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EXPLOITING THE CHARITABLE CONTRIBUTION DEDUCTION'S HYPERSALIENCE

Eric S. Smith*

I. INTRODUCTION

For all the varied opinions on the Tax Cuts and Jobs Act of 2017¹ (“TCJA”), tax pundits would generally agree that this Act is the most substantial federal tax reform in 30 years² and has made tax law more salient. That is to say, it is reasonable to suggest (at least anecdotally) that individuals are now more aware of certain tax provisions, and perhaps the way the tax laws operate generally, than they were before.³ At least for November and December of 2017, terms like “standard deduction” and “personal exemption” enjoyed a stint in the mainstream news cycle.⁴ This Article suggests that market distortions attributable to hypersalience do not rise to a level that requires affirmative congressional correction. Moreover, this Article suggests that concerns of constitutionally worrisome burdens on speech, overregulation, and a less viable charities sector outweigh concerns associated with behavior driven by taxpayer cognitive error in connection with the actual deductibility of charitable donations.

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¹ Tax Cuts and Jobs Act of 2017, Pub. L. 115-97, 131 Stat. 2054 (2017) (codified as amended in scattered sections of 26 U.S.C.) (Supp. 2017).

² WILLIAM G. GALE ET AL., URBAN-BROOKINGS TAX POL’Y CTR, EFFECTS OF THE TAX CUTS AND JOBS ACT: A PRELIMINARY ANALYSIS 1 (2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180608_tcja_summary_paper_final.pdf [<https://perma.cc/6L5Z-THG6>].

³ In its monthly survey on Consumer Confidence shortly after the promulgation of the TCJA, Forbes reported that of 7,500 Americans surveyed, 54% were aware of the new tax reform. Gary Drenik, *Tax Cuts and Jobs Act Begins to Have Positive Impact on Spending Intentions*, FORBES (Mar. 19, 2018, 4:25 PM), <https://www.forbes.com/sites/forbesinsights/2018/03/19/tax-cuts-and-jobs-act-begins-to-have-positive-impact-on-spending-intentions/#1efc41b3f984> [<https://perma.cc/5KKC-MTSK>].

⁴ See, e.g., Alicia Parlapiano, *The Five Biggest Changes for Families Proposed in the Republican Tax Bill*, N.Y. TIMES, Nov. 4, 2017, at A14; Richard Rubin, *GOP Bets on a Simpler Tax Code*, WALL ST. J., Nov. 13, 2017, at A1; Russ Wiles, *With Tax Reform Pending, It’s Time to Consider Actions Now*, USA TODAY, Dec. 15, 2017, at 3b.

Consider the deduction for state and local taxes paid as an example.⁵ This provision made headlines⁶ when a senate bill proposed wholesale abandonment of the deduction.⁷ The \$10,000 deduction cap that eventually emerged as law⁸ represents a tax provision of which many are now more aware (even as their awareness is tinged with gloom in many state and local tax-heavy “blue states”).⁹

Yet salience¹⁰ (to whatever extent it exists) in this context has a shelf life; it erodes with the passage of time. Without constant reinforcement, especially when considering something as uninviting to understand as the tax law, general awareness would seem to diminish as tax reform becomes old news. Moreover, even if salience could be maintained, the passage of time notwithstanding, it would last only so long as the tax law remained static. For at least two reasons, permanency is not likely to be a hallmark of the most recent tax reform. First, most of the TCJA’s changes with respect to individuals statutorily sunset at the end of 2025.¹¹ Second, on a broader

⁵ See I.R.C. § 164(a) (Supp. 2017).

⁶ See, e.g., Kenneth R. Harney, *Portions of Senate Tax Bill Are Harsher on Homeowners than the House Proposal*, WASH. POST (Nov. 15, 2017), https://www.washingtonpost.com/realestate/portions-of-senate-tax-bill-are-harsher-on-homeowners-than-the-house-proposal/2017/11/14/9bb04aec-c8b6-11e7-8321-481fd63f174d_story.html?utm_term=.6b85077193c3 [<https://perma.cc/KU2L-HSJ2>].

⁷ S. 1, 115th Cong. § 11042 (2017).

⁸ Pub. L. 115-97, § 11042, 131 Stat. 2054, 2085–86 (2017) (codified at I.R.C. § 164(b)(6)(B) (Supp. 2017)).

⁹ If the federal state and local tax deduction is now capped, see I.R.C. § 164(a)-(b), taxpayers in states with high state and local taxes will not be able to deduct the full amount of those taxes. States with high state and local taxes tend to be blue states. John S. Kiernan, *2019 Tax Rates by State*, WALLETHUB (Mar. 12, 2019), <https://wallethub.com/edu/best-worst-states-to-be-a-taxpayer/2416/#red-vs-blue> [<https://perma.cc/CD5A-GRB5>]; see also Ben Casselman & Jeffery C. Mays, *Last-Minute Rush to Prepay Taxes Gives Way to Confusion and Anger*, N. Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/business/economy/irs-prepay-property-tax.html> [<https://perma.cc/2J4X-KC4M>].

¹⁰ Use of the term “salience” here is in its most general sense: a reference to “visibility or prominence.” Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253, 254 (2011). This Article’s working definition of salience is informed by Schenk, as well as Gamage and Shanske, who distinguish market/economic salience from political salience. See David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX L. REV. 19, 20 (2011). Market/economic salience “refers to how tax presentation affects market decisions and economic activity.” *Id.* “Political salience refers to how tax presentation affects voting behavior and political outcomes.” *Id.* As discussed *infra* Part IV, these definitions differ from that of some other scholars who define “salience” more narrowly to focus on perception or understanding, rather than simply general awareness.

¹¹ See, e.g., I.R.C. § 164(b)(6)(B) (Supp. 2017). This and nearly all of the TCJA’s tax cuts relating to individuals will expire on December 31, 2025. See JOINT COMM. ON TAX’N, LIST OF EXPIRING FEDERAL TAX PROVISIONS 2016–2027, at 15–17 (2018). The Congressional Budget Resolution “allows for up to \$1.5 trillion in net tax cuts over 10 years through the filibuster-proof process of reconciliation.” Patrick Louis Knudsen, *Estimating*

level, Rebecca Kysar and Linda Sugin believe that the TCJA is plagued with instability and has created a system that will not last.¹² They suggest that the partisan way that Republican Party leaders chose to strong-arm the legislation through Congress, without a single Democrat's support, undermined the law's likelihood of long-term survival.¹³

Like the deduction for state and local taxes paid, the TCJA also affected the deductibility of charitable contributions, though in a less direct way.¹⁴ The TCJA increased the standard deduction to \$24,000 for joint return filers and \$12,000 for single filers.¹⁵ It also suspended the personal exemption until 2026.¹⁶

The expansion of the standard deduction¹⁷ and the suspension of the personal exemption caught the attention of media outlets for the effect these provisions would have on charitable giving.¹⁸ With such an expansive standard deduction, one

the Effects of Tax Reform, 2 HOUSE BUDGET COMM. 13 (Nov. 7, 2017), <https://republicans-budget.house.gov/wp-content/uploads/2017/11/13-Scoring-Tax-Reform-column.pdf> [<https://perma.cc/3668-FQLX>]. Making provisions affecting individuals permanent would have exceeded this limitation.

¹² Rebecca M. Kysar & Linda Sugin, Opinion, *The Tax Bill's Built-In Instability*, N.Y. TIMES, Dec. 20, 2017, at A27.

¹³ *See id.* As rationale for this conclusion, Kysar and Sugin note that the law could change as quickly as when Congressional controls shifts to the Democrats again. *See id.* They note that this “dynamic is worsened by the fact that the tax legislation pits blue states against red through the limitation of the state and local tax deductions.” *Id.* They further cite the fact that corporate tax relief was deep and permanent, while individual relief was temporary and modest, that the law increases the deficit, and that international provisions may violate World Trade Agreements as additional signs of instability and factors that may limit the TCJA's survival. *Id.*

¹⁴ The TCJA also increased the limitation on cash contributions to public charities from 50% to 60%, beginning after 2017 and before 2026. Pub. L. 115-97, § 11021, 131 Stat. 2054, 2074–75 (2017) (codified at I.R.C. § 170(b)(1)(G) (Supp. 2017)).

¹⁵ Pub. L. 115-97, § 11021, 131 Stat. 2054, 2074–75 (2017) (codified at I.R.C. § 63(c)(7)(A) (Supp. 2017)) (increasing the standard deduction and requiring that this amount is indexed for inflation).

¹⁶ Pub. L. 115-97, § 11041(a), 131 Stat. 2054, 2082 (2017) (codified at I.R.C. § 151(d) (Supp. 2017)).

¹⁷ The amount of the standard deduction will be indexed for inflation using Chained Consumer Price Index For All Urban Consumers in tax years beginning after 2018. I.R.C. § 63(c)(7)(B) (Supp. 2017). Increased standard deduction amounts will expire after Dec. 31, 2025. *Id.* §63(c)(7).

¹⁸ *See, e.g.*, Laura Saunders, *Winners and Losers in Tax Plan*, WALL ST. J., Sept. 28, 2017, at B1; Darla Mercado, *Tax Reform: Families will feel the pain of losing this break*, USA TODAY (Dec. 20, 2017, 2:49 PM), <https://www.usatoday.com/story/money/taxes/2017/12/20/tax-reform-families-feel-pain-losing-break/970385001/> [<https://perma.cc/HJ2U-P5JJ>]; Richard Rubin, *Tax Bill to Have Uneven Effect on Households, Study Says*, WALL ST. J. (Nov. 7, 2017, 12:11 PM), <https://www.wsj.com/articles/majority-would-benefit-from-tax-bill-but-effects-peter-out-study-says-1510074698> [<https://perma.cc/8TZS-UM7X>]; *Republicans Unveil a Tax Plan at Last*, ECONOMIST (Sept. 30, 2017),

nonprofit spokesperson publicly lamented that many taxpayers would no longer have a tax incentive to give.¹⁹ This seems very likely true, as it will be more difficult for taxpayers to cobble together enough itemized deductions (e.g., medical expenses, state and local taxes paid subject to \$10,000 limit, home mortgage interest paid, and more relevantly charitable giving) to surpass the more generous standard deduction amounts.²⁰ Therefore, these taxpayers will likely choose the standardized deduction, rather than itemization, in order to obtain the maximize deduction.

This new awareness potentially undermines a phenomenon that Lillian Faulhaber observed in relation to the charitable contribution deduction.²¹ She identified and introduced the concept of “hypersalience,” to describe the cognitive error that occurs when taxpayers are highly aware of a tax provision generally but fail to correctly perceive its associated limitations.²² The charitable contribution deduction—a revenue-reducing tax provision which on its face is fully, or almost fully, salient, but which harbors limitations that are hidden, or at least less salient—was Faulhaber’s prime example.²³

Faulhaber focused on the interplay between the deductibility of charitable donations and the standard deduction.²⁴ She suggested that because the charitable contribution deduction is limited to taxpayers who itemize deductions, “its salience to all taxpayers may be misleading.”²⁵ With the promulgation of the TCJA, the limiting influence of the standard deduction has been amplified and cast into the spotlight.²⁶ Ostensibly, more taxpayers should now be aware that the tax benefit for

<https://www.economist.com/united-states/2017/09/30/republicans-unveil-a-tax-plan-at-last> [<https://perma.cc/H5GR-T3H3>].

