits include the section 170(b) limit on the percentage of income that taxpayers can donate and the section 68 phase-out of the deduction. I.R.C. § 170(b) (2006); I.R.C. § 68 (2006). Under section 170(b)(1), individuals are limited to deducting either fifty or thirty percent of their adjusted gross income in charitable donations, depending on the form and recipient of those donations. I.R.C. § 170(b)(1). Until January 1, 2010, section 68 provided a further restriction in that taxpayers with adjusted gross incomes over a set amount were required to reduce their itemized deductions by the lesser of three percent of excess adjusted gross income or eighty percent of itemized deductions. I.R.C. § 68(c).

Article focuses on just one restriction that serves to limit the deduction's applicability to fewer than 50% of taxpayers.⁶⁶ The charitable deduction, as with many other deductions, is only available to those taxpayers who itemize their deductions.⁶⁷ If a taxpayer's donations total less than the standard deduction, the taxpayer, regardless of whether she has donated to charitable organizations, may not take advantage of any itemized deductions – including the charitable deduction.⁶⁸ The deductibility of a charitable donation can therefore be seen as dependent on a taxpayer's *other* deductions. If, for example, a taxpayer makes significant interest payments on a home mortgage and lives in a state with high income taxes and a city with high property and income taxes, then that taxpayer may be more likely to be able to deduct her charitable donations. If that same taxpayer made the exact same amount of donations but rented an apartment and lived in a state and city with low or no deductible state or local taxes, then that taxpayer would be less likely to be able to deduct those same charitable deductions.

This Article is not arguing that all taxpayers, whether or not they itemize, should be permitted to take the charitable deduction,⁶⁹ nor is it arguing for the abolition or modification of the standard deduction.⁷⁰ One of the purposes of

⁶⁶ This Article does not engage with the fact that some taxpayers may mistakenly believe that a deduction is a dollar-for-dollar credit, and not a reduction of taxable income. Such a misunderstanding, however, is yet another contributing factor to the hypersalience of this and other deductions.

⁶⁷ See I.R.C. §§ 161-224 (2006). An itemization requirement has attached to the charitable deduction since the deduction was first created. See CONG. BUDGET OFFICE, *supra* note 55, at 3 (stating that “taxpayers had to itemize their allowable expenditures” to claim the deduction in 1917). The standard deduction did not exist until 1944. See *id.* The effects of itemization have been discussed in a host of contexts, including the distortion created between the price for itemizers and non-itemizers. See Charles T. Clotfelter, *Tax-Induced Distortions in the Voluntary Sector*, 39 CASE W. RES. L. REV. 663, 671 (1989).

⁶⁸ If the taxpayer does itemize her deductions and they are less than the standard deduction, expectations about both economic self-interest and IRS recalculations of overpayment will lead her to take the standard deduction.

⁶⁹ This argument has been made many times, with varying success, in the context of the charitable deduction. From 1982 through 1985, non-itemizers could partially deduct their charitable donations. In 1986, they could fully deduct their donations. CONG. BUDGET OFFICE, *supra* note 55, at 3; Friedman & Greenstein, *supra* note 10, at 7.

⁷⁰ Charitable organizations themselves raised such an argument when the standard deduction was first proposed in 1944. See Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 850 (2001). One response to such an argument is that the standard deduction's purpose is to prevent taxpayers from itemizing the first dollar of income, instead only providing a subsidy once taxpayers have donated a significant amount. See David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 238 (2009). The deduction's current structure raises questions about the effectiveness of the standard deduction at achieving this purpose. Such concerns arise because, in reality, a taxpayer's choice to itemize is largely attributable to other deductions – such as the home

the standard deduction is to stand in for itemized deductions and create administrative simplicity for those taxpayers who do not have enough deductions to itemize.⁷¹ This Article does argue that, because the charitable deduction is currently limited to those taxpayers who itemize, its salience to all taxpayers may be misleading. Even though the number of taxpayers who itemize has been growing in recent years,⁷² the majority of Americans still take the standard deduction. In tax year 2008, 48.2 million tax returns itemized deductions, while 91.8 million took the standard deduction, and 3.9 million were subject to the alternative minimum tax.⁷³ Of the approximately 143 million income tax returns filed, approximately one-third itemized their deductions.⁷⁴ In other words, two-thirds of returns did *not* itemize deductions.⁷⁵

This means that the vast majority of taxpayers were not able to take the charitable deduction. Even though itemizers are the only taxpayers who may make use of the charitable deduction, subject to the other limits that apply, they are not the only taxpayers who make charitable contributions. Certainly, for those 48 million taxpayers who itemize, the charitable deduction is one of the largest itemized deductions, behind only the deductions for interest (including home mortgage interest) and for taxes paid to states and localities.⁷⁶ In 2008, approximately 39 million taxpayers itemized their charitable contributions, claiming \$173 billion in deductions.⁷⁷ According to the charitable organizations who received them, however, the donations in that same year amounted to significantly more than \$173 billion. In 2008, charitable

mortgage interest deduction and the state and local tax deduction – than to the number of donations a taxpayer makes. *See id.*

⁷¹ *See* CONG. BUDGET OFFICE, *supra* note 55, at 1 (“In principle, taxpayers who claim the standard deduction already receive recognition for their charitable contributions under current tax law.”); John R. Brooks II, *Doing Too Much: The Standard Deduction and the Conflict Between Progressivity and Simplification*, 2 COLUM. J. TAX L. 203, 205 (2011) (arguing that the standard deduction’s two purposes are to provide for a minimum amount of untaxed income and to provide a simple alternative to itemized deductions).

⁷² ERIC J. TODER & CAROL ROSENBERG, TAX POL’Y CTR., THE SHARE OF TAXPAYERS WHO ITEMIZE IS GROWING 695 (2007) (“Between 1995 and 2004, the share of itemizers increased from 29 percent to 35 percent, increasing every year except 2003 . . .”).

⁷³ JUSTIN BRYAN, INTERNAL REVENUE SERVICE, INDIVIDUAL INCOME TAX RETURNS, 2008, at 9-10 (2010). For more on the alternative minimum tax, see *infra* notes 158-165 and accompanying text.

⁷⁴ BRYAN, *supra* note 73, at 6-9. These statistics focus on returns rather than individual taxpayers.

⁷⁵ *Id.*

⁷⁶ *Id.* (stating that approximately forty-eight million Americans took a deduction for \$467 billion in taxes paid; approximately thirty-nine million Americans took a deduction for \$498 billion in interest paid; and approximately thirty-nine million Americans took a deduction for \$173 billion in charitable contributions).

⁷⁷ *Id.*

organizations reported receiving \$229 billion in donations.⁷⁸ The difference between these two numbers reveals that \$56 billion of donations were not claimed as deductible contributions.⁷⁹ Regardless of whether these donations were made by taxpayers who took the standard deduction or by taxpayers who itemized their deductions but failed to account for these donations, that number reveals that approximately a quarter of all charitable donations, in terms of value, are made by taxpayers who do not use those donations to benefit from the charitable deduction.

This suggests that, for at least some of the donors who made the \$56 billion of donations that did not result in reduced tax liability, the charitable deduction is hypersalient. While such a contention requires empirical support, this Article presents the charitable deduction as a likely example of hypersalience – and hypersalience as a possible explanation for some of the \$56 billion donation-deduction gap. Presenting the charitable deduction as an illustration of hypersalience may lead readers to raise certain criticisms of this concept. This Article seeks to address and allay those concerns. Criticisms of hypersalience can be broken into three categories: debiasing, prevalence, and relevance. This section addresses the first two categories in turn. The next section tackles the question of relevance.

Critics of hypersalience who point to debiasing would suggest that, even if some donors are not aware that they will only get the benefit of the charitable deduction if they itemize, such donors will only make this error once.⁸⁰ In other words, they will educate – or debias – themselves sufficiently to overcome the hypersalience of the charitable deduction after one year of losing out on its benefits. This critique suggests that perhaps taxpayers fall into this trap once – the first time they pay their taxes – and then, once they realize the difference between itemizing and taking the standard deduction, they never again mistakenly believe that they will receive a tax benefit such as the charitable deduction.

⁷⁸ GIVING U.S.A., U.S. CHARITABLE GIVING ESTIMATED TO BE \$307.65 BILLION IN 2008, at 3 (2009), available at http://www.givingusa.org/press_releases/gusa/GivingReaches300billion.pdf.

⁷⁹ The actual difference between \$229.28 billion and \$172.94 billion is \$56.34 billion. This number is significantly different from the estimate that the Joint Committee on Taxation made in 2002 that claimed that non-itemizers in recent years had contributed over \$20 billion per year. See Friedman & Greenstein, *supra* note 10, at 1. There are several possible reasons for this difference. First, it is possible that the \$229.28 billion number is skewed higher due to reporting by charitable organizations. Even if this is the case, and the difference is closer to the JCT's estimate of over \$20 billion, this latter number is still significant. Second, it is possible that the difference has grown since 2002 due to the focus on "compassionate conservatism," increased giving to religious organizations, and/or increased giving due to economic concerns.

⁸⁰ See, e.g., Christine Jolls & Cass R. Sunstein, *De-biasing Through Law* (Nat'l Bureau of Econ. Research, Working Paper No. 11738, 2005).