¹⁹ See Bryan McQueeney, Op-Ed, *The GOP Tax Reform Will Devastate Charitable Giving*, L.A. TIMES (Dec. 27, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-mcqueeney-charitable-giving-under-new-tax-law-20171227-story.html> [<http://perma.cc/3U2N-3VAG>].

²⁰ Taxpayers may take the standard deduction, a statutory amount indexed for inflation and driven by the taxpayer’s filing status in the calculation of taxable income, or they may itemize their deductions. See I.R.C. § 63(b), (c) (Supp. 2017). Itemized deductions are available for, *inter alia*, medical expenses, state and local taxes paid, certain interest paid, and for charitable donations. *Id.* at §§ 63(d), 163, 164, 170, 213. Assuming a taxpayer is eligible for both, she will choose the greater of the two amounts to maximize tax benefit.

²¹ Lillian V. Faulhaber, *The Hidden Limits of the Charitable Deduction: An Introduction to Hypersalience*, 92 B.U.L. REV. 1307, 1317–20 (2012).

²² *Id.*

²³ *Id.* at 1309, 1318–28.

²⁴ *Id.* at 1320–21.

²⁵ *Id.* at 1322.

²⁶ It should be noted that hypersalience, as Faulhaber defines it, likely still exists. In the early years in which the TCJA applies, it seems improbable that many taxpayers will have followed the tax reform narrative closely enough to determine that their charitable giving will not likely be deductible. Some taxpayers may have previously itemized and undertaken charitable giving annually. Thus, in meaningful ways, hypersalience still accurately describes the cognitive state of a critical mass of taxpayers.

charitable giving will be limited and available only to substantial charitable donors and/or those who mix a cocktail with the other itemized deductions and charitable giving.²⁷ Yet this awareness will, on the face of the legislation, only be accurate for a limited period of time.²⁸

The sunset provisions by which the standard deduction will revert to its pre-TCJA levels in 2026²⁹ should, in theory, reinvigorate the charitable contribution deduction as a viable tax incentive and make it financially appealing to more taxpayers.³⁰ Perhaps even sooner, given the instability that could ensue if the pendulum of political power makes its return stroke to the Democrats in an upcoming election,³¹ future tax reform could incentivize charitable giving by (among other measures) affirmatively lowering the standard deduction amounts to make deductions for charitable donations financially appealing to more taxpayers. In either case, hypersalience with respect to charitable giving will likely permeate the cognitive perception of the American taxpayer once more, perhaps even at pre-TCJA levels, as sunsets or affirmative legislative repeals obfuscate the granular details of deducting charitable donations.

Consider, for example, the media response that would follow if a Democrat-controlled Congress affirmatively lowered the standard deduction to pre-TCJA levels before the sunset provisions apply at the end of 2025. Journalists would likely play up the angle that more taxpayers now have a financial incentive to donate to charity, though this characterization would be incomplete and still inaccurate for many. Hypersalience in relation to the charitable contribution deduction would almost surely follow.³²

²⁷ See generally Alyssa A. DiRusso, *Charity at Work: Proposing a Charitable Flexible Spending Account*, 2014 UTAH L. REV. 281, 287 (2014) (explaining that roughly two-thirds of taxpayers take the standard deduction, rather than itemizing); Faulhaber, *supra* note 21, at 1322–23 (discussing the disparity between the amount of charitable donations made and the lower amount of charitable donations claimed in itemized tax deductions).

²⁸ See, e.g., I.R.C. § 1(j) (Supp. 2017); JOINT COMM. ON TAX'N, *supra* note 11, at 15–17.

²⁹ Pub. L. 115-97, § 11021, 131 Stat. 2054, 2074–75 (2017) (codified at I.R.C. § 63(c)(7) (Supp. 2017)).

³⁰ See discussion *infra* Section IV.B.; see also DiRusso, *supra* note 27, at 298 (“[M]etrics generally suggest that the charitable deduction does in fact incentivize charitable giving and quantitatively increase taxpayer giving behavior among those who qualify for the deduction.”).

³¹ Laura Davison, *Trump’s Tax Cuts Could Die the Hard Way: A Little at a Time*, BLOOMBERG (June 18, 2019, 1:47 PM MDT), <https://www.bloomberg.com/news/articles/2019-06-18/trump-s-tax-cuts-could-die-the-hard-way-a-little-at-a-time> [<https://perma.cc/BY6H-2KB3>].

³² This is not to suggest that the TCJA has made the limitations on the deductibility of charitable giving fully salient. It would be foolhardy to suggest that the lead-up to and fall-out from the TCJA, and its associated media coverage, were sufficient to bring all taxpayers to a full level of awareness with respect to the mutual exclusivity between tax benefit from charitable giving and the standard deduction. This paper moves forward on the suppositions

This Article considers the appropriate congressional reaction to hypersalience through two lenses. The first is market, or economic salience. Lillian Faulhaber's introduction of hypersalience, as illustrated through the charitable contribution deduction, includes a policy recommendation: Congress should take affirmative steps to minimize or mitigate hypersalience.³³ Her argument is based exclusively on the effects hypersalience appears to have on market behavior.³⁴ This Article is a rejoinder to Faulhaber's position and suggests that market distortions attributable to hypersalience do not rise to a level that requires affirmative congressional correction. Moreover, this Article suggests that concerns about constitutionally worrisome burdens on speech, overregulation, and a less viable charities sector outweigh concerns associated with behavior driven by taxpayer cognitive error in connection with the actual deductibility of charitable donations.

The second element of salience this Article considers is political salience. Deborah Schenk writes in favor of exploiting political salience in the context of hidden or low-salience taxes.³⁵ Her rationale stems, in part, from the American taxpayer's adverseness to tax increases but general support of government programs. Combined, this willingness to play but not pay mentality gives rise to budget shortfalls. Schenk contends that a viable and cogent argument can be made in favor of low salience or hidden taxes that prevent American taxpayers from fully appreciating their incidence of tax.³⁶ This Article applies Schenk's argument in favor of exploiting salience, and gauges whether similar logic applies in favor of exploiting hypersalience. This Article finds that Congress, facing an utterly tax-averse electorate, can ill-afford to expend political capital to correct the cognitive misperception of tax deductions (which could be perceived as new taxes), when it would give rise to no additional revenues.

The first three parts of this Article assimilate the literature and set the foundation to determine whether a viable argument exists for the exploitation of hypersalience. They comment upon, but are more than recitations of, prior studies; they dissect and elaborate. The combined narrative is meant to weave the literature together to provide a clear context with respect to the arguments made in this Article.

Part II distinguishes salience and hypersalience and reaffirms the notion that low salience taxes and hypersalient tax deductions are functional equivalents. Part III examines Schenk's normative argument for the exploitation of political salience—an argument stemming from the citizenry's utterly incompatible desire

that: 1) the TCJA affected the charitable contribution deduction's hypersalient character, but by no means did it completely resolve it; and 2) that hypersalience will reemerge with more force over time.

³³ Faulhaber, *supra* note 21, at 1345–46.

³⁴ *See generally id.* (introducing the concept of hypersalience with an overview of behavior economics in tax literature).

³⁵ *See generally* Schenk, *supra* note 10 (arguing the use of low-salience tax provisions may in fact be democracy-enhancing including a case study demonstrating the use low-salience tax provisions is justified and effective).

³⁶ *Id.* at 281.

for more government-provided goods and services but less taxes. Schenk tightly frames her argument for exploitation of salience within conditions of transparency and availability. The process by which low-salience taxes are promulgated should be reasonably transparent, and knowledge of the low-salience provisions themselves should be accessible if a taxpayer seeks them out.³⁷

Part IV revisits Faulhaber's use of the charitable contribution deduction as an example of hypersalience. This analysis goes beyond the four corners of Faulhaber's paper and attempts to reconcile the findings of a subsequent study by Goldin and Listokin³⁸ that seems to undermine Faulhaber's anecdotal determinations related to hypersalience. Ultimately, this discussion distinguishes Faulhaber's and Goldin and Listokin's studies on their disparate definitions of the term hypersalience and confirms Faulhaber's assumptions related to taxpayer cognitive error and the charitable contribution deduction.

Part V considers hypersalience from market and political salience perspectives. On market salience, it offers a counter-narrative to Faulhaber's assertion that Congress should intervene to address the effects of hypersalience. With respect to political salience, Part V explores Schenk's arguments for the exploitation of salience in tax design to measure whether these points apply with equal weight to hypersalient tax provisions. To conclude, this Article offers the following policy recommendation: Congress should not affirmatively correct the charitable contribution deduction's hypersalience because exploitation of its effect on taxpayer behavior is justifiable.

II. SALIENCE AND TAXES

A. *Salience Defined and Applied*

On first impression, the notion of exploitation as a tax policy device appears nearly invalid on its face. When the exploited object is the American taxpayer's cognitive biases with respect to decision-making, the prospect seems even less appealing. In at least one context, however—the cognitive bias of salience—this predictable aversion is not so easily justified.

³⁷ *Id.* at 310.

³⁸ See generally Jacob Goldin & Yair Listokin, *Tax Expenditure Salience*, 16 AM. L. & ECON. REV. 144 (2013) (finding nearly half of all eligible taxpayers are unaware of the charitable contribution deduction and those who are aware underestimate the size of the available tax deduction).

Saliency describes heuristics—cognitive shortcuts or “rules of thumb” that simplify decisions³⁹—associated with visibility, prominence, or vividness.⁴⁰ Saliency and awareness are corollaries. If information is highly or fully salient, it approaches common knowledge. If individuals are generally unaware of information, that information has low saliency.

Normative disagreement exists among tax scholars with respect to low-saliency taxes.⁴¹ Some tax scholars, who often describe low-saliency taxes as “hidden taxes,” argue that increased saliency is a desirable outcome, and the government’s intentional use of low-saliency taxes upends general concepts of representative government and accountability and undermines economic efficiency.⁴² On the other hand, Deborah Schenk counters that there are times when low-saliency taxes are, in fact, desirable and can be used as fiscal tools to exploit cognitive bias.⁴³ Her position is carefully crafted and depends upon a clear distinction between saliency as a measure of either economic (market) or political awareness of tax provisions.⁴⁴ Schenk argues that a democracy-enhancing case can be made based on diminished political saliency, increasing political acceptance of low-saliency taxes.⁴⁵ David Gamage and Darien Shanske continue this line in the literature and go on to conclude that, at least in the context of market or economic saliency, it is generally desirable to lessen saliency to any extent possible.⁴⁶

This debate occurred in the context of the income tax and its “revenue-raising tax provisions,” until Lilian Faulhaber recast the conversation to consider the saliency of provisions that decrease taxpayer burdens—deductions, exclusions, and credits.⁴⁷ She coined these “revenue-reducing tax provisions” and argued that the saliency discussion was incomplete without considering these provisions.⁴⁸ For Faulhaber, this was a critical omission in the literature, given the many ways in

³⁹ Shlomo Benartzi & Richard H. Thaler, *Heuristics and Biases in Retirement Savings Behavior*, 21 J. ECON. PERSP. 81, 82 (2007) (describing heuristics as a substitution process); see Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1469 (2002) (“[P]eople sometimes answer a difficult question by answering an easier one instead.”).

⁴⁰ Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1886 (1994).

⁴¹ Saliency literature has grown as the concept has been the vehicle to analyze, among other topics, behavior in response to state taxation. See generally, e.g., Hayes R. Holderness, *The Unexpected Role of Tax Saliency in State Competition for Businesses*, 84 U. CHI. L. REV. 1091, 1120 (2017).

⁴² See generally Brian Galle, *Carrots, Sticks, and Saliency*, 67 TAX L. REV. 53, 69 (2013); Brian Galle, *Hidden Taxes*, 87 WASH. U. L. REV. 59, 64–65 (2009) [hereinafter Galle, *Hidden Taxes*].

⁴³ Schenk, *supra* note 10, at 253.

⁴⁴ *Id.* at 308.

⁴⁵ *Id.* at 255.

⁴⁶ Gamage & Shanske, *supra* note 10, at 99.

⁴⁷ Faulhaber, *supra* note 21, at 1309.

⁴⁸ *Id.*

which misapprehension of deductions, exclusions, and credits mirrors the low-salience revenue-raising tax provisions' effect on taxpayer behavior. Low-salience revenue-raising tax provisions, for example, tend to cause taxpayers to underestimate their tax burden.⁴⁹ In reverse course, low-salience revenue-reducing tax provisions cause taxpayers to over-estimate reductions to their tax burden.⁵⁰ In either case, and generally detrimentally, taxpayers underappreciate their ultimate tax exposure. Thus, for Faulhaber, hidden taxes and hypersalient tax provisions are economic equivalents.⁵¹

As a model for analysis, Faulhaber narrows on the salience of the charitable contribution deduction. What she observes, however, does not neatly fit within the scale of high or low-salience. On the one hand, Faulhaber finds that the charitable contribution deduction as a revenue-reducing provision is fully—or almost fully—salient.⁵² Because many petitions for charitable giving include some suggestion or implication of tax benefit, most taxpayers are aware of and make decisions operating under the impression that charitable giving affects their tax circumstance favorably.⁵³ On the other hand, relatively few people perceive or appreciate the limitations associated with the charitable contribution deduction—most significantly, the standard deduction's blanket preclusion to any direct tax benefit for charitable giving.⁵⁴ On this account, limitations restricting the application of the charitable contribution deduction are low-salience provisions.⁵⁵

To describe a high-salience tax provision with low-salience limitations or restrictions, Faulhaber introduces the concept of hypersalience to the legal tax literature. This term, as Faulhaber uses it, seems to capture elements of multiple cognitive biases.⁵⁶ For example, the cognitive bias of overconfidence seems present as taxpayers operate under the delusion that they understand the tax benefit associated with charitable giving, and therefore have no desire to search for more information that could reveal limitations or restrictions.⁵⁷ Blocking—the notion that something once learned impairs the ability to learn new things—another element of cognition may also describe at least part of hypersalience. The high-salient nature of the charitable contribution deduction may impair, or block, the taxpayer's ability to learn about its limitations or restrictions.⁵⁸

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1309–10; *see* I.R.C. §§ 63(b), (c) (Supp. 2017).

⁵⁵ Faulhaber, *supra* note 21, at 1309–10.

⁵⁶ McCaffery notes that cognitive tendencies tend to converge or overlap. McCaffery, *supra* note 40, at 1905.

⁵⁷ *Id.* at 1911–12.

⁵⁸ *Id.*

After measuring both, Faulhaber ultimately concludes that the costs of hypersalience outweigh any benefits through the lens of market salience.⁵⁹ In turn, she offers three alternatives for curing or at least mitigating, hypersalience, including a policy recommendation that governments should limit statements made by private third-party beneficiaries about tax-deductibility.⁶⁰ Given that the government already limits charities' activities, she suggests that this could simply be another element of regulation.⁶¹

Faulhaber's recommendations echo scholarly discourse averse to "hidden taxes" or low-salience revenue-raising taxes.⁶² Schenk, however, counters this line of reasoning by arguing that low-salience taxes may have intrinsic value and a normative argument exists for government exploitation of the cognitive bias of political salience.⁶³ Schenk's analysis, however, is limited to revenue-raising tax provisions. With Faulhaber's introduction of hypersalience to the literature, and given her suggestion that low-salience taxes and hypersalience taxes are economic equivalents, a gap in the literature exists with respect to whether Schenk's arguments in favor of exploitation of political salience apply to hypersalience.

B. Salience as a Tool to Analyze Tax

Edward McCaffery brokered the merger of cognitive theory and tax on the overall thesis that analyzing tax through the lens of behavioral decision theory could help "explain major structural features of our existing tax system."⁶⁴ He cast his rationale as both historical and prospective, arguing that cognitive tendencies could explain how our tax system came to be and should be taken into account in the development of any general normative theory of tax.⁶⁵

To illustrate, McCaffery posited that cognitive biases affect the promulgation and survival of tax laws in two ways. The first is active and conscious: that lawmakers are influenced by cognition and may exploit cognitive biases to maximize revenue collections and minimize opposition.⁶⁶ The second is passive and evolutionary: the idea that cognitively-favored tax laws are more likely to survive

⁵⁹ Faulhaber, *supra* note 21, at 1343. Faulhaber's rationale is that hypersalience in the context of the charitable contribution deduction leads to "overconsumption of goods" and perpetuates tax illiteracy as "self-interested third-party beneficiaries" promote the deduction without alluding to its limitations. *Id.* at 1344.

⁶⁰ *Id.* at 1345.

⁶¹ *Id.* at 1345–46.

⁶² See, e.g., Galle, *Hidden Taxes*, *supra* note 42, at 59 (2009); Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1356 (1993).

⁶³ Schenk, *supra* note 10, at 255.

⁶⁴ McCaffery, *supra* note 40, at 1864.

⁶⁵ *Id.*

⁶⁶ *Id.*

and become fixtures in the tax system than cognitively-disfavored tax laws.⁶⁷ This is not to suggest that cognitively-favored tax laws are normatively valid or even correctly perceived. In fact, taxpayers may harbor cognitive biases in favor of certain tax provisions based on incorrect perceptions of the tax law.⁶⁸ Thus, in several instances, our tax system is the product of evolution in the face of cognitive error.

McCaffery discusses several examples of cognitive biases at work in the tax laws. At the forefront, he identifies hidden taxes,⁶⁹ the functional counterpoint to Faulhaber's hypersalient tax reductions. Hidden taxes represent the byproduct of one of the critical lessons in psychology literature on cognitive theory: that people are especially averse to losses.⁷⁰ Applied in a legislative tax setting, loss aversion suggests that the tax-maximizing legislator ought to impose tax laws before the money subject to the tax ever reaches the taxpayer's hands.⁷¹ This strategy is not to be construed as political gamesmanship that economically harms the taxpayer. This theory plays off Kahneman and Tversky's "prospect theory" and their general finding that losses hurt more than gains feel good.⁷² In promulgation of the tax law,

⁶⁷ *Id.*

⁶⁸ *See, e.g., id.* at 1930–31.

⁶⁹ *Id.* at 1874. McCaffery identifies several examples of hidden taxes while separating them into one of two categories: partially hidden or fully hidden taxes. *Id.* at 1875. He defines a partially hidden tax as one that "simply involves taking money from taxpayers' pockets without necessarily telling them that they are paying a tax." *Id.* Incidence of partially hidden tax include the sales tax (where the tax is not included in the listed price of the good) and perhaps the even more inconspicuous (but still not completely hidden) excise taxes on certain commodities such as fuel, alcohol, and tobacco products. *Id.* The upshot is that, "taxpayers somehow do not notice or object to" these types of taxes. *Id.* McCaffery defines a fully hidden tax as one that "involves appropriating the money before it ever reaches the hands of its contingent owner." *Id.* McCaffery considers the employer's share of the FICA tax and the corporate income tax to exhibit a fully "hidden pattern." *Id.* at 1875–76. Both taxes are levied and syphoned off to the government before ever reaching the potential recipients hands. *Id.* McCaffery distinguishes the partially hidden tax from the fully hidden tax as follows: the partially hidden tax involves an "initial giving followed by a surreptitious taking away," while the fully hidden tax involves "no giving in the first place; deceit precedes receipt, so to speak." *Id.* at 1876.

⁷⁰ *See* Edward J. McCaffery & Jonathan Baron, *Isolation Effects and the Neglect of Indirect Effects of Fiscal Policies*, 19 J. BEHAV. DECISION MAKING 289, 290 (2006) (noting how hidden taxes are promulgated due to taxpayers' strong aversion to losses). McCaffery and Baron's experiments suggest that taxpayers "preferred 'hidden' taxes to transparent ones." *Id.* at 289. They further suggest that uncertainty about the incidence of a tax "may be perceived as a good thing" and "may lead to a relative muting of a fairly general tax aversion." *Id.* at 291.

⁷¹ McCaffery, *supra* note 40, at 1890.

⁷² *See generally* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263 (1979) (discussing "expected utility theory as a descriptive model of decision making under risk," and developing an alternative theory, prospect theory, which found that losses hurt more than gains feel good).

loss aversion stands for the idea that a hidden tax spares taxpayers the cognitive strain that comes with receiving money and then having to give some of it back.

Most relevant to this discussion, McCaffery highlights the influence cognitive biases can have on tax deductions—the context in which Faulhaber frames the hypersalience phenomenon. McCaffery predicts that, just as individuals will overvalue nontaxable benefits (e.g., fringe benefits), they will overestimate the tax-deductible component of tax deductions like charitable gifts.⁷³ In other words, it seems that for McCaffery, the cognitive tendency Faulhaber describes as hypersalience would develop of its own accord, based on heuristics.