This is an appealing idea, and much has been written about taxpayer literacy and education,⁸¹ but it seems doubtful that individuals can teach themselves sufficiently to offset any concerns about hypersalience. First, some commentators have argued that taxpayers adopt a “learned helplessness” toward the tax law: some taxpayers essentially give up on teaching themselves in the face of the complexity of the Internal Revenue Code.⁸² If this is true, taxpayers who have adopted this helpless attitude are unlikely to break out of that attitude solely to educate themselves as to when the tax provision will apply.

A second argument against the idea that taxpayers will learn not to overestimate the benefits accruing from a provision rests on the increasing number of taxpayers who rely on outside preparers and computer programs to file their taxes. Perhaps the twenty percent of taxpayers who do their own taxes⁸³ are less likely to perceive provisions such as the charitable deduction as hypersalient. For the remaining eighty percent of taxpayers, however, it seems far less likely that they will internalize the lessons about the limits of such provisions. In the context of the charitable deduction, while those taxpayers who use computer programs may notice whether or not they itemize, these programs make the decision for them, after taxpayers have entered all their potentially itemizable deductions.⁸⁴ Taxpayers who use outside preparers are also unlikely to decide independently whether to itemize or to take the standard deduction. Both of these latter groups of taxpayers collect their itemizable receipts during the course of the year and turn the data on those receipts over to another entity, whether computer or human, to decide for them. It seems unlikely that such an experience will “teach” taxpayers the limits on the charitable deduction.⁸⁵ Another way of framing this contention is to point out

⁸¹ See, e.g., Galle, *supra* note 7, at 89-93; Schenk, *supra* note 6, at 294-95 (questioning whether debiasing actually occurs in the context of low-salience taxes).

⁸² McCaffery, *supra* note 5, at 1925 (“[A] good many individuals have learned to be helpless vis-à-vis the tax system; that is, they have given up altogether the formidable task of understanding the law, even as it applies to them.”).

⁸³ Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 751 (2009).

⁸⁴ See, e.g., *Tax-Deduction Wisdom – Should You Itemize?*, TURBOTAX, <http://turbotax.intuit.com/tax-tools/tax-tips/Tax-Deductions-and-Credits/Tax-Deduction-Wisdom---Should-You-Itemize-/INF12061.html> (last visited Mar. 23, 2012) (“TurboTax can help you decide whether you should itemize your deductions. Simply enter all of your information when prompted, and let the program determine if it’s better for you to itemize or take the standard deduction.”).

⁸⁵ See also Lawrence Zelenak, *Complex Tax Legislation in the TurboTax Era*, 1 COLUM. J. TAX L. 91 (2010) (suggesting that greater computerization of tax return filing has turned tax into a “black box” for taxpayers because it has allowed Congress to pass increasingly complex legislation). One could argue that these taxpayers are in fact more likely to self-educate because some data from tax year 2000 suggests, somewhat counterintuitively, that taxpayers who use software and taxpayers who hire paid preparers spend *more* time on

that taxpayers are more likely to self-educate when they experience an event;⁸⁶ if they do not directly experience the act of preparing their taxes and are instead told that they took the standard deduction, it is less likely that they will internalize any lessons about the effect of the standard deduction.

A third argument against taxpayer self-education lies in the complicated nature of the limits on provisions such as the charitable deduction. Even if a taxpayer does learn in Year 1 that she was not able to take a charitable deduction because she had not itemized enough other deductions, it is unclear how this lesson will affect her in the following years. Will this information prepare her for the fact that she may be able to itemize in Year 2? What if she moves in and out of the itemization umbrella over the years, as is likely to happen as taxpayers move, marry or divorce, add or lose dependents, buy or sell homes, or otherwise face the changing circumstances that life brings with it? In short, the complexities of the limits on the charitable deduction – as well as many other provisions in the Internal Revenue Code – raise questions about how likely it is that taxpayers will correctly self-teach. Furthermore, even if taxpayers are fully aware of the actual statutory limits on the charitable deduction, that is not sufficient to undo the hypersalience of the deduction. Hypersalience arises not only from the degree of information possessed by taxpayers but also from the prominence of the deduction when taxpayers are making contribution decisions. Thus, even if a taxpayer is intellectually aware of the full extent of the charitable deduction, she still may overreact to the deduction when she donates to a charitable organization early in the year, before she knows how many other deductions she is likely to have for the year. This may be most true of taxpayers who are on the cusp of the standard deduction cut-off; they may know the facts about the charitable deduction but not be sure from year-to-year whether it will affect them.⁸⁷

Self-education, therefore, appears not to be a sufficient response to hypersalience for those readers who are concerned with the problems raised by this concept.⁸⁸ A second and related category of potential criticism of

average than those who prepare their returns by hand. See John L. Guyton et al., *The Effects of Tax Software and Paid Preparers on Compliance Costs*, 58 NAT'L TAX. J. 439, 442 (2005). It seems likely, however, that this disparity in time is based more on the increased complexity of the tax returns of the first two groups of taxpayers than it is on some other factor. See *id.*

⁸⁶ See, e.g., Hanson & Kysar, *supra* note 11, at 669 (discussing the finding that individuals view experiential thinking as more compelling than “dispassionate logical thinking”); Rupert Sausgruber & Jean-Robert Tyran, *Tax Salience, Voting, and Deliberation* 23 (Dept. of Econ., U. of Copenhagen, Discussion Paper No. 08-21, 2008), available at <http://www.econ.ku.dk/english/research/publications/wp/2008/0821.pdf/> (finding that, while deliberation is not sufficient to de-bias people, experience “is a powerful argument to convince others”).

⁸⁷ For more on taxpayers on the cusp of the standard-deduction cut-off, see *infra* notes 88-91 and accompanying text.

⁸⁸ For more on the difficulties of debiasing, see, for example, Norbert Schwarz et al.,

hypersalience relates to the prevalence of this phenomenon. These types of critiques rest on a belief that low-income taxpayers know that they will not receive any tax benefit from deductions and high-income taxpayers are sophisticated enough about taxation that they are aware of the limits on the charitable deduction and unlikely to be subject to them since a higher percentage of high-income taxpayers are itemizers. Who, then, is overestimating the incidence of the charitable deduction?

Even if beliefs about the responses of low-income and high-income taxpayers to potentially hypersalient provisions are correct,⁸⁹ a large swath of taxpayers is still susceptible to hypersalience: those with incomes in the middle of the income spectrum. In particular, the hypersalience of the charitable deduction and other itemized deductions is most likely to affect taxpayers who have itemized deductions with a total value that approaches the standard deduction.⁹⁰ These taxpayers may not have home mortgages or high state or local taxes, but they may have enough itemized deductions that they take the standard deduction in some years but itemize their deductions in other years. What makes hypersalience prevalent is the fact that the population of itemizers is constantly changing, so many taxpayers who itemize one year may act on that knowledge only to be limited to the standard deduction the next.

Every year, the group of taxpayers who itemize varies both in terms of individual members and percentage of total taxpayers.⁹¹ From the perspective of individual taxpayers, therefore, the decision to itemize deductions may change from year to year. Although commentators repeatedly acknowledge that a minority of taxpayers itemizes their deductions, many seem not to acknowledge that this minority is not necessarily fixed. One argument in favor of the standard deduction is that it frees a majority of taxpayers from the recordkeeping associated with itemizing.⁹² That argument assumes, however, both that taxpayers can predict that they will not be itemizing their deductions for the relevant taxable year and that taxpayers know that recordkeeping is only required for itemizers. Commentators seem to accept that both of these

Metacognitive Experiences and the Intricacies of Setting People Straight: Implications for De-biasing and Public Information Campaigns, 39 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 127, 143 (2007) (suggesting that debiasing efforts often lead to reinforcing the biases they seek to undo).

⁸⁹ This Article does not endorse these beliefs, particularly those regarding low-income taxpayers, but the rejection of them is not necessary to the validity of hypersalience as a concept.

⁹⁰ For tax year 2011, these would-be taxpayers with deductions right above or below \$5800 for single taxpayers. See Rev. Proc. 2011-12, 2011-2 I.R.B. 297.

⁹¹ See Clotfelter, *supra* note 67, at 682-83 (referring to the “substantial variation over time in the number of taxpayers who” itemize, fluctuating from 16.4% in 1948 to 48.0% in 1970).

⁹² See Brooks, *supra* note 71, at 205.

assumptions are correct.⁹³ Yet the statistics about the fluctuating membership of the group of taxpayers who itemize challenge these assumptions.

Furthermore, the assumption that all nonitemizers are aware that they will not receive the charitable deduction also ignores that nonitemizers as a whole may be less sophisticated about tax matters than itemizers.⁹⁴ One reason for this contention is that nonitemizers generally have lower incomes than do itemizers; most higher-income taxpayers itemize their deductions.⁹⁵ Non-itemizers are thus likely to have less of an incentive to educate themselves about the actual effect of the charitable deduction, both because their lower incomes mean that they likely make smaller charitable contributions, at least in terms of absolute dollar amounts, than do itemizers⁹⁶ and because their lower tax rates make any deduction less valuable to them.⁹⁷ Among non-itemizers, many taxpayers therefore may be unaware of the effect of or requirements for itemizing – or who incorrectly extrapolate from previous years – and believe that they will receive a deduction for charitable donations.

The \$56 billion difference between donations received and deductions claimed is thus likely due, at least in part, to nonitemizers who believe they will receive the charitable deduction. Some readers may argue that many of those donors likely gave solely out of altruism and that none of them gave

⁹³ See, e.g., Christopher M. Duquette, *Is Charitable Giving by Nonitemizers Responsive to Tax Incentives? New Evidence*, 102 NAT'L TAX J. 195, 204 (1999) ("Nonitemizers . . . are not required to maintain as many records for tax purposes."); Krishna & Slemrod, *supra* note 2, at 192 ("The tradeoff from a tax policy perspective is the cost of keeping records of the deductions Having a standard deduction eliminates these costs for 70% of individual taxpayers.").

⁹⁴ See Duquette, *supra* note 93, at 204 ("There is also the argument that nonitemizers may be less sophisticated than itemizers in terms of understanding the tax code.").

⁹⁵ CONG. BUDGET OFFICE, *supra* note 55, at 2 ("[N]onitemizers tend to face lower tax rates than itemizers do"); JANE G. GRAVELLE, CONG. RESEARCH SERV., ECONOMIC ANALYSIS OF THE CHARITABLE CONTRIBUTION DEDUCTION FOR NON-ITEMIZERS 6 (2003), available at http://digital.library.unt.edu/ark:/67531/metacrs5437/m1/1/high_res_d/RL31108_2003May19.pdf ("[I]t is in the lower income levels that the standard deduction is normally taken."); Toder & Rosenberg, *supra* note 72, at 695 (stating that in 2004, 53% of taxpayers between the 50th and 90th percentiles of the AGI distribution itemized, as did 87% in the top 10th percentile).

⁹⁶ Much has been written about the different recipients of donations from higher and lower income taxpayers, as well as from itemizers and nonitemizers. See, e.g., CONG. BUDGET OFFICE, *supra* note 55, at 8 (suggesting that nonitemizers "tend to give to the same types of organizations as taxpayers who itemize" but then pointing to data that indicate that "the percentage of contributions going to religious organizations is larger for households with lower income," which "suggests that nonitemizers should tend to give a greater proportion of their contributions to religious organizations"); Aprill, *supra* note 70, at 846 (citing studies suggesting that low-income taxpayers contribute primarily to the religious institutions that they themselves attend).

⁹⁷ See *supra* note 54 and accompanying text.

based on the belief that their donation would be deductible. A complete response to this claim ultimately requires an interview with every donor at the moment of her decision to donate. Although such a response is impossible, it seems unlikely that all \$56 billion is due to pure altruism when giving overall has been shown to be motivated by many other impulses, including the incentive created by the charitable deduction.⁹⁸ If it turns out that a defined group of taxpayers – here, those who did not itemize in 2008 but did donate to charitable organizations in that same year – can be shown to donate entirely out of pure altruism while others require a tax deduction for encouragement, the literature and policy work on tax incentives needs to shift its focus to better understand those two groups of taxpayers. More likely, however, some of the itemizers responsible for the \$173 billion of deducted donations and some of the non-itemizers responsible for the other \$56 billion of donations gave out of pure altruism, while some proportion of both groups gave for other purposes, including a belief that their donation would lower their tax burden. Even if only a small number of non-itemizers donated in part based on a mistaken understanding of the charitable deduction, the deduction is hypersalient due to that over-response to its incentives.

III. THE IMPLICATIONS OF HYPERSALIENCE

The above discussion of hypersalience and the charitable deduction leads to a third potential question: why is hypersalience relevant? In other words, why does hypersalience matter? This Part suggests that hypersalience matters for three reasons: (1) it sheds light on the role of non-governmental actors in fostering taxpayer ignorance of the tax system; (2) it challenges models on which policy decisions rest; and (3) it may lead to an economically inefficient level of consumption.

A. *Third-Party Marketing*

One important aspect of hypersalience is the means by which revenue-reducing tax provisions become hypersalient. Although it is possible that some provisions become hypersalient due to government action or word-of-mouth, one striking aspect of hypersalience is that it may frequently result from the actions of private parties. Hypersalient provisions differ from hidden taxes in that they are no longer in need of greater publicity to alert taxpayers to their effect. Instead, they have already received such publicity. What differentiates hypersalient revenue-reducing tax provisions from their hidden tax counterparts is that to achieve the same degree of underestimation of taxes

⁹⁸ See BRIAN KLUTH, 4 KEY FINDINGS FROM STATE OF THE PLATE: GIVING REBOUNDS FOR SOME CHURCHES, BUT CHARITABLE DEDUCTION ISSUE LOOMS LARGE 2 (2011), *available at* <http://www.ecfa.org/Content/State-of-the-Plate-Research-Results> (finding that 91% of Christian pastors and church staff and leaders believed that a change in the charitable deduction would change giving); Andreoni, *supra* note 60, at 464-77.

owed on the part of a taxpayer, these provisions must be overly prominent. To achieve this extreme prominence, the provision in question must be explicitly marketed to taxpayers.

In the case of some hypersalient deductions, exclusions, and credits, the marketing that leads to hypersalience is often undertaken by private⁹⁹ third-party beneficiaries, rather than by government agencies or even quasi-governmental agencies. Instead of the Internal Revenue Service, the Treasury Department, or even Congress alerting taxpayers to the workings of the tax system, it has been those organizations that indirectly benefit from the relevant tax provision that have publicized this tax provision to taxpayers.

The marketing to which this Article refers is not one-on-one marketing between a fundraising director and a potential donor.¹⁰⁰ Nor is it publicity in the general press about the relevant tax provision (although that may arguably play its own role in developing the hypersalience of some provisions.)¹⁰¹ Instead, this marketing includes direct mailings, television and radio spots, announcements on websites, and other generally available advertising that, in the process of requesting a payment, alerts potential customers to the deductibility or excludability of that payment.¹⁰² This marketing is thus, from the perspective of the marketers, only indirectly advertising the relevant tax provision. Instead, it is primarily focused on raising funds or increasing business. This marketing, however, has the secondary effect of informing taxpayers of the benefits provided by the tax provision.

This third-party marketing contributes to hypersalience by only advertising the tax benefits of a provision and not any associated limits. The statements made by charitable organizations, for example, do not alert taxpayers to all of the limits on the charitable deduction, nor do they lead potential donors to believe that this deduction is available to a minority of taxpayers. Instead, they repeatedly inform potential donors of one general concept: donations are tax-

⁹⁹ For purposes of this Article, “private” is only meant to differentiate these beneficiaries from the governmental bodies responsible for designing and granting the deduction.

¹⁰⁰ For a discussion of the role of fundraising professionals in matching donors and charitable organizations, see Schizer, *supra* note 70, at 231 (arguing that professional fundraisers solve the “information problem” inherent in matching donors and charities that would be appropriate for them).

¹⁰¹ For more on the general press and its role in informing taxpayers about the tax writing process, see 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, 1179-80 (1993).

¹⁰² The idea of third-party marketing is so well-understood that a recent study of the impact of matching grants on donations built on direct mail solicitations as part of the experiment. Dean Karlan & John A. List, *Does Price Matter in Charitable Giving? Evidence from a Large-Scale Natural Field Experiment*, 97 AM. ECON. REV. 1774, 1777 (2007) (“[B]y conducting the experiment through a communication channel commonly used by large charities in the United States (direct mail), we are ensured that the results are of practical interest.”).

deductible. As discussed earlier, the itemization requirement means that this statement is not true for the majority of potential givers.¹⁰³

To illustrate the role of third-party marketing in contributing to the hypersalience of the charitable deduction, this author's research assistants collected materials issued by charitable organizations that benefit from the charitable deduction. Out of 500 randomly selected organizations that alerted potential donors of the tax benefits of donating, 351 told potential donors that donations were either "tax-deductible" or "fully tax-deductible"; 117 slightly tempered this statement by telling potential donors that donations were deductible "to the extent allowable by law."¹⁰⁴ While it is unlikely that these organizations have banded together to advertise the charitable deduction itself, that is the indirect effect of their efforts to increase donations. In alerting would-be donors that donations qualify for deductible treatment, these organizations are increasing the salience of the charitable deduction.¹⁰⁵ In fact, the frequency and variety of these messages make the deduction particularly salient. Potential donors are bombarded by messages about the charitable deduction whether they are at the ballet, taking their dog to the vet, sorting through junk mail, or listening to the radio as they drive to work. For many taxpayers, this is one of the few tax provisions that they hear and think about when they are not preparing their taxes or making explicit payment or tax planning decisions. Although 16 of the 500 organizations suggested that the donor "consult with [a] tax advisor," the most salient information from these organizations as a group is that charitable donations are tax-deductible. Any restrictions on such deductibility are not marketed to anywhere near the same degree as the deductibility itself.

B. Policy Implications

Along with highlighting the role of third-party beneficiaries in marketing certain tax provisions, hypersalience also suggests that the models that

¹⁰³ See *supra* notes 65-68 and accompanying text.

¹⁰⁴ These 500 organizations, which were compiled by the author, are divided such that there are ten organizations from each of the fifty states. These organizations were found not by searching for terms such as "tax-deductible" or "charitable deduction," but rather by randomly choosing a wide assortment of charitable organizations and contacting them individually to determine whether they informed potential donors of the charitable deduction. While some very small organizations did not, many of the organizations contacted did include information about the deductibility of donations. Of those that did not provide any information, many still referred to their "501(c)(3) status," perhaps assuming that tax exemption and deductible contributions are synonymous in the minds of donors. The list of these organizations is on file with the author.