McCaffery's prediction is based on the framing heuristic—the phenomenon under which “individuals react to the purely formal way in which a question is presented or ‘framed.’”⁷⁴ Framing and hypersalience explain similar cognitive errors from different perspectives. While acknowledging that “a good many charitable contributions come from non-itemizers,”⁷⁵ McCaffery focuses on the itemizer's cognitive error. The itemizer tends to massively over-value the deduction for charitable giving such that she gives more than what the tax rate change and economic rationality might suggest is appropriate.⁷⁶ To explain this overreaction, he theorizes that the prominence heuristic (salience) of the tax rates, combined with the framing effect of being able to make a “‘fully tax deductible’ gift” combine to mislead taxpayers.⁷⁷

Faulhaber's notion of hypersalience considers the charitable contribution deduction from the perspective of the non-itemizer.⁷⁸ Her normative response to the phenomenon of hypersalience is that the onus falls on the government to correct cognitive error through additional regulation in an already heavily regulated area of tax.⁷⁹ As a general matter, McCaffery stops short of recommending additional regulation in the face of cognitive error. He recommends a more nuanced approach that gauges costs and benefits associated with a more overtly paternalistic reaction to heuristics.⁸⁰

His temperate approach is motivated by the following axiomatic statement: “[i]t is always a bit dangerous to conclude too quickly that the people are ignorant.”⁸¹ Preference utilitarianism, or methodological individualism, is an economic theory that suggests any recommendations related to any normative social theory should be

⁷³ McCaffery, *supra* note 40, at 1906–07.

⁷⁴ *Id.* at 1905.

⁷⁵ *Id.* at 1911.

⁷⁶ *See id.* McCaffery suggests that the elasticity of contributions to changes in the tax rate may be greater than one. *Id.* This means that a taxpayer may be inclined to contribute “more than the tax rate.” *Id.* at 1912.

⁷⁷ *Id.* at 1912–13.

⁷⁸ Faulhaber, *supra* note 21, at 1327–28.

⁷⁹ *Id.* at 1345–46.

⁸⁰ McCaffery, *supra* note 40, at 1921.

⁸¹ *Id.* at 1933.

cast in a light that respects and accepts individual preferences.⁸² McCaffery applies this theory to cognitive biases and heuristics related to tax and suggests that a non-paternalistic response requires consideration of the idea that “as a matter of psychology’ . . . people [may be] happier . . . living under hidden taxes.”⁸³

It might be fair to say that McCaffery’s general aversion towards creating awareness of hidden taxes—at least not without carefully considering the psychological cost—is the springboard for Deborah Schenk’s theory that cognitive errors, in particular the salience bias, should be exploited in tax design. That is to say, Schenk’s view is that hidden taxes should not only stay hidden but should also be used as a tool to effect fiscal policy, as the next Part discusses.

III. EXPLOITING THE SALIENCE BIAS IN DESIGNING TAXES

Schenk’s proposal begins with the acknowledgement of her contrarian position: scholarly dialogue approaches a consensus “that increased salience is preferred and that the intentional use of low-salience taxes by the government is undesirable.”⁸⁴ The second stanza of this premise is where Schenk’s work reverberates. McCaffery’s position on the introduction of cognitive theory to legal tax research⁸⁵ left room for debate on the desirability of hidden taxes. McCaffery’s narrative, however, was offered in the context of unintentional, but practically unavoidable, cognitive errors that follow the public’s perception of the tax laws.⁸⁶ McCaffery wanted lawmakers to be aware of taxpayers’ lack of awareness.⁸⁷ In contrast, Schenk’s bold position is that lawmakers should not only be aware of taxpayers’ lack of awareness but should also exploit that lack of awareness.⁸⁸ As such, her paper offers the first “comprehensive case for the normative desirability of low-salience taxes.”⁸⁹

Schenk’s proposal is less a contradiction to the other literature and more a contortion of it. In order to prevent misunderstanding and to reconcile her proposal with other scholarly work, she clearly differentiates the two different types of salience identified in the literature: economic (or market) salience and political salience.⁹⁰ Economic or market salience describes the cognitive perception that

⁸² *Id.* at 1934.

⁸³ *Id.*

⁸⁴ Schenk, *supra* note 10, at 255.

⁸⁵ *See* discussion *supra* Section II.B.

⁸⁶ *See generally* McCaffery, *supra* note 40 (discussing cognitive biases as a means to “help to explain major structural features of our existing tax system that are otherwise difficult to understand, and that such biases must be taken into account in developing any general normative theory of tax.”).

⁸⁷ *Id.* at 1928.

⁸⁸ Schenk, *supra* note 10, at 255.

⁸⁹ *Id.* at 255.

⁹⁰ *Id.* at 272.

causes a change in individual decision-making relative to the market.⁹¹ That is, in the context of taxes, economic or market salience considers the way in which taxpayers' economic responses vary with the salience of a tax or a tax provision.

Political salience, on the other hand, measures the political response to government action.⁹² That is, political salience measures the "political reaction or response from the electorate to the adoption of a tax or tax provision."⁹³ These reactions come in the form of acceptance, rejection, or no response at all.⁹⁴ Applied to the American taxpayer, economic salience is distinguished from political salience based on the direction of the response to a tax or tax provision. Economic salience (or lack thereof) measures taxpayers' reactions to the market. Political salience measures taxpayers' reactions to legislators, as expressed through the political process.

Schenk offers two abstract examples to illustrate how political salience could affect the legislative process as lawmakers respond to the electorate's awareness of the tax law. The first example frames the question from a revenue-maximizing legislator's perspective, whose political environment makes it a challenge to raise taxes. That legislator could exploit the availability bias by consciously proposing and voting for low-salience tax provisions.⁹⁵ The counterpoint, and second example, is the tax-averse legislator who could highlight or try to increase the salience of tax increase proposals in a way that would gather opposition to them.⁹⁶

Schenk follows the abstract with actual examples of low-salience tax provisions where evidence suggests that Congress intentionally designed these taxes with obfuscation in mind. Low-salience tax provisions are typically passed without much fanfare, not highlighted by the administrative agency administering the provision, and receive little media attention.⁹⁷ The withholding of income taxes on wages is an example of a low-salience collection system.⁹⁸ Similarly, a tax increase was achieved without raising rates with the Omnibus Budget Reconciliation Act of 1990, which reduced itemized deductions for high-income taxpayers.⁹⁹ To this point, phase-outs generally represent low-salience tax increases. Schenk notes that, up until 1981, Congress enjoyed the low-salience tax increases ("inflation creep") that followed inflation.¹⁰⁰ Before then, the rates were not indexed for inflation, and yearly tax increases went relatively undetected as buying power diminished, but rates

⁹¹ *Id.* at 273.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 274.

⁹⁶ *Id.*

⁹⁷ *Id.* at 277.

⁹⁸ *Id.* Schenk notes that loss aversion also plays a role here. *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 278–79.

remained static. Rampant inflation increased political salience enough relative to this yearly automatic tax increase to compel legislators to action.¹⁰¹

To explain the use of salience as a fiscal policy tool, Schenk crafts her argument from the perspective of political-economy: that there are some circumstances in which it is appropriate for legislators to take advantage of cognitive biases in designing taxes.¹⁰² She builds her argument on the basis of two fundamental constructs: (1) the state has the power to levy taxes; and (2) the state has an appropriate need for revenue. If these statements are true, then it is proper, according to Schenk's argument, for the state to choose a form of taxation that is the most palatable, though not necessarily the most salient, to its citizens.¹⁰³

This position is premised on what Schenk considers contradictory and perhaps mutually exclusive ideals: the citizenry wants public goods (including redistribution of wealth) but abhors taxation.¹⁰⁴ That is, the citizenry looks to the government to provide certain goods and services for its general welfare. Yet, even so, the citizenry disdains the means by which those goods and services are funded. For Schenk, these competing positions justify the government's use of fiscal tools that can "accomplish the revenue goal with the least pain and most acceptance."¹⁰⁵

Schenk's justification for exploiting hypersalience considers more than a politician's selfish interests. That is, it goes beyond the Leviathan-inspired¹⁰⁶ justification that politicians are revenue-maximizing and interested solely in their own reelections.¹⁰⁷ Schenk acknowledges Finkelstein's¹⁰⁸ determination that politicians will be rewarded by adopting less salient taxes and punished for adopting more salient taxes.¹⁰⁹ Yet, Schenk's argument is more layered and bends towards the notion of "political acceptance of taxes by the populace."¹¹⁰ To paraphrase Schenk,

¹⁰¹ See Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 104(a), 95 Stat. 172, 188 (1981) (codified as amended at I.R.C. § 1(f) (Supp. 2017)).

¹⁰² Schenk, *supra* note 10, at 284.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See McCaffery, *supra* note 40, at 1927–33. McCaffery uses the "Leviathan hypothesis" to help explain "how cognitive effects mesh with other descriptive and political features in a general theory of taxation." *Id.* at 1926–27. The Leviathan hypothesis contends that government (or any bureaucracy) will continue to expand akin to a living organism, "motivated by base self-interest and instincts for self-preservation and enlargement." *Id.* at 1927. McCaffery concedes that "the growth of the federal government in the United States over time lends support to the basic metaphor." *Id.* In sum, the "Leviathan hypothesis suggests that governments [and government actors (e.g. legislators)] will act like tax-maximizing monopolists, hoping to hit the peak of the Laffer curve and stopping just short of squeezing blood from a stone. Yet, almost inevitably, they will go too far." *Id.* at 1930.

¹⁰⁷ Schenk, *supra* note 10, at 284–285.

¹⁰⁸ *Id.* at 284 (citing Amy Finkelstein, *E-ZTAX: Tax Salience and Tax Rates*, 124 Q.J. ECON. 969, 1009 (2009)).

¹⁰⁹ Schenk, *supra* note 10, at 284.

¹¹⁰ *Id.* at 285.

it would be foolhardy to suggest that lawmakers should unabashedly favor low-salience taxes because of their political expediency.¹¹¹ Yet it would be just as shortsighted, taking into account the citizenry's generally strong aversion to taxes, to suggest that lawmakers should not take salience into account as a fiscal policy tool to spare taxpayers the "psychic pain of paying taxes."¹¹²

To illustrate, Schenk conjures a general political setting in which exploiting salience might be preferable: one where Congress's political climate makes it "impossible for Congress to raise tax rates directly," even where additional revenues are warranted.¹¹³ In this type of setting, low-salience taxes have the potential to overcome a political-economy of tax legislation.¹¹⁴

In circumstances like these, Schenk offers a three-pronged argument to justify Congress's use of low-salience taxes: (1) general cognitive preferences to avoid losses; (2) budget crises; and (3) political rhetoric that makes it difficult to raise taxes directly. Schenk's first justification for low-salience taxes examines the cognitive bias of loss aversion as an analog to tax aversion.¹¹⁵ As noted above, loss aversion follows from Kahneman and Tversky's "prospect theory."¹¹⁶ This theory is based on a cognitive bias, which suggests that to the human mind, losses are more painful than gains are pleasurable, so humans tend to prefer loss avoidance over equivalent gains.¹¹⁷ Schenk cites the loss aversion literature associated with tax to suggest that the "disutility from paying taxes is greater than that from other types of losses."¹¹⁸ This illustrates the precariousness of Congress's circumstance. Taxpayers operate with a general aversion to any loss but assign particular disdain to losses generated through taxes. This is true even while taxpayers expect Congress to fund government programs that provide for their welfare.¹¹⁹ Thus, an initial justification for the use of

¹¹¹ *Id.*

¹¹² *Id.* at 284.