¹⁰⁵ This is not to say that they are the only marketers. See, e.g., *Tax Tip: Charitable Contributions*, YOUTUBE (Mar. 5, 2009), <http://www.youtube.com/watch?v=hRX9GQZMWZ4> (video informing taxpayers of documentation requirements of the charitable contributions).

policymakers use to assess the efficacy and cost of revenue-reducing tax provisions may not be accurate. An example of this effect is the level to which the hypersalience of the charitable deduction complicates models of price elasticity of giving. The first study of price elasticity of giving was conducted in 1967,¹⁰⁶ and the actual elasticity of giving has been the subject of debate since then. Price elasticity of giving essentially considers how responsive charitable giving is to changes in the tax rate. Since the price of a deductible charitable donation decreases as tax rates increase, and vice versa, elastic giving would mean that charitable donations increased as tax rates increased. Although this Article does not aim to challenge existing models of price elasticity of giving entirely, it argues that the concept of hypersalience adds several new considerations to discussions and studies of price elasticity of giving.

These considerations can be broken into three subcategories. First, many models of the price elasticity of giving are affected by the hypersalience of the charitable deduction. They generally use data that is limited to itemizers and assume that all giving is deductible, without explicitly considering the consequences on the models if these limitations and assumptions are incorrect for the full universe of donors.¹⁰⁷ Hypersalience thus highlights that many of these models are perhaps more extreme in their assumptions than they may state. Stated otherwise, the conclusions that can be drawn from these models may be limited to the price elasticity of giving *only* for taxpayers who can deduct their contributions.

Second, to date, models of price elasticity of giving have ignored the distinction between subjective and objective understandings of the change in tax rate.¹⁰⁸ If some taxpayers give because they assume that they are receiving a deduction when in fact they are not, what exactly does that mean for price elasticity of giving? Their objective price of giving \$1.00 is exactly that – \$1.00 – but they may believe that their price is much closer to \$0.65. Furthermore, even though their price of giving does not change when tax rates change,¹⁰⁹ they may respond to rate changes as if those changes affect their price of giving. Current calculations of price elasticity of giving seem not to

¹⁰⁶ See Karlan & List, *supra* note 101, at 1783.

¹⁰⁷ See, e.g., Auten., *supra* note 62, at 13 (“The sample is generally restricted to those taxpayers who itemized deductions, since information on donations for nonitemizers is typically not available. Nonitemizers are included in 1985 and 1986, when they were allowed to deduct, respectively, half and all of their contributions.”); Randolph, *supra* note 62, at 712 (“[G]iving is deductible.”); *id.* at 718 (“As in previous charity studies based on tax return data, the sample excludes people who did not report amounts of giving because they did not itemize deductions. Further, in keeping with many previous empirical studies, the sample is also restricted to those taxpayers who would have itemized personal deductions even without charitable deductions.”).

¹⁰⁸ Edward McCaffery suggested a similar idea. McCaffery, *supra* note 5, at 1911.

¹⁰⁹ This discussion assumes that rate changes do not change taxpayers’ ability to deduct.

consider this effect of subjective understandings of the price of giving, as current calculations are generally focused on the price elasticity of giving by those donors who can deduct donations. Hypersalience suggests, however, that these calculations may underestimate the total price elasticity of giving in that some taxpayers not currently included in estimates of price elasticity of giving may actually be responsive even when their objective change in price is zero. Even if these nonitemizers who subjectively believe that their price has changed are less responsive than itemizers,¹¹⁰ any change in giving in response to a perceived change in price that does not in fact exist complicates the concept of elasticity. While one could argue that the idea of a subjective understanding of price means that some donors apply the same price elasticity of giving but underestimate the price, many models of price elasticity of giving are applied to objective changes in price and ignore the fact that some donors may distort their behavior based on a price other than the actual price.

This complication of the price elasticity of giving is not a response to attempts to estimate the price elasticity of giving if nonitemizers were permitted to itemize their deductions. Several academics have attempted to calculate that figure, with quite varied outcomes, in the face of proposals to extend the charitable deduction to nonitemizers.¹¹¹ Those studies focused on the question of how current nonitemizers (whose price of giving \$1.00 is now \$1.00) would react were their objective price of giving actually to decrease. Instead, this Article suggests that current nonitemizers (whose objective price of giving \$1.00 is still \$1.00) may act as if their price of giving is in fact less. In other words, the objective price, the price on which price elasticity depends, remains the same, but the giving itself may be more elastic because it is based on a subjective (and incorrect) understanding of the price of that giving.

Third, a final addition to the concept of price elasticity of giving is the distinction between total giving and claimed giving. Despite its name, price elasticity of giving is not a measurement of the responsiveness of charitable giving to changes in the price of that giving. Instead, it is a measurement of the responsiveness of *claimed* charitable giving to changes in the price of that

¹¹⁰ Estimates of the price elasticity of giving have suggested that giving by nonitemizers is less elastic than giving by itemizers when nonitemizers are permitted to deduct. *See, e.g.,* Duquette, *supra* note 93, at 201.

¹¹¹ *See, e.g.,* CONG. BUDGET OFFICE, *supra* note 55, at 10-11 (explaining that, because the “effect of the tax incentive on nonitemizers is much more difficult to estimate,” its predictions of nonitemizer giving if the deduction is extended to them will use multiple possible elasticities, ranging from -0.2 to -1.0); GRAVELLE, *supra* note 95, at 5 (suggesting that nonitemizers may have lower elasticity because price elasticities are lower at lower income levels); Aprill, *supra* note 70, at 857-59 (discussing and critiquing studies attempting to determine the price elasticity of nonitemizers). One particular flaw with attempts to determine the price elasticity of nonitemizers is that many studies rely on data from the one year in which nonitemizers could take the full deduction; this year, 1986, was also characterized by many other incentives to give, not least of which was the fact that the extension to nonitemizers was going to be repealed.

giving. A similar critique has been noted in articles suggesting that taxpayers incorrectly deduct more charitable contributions than they actually made, but this Article employs the opposite critique. Not only do price-elasticity-of-giving calculations incorrectly include fraudulent donations in the tally of total giving, but they also incorrectly exclude unclaimed donations.¹¹²

These last two complications to the models of price elasticity of giving suggest a similar point: current models may underestimate total price elasticity of giving. Since these models generally include the change in giving as the numerator and the change in tax rate (or price) as the denominator, the two complications just discussed serve to level the same criticism at current calculations of price elasticity. Subjective perceptions of price mean that the denominator of the calculation may currently be overestimated by not including those donors who change their donations even though their objective change in price is zero; exclusion of unclaimed donations means that the numerator may currently be underestimated, because some donations that may have been made in reaction to perceived changes in price are not included. Together, both contentions suggest that the total price elasticity of giving may be underestimated if the concept of hypersalience is not considered. These claims require significant empirical research for substantiation. They are offered here to suggest the impact that the concept of hypersalience may have on discussions beyond salience.¹¹³

Taken together, these complications to models of the price elasticity of giving provide one overarching implication of hypersalience: once this phenomenon is considered, the models on which policymakers are basing their conclusions may change. This, in turn, may mean that the conclusions – and thus the resulting policies – could change were hypersalience considered. Therefore, in the context of the charitable deduction, discussions of the deduction may not accurately consider the amount of charitable giving tied to the deduction if models ignore hypersalience and the potentially resultant overreaction on the part of taxpayers who believe themselves to be subject to the deduction. Hypersalience may also change the models used to support policy decisions relating to other tax provisions. Although these are not explored here, the many complications added to price elasticity of giving suggest similar complications could be raised in other policy areas, such as home purchases supported by the home mortgage interest deduction or school enrollment supported by educational benefits in the Internal Revenue Code.

The effect of hypersalience on models of price elasticity of giving may in turn have ramifications for the treasury efficiency of revenue-reducing tax

¹¹² For an example of such exclusion, see Duquette, *supra* note 93, tbls.1 & 2 (calculating giving based on the claimed deductions of nonitemizers).

¹¹³ It is possible that models of price elasticity of giving are also complicated by offsetting errors. The charitable deduction may, for example, have low salience for some itemizers. This Article does not consider specific offsetting errors, but it recognizes them as a possible further complication to models of price elasticity of giving.

provisions such as the charitable deduction. Treasury-efficient provisions are those provisions that cost the fisc less than they raise; treasury-inefficient provisions cost the fisc more than they raise.¹¹⁴ Hypersalience suggests that the charitable deduction may be more treasury efficient than previously thought. Price elasticity and treasury efficiency both respond to the question of whether the charitable deduction is worth its cost to the government.¹¹⁵ For a change to the charitable deduction to be treasury efficient, it must raise more money for charitable organizations than it loses for the government. If the charitable deduction induces even one non-itemizing taxpayer to make more charitable contributions than she otherwise would have, then the deduction in that case cost the government nothing but created a distortion that led more money to flow to a charitable organization. This makes the deduction more treasury efficient than previously thought. This claim may extend to other hypersalient tax provisions, suggesting that they may be more treasury efficient than previously believed.