¹¹³ *Id.* at 297.

¹¹⁴ *Id.* at 298.

¹¹⁵ *Id.*

¹¹⁶ Kahneman & Tversky, *supra* note 72, at 278–88.

¹¹⁷ Schenk, *supra* note 10, at 283.

¹¹⁸ *Id.* at 298 n. 175 (citing Christopher C. Fennell & Lee Anne Fennell, *Fear and Greed in Tax Policy: A Qualitative Research Agenda*, 13 WASH. U. J.L. & POL'Y 75, 79 (2003)) (defining one kind of tax aversion as "the amount by which one's aversion to a tax exceeds the economic cost of the tax."); Joshua D. Rosenburg, *The Psychology of Taxes: Why They Drive Us Crazy and How We Can Make Them Sane*, 16 VA. TAX REV. 155, 157–58 (1996) ("Most working Americans would readily acknowledge that taxes drive them crazy. . . . [O]nly tax laws seem capable of engendering nearly universal anger, anxiety, paranoia and outright hatred, as well as substantial noncompliance. . . . For most Americans, any tax is a bad tax. . . .").

¹¹⁹ See *Little Public Support for Reductions in Federal Spending: Low Trust in Government; Little Confidence in the Public's Political Wisdom*, PEW RES. CTR. (Apr. 11, 2019), <https://www.people-press.org/2019/04/11/little-public-support-for-reductions-in-federal-spending/> [<https://perma.cc/X8TH-A8DK>]. The Pew Research survey found that "most either want to increase spending or maintain it at current levels." *Id.*

politically low-salience taxes, given strong taxpayer aversion to increased taxes, is that low-salience taxes may be politically unavoidable when considered in light of the cognitive biases under which taxpayers operate.

As a second justification for exploiting low-salience taxes, Schenk considers the budget crisis in which the United States was then operating.¹²⁰ This reasoning rings even truer with the promulgation of the TCJA, which—according to Congressional Budget Office estimates—will increase the budget deficit by around \$12 trillion.¹²¹ This justification could be a subset to or consequence of the tax aversion concept. Schenk affirms, based on government reports, that under then-current law (2009) the federal government would only collect enough revenue to meet two-thirds of expected expenditures by 2080.¹²² The TCJA will most likely exacerbate this disparity.

Simply stated, yet rife with political peril, Schenk considers two possible solutions to dramatic budget imbalances: (1) cut spending, and/or (2) raise revenue. Schenk points out that neither Congress nor the public has shown much of an appetite for spending cuts.¹²³ Elements of the Leviathan hypothesis lurk beneath this barrier to fiscal solvency, this time related to the cognitive bias of loss aversion.¹²⁴ Once a government program is in place, it is hard to take away. The second solution Schenk considers for addressing budget imbalances—raising revenue—generally faces bleak prospects in light of the citizenry's general and strong aversion to tax increases.¹²⁵ Schenk elaborates on this conundrum and goes so far as to suggest that the current political climate makes it impossible to increase rates or expand the base in a direct and salient way.¹²⁶

Schenk's third prong suggests that low salience taxes may be the only option left for raising taxes, given a Congress rife with political rhetoric and an electorate utterly averse to new taxes.¹²⁷ Her rationale is explained through Mancur Olson's public choice theory, an economic model used to explain interest group politics.¹²⁸

¹²⁰ Schenk, *supra* note 10, at 299.

¹²¹ CONG. BUDGET OFF., THE BUDGET AND ECONOMIC OUTLOOK: 2018 TO 2028, at 4 (2018), <https://www.cbo.gov/system/files/2019-04/53651-outlook-2.pdf> [<https://perma.cc/TRC7-RA7N>]. Summary Table 2 notes that over the period 2019–2028, projected revenues will be \$44.2 trillion relative to \$56.6 trillion of outlays. *Id.*

¹²² Schenk, *supra* note 10, at 299 (citing FIN. MGMT. SERV., U.S. TREASURY DEP'T, FINANCIAL REPORTS OF THE U.S. GOVERNMENT: 2009 FINANCIAL REPORT OF THE UNITED STATES GOVERNMENT - MANAGEMENT'S DISCUSSION AND ANALYSIS 23 chart J (Feb. 26, 2010), <http://www.gao.gov/financial/fy2009/09mda.pdf> [<https://perma.cc/AQP7-WKSC>]).

¹²³ *Id.*

¹²⁴ See McCaffery, *supra* note 40 and accompanying text.

¹²⁵ Schenk, *supra* note 10, at 299.

¹²⁶ *Id.* at 300.

¹²⁷ *Id.*

¹²⁸ *Id.* (citing MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965)).

Under Olson's model, the government is an actor in a market transaction, "providing goods and services (via legislation) to interest groups."¹²⁹ In turn, these interest groups, while seeking to maximize their members' incomes, "bid for legislation and pay for it" with campaign contributions and votes.¹³⁰ Schenk points to two scholarly works that have attempted to explain tax legislation through public choice theory.¹³¹ As Schenk highlights, Doernberg and McChesney make a rent-seeking argument: that unstable federal tax legislation can be explained "by Congress's responding to well-organized groups who paid for tax benefits that maximized their wealth."¹³² Likewise, McCaffery and Cohen suggest that tax legislation may be better explained, but not completely explained, by rent extraction: politicians have a tendency to focus on tax provisions that apply "to very few people who face high stakes" and then threaten to eliminate the rent by imposing higher taxes elsewhere or eliminating a tax incentive.¹³³ Schenk leans towards this model as a better predictive tool to forecast political behavior. The rent extraction model predicts that Congress will avoid ballot box issues (e.g., setting tax rates) during elections and that "payments" to politicians (e.g., donations and votes) may occur to simply maintain the status quo.¹³⁴ It also suggests that interest groups and legislators are equally interested in recurring opportunities to bargain and extract rents, respectively.¹³⁵ This means that interest groups lobbying for benefits will be disinterested in tax rate changes, as such rate changes could potentially block future opportunities for bargaining.¹³⁶ In this light, public choice theory supports the view that raising taxes—a ballot box issue—will be of equally little interest to interest groups and legislators alike.

Schenk cites several other impediments that compound barriers to direct tax reform. One such compounding barrier is the permanent campaign station in which members of Congress find themselves—dedicating efforts to raising money rather

¹²⁹ *Id.* (citing MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965)).

¹³⁰ *Id.*

¹³¹ *Id.* at 301.

¹³² *Id.* (citing Richard Doernberg & Fred McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891 (1987)); Richard Doernberg & Fred McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 926 (1987)).

¹³³ Schenk, *supra* note 10, at 302 (citing Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159 (2006)). Schenk notes that McCaffery and Cohen describe the government actor as a "rent extract[or]" and the interest group as a "rent-seek[er]." *Id.* at 301. The interest group is a rent seeker as it attempts to win preferences from legislators that are not available in the open market. The government actor is a rent extractor as it regulates to either favor interest groups or create barriers to insulate interest groups from competitors in the open market. In sum, legislators provide "rent" to interest groups in the form of preferential regulation beyond what is available in the open market. *Id.* at 301–02.

¹³⁴ *Id.* at 302–03.

¹³⁵ *Id.* at 303.

¹³⁶ *Id.*

than engaging in thoughtful dialogue with an eye towards collaboration for the public good.¹³⁷ The “poisonous atmosphere with respect to taxes” similarly makes direct tax increases unlikely.¹³⁸ This atmosphere becomes more toxic as the public consumes media sound bites and political takes to formulate an opinion on tax policy, with particular angst for anything that may be contrived as a tax increase. This all culminates with irreconcilable taxpayer perspective: to pay as little tax as possible but to receive as large public benefits as possible.

For Schenk then, because politics dictates tax policy in the real world, a normative argument exists for the government to take advantage of cognitive error, rather than attempt to correct it.¹³⁹ On this groundwork, Schenk builds her argument subject to two conditions. First, the process by which low-salience taxes are promulgated must be reasonably transparent.¹⁴⁰ Second, the information with respect to the low-salience provisions must be readily available.¹⁴¹ If these conditions are satisfied, Schenk asserts, “there is no convincing argument that it would be wrong for the government to take error into account by effectively using politically pleasing taxes or provisions.”¹⁴²

These conditions, to some degree, clarify and validate Schenk’s position. Exploitation of the taxpayer’s cognitive bias is distinguishable from exploitation of the taxpayer. Schenk is not arguing for the promulgation of tax laws that are unknowable or undiscoverable to the taxpayer. With all candor, she argues that information regarding low-salience taxes should be within the reach of any taxpayer who chooses to make an effort to find it.¹⁴³ Similarly, the process through which those laws come to light should be discoverable if the taxpayer feels so compelled.¹⁴⁴ The cognitive bias of salience exists because most taxpayers will not make that effort.

Kahneman illustrates the process through which the human mind perceives information with two distinct systems: System 1 and System 2.¹⁴⁵ The human mind relies on System 1 to react, interpret, and otherwise manage daily existence.¹⁴⁶ Only

¹³⁷ *Id.* at 304.

¹³⁸ *Id.* at 308.

¹³⁹ *Id.* at 310.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Kahneman gives credit for the System 1 and System 2 terms to Keith E. Stanovich and Richard F. West, both of whom “greatly influenced” his thinking. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 450 n.20 (2013); see Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate*, 23 BEHAV. & BRAIN SCI. 645, 658–59 (2000). See generally RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) (using the System 1/System 2 terms to describe why nudges (rather than paternalistic compulsion) lead to better decision-making).

¹⁴⁶ See KAHNEMAN, *supra* note 145, at 20–22.

when compelled by a difficult task will the human mind engage System 2, and concert effort towards that task.¹⁴⁷ Schenk's framework relies on the laziness of the human mind and its ongoing tendency to System 1. Low-salience taxes only remain so because taxpayers will generally be unwilling to engage System 2 to make the tax provisions more salient. Schenk's conditions ensure that means of enactment and information with respect to the tax provisions are observable and available to the taxpayer.

Put another way, Schenk describes salience as exogenous¹⁴⁸ (i.e., salience is caused by external forces or factors outside the tax provision). This idea, mingled with Kahneman's framework, seems to suggest that salience exists in circumstances where: (1) the tax law is not simple enough to understand with System 1; (2) the media or other external parties distill the tax law to something that can be understood with System 1 in the form of a newspaper article (or increasingly more common, a tweet); or (3) taxpayers engage System 2 to fully understand or react to certain tax provisions. Circumstance 1 is as likely as circumstance 3 is unlikely. Circumstance 2 usually occurs in the context of rates and a superficial understanding of deductions and exemptions. Most taxpayers will rely on System 1 to perceive the tax law.¹⁴⁹ They will understand it to the extent it enables them to formulate a System 1-inspired map of their tax exposure.¹⁵⁰ The key element here is that they are cognitively satisfied with this understanding because to understand any further would compel System 2 engagement.