If revenue-reducing tax provisions such as the charitable deduction are more treasury efficient than previously thought, debates over tax expenditures may be missing a potential argument in favor of tax expenditures over direct spending. The term “tax expenditures” refers to tax provisions that allow taxpayers not to pay taxes that normally would be due.¹¹⁶ Because tax expenditures represent revenue foregone by the government, they are essentially spending provisions within the Internal Revenue Code.¹¹⁷ Deductions, exclusions, and credits are all examples of tax expenditures in that, in their absence, the government would raise more revenue.¹¹⁸ Despite a recent opinion by the Supreme Court questioning the full extent of this equivalency,¹¹⁹ both academics and government actors have generally accepted the concept of tax expenditures as spending.¹²⁰ Although Surrey, who

¹¹⁴ See Ilan Benshalom, *The Dual Subsidy Theory of Charitable Deductions*, 84 IND. L.J. 1047, 1059 (2009).

¹¹⁵ For more on this question, see JOSEPH CORDES, THE URBAN INST., THE COST OF GIVING: HOW DO CHANGES IN TAX DEDUCTIONS AFFECT CHARITABLE CONTRIBUTIONS? (1999) (summarizing a seminar in April 1999 on “whether the benefits derived from the charitable tax deduction are worth the cost”).

¹¹⁶ JOINT COMM. ON TAXATION, *supra* note 45, at 2.

¹¹⁷ See *id.* (citing Stanley S. Surrey, Assistant Sec’y, U.S. Dep’t of the Treasury, *The U.S. Income Tax System – the Need for a Full Accounting*, Excerpts from Remarks Before the Money Marketeers (Nov. 15, 1967), in U. S. DEP’T OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR ENDED JUNE 30, 1968, at 322 (1969)) (describing Stanley Sturrey as introducing the idea of government expenditures through a tax system).

¹¹⁸ JOINT COMM. ON TAXATION, *supra* note 45, at 2.

¹¹⁹ See *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1444 (2011) (distinguishing between tax credits and governmental expenditures). But see *id.* at 1452-53 (Kagan, J., dissenting).

¹²⁰ For a discussion of the use of tax expenditures in the budget, see Edward D.

introduced the term “tax expenditure,” ultimately wanted to use tax expenditures to shift spending out of the Internal Revenue Code and into the direct spending arena,¹²¹ the number of tax expenditures has risen sharply since they were first included in the budget calculation of the Joint Committee on Taxation.¹²²

This increase has led to ongoing debates about the role of tax expenditures and whether some or all of these expenditures would be more effective, efficient, or transparent as direct spending measures.¹²³ One strong argument against the increasing number of tax expenditures is that, by placing spending within the Internal Revenue Code, Congress essentially hides these spending provisions from the eyes of voters.¹²⁴ Debates over tax expenditures often center around whether tax expenditures should be used for spending programs that may be better suited to direct spending. The idea of hypersalience complicates these debates. If tax expenditures do not just induce those taxpayers from whom the government is foregoing revenue to distort their behavior and donate more to charity, but induce that same behavior from taxpayers *from whom the government has not foregone any revenue*, then the debate over tax expenditures may need to be updated. Tax expenditures are an unquestionably large cost to government. In 2008, for example, tax expenditures totaled \$1.2 trillion, which Kleinbard described as “greater than the entire amount raised by the individual income tax in 2008, or for that matter all federal discretionary spending in that year (in each case, about \$1.1 trillion). Indeed, it is more than twice as much as all non-defense discretionary spending in 2008 (\$528 billion).”¹²⁵ Hypersalience suggests, however, that some tax expenditures may actually be achieving distortionary goals at a lower cost than were they direct spending measures.¹²⁶ In short, for the deductions and other expenditures that are hypersalient, Congress may be getting more than its money’s worth, in that it is inducing distortions in some taxpayers without having to pay for them.

Kleinbard, *The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U. L. REV. 1 (2010).

¹²¹ See SURREY, *supra* note 54, at 198.

¹²² See Kleinbard, *supra* note 120, at 13 (pointing out the increase from sixty tax expenditures in the Joint Committee on Taxation’s first list in 1972 to 247 in 2008).

¹²³ See, e.g., Zelinsky, *supra* note 101, at 1166 (asserting that tax expenditures may in fact be more transparent than other types of spending because “the institutions formulating and administering tax policy are more competitive and visible than their direct outlay counterparts because tax institutions are subject to more numerous and diverse constituencies”).

¹²⁴ See, e.g., Kleinbard, *supra* note 120, at 28 (“[T]he irresistible political attraction of tax expenditures lies in their invisibility to normal inspection of the budget . . .”).

¹²⁵ *Id.* at 13.

¹²⁶ This claim assumes that direct spending measures would not also be limited to itemizers or have other low-salience limits restricting their availability.

This argument only applies, of course, to those tax expenditures that are explicitly intended to achieve some sort of behavioral distortion. As discussed in a Joint Committee on Taxation proposal from 2008, not all tax expenditures are intended to do so.¹²⁷ For those that are intended to create distortions, however, hypersalience suggests that there may be a new argument to consider in the debate over tax expenditures. Tax expenditures whose effect is overestimated by taxpayers may be more cost-effective for the government than previously expected. In other words, hypersalient tax expenditures may create more behavioral change at a lower cost to the government because some taxpayers wrongly believe that their distorted behavior will lead to tax benefits.

C. *Increased Consumption*

Along with shedding light on third-party marketing and changing the shape of policy debates, hypersalience also may lead taxpayers to increase their consumption of goods that they wrongly believe will reduce their tax liability. Although this result is implicit in the policy implications discussed above, it is also significant enough to be discussed as a stand-alone issue. In the context of the charitable deduction, this increased consumption may not seem particular concerning given that the “consumption” in question is charitable giving.

In the context of other tax provisions, however, the increased consumption resulting from hypersalience may be of greater concern. One provision that illustrates this concern is the home mortgage interest deduction, which is likely to be extremely salient for many Americans.¹²⁸ As McCaffery explained, many of his own students overvalued the benefits of this provision even after being taught about the specifics of the deduction.¹²⁹ As with charitable donations, home mortgage interest is popularly understood to be fully deductible and yet is in reality only available to itemizers.

Although homeowners in general may be more likely to itemize than renters or other taxpayers that do not own their own homes,¹³⁰ there may still be a

¹²⁷ See JOINT COMM. ON TAXATION, *supra* note 45, at 12-13 (distinguishing Tax Transfers, which “usually are based on perceived need as measured by income,” from both Social Spending and Business Synthetic Spending, both of which are “intended to subsidize or induce behavior”).

¹²⁸ See William G. Gale et al., *Encouraging Homeownership Through the Tax Code*, 115 TAX NOTES 1171, 1171 (2007) (“The income tax deduction for mortgage interest payments is possibly the best-known federal housing policy and is deeply ingrained in the economic and social fabric of the country.”).

¹²⁹ See McCaffery, *supra* note 5, at 1918.

¹³⁰ One reason for this is that home ownership is generally associated with higher incomes, and, as noted in Part II *supra*, higher income taxpayers are more likely to itemize their deductions. A second reason is that the mortgage interest deduction itself creates many itemizers, in that mortgage payments are often in and of themselves enough to meet the standard deduction limit. Finally, homeowners are often also subject to property taxes, which are also itemizable expenses. If the mortgage payments are not sufficient to

difference between the public perception of home mortgage interest as fully deductible and the actual extent of that deductibility. For many homeowners, the combination of home mortgage interest and property tax payments is sufficient to exceed the standard deduction. For these owners, the difference between hypersalience and full salience is likely not very large because home ownership creates sufficient deductions to exceed the limit on those very deductions. In tax year 2008, the average deduction for mortgage interest was \$12,221, well above the cut-off for the standard deduction.¹³¹ For higher-income taxpayers, therefore, the home mortgage interest deduction is likely merely salient, rather than hypersalient.

It is not clear, however, that this is true for all homeowners. Given that a large majority of Americans own their own homes, while a minority itemize deductions,¹³² there may be many homeowners with mortgages who are not able to deduct their interest payments because they do not surpass the standard deduction.¹³³ In tax year 2009, thirty-seven million returns claimed the mortgage interest deduction;¹³⁴ in that same year, there were approximately forty-seven million home acquisition loans and thirteen million home equity loans and lines of credit.¹³⁵ It is possible that those thirty-seven million returns claimed all of the associated mortgage interest payments. It is also possible – and seems more likely – that up to twenty-three million mortgages and home equity loans did not create tax-deductible interest payments for a variety of reasons.

Furthermore, since only the interest is deductible on a home mortgage, and mortgage amortization tables generally schedule principal payments for later in the mortgage, homeowners who rightly understood the deduction to apply to them in the first few years of their mortgage may be surprised to learn that they

overcome the standard deduction limit, the combination of these payments with property tax payments may be sufficient.

¹³¹ PATRICK FLEENOR, TAX FOUND., TAX SAVINGS FROM MORTGAGE INTEREST DEDUCTION VARY SIGNIFICANTLY FROM STATE TO STATE 2 tbl.1 (2010).

¹³² See Gale et al., *supra* note 128, at 1172 (stating that the homeownership rate in 2005 was sixty-nine percent); David Streitfeld, *Economy Gains, Yet Housing Spirals Downward*, BOS. GLOBE, MAY 31, 2011, at 5 (stating that homeownership rates fell to 66.4% in 2010). This could be due to hypersalience combined with low mortgage and property rates. It could also, however, be due to homeowners who have fully paid off their homes.