In all this, for Schenk, "an attempt to minimize the perceived burden of a tax is not wrong per se."¹⁵¹ Congress needs revenues, but raising taxes is politically difficult. The use of low-salience taxes, subject to Schenk's conditions, represents a viable alternative to continued deficit spending.

IV. FAULHABER'S HYPERSALIENCE

Faulhaber's contribution to the literature represents the first analysis of "revenue-reducing tax provisions" through the lens of salience. As explored above, for Faulhaber, this was an omission in the literature related to a significant aspect of salience. In the case of revenue-*raising* provisions, taxpayers tend to underestimate their tax liability as a tax becomes *less* salient.¹⁵² By contrast, in the case of revenue-*reducing* tax provisions, taxpayers underestimate their tax liability (as they overestimate the reduction to their tax burden) as tax-reducing provisions become *more* salient.¹⁵³ In either case, misapprehension of tax exposure occurs.

¹⁴⁷ *Id.* at 21–24.

¹⁴⁸ Schenk, *supra* note 10, at 310.

¹⁴⁹ *See id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Faulhaber, *supra* note 21, at 1309.

¹⁵³ *Id.*

In her salience analysis of revenue-reducing provisions, Faulhaber identified the charitable contribution deduction as the quintessential example of hypersalience.¹⁵⁴ Though the charitable deduction is not the only tax-reducing provision that bears hypersalient qualities, Faulhaber considers it the best vehicle for exploring hypersalience's implications. After all, she notes, it is perhaps the most well-known deduction as charities commonly alert potential donors that their donations are tax-deductible.¹⁵⁵ At the same time, relatively few people are aware of the limitations associated with the charitable deduction.¹⁵⁶

A. *The Effects of Hypersalience*

To explain why hypersalience deserves policymakers' attention, Faulhaber makes three distinct points: (1) through promises of tax benefit for donations, third-party charities create general awareness of the charitable contribution deduction, without fully announcing associated limitations; (2) the notion of hypersalience calls into question the effectiveness of economic models for validating tax policy; and (3) hypersalience "may lead to an economically inefficient level of consumption."¹⁵⁷ First, hypersalience explains a likely unintended consequence of government-subsidized charitable giving: that third-parties can play a significant role in increasing taxpayer-awareness of the charitable contribution deduction, even if only on the most superficial level.¹⁵⁸ Charitable appeals are often followed by or offered in connection with a promise of tax benefit.¹⁵⁹ The promise of tax deductibility is not a trivial matter for charities. They navigated the process of obtaining tax-exempt status and have acquiesced to certain rules pertaining to that exemption. For example, they sacrifice their ability to intervene (positively or negatively) in the political campaign process.¹⁶⁰ They pledge to engage in lobbying only as an ancillary

¹⁵⁴ *Id.* at 1323.

¹⁵⁵ *Id.* at 1309.

¹⁵⁶ *Id.* at 1309–10. Faulhaber further notes that the charitable contribution deduction has been around a long time and "is not hampered by a short existence or varying provisions." *Id.* at 1310. As a final reason, she notes that the charitable contribution deduction "is unlikely to disappear in the near future." *Id.*

¹⁵⁷ *Id.* at 1328.

¹⁵⁸ *Id.* at 1342.

¹⁵⁹ See, e.g., *Frequently Asked Questions*, SPECIAL OLYMPICS, <https://www.specialolympics.org/get-involved/donate/faq> [<https://perma.cc/RGP3-MAPB>] (last visited Sept. 10, 2019); *Make Your Gift*, GREATERGOOD, <https://greatergood.org/donate/> [<https://perma.cc/8B5Q-U54P>] (last visited Sept. 10, 2019); *Your Donation Is Tax Deductible*, FEEDING AMERICA, <https://www.feedingamerica.org/ways-to-give/faq/tax-deductible-donation> [<https://perma.cc/ZK2C-M62R>] (last visited Sept. 10, 2019).

¹⁶⁰ An organization "organized and operated" exclusively for, *inter alia*, religious, charitable, scientific, testing for public safety, literary, or educational purposes, is exempt from tax if it does not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3) (2012).

activity to their primary charitable purpose.¹⁶¹ All this then, from the charities' perspectives, entitles them to flout their status as a charity capable of receiving tax-deductible donations.

By the same token, charities have no interest in educating the population of potential donors regarding the limitations associated with charitable giving—in particular, the mutual exclusivity associated with itemizing (receiving a benefit for charitable giving) or taking the standard deduction (receiving no benefit for charitable giving). Thus, third-party, non-governmental actors propagate hypersalience, according to Faulhaber, as charities market the charitable contribution deduction (increasing its general salience) while limitations remain hidden from general public awareness.¹⁶²

The second reason Faulhaber cites for why hypersalience deserves policymakers' attention is that hypersalience suggests economic models for validating tax policy may not accurately capture taxpayer behavior.¹⁶³ This point underlies the dissonance between economics and psychology.¹⁶⁴ In the context of the charitable contribution deduction, Faulhaber highlights economic models of price elasticity as an example.¹⁶⁵ These models measure the incentivizing effect of the charitable contribution deduction given that the tax benefits associated with charitable giving decrease the marginal price of giving.¹⁶⁶ Specifically, they inquire: “what percentage change in giving is engendered by a one percent decrease in the price of giving?”¹⁶⁷ Economists consider this measure “the ‘treasury efficiency’ of the tax incentive.”¹⁶⁸ Ignoring the existence of hypersalience, Faulhaber suggests

¹⁶¹ *See id.*

¹⁶² Faulhaber, *supra* note 21, at 1342.

¹⁶³ *Id.* at 1330.

¹⁶⁴ In order to illustrate the differences between the disciplines of economics and psychology in this regard, Richard Thaler and Cass Sunstein describe two separate beings: Econs and Humans. THALER & SUNSTEIN, *supra* note 145, at 6–8. Kahneman borrows the terms Econs and Humans to suggest that it is as if economists and psychologists are studying two “different species.” KAHNEMAN, *supra* note 145, at 269. The Econs represent the object of economic theory, they are rational, selfish, and have tastes that do not change. *Id.* Psychologists study Humans, and take it as a given that “people are neither fully rational nor completely selfish, and that their tastes are anything but stable.” *Id.*

¹⁶⁵ Faulhaber, *supra* note 21, at 1310.

¹⁶⁶ In relation to the magnitude of the incentive, Mark Gergen describes the upside-down subsidy effect. Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1405 (1988). The upside-down subsidy makes it “cheaper for high-bracket taxpayers to give.” *Id.* For example, “[a] person in a thirty-three percent bracket pays, after tax, sixty-seven cents for each dollar she gives to charity. A person in a fifteen percent bracket pays eighty-five cents. A poor man who pays no taxes pays one dollar to give one dollar to charity.” *Id.*

¹⁶⁷ J. Mark Schuster, *Tax Incentives in Cultural Policy*, in 1 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 1253, 1272 (Victor A. Ginsburgh & David Throsby eds., 2006).

¹⁶⁸ *Id.*

that economic models of price elasticity may “underestimate taxpayer response to changes in tax rates and the charitable contribution deduction may, in fact, be more treasury efficient than previously thought.”¹⁶⁹

Faulhaber points to overconsumption as a third and final reason for which policymakers should understand the effects of hypersalience on decision-making.¹⁷⁰ Ostensibly, hypersalience invites taxpayers to consume more of certain goods (in this case, to make more charitable contributions) than they would if the deduction were fully salient. Though Faulhaber acknowledges that this, in the context of charitable giving, may be fine, it could raise concerns with respect to other deductions like the home mortgage interest deduction.¹⁷¹

B. *Hypersalience and the Charitable Contribution Deduction*

At the outset, Faulhaber concedes that she can point to no empirical proof to confirm the existence of hypersalience.¹⁷² Studies have confirmed that taxpayer motivation for giving may be based on pure altruism or a combination of altruism and tax benefit.¹⁷³ Otherwise, Faulhaber depends on anecdotal support for the general notion that the charitable contribution deduction is salient. She points to “all types of media”—with particular emphasis on media disseminated for the purpose of drumming up support for public charities—that help contribute to the public awareness of tax benefit correlating with charitable giving.¹⁷⁴

Though it is true that no empirical studies existed at the time to test the saliency of the charitable contribution deduction, Jacob Goldin and Yair Listokin, a year after Faulhaber’s article was published, investigated the salience of the charitable contribution deduction and the home mortgage interest deduction.¹⁷⁵ Their findings generally contravene Faulhaber’s assertion that at least superficially, the charitable contribution deduction approaches full saliency.¹⁷⁶

Goldin and Listokin’s study concerns the perception of incentives: how do taxpayers perceive the tax benefits associated with the charitable contribution

¹⁶⁹ Faulhaber, *supra* note 21, at 1310. “Although the greater treasury efficiency of certain provisions could be seen as a positive consequence of hypersalience,” Faulhaber takes the position that the better course is curtailment. *Id.* at 1311. Her justification is that hypersalience relies on “ignorance or misunderstanding.” *Id.*

¹⁷⁰ *Id.* at 1344.

¹⁷¹ *Id.* at 1336–37.

¹⁷² *Id.* at 1320.

¹⁷³ Faulhaber cites to Andreoni’s study which found that a combination of tax incentive and altruism often motivate giving. *Id.* at 1319 (citing James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 *ECON. J.* 464, 464–77 (1990)).

¹⁷⁴ *See id.* at 1320.

¹⁷⁵ Goldin & Listokin, *supra* note 38, at 145.

¹⁷⁶ *See id.* at 168.

deduction and the home mortgage interest deduction?¹⁷⁷ On this point, they identify three potential levels of perception. First, taxpayers may “correctly perceive the incentives the expenditures generate”—a “fully salient” tax expenditure.¹⁷⁸ Second, taxpayers may “under-account for the true incentives the expenditures generate”—a result which compels a “low-salience” classification in relation to the tax expenditure.¹⁷⁹ Finally, taxpayers may “overestim[ate] the associated tax benefits” stemming from a tax expenditure.¹⁸⁰ Goldin and Listokin classify this perception as “hyper-salient.”¹⁸¹

These classifications are further distilled into economic explanations. Goldin and Listokin first define terms: the “true [(also termed actual)] subsidy rate” is equal to “the actual effect of a tax expenditure on the after-tax price of the targeted behavior.”¹⁸² The “perceived subsidy rate” is equal to the “tax savings as understood by taxpayers when making decisions.”¹⁸³ Given these definitions, a tax expenditure has “low salience” if “the perceived subsidy rate is below the actual [true] subsidy rate.”¹⁸⁴ A tax expenditure has “full salience” if the perceived subsidy rate and the actual subsidy rate are about equal.¹⁸⁵ “Hypersalience” defines a tax expenditure in which the “perceived subsidy rate exceeds the actual subsidy rate.”¹⁸⁶

Goldin and Listokin identify two distinct ways in which tax expenditures fall short of or exceed full salience. In one, taxpayers make “eligibility mistakes” (i.e., “errors as to whether they qualify for a particular tax subsidy”).¹⁸⁷ In the other, taxpayers make “magnitude errors” (i.e., they make “mistakes about the amount of savings associated with a particular subsidy for which they qualify”).¹⁸⁸

Eligibility mistakes can occur positively or negatively. Goldin and Listokin describe an eligibility mistake that occurs when “a taxpayer who is eligible for the [charitable contribution deduction] . . . falsely believe[s] that he is not eligible” as a “false-negative.”¹⁸⁹ In the other direction, they describe a taxpayer who falsely believes himself eligible for the charitable contribution deduction to make a “false-positive mistake.”¹⁹⁰ A false negative undermines the incentive as taxpayers operating under this perception will be less inclined to give. A false positive will compel taxpayers to give without any actual tax incentive to do so.

¹⁷⁷ *Id.* at 145.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 149.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

“Magnitude errors” distort the amount of tax benefit available to a taxpayer.¹⁹¹ Goldin and Listokin illustrate with a single filing status, itemizing taxpayer whose taxable income will be taxed at a marginal rate of 25%.¹⁹² The true subsidy rate for every dollar donated to charity is 25 cents.¹⁹³ If this taxpayer “under-estimates the actual subsidy, . . . the perceived price of charitable giving will exceed 75 cents,” which is a deterrent to giving.¹⁹⁴ If the taxpayer overestimates the actual subsidy, the perceived price of charitable giving will be less than 75 cents, thus enhancing the perceived benefit of additional donations.¹⁹⁵

With all this as groundwork, the study’s findings were counterintuitive as they related to the charitable contribution deduction. Eligibility mistakes were estimated based on the taxpayer’s response to question #13 of the survey: “*When your[sic] file your income taxes, do you usually itemize deductions or do you take the standard deduction?*”¹⁹⁶ Potential responses to these questions were: “*I usually itemize my deductions; I usually take the standard deduction; and I don’t know.*”¹⁹⁷ Goldin and Listokin then measured the frequency with which taxpayers correctly responded to a separate question on whether charitable giving would affect the amount of taxes owed to the government. Taking itemizers and non-itemizers as a whole, 72% correctly perceived the effect that charitable giving would have on their overall tax liability (decrease taxes for itemizers; no effect for non-itemizers).¹⁹⁸ Forty-six percent of itemizing respondents made false negative mistakes, reporting that charitable giving would have no effect on their tax liability.¹⁹⁹ Finally, and perhaps most perilously for Faulhaber’s anecdotal assumptions, only 11% of non-itemizers made “false-positive” mistakes; as ineligible taxpayers, they perceived that charitable giving would reduce their tax liability.²⁰⁰

Though Goldin and Listokin had not yet published their paper, Faulhaber had access to the unpublished manuscript and briefly responded to Goldin and Listokin’s findings. She made two points. First, she noted that the study focused on taxpayers “who are aware of their itemization status.”²⁰¹ Respondents who answered that they did not know their filing statuses were excluded from the analysis.²⁰² This exclusion allowed Goldin and Listokin to narrow on their research questions, but the effect of

¹⁹¹ *Id.*

¹⁹² *Id.* at 149–50.

¹⁹³ *Id.* at 149.

¹⁹⁴ *Id.* at 150.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 175.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 156–57.

¹⁹⁹ *Id.* at 157.

²⁰⁰ *Id.* at 157.

²⁰¹ Faulhaber, *supra* note 21, at 1316 & n.48.

²⁰² *See id.* at 1316 n.48.

this exclusion for Faulhaber is that the question of hypersalience (as she defined it) was not directly addressed in the study.²⁰³

That said, her second point notes Goldin and Listokin did detect that “a number of taxpayers who do not itemize believe they get a benefit from revenue-reducing tax provisions.”²⁰⁴ This was “itself evidence of hypersalience.”²⁰⁵ Faulhaber’s reference here is to the 11% of nonitemizers who made false-positive mistakes—they responded that charitable giving would help their tax circumstance.²⁰⁶ Though accurate, this small minority of nonitemizer respondents must have been short of what Faulhaber had expected based on anecdotal experience and conventional wisdom.

Three additional observations are warranted in relation to the interplay between Faulhaber’s study and Goldin and Listokin’s findings. First, Goldin and Listokin’s definition of salience seems to differ from Faulhaber’s, which considers the “prominence of an item: the more salient something is, the more aware individuals are of its effects.”²⁰⁷ The focal point of Faulhaber’s definition is cognitive *awareness* based on prominence or lack thereof. This suggests a System 1²⁰⁸ type of thinking operation; a taxpayer relies on her innate ability to become aware of the charitable contribution deduction without engaging System 2 to explore whether that superficial level of understanding is correct. In contrast, Goldin and Listokin’s definition of salience focuses on individual *perception* of the tax law.²⁰⁹ This is a nuanced distinction. Awareness is a state of cognition. Perception requires more than awareness; it requires learning. Awareness is a state of being. Perception connotes active understanding. Perception springs from engaging System 2²¹⁰ thinking operation and allocating some level of mental effort to determine whether understanding is accurate.

Consider that Goldin and Listokin investigate the way in which individuals perceive the tax law related to the charitable contribution deduction and the home mortgage interest deduction, specifically their perception of incentives.²¹¹ Correct perception of incentives is the measure for full salience.²¹² An under-accounting perception suggests low-salience and an over-accounting perception hypersalience.²¹³

Contrast Goldin and Listokin’s definitions with Faulhaber’s more expansive, even if less precise, definition of salience. Her focus is the prominence (awareness)

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See Goldin & Listokin, *supra* note 38, at 157.

²⁰⁷ Faulhaber, *supra* note 21, at 1307.

²⁰⁸ See KAHNEMAN, *supra* note 145, at 20.

²⁰⁹ Goldin and Listokin, *supra* note 38, at 145.

²¹⁰ See KAHNEMAN, *supra* note 145, at 20.

²¹¹ Goldin and Listokin, *supra* note 38, at 145.

²¹² *Id.*

²¹³ *Id.*

of tax provisions and the tax system as a whole in the minds of taxpayers, irrespective of true understanding of the provisions' implications.²¹⁴ In other words, by Faulhaber's definition, a tax-reducing provision is fully salient when taxpayers are generally aware of the provision—something approaching common knowledge. A tax-reducing provision has low salience if taxpayers are unaware of or fail to apprehend its incidence. These taxes are also described as hidden taxes.²¹⁵ For Faulhaber, a tax-reducing provision is hypersalient if taxpayers are fully aware of the tax provision's existence, but are unaware of or fail to appreciate associated limitations or restrictions.²¹⁶ For Goldin and Listokin, hypersalience is less a matter of awareness and more a matter of misperception through overestimation.²¹⁷ Their definition of hypersalience assumes that the taxpayer is aware of the tax provision and its associated limitations and benefits, but misperceives aspects of the provision to his or her peril.²¹⁸

In other words, if Goldin and Listokin had tested Faulhaber's definition of salience in their survey, it would have been a more broadly construed question. For example, rather than asking, in question #3, "*How does giving money to charity affect your income taxes?*,"²¹⁹ the question would have been, "*Does giving money to charity affect your income taxes?*" To test Faulhaber's definition of hypersalience, the question may have been posed to taxpayers who were aware that giving money to charity affects their income taxes along these lines: "*Does the law limit any positive tax effect that giving to charity provides?*" Thus, the inquiries would measure the respondent's general awareness that charitable giving plays a role in the tax formula, subject to limitations, but without exploring further as to whether the taxpayer understood the details of this role.

In sum, Goldin and Listokin, relative to Faulhaber, are considering separate ideas. To be sure, the salience definitions are related; but they are distinct in important ways that may help reconcile the two articles. With this reconciliation, Faulhaber's definition of hypersalience—the object of this paper—survives Goldin and Listokin's study and remains viable as a tool for analyzing tax policy.

As a second observation, Edward McCaffery suggests that the papers are complementary.²²⁰ He notes that Faulhaber's definition of hypersalience relates to "a phenomenon common to marketers . . . —ignoring the fine print."²²¹ Taxpayers

²¹⁴ See Faulhaber, *supra* note 21, at 1307.

²¹⁵ *Id.* at 1313.

²¹⁶ *Id.* at 1309.

²¹⁷ Goldin & Listokin, *supra* note 38, at 145.

²¹⁸ *Id.* at 149 (explaining the language used to describe a "hyper-salient" tax provision hinges on the taxpayer's perception that the subsidy rate exceeds the actual subsidy rate).

²¹⁹ *Id.* at 172.

²²⁰ E-mail from Edward J. McCaffery, Professor of Law, U.S.C. Gould Sch. of Law, to Eric Smith, Assoc. Dean, Goddard Sch. of Bus. & Econ. (Oct. 22, 2019, 10:18 AM MST) (on file with author).

²²¹ *Id.*

“focus on the salient benefit, to the exclusion of the less salient restrictions.”²²² He considers Faulhaber to have identified a “possibility,”²²³ akin to a person signing up for a timeshare property without reading the fine print. The aspiring vacationer focuses on the possibility of affordable vacation residences in a variety of exotic places without taking into account undesirable timeframes of availability or excessive cancellation fees. Faulhaber theorizes (and Goldin and Listokin do not disprove) that some taxpayers focus only on the possibility of deduction without exploring associated limitations.

For McCaffery, Faulhaber’s study may be best understood as a *part* of Goldin and Listokin’s “empirical analysis of what taxpayers actually think.”²²⁴ To make this point, he emphasizes that 11% of nonitemizers who incorrectly believed that tax benefit flows from their charitable giving “is not an insignificant number (as 90% of all taxpayers now don’t itemize, so that’s like 10% of the taxpaying public.)”²²⁵ In all, Goldin and Listokin empirically discover that “lots of stuff” seem to be going on with the charitable contribution deduction, and Faulhaber’s “effect may be a *part* of that.”²²⁶

McCaffery’s main point of distinction is that Faulhaber’s hypersalience is “theoretical, a possibility result,” while Goldin and Listokin’s study is empirical.²²⁷ The empirical approach confirms that “the real world is complex, because there are often cross currents, and this may be especially true in tax (which is complex).”²²⁸ Faulhaber’s theory is not inconsistent with this overall finding.

A third and final, though much more brief observation is warranted: if we focus on Goldin and Listokin’s findings, that “taxpayers appear to markedly underestimate the tax savings associated with charitable donations,” it should sound an alarm for charities.²²⁹ Goldin and Listokin note that this finding contravenes conventional wisdom, but suggest that the charitable contribution deduction is an ineffective way to promote charitable giving.²³⁰ By the same token, it may well imply that charities are ineffectively promoting the tax benefits associated with giving.

For purposes of this discussion, this Article acknowledges that Goldin and Listokin’s work related to tax expenditure salience is an important contribution to the literature. Even so, this work did not disprove Faulhaber’s anecdotal assertions related to salience as a construct of awareness, nor did it disprove her associated analysis. As such, her analysis of hypersalience continues as the basis for this Article.

²²² *Id.* (noting this may be an example of the “isolation effect”).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* (emphasis in original).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Goldin & Listokin, *supra* note 38, at 168.

²³⁰ *Id.*

V. MARKET SALIENCE, POLITICAL SALIENCE, AND THE EXPLOITATION
OF HYPERSALIENCE

In the aftermath of the TCJA tax reform, the incentive of the charitable contribution deduction was somewhat muted.²³¹ Going forward, the increased standard deduction will inevitably minimize the number of itemizing taxpayers.²³² Even potentially more perilous for charities, at least anecdotally, taxpayers are (or were on a broader proportional basis at the end of 2017) more aware of this effect in the tax law. Yet this phenomenon is statutorily and politically temporary. By the statute itself, the new standard deduction amounts will expire after December 31, 2025.²³³ Given the partisan terms on which Congress passed the TCJA into law, there is a likelihood that a Democrat-controlled Congress will accelerate the standard deduction's return to pre-TCJA levels.²³⁴

In either case, in time, if Faulhaber's hypersalience has at all waned, it is likely to reengage as a significant cognitive bias in the typical taxpayer's awareness of the charitable contribution deduction. With each day that passes, despite the standard deduction's moment in the limelight—November and December of 2017—it will fade into obscurity. If and when the standard deduction returns to its pre-TCJA rates, as noted above, it will likely garner general media attention. This attention has the potential to enhance Faulhaber's hypersalience to new levels on at least two fronts: (1) via inadequate or inaccurate media portrayal; and (2) via promotions by charities.

First, the media's broad-based coverage will likely not include a detailed analysis of the mutually exclusive relationship between the standard deduction and itemized deductions. The much more intriguing headline (one that will sell newspapers or drive Internet traffic) will focus on the fact that more taxpayers will now be able to deduct their charitable contribution deductions.

Many taxpayers who will consume this media coverage were not affected by the TCJA and would not be affected by a reinstatement of pre-TCJA standard deduction amounts.²³⁵ They are non-itemizers in either case: they take the standard

²³¹ See discussion *supra* Part I.

²³² See discussion *supra* Part I.

²³³ I.R.C. § 63(c)(7) (Supp. 2017). Even with enhanced awareness, hypersalience remains in some form. It is unreasonable to suggest that November and December's lead-up to the TCJA lifted all American taxpayers to a full awareness of the standard deduction and its overriding role relative to the charitable contribution deduction.

²³⁴ See discussion *supra* Part I.

²³⁵ According to the Tax Policy Center, 69% of taxpayers in 2016 took the basic Standard Deduction or the Standard Deduction plus additional deduction for age and/or blindness. TAX POL'Y CTR., *Key Elements of the U.S. Tax System: What Are Itemized Deductions and Who Claims Them?*, in THE TAX POLICY CENTER'S BRIEFING BOOK, <https://www.taxpolicycenter.org/briefing-book/what-are-itemized-deductions-and-who-claims-them> [<https://perma.cc/SJ6X-PPEN>] (last visited Oct. 26, 2019). Substantially all of these taxpayers will take the Standard Deduction in years during which the TCJA is in effect. See *id.*

deduction and receive no tax benefit for charitable giving. Nevertheless, their perception may well have been affected. When reports in November and December of 2017 announced that charities were in trouble because fewer taxpayers would be eligible to deduct their charitable gifts (because they would opt to take the standard deduction instead),²³⁶ a taxpayer's reasonable conclusion may have been that tax benefits no longer followed charitable giving. This was an inaccurate perception. In the future, when media coverage reports that charities are either lauding Democrats for reviving the charitable contribution deduction (through lowering the standard deduction to pre-TCJA levels) or celebrating the expiration of the TCJA standard deduction amounts at the end of 2025, taxpayer awareness will be affected in the opposite direction. They could not be blamed for thinking their charitable giving is deductible again, even if it never was in the first place.

In similar fashion, charity-sponsored marketing campaigns and promotional events may place renewed emphasis on the expiration or revision of the TCJA standard deduction amounts. Charities will have born as many as eight years with the inflated standard deduction amounts. It will be their opportunity to make up for lost time. It would be reasonable to assume that fundraising pitches and advertisements could feature, perhaps more prominently than ever before, the promise that donations are *again* tax-deductible.²³⁷ With all this then, what should be done? Should hypersalience be squelched? Should Congress take affirmative steps to unwind hypersalience before it returns to or surpasses pre-TCJA levels? Or does an opportunity exist for the exploitation of hypersalience by simply leaving it be? Answers to these questions will consider hypersalience through lenses of market salience and political salience.

A. Market Salience

Schenk describes the notion of market salience²³⁸ as an economic response: specifically an observation of how changes in individual decision making vary with the salience of a tax or tax provision.²³⁹ For example, empirical studies have shown

²³⁶ See, e.g., Robert Channick, *Charities Fear GOP Tax Plan Could Lead to Loss of Billions of Dollars in Charitable Donations*, CHI. TRIB (Nov. 13, 2017, 08:53 AM), <http://www.chicagotribune.com/business/ct-biz-trump-tax-plan-standard-deduction-charities-20171109-story.html#> [<https://perma.cc/MW7X-WSSF>]; Todd C. Frankel, *Charities Fear Tax Bill Could Turn Philanthropy into a Pursuit Only for the Rich*, WASH. POST (Dec. 23, 2017), https://www.washingtonpost.com/business/economy/charities-fear-tax-bill-could-turn-philanthropy-into-a-pursuit-only-for-the-rich/2017/12/23/38b65eb6-e69a-11e7-9ec2-518810e7d44d_story.html?utm_term=.27966804638c [<https://perma.cc/NMJ9-26JF>].

²³⁷ See generally Frankel, *supra* note 236 (discussing the 2017 tax reform's impact on many charities ability to appeal to middle class donors).

²³⁸ Schenk uses the term "economic salience" in place of "market salience." See Schenk, *supra* note 10, at 272.

²³⁹ *Id.* at 273.

that a positive relationship exists between the degree of salience of sales and excise taxes and the level of change in economic behavior.²⁴⁰

In their work on market and political salience, Gamage and Shanske describe market salience as a study of “how tax presentation affects market decisions and economic activity.”²⁴¹ They normatively evaluate taxes in relation to market salience and find (contrary to the predominant opinion in the literature) that policymakers should work to reduce market salience.²⁴² The benefits of reduced market salience “may be overwhelmed by concerns related to: (1) distortionary income effects, (2) externalities, and (3) distribution.”²⁴³

A significant element of their argument is explained through “substitution effects,” meaning that shifts in taxpayer behavior occur when taxes alter the relative price of goods and activities.²⁴⁴ In economic terms, the measure of the distortion is commonly referred to as “deadweight loss.”²⁴⁵ To measure the deadweight loss connected to relative market salience, Gamage and Shanske propose a two-step analysis.

The first step is to imagine decisions taxpayers would have made in a hypothetical pretax world.²⁴⁶ Step two is to calculate how taxpayers deviate from this behavior as a result of taxation.²⁴⁷ To illustrate, Gamage and Shanske offer the example of taxed hamburgers versus untaxed hot dogs. Assume, at step one, that a taxpayer would prefer a hamburger in a pretax world.²⁴⁸ At step two, a tax is imposed on that hamburger.²⁴⁹ In response to the tax, the taxpayer will either continue to eat the hamburger, tax notwithstanding, or shift her consumption to something with less or no tax (e.g., the untaxed hot dog).²⁵⁰ The latter reaction is an illustration of the substitution effect. It shows how taxes cause market distortions or inefficiencies. The deadweight loss is equal to the amount of the difference between the taxpayer’s preference for a hamburger less the taxpayer’s amount of preference for a hot dog.²⁵¹

In the event the tax is onerous enough to cause a change in consumption—invoking the substitution effect—two undesirable outcomes follow: (1) the taxpayer loses the enjoyment (utility) of eating a hamburger (creating deadweight loss); and

²⁴⁰ Raj Chetty, Adam Looney & Kory Kroft, *Salience and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145, 1165 (2009).

²⁴¹ Gamage & Shanske, *supra* note 10, at 20.

²⁴² *Id.* at 99.

²⁴³ *Id.* at 21.

²⁴⁴ *Id.* at 62.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

(2) the government collects no additional revenues.²⁵² These are undesirable results on all fronts.

Gamage and Shanske go on to suggest that the substitution effect can be quelled by reducing the market salience of a tax instrument.²⁵³ A lower market salience tax instrument relative to a higher market salience equivalent instrument alleviates deadweight loss caused by substitution effects.²⁵⁴ Taxpayers continue to eat hamburgers, tax notwithstanding. The tax transfers resources to the government, which are then transferred back to the taxpayer and others in the form of government spending.²⁵⁵

A modified version of this model provides one aspect of the argument for exploiting hypersalience, in the context of the charitable contribution deduction from a market salience perspective.²⁵⁶ It begins with a change in assumption and perspective: from the government's standpoint, the substitution effect is desirable (even if not in terms of economic efficiencies) and should be encouraged as the taxpayer modifies behavior in response to the tax incentive—here, the salient portion of the charitable contribution deduction. It also depends on the generally accepted notion that charities fulfill a unique role in society. As they fulfill their charitable purposes, they satisfy a societal need that markets cannot address, and governments with limited resources do not have the wherewithal to satisfy. If charities are underfunded and are thereby less able or unable to fulfill their charitable purposes, the government (though likely with less precision and effectiveness) will have to make up the difference.

Admittedly, this rationale applies in proportion to the societal benefit that a charity provides. That benefit is largely dependent upon the charity's role as a proxy for the government. For example, if one of the government's roles in society is to address and mitigate poverty, the government has a strong incentive to subsidize charities that also serve that purpose (likely with more precision and more

²⁵² *Id.*

²⁵³ *Id.* at 64.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 62. In personal correspondence with the author, Hayes Holderness makes a fair criticism of this line of reasoning. See E-mail from Hayes Holderness, Assistant Professor of Law, Univ. of Richmond School of Law (Aug. 23, 2018, 11:39 MDT) (on file with author). Neither the government nor the taxpayer wins as cleanly as this narrative may depict. *Id.* Even while taxpayers continue to eat hamburgers, unaware of the tax due to its low salience, they suffer reduced spending power. *Id.* Moreover, if the taxpayer has less money to spend, the government may need to provide more services to make up the shortfall. *Id.*

²⁵⁶ This argument is a play on what Faulhaber acknowledges as “the primary argument in favor of hypersalience,” treasury efficiency. Faulhaber, *supra* note 21, at 1339. There she acknowledges that the hypersalience creates in the charitable contribution deduction an extremely treasury efficient provision. See *id.* When “a taxpayer mistakenly believes that she will benefit from a deduction and thus changes her behavior