¹³³ As with the charitable deduction, the difference may be larger for lower-income taxpayers whose home mortgage interest payments are not sufficient to surpass the standard deduction limit. See, e.g., Gale et al., *supra* note 128, at 1179 (“[N]ew homeowners typically are lower- or middle-income households who do not itemize.”).

¹³⁴ DEP’T OF REVENUE, INTERNAL REVENUE SERVICE, INDIVIDUAL INCOME TAX RETURNS 2009, PUBLICATION 1304 (REV. 07-2011), at 82 (2009), available at <http://www.irs.gov/pub/irs-soi/09inalcr.pdf> (listing itemized deductions by type).

¹³⁵ U.S. DEP’T OF HOUS. & URBAN DEV. & U.S. DEP’T OF COMMERCE, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2009, at 65 tbl.3-15 (2011) (listing mortgage characteristics of owner-occupied units).

are no longer able to deduct the same portion of their mortgage payment in later years, even as their payment stays the same. Thus, for some homeowners, the home mortgage interest deduction may very well be hypersalient.

If true, it is worth considering what this means for the consumption of homes. The hypersalience of the home mortgage interest deduction could potentially lead to increased consumption, either because taxpayers buy homes that they would not have purchased or because taxpayers buy more expensive homes than they otherwise would have purchased. While some readers and policymakers may support the goal of home ownership for all Americans,¹³⁶ others may see the recent housing bubble and resulting economic collapse as a warning sign that perhaps this goal is not appropriate.¹³⁷ Many commentators have pointed out that the common knowledge of the home mortgage interest deduction has likely led to increased home prices,¹³⁸ and the recent housing bubble has been attributed, at least in part, to taxpayer over-response to the home mortgage interest deduction.¹³⁹

This Article is not aiming to prove that the home mortgage interest deduction is hypersalient, nor is it entering the debate on the impact of this tax provision on consumption of overpriced homes.¹⁴⁰ It is instead using the home

¹³⁶ See, e.g., Home Ownership Moves the Economy (HOME) Act of 2009, H.R. 2801, 111th Cong. (2009) (proposing to amend the IRC to expand and extend the first-time homebuyer credit); Expanding American Homeownership Act of 2007, H.R. 1852, 110th Cong. (2007) (proposing to modernize and update the National Housing Act and enable the Federal Housing Administration to use risk-based pricing to more effectively reach undeserved borrowers).

¹³⁷ See, e.g., Dennis J. Ventry, Jr., *Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 LAW & CONTEMP. PROBS. 233, 278 (2010) (“Housing tax policies fueled the boom and exacerbated the bust.”); Christian A. L. Hilber & Tracy M. Turner, *The Mortgage Interest Deduction and Its Impact on Homeownership Decisions* (Aug. 12, 210) (unpublished manuscript) (on file with author) (finding that the deduction has the overall effect of inflating home prices and reducing home ownership). For more on the positive and negative externalities of home ownership, see Edward L. Glaeser & Jesse M. Shapiro, *The Benefits of the Home Mortgage Interest Deduction* 28-36 (Nat’l Bureau of Econ. Research, Working Paper No. 9284, 2002).

¹³⁸ See Gale et al., *supra* note 128, at 1171 (arguing that the main effect of the home mortgage interest deduction is “to raise the price of housing and land and to encourage people who do buy homes to borrow more and to buy larger homes than they otherwise would”).

¹³⁹ But see *id.* (arguing that the mortgage interest deduction “does little if anything to encourage home ownership”); Glaeser & Shapiro, *supra* note 137, at 38-40 (concluding that the home mortgage interest deduction does little to change the rate of homeownership).

¹⁴⁰ Professors Gale, Gruber, and Stephens-Davidowitz discussed the impact of the deduction on consumption of homes in their article about the home mortgage interest deduction. See Gale et al., *supra* note 128, at 1178 (“It is possible that members of some groups, low-income groups in particular, are persuaded by others to purchase homes when they are not really prepared to take on the burdens and responsibilities of homeownership, or to take out unduly risky loans to finance a home purchase. To the extent that potential

mortgage deduction as an example of the increased consumption that is one of the potential ramifications of hypersalience.

IV. HYPERALIENANCE: TO EXPAND OR CURTAIL?

The concept of hypersalience raises a multitude of questions, but perhaps the most immediate question is whether this characteristic is to be encouraged or discouraged. If a reader believes that hypersalience is a potentially good thing, then it makes sense to consider which other tax provisions are or could become hypersalient and how to achieve such hypersalience. If a reader believes that hypersalience is a bad thing overall, then the opposite is true and it makes sense to consider how to reduce the salience of tax provisions such that they become fully, but not overly, salient.

A. *The Costs and Benefits of Hypersalience*

Since this Article has considered hypersalience primarily through the lens of the charitable deduction, at first it may seem that the benefits of taxpayer overestimation of the incidence of certain tax provisions outweigh any costs. If hypersalience suggests that the government may be inducing more charitable contributions without having to subsidize those donations, what can be wrong with this phenomenon? Some readers may see the appeal of a concept that achieves certain desired policy goals without the expense of either government marketing or the lost revenues that would be associated with a charitable deduction available to all taxpayers.

The primary argument in favor of hypersalience rests on the concept of treasury efficiency. Although some may argue that the charitable deduction is economically inefficient given that it induces individuals to distort their behaviors from what they would do in the absence of a tax system, one of the primary rationales for the charitable deduction is that it creates an incentive for individuals to donate more to charitable organizations than they otherwise would.¹⁴¹ Accepting that this inefficiency is one of the rationales of the deduction, the charitable deduction is arguably more treasury efficient than previously believed because of hypersalience. If a taxpayer mistakenly believes that she will benefit from a deduction and thus changes her behavior

purchasers are making systematically poor decisions in favor of buying homes, it would be appropriate for policy to discourage those home purchases at the margin.”). So too did Glaeser and Shapiro consider whether the deduction had an effect on the consumption of homes. See Glaeser & Shapiro, *supra* note 137, at 3 (“While the deduction appears to increase the amount spent on housing, it appears to have almost no effect on the homeownership rate.”).

¹⁴¹ See C. Eugene Steuerle & Martin A. Sullivan, *Toward More Simple and Effective Giving: Reforming the Tax Rules for Charitable Contributions and Charitable Organizations*, 12 AM. J. TAX POL’Y 399, 403 (1995) (citing RICHARD GOODE, *THE INDIVIDUAL INCOME TAX* (1976) and stating that “incentives were the primary purpose of the deduction”).

to take advantage of this deduction, the indirect beneficiary of the deduction raises revenue. Since that taxpayer does not in fact benefit from the deduction, however, the government does not lose any revenue. The government thus has paid nothing for the behavioral distortion. In the context of the charitable deduction, when a nonitemizer donates more to charitable organizations based on a belief that she will receive the deduction, greater charitable giving was achieved without any foregone revenue. This over-responsiveness to the charitable deduction may be even more beneficial to charities than suggested here. If increased donations lead to increased volunteering,¹⁴² then perhaps leading people to believe that they will receive a charitable deduction would not only increase donations but could in fact increase both donations and volunteer activity.

This increased treasury efficiency may suggest not only that the hypersalience that currently exists should be permitted but also that hypersalience should be extended to other tax provisions. This argument is similar to arguments made in favor of taking advantage of insights into hidden taxes to achieve policy goals.¹⁴³ Commentators who favor using hidden taxes argue that they provide a tool for raising revenue without excessive distortion. The strongest argument in favor of hypersalience is thus that it achieves greater distortions without foregoing revenue.

Despite these benefits, hypersalience also has significant costs. Many of the concerns that hypersalience raises are similar to those raised by its inverse, low salience. Hypersalience raises issues about misinformation, tax literacy, and government paternalism. These issues are made even more complex by the fact that hypersalience often occurs due to marketing by private parties acting in their own self-interest.

The first concern with hypersalience relates to the fact that this overestimation of benefits is, at its core, fundamentally a cognitive misperception. In other words, taxpayers believe that they will receive a deduction for charitable contributions, regardless of their income or other deductible expenses, because they misunderstand the tax system. In this way, hypersalience mirrors low salience. On either side of the salience spectrum, taxpayers wrongly believe that they know how the tax system works. This misunderstanding – or acceptance of misinformation – has been criticized in the context of low salience for being yet another example of tax illiteracy. Commentators argue that encouraging such misinformation, even if the

¹⁴² See CORDES, *supra* note 115, at 3 (“[S]ome studies have found that when people give money to charities they are also more likely to volunteer their time.”).

¹⁴³ See McCaffery, *supra* note 5, at 1942-43 (critically citing Jane Gravelle as saying, “[R]ather than despair over the public’s lack of economic knowledge, there may be scope for using their characteristic biases in the name of good tax policy.”); Schenk, *supra* note 6, at 284 (arguing for “intentionally exploiting political salience Assuming that the state has the power to levy taxes and an appropriate need for revenue, it is proper for it to choose a form that is most palatable to its citizens.”).

misinformation leads to positive ends, such as greater contributions to charitable organizations, is fundamentally wrong.¹⁴⁴ These arguments are premised on practical concerns that this practice will send the tax system down a slippery slope of misinformation and distrust, as well as moral concerns that misleading others, regardless of the context or the purpose, is undemocratic.¹⁴⁵

The second concern with hypersalience relates to the distortions that it may induce. While some readers may applaud the suggestion that a hypersalient charitable deduction encourages more charitable contributions without costing the government any lost revenue when the contributions are made by non-itemizers or other taxpayers unable to tax advantage of the deduction, the fact remains that an action in which a taxpayer would not engage in giving but for a tax incentive is inefficient.¹⁴⁶ If a taxpayer who would otherwise not have donated to a charitable organization did so because of her misunderstanding of the tax system, that is a behavioral distortion that would not have occurred in the absence of the tax system.

A final concern about the hypersalience of tax provisions focuses on the parties who are at least partially creating this situation. If hypersalience is due to marketing by private third-party beneficiaries acting in their own self-interest, it is worth asking whether we want the tax system being advertised by such parties. In a climate of taxpayer illiteracy, does it make sense for third parties to spread information about deductions and the tax system as a whole? Charitable organizations, for example, have every reason to make strong claims about the deductibility of donations if they believe – rightly, based on many models of the price elasticity of giving – that these claims will induce taxpayers to give more in donations. They have far fewer reasons to temper these strong claims by explaining the limits of the deductibility of charitable contributions in detail, and it appears that they do not feel the need to do so.

¹⁴⁴ McCaffery & Baron, *supra* note 16, at 1781 (rejecting the argument in favor of making taxes more psychologically palatable by lowering their salience by stating that such a view is “wrong – dangerously wrong – for several reasons”). *But see* Schenk, *supra* note 6, at 287-89 (providing several responses to the critique that use of low-salience taxes exploits ignorance: government must always weigh costs and trade-offs, including the value of instrumentalist approaches in the context of their ultimate goals; voter preferences are never clearly discerned; perhaps citizens prefer to be misled about the actual steps taken to raise needed revenue; and law is inherently designed to create incentives for certain behavior).

¹⁴⁵ McCaffery, *supra* note 5, at 1943 (“[E]xploiting cognitive error for noble purposes is fraught with danger Especially if one believes, as I do, that the prevalence of cognitive error has, in the main, blocked the evolution of a more sensible as well as a more progressive, egalitarian, just tax structure, the cognitive manipulation approach seems to run the risk of winning the battle at the expense of the war. Furthermore, the manipulative strategy runs afoul of basic moral notions; it shows disrespect for the people, and treats them as obstacles to be overcome in getting to the right result.”); *see also* Zelenak, *supra* note 85, at 102-03 (criticizing a black-box tax system for being undemocratic).

¹⁴⁶ Saez, *supra* note 28, at 2.

Due to these incentives, it is no surprise that a marketing campaign run by private third-party beneficiaries would lead to hypersalience of the deduction.

Furthermore, given that the determination of whether a taxpayer can deduct a charitable contribution is a complicated one, based on the way in which a host of tax provisions apply to each individual taxpayer, it may make sense that many of the marketing materials issued by charitable organizations refer to the benefits of the deduction in the broadest of terms, without identifying any possibly relevant limitations. The result, however, is that many of the statements by private third-party beneficiaries are so succinct and broad that they are particularly memorable and appealingly oversimplified. By presenting the charitable deduction in its most basic form, stripped of the complexities associated with much of the Internal Revenue Code, private third-party beneficiaries have presented it in such a way as to both increase the salience of the deduction and decrease the salience of its limitations, thereby contributing to both elements of hypersalience.

This Article does not intend to suggest that charitable organizations are maliciously misinforming taxpayers in order to induce them to give money that they would not otherwise donate. Given the high number of charitable organizations, coupled with the fact that the majority of charitable organizations are quite small,¹⁴⁷ it is unlikely that these organizations are uniting to mislead taxpayers.¹⁴⁸ However, for readers concerned about hypersalience, the fact that this state is often achieved by the actions of private third parties that both have little incentive to downplay the effect of certain tax provisions and that have high incentives to present those tax provisions and their benefits in the broadest light possible may be yet another argument in favor of curtailing hypersalience.

As alluded to in the earlier discussion of the home mortgage interest deduction,¹⁴⁹ the problems of hypersalience are perhaps even more worrisome because this phenomenon is likely not limited to the charitable deduction. Many revenue-reducing tax provisions are subject to a host of misunderstood limits and are therefore candidates for hypersalience if their benefits are highly salient yet subject to such limits.

¹⁴⁷ See KENNARD T. WING, KATIE L. ROEGER & THOMAS H. POLLAK, *THE URBAN INST., THE NONPROFIT SECTOR IN BRIEF: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING 2* (2010), available at <http://www.urban.org/uploadedpdf/412209-nonprof-public-charities.pdf> (reporting that approximately two-thirds of nonprofits collected less than \$25,000 in gross receipts).

¹⁴⁸ It is particularly unlikely that organizations are uniting to mislead taxpayers since there is hardly any guidance provided to these organizations about marketing. It appears that, rather than following specific instructions provided by any oversight body, organizations are instead following the example of other organizations, thus creating a snowball effect of marketing where the wording in one organization's successful campaign is repeated by many other organizations.

¹⁴⁹ See *supra* Part III.C.

One reason that hypersalience may characterize more than just the charitable deduction provision is that itemization is not the only limit that may be hidden to taxpayers. Two other limitations that do not apply to the charitable deduction but that do limit the applicability of certain other revenue-reducing tax provisions are the floor on miscellaneous itemized deductions and the alternative minimum tax (AMT). Unlike many other itemized deductions,¹⁵⁰ the charitable deduction is not a “miscellaneous itemized deduction.”¹⁵¹ If it were, taxpayers would only be permitted to deduct charitable contributions once they exceeded 2% of adjusted gross income.¹⁵² Also unlike many other itemized deductions, the charitable deduction remains deductible under the AMT. Since the overall purpose of the AMT is to create a broader base to ensure that high-income taxpayers do not escape taxation through the judicious use of deductions,¹⁵³ many deductions are disallowed under the AMT. These provisions, known as “tax preferences,” are not available to those taxpayers who are subject to the AMT.¹⁵⁴ Because the AMT’s reach has increased in recent years,¹⁵⁵ more and more taxpayers are losing the ability to take deductions that they would have been able to take under the regular tax system; many of these taxpayers do not learn of the disallowance of their deductions until they (or their preparers) are filing their taxes. These other limitations suggest that while the charitable deduction is a useful example of the complicated limits that apply to deductions that taxpayers may believe to be fairly simple, it is far from the only deduction that is so limited.¹⁵⁶ Furthermore, provisions may be hypersalient even when they are not limited by the itemization requirement.¹⁵⁷

¹⁵⁰ Compare I.R.C. § 67(b) (2006) (listing the itemized deductions that are not miscellaneous itemized deductions), with *id.* §§ 161-224 (listing itemized deductions for individuals).

¹⁵¹ *Id.* § 67(b)(4). Note that there have been proposals to treat the charitable deduction as a miscellaneous itemized deduction. See CONG. BUDGET OFFICE, *supra* note 55, at 24 (citing a Joint Committee on Taxation estimate of the revenue effects of limiting the charitable deduction for itemizers who gave more than two percent of their adjusted gross income).

¹⁵² I.R.C. § 67(a).

¹⁵³ See Schenk, *supra* note 6, at 279 (“The original purpose of the AMT was to insure that high income individuals paid at least some income tax . . .”).

¹⁵⁴ The two largest tax preferences that are *not* allowed under the AMT are state and local tax deductions and personal exemptions. See Zelenak, *supra* note 85, at 101.

¹⁵⁵ *Id.* at 100 (recognizing an increase in the number of taxpayers subject to the AMT, from 20,000 in 1970 to four million in 2005).

¹⁵⁶ Previous commentators have highlighted the complexity created by the AMT and the fact that it makes it harder for individuals to accurately predict the taxes they will owe. See Schenk, *supra* note 6, at 279 (“Because of the interaction of the AMT with the regular tax rate schedule as well as the fact that the AMT base and regular base differ, it is difficult for taxpayers to determine their actual marginal rate.”); Zelenak, *supra* note 85, at 102 (“[T]he AMT turns the tax system into a black box for those taxpayers to whom it applies.”).

¹⁵⁷ Hypersalience may also be more common if some revenue-raising tax provisions are

Thus, hypersalience may characterize more than just the charitable deduction. Given that it may lead to overconsumption of goods, as well as the facts that it is based on taxpayer illiteracy and at least partly due to the actions of self-interested third-party beneficiaries, this Article concludes that the costs of hypersalience outweigh any benefits. This conclusion is based primarily on the role of misinformation in hypersalience. Although the ability to achieve substantive policy goals at a lower cost to the government may seem appealing to some readers, particularly in a political and economic climate focused on limiting government spending, this ability exists only because taxpayers are acting on a misunderstanding of how the tax system works. The fact that this misunderstanding may often be due to the actions of private third-party beneficiaries only increases the concerns raised by hypersalience.

B. *How to Curtail Hypersalience*

If hypersalience is overall a negative, what policy changes could best address the problems raised above? Some readers may argue that the only response is to change the tax system so drastically that hypersalience would be impossible. The charitable deduction, for example, could be allowed for all taxpayers, not just itemizers, and its other limits could be eliminated. A hypersalient provision becomes fully salient only when all limits and restrictions are eliminated (or made equally salient to the benefits of the provision). The downside of such a modification would be sharply decreased government revenues. This would also raise significant questions about the role of the standard deduction and the charitable deduction itself. If the standard deduction is meant to act as a rough estimate of itemized deductions for those who do not itemize, why would the charitable deduction not be included in that estimate? Would this modification to the charitable deduction pave the way for the allowance of all itemized deductions for nonitemizers? Is the purpose of the charitable deduction to subsidize every dollar donated, or is it instead to subsidize only donations above a certain limit? Moreover, this proposal raises the unanswerable question of whether it is possible to reach full salience without sliding along the spectrum to either hypersalience or low salience. Regardless of the answer, however, a wholesale upending of our tax system in response to the hypersalience of certain tax provisions seems both unlikely and unnecessarily extreme for a first step.

Alternatively, some readers may contend that the fact that third-party marketers are at least partially responsible for hypersalience suggests that a proactive government response is the only way to curtail hypersalience. Such government action could include government advertisements emphasizing the limits of hypersalient provisions or penalties for third-party beneficiaries that mislead donors with their marketing. Neither of these ideas is

themselves hypersalient. This Article does not consider such provisions, but it welcomes further research on hypersalience revenue-raising tax provisions. Such provisions may include the estate tax and the capital gains tax.

unprecedented.¹⁵⁸ This Article, however, rejects both of these approaches as too extreme for a first step. The first approach will likely do little to increase taxpayer morale in that it will mean that many taxpayers' only direct interaction with the IRS will involve the government emphasizing the complexity of the tax system, as well as the fact that a broadly popular tax provision is not in fact available to many taxpayers. Furthermore, it may not fully offset the marketing efforts by private parties because the latter may still prove more salient than occasional advertisements by the government. The second approach will also likely lower taxpayer morale and create a negative impression of the government, since it involves penalizing charitable organizations, which may be more popular with taxpayers than the IRS.

The best initial response to hypersalience for those who aim to curtail it is one that harnesses the power of those entities that currently contribute to hypersalience. Rather than changing the provisions that are themselves hypersalient or using government resources to create negative advertisements or impose penalties, the response preferred by this Article focuses on the marketing that creates hypersalience.¹⁵⁹ To limit hypersalience, the government could limit statements made by private third-party beneficiaries about tax-deductibility. The government already provides numerous limits on charitable organizations,¹⁶⁰ and restricting their marketing efforts could be

¹⁵⁸ For examples of government advertisements, see, for example, Internal Revenue Serv., *Tax Tip: Summer Day Camp Expenses*, YOUTUBE, http://www.youtube.com/watch?v=iehimv_UEY4 (Jul. 8, 2010) (informing parents that summer day camp expenses may qualify for the child and dependent care credit). See also Susan Cleary Morse, *Using Salience and Influence to Narrow the Tax Gap*, 40 LOY. U. CHI. L.J. 483, 507 (2009) (providing scripts for potential television spots); Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 VA. TAX REV. 155, 228-32 (1996) (proposing, inter alia, a television spot featuring Charles Barkley).

For examples of penalties already placed on certain organizations if they mislead taxpayers about the deductibility of donations, see I.R.C. §§ 6113 and 6710 (2006). Section 6113 prohibits certain organizations from incorrectly telling donors that non-deductible donations are deductible; section 6710 imposes a penalty of up to \$10,000 per year if those organizations do not follow the requirements of section 6113. For more on this regime, see Gregory I. Devorkin, *Dual Character Contributions: A Proposed Penalty to Deter Charities from Providing Erroneous Information Regarding Deductibility*, 76 MARQ. L. REV. 294, 305 (1992).

¹⁵⁹ One reason to impose limitations or penalties on the charitable organizations rather than the taxpayers is that it would offset the current indirect penalty. See Devorkin, *supra* note 158, at 316 (stating in the context of dual character contributions that the "only existing deterrent is indirect [in that] charities may refrain from issuing erroneous or false receipts if they fear that future fund-raising campaigns will be hurt if their contributors are audited and assessed deficiencies against them").

¹⁶⁰ See IRS, COMPLIANCE GUIDE FOR 501(C)(3) PUBLIC CHARITIES (2009), available at <http://www.irs.gov/pub/irs-pdf/p4221pc.pdf> (outlining IRS enforcement procedures for

another such limit. Such limits need not amount to a full prohibition on third-party marketing, since that may have the effect of reducing the salience of both the deduction and its limits, rather than increasing the salience of the limits. A full-scale prohibition could also potentially run afoul of constitutional limits.¹⁶¹ Instead, the IRS and the Treasury could build on precedents such as Circular 230 or guidance to nonprofit organizations receiving dual-purpose contributions and encourage charitable organizations to modify their marketing materials.¹⁶² As shown by the 500 organizations whose marketing efforts were reviewed for this Article, while some organizations advise donors to contact their tax advisors or suggest that tax deductions only apply to the vague “extent provided by law,” many provide no such guidance. A first step could thus be to encourage third-party beneficiaries to use their marketing materials to convey more accurately the application of relevant tax provisions.

Rather than leading to low salience, as could happen with a blanket prohibition on third-party marketing, this solution would ideally push the charitable deduction and other hypersalient provisions closer to full salience, with taxpayers understanding the extent to which they may take advantage of this deduction. Similar proposals have been made in the context of hidden taxes, with McCaffery suggesting a “quasi-paternalistic” system focused on correcting cognitive errors.¹⁶³ Such a suggestion also builds on general proposals for “asymmetric paternalism,” in that greater information would not hurt those taxpayers who are already aware of the limits of the charitable deduction, but it would likely greatly change the knowledge level of those who were not aware of such limits.¹⁶⁴

One of the lessons from behavioral economics is that significant changes in behavior may be achieved through a simple reframing of a situation.¹⁶⁵ One form of government action to curtail hypersalience could be as simple as requiring private third-party beneficiaries to couch all references to the availability of tax benefits with words such as “may,” “might,” or “possibly,” or to follow the lead of some organizations and encourage taxpayers to consult with their tax advisors. In the context of the charitable deduction, third-party

charitable entities).

¹⁶¹ For more on the constitutionality of disclosure requirements, see Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339-40 (2010).

¹⁶² See Rev. Rul. 67-246, 1967-2 C.B. 104-07 (providing guidelines for charities that solicit dual-purpose contributions, including a requirement that marketing materials and any receipts must include the amount of the donation that is not deductible); Rev. Proc. 90-12, 1990-1 C.B. 471-73 (providing extra guidelines).

¹⁶³ McCaffery, *supra* note 5, at 1935.

¹⁶⁴ For more on asymmetric paternalism, see generally Camerer, *supra* note 15. There, the authors define asymmetric paternalism as “creat[ing] large benefits for those who make errors, while imposing little or no harm on those who are fully rational.” *Id.* at 1212.

¹⁶⁵ *Id.* at 1230 (“[R]e-framing a situation in subtle ways that would be irrelevant from the perspective of the standard economic model can have large effects on behavior.”).

marketing materials could also be required to refer explicitly to the fact that only a minority of taxpayers will itemize their deductions. Such a change would be unlikely to change the perception of taxpayers who are already fully aware of the limits of the deduction, but it may prevent at least some others who currently act on misinformation.¹⁶⁶

While such a limit is unlikely to eliminate hypersalience completely, it responds to the cognitive distortions underlying hypersalience both by taking advantage of the insights of behavioral economics and by relying on the parties whose actions have contributed to hypersalience. Given that this limit would have to be structured to avoid constitutional concerns and that it would also create monitoring costs for the government, this proposal may not be ideal. It is, however, the least problematic first step toward curtailing hypersalience in revenue-reducing tax provisions. And while this proposal has focused primarily on the limits that could be imposed on charitable organizations, the concept of requiring third-party beneficiaries to advertise the restrictions as well as the benefits could likely be extended to other hypersalient tax provisions as well.

CONCLUSION

Until now, discussions of salience in the context of the tax system have focused primarily on the distinction between hidden taxes and more salient taxes. Taking the charitable deduction as its primary example, this Article argues that some tax provisions are in fact more than fully salient – their benefits are extremely prominent, while the limits that restrict the availability of these benefits are themselves hidden. This combination of a highly salient tax provision and that provision's hidden limits is hypersalience. While this Article does not provide empirical evidence of the incidence of hypersalience, its primary contribution to the literature is to introduce the concept of hypersalience and its implications. By illustrating this term by way of the charitable deduction and highlighting the ramifications of hypersalience, this Article both invites further research and complicates the current literature on tax policy and behavioral economics.

The concept of hypersalience suggests that some tax provisions may be more treasury efficient than previously expected and that certain tax expenditures may thus provide less expensive means for achieving some policy goals than direct spending. Although some readers may see this concept as a new tool in the efforts to achieve desirable policy goals while reducing revenue loss, this Article concludes that the costs of hypersalience outweigh its benefits due to its reliance on taxpayer illiteracy and misinformation. Although this

¹⁶⁶ But see Sumit Agarwal et al., *The Age of Reason: Financial Decisions over the Life-Cycle with Implications for Regulation*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2009, at 27 (expressing skepticism at the value of disclosure and stating that “[e]ven for cognitively healthy populations, there is scant evidence that increases in disclosure improve decision-making”).

Article concludes with potential responses to hypersalience, its main goal is to introduce the concept of hypersalience and to illustrate how this phenomenon brings new complications and complexities to discussions of salience, tax expenditures, and taxation as a whole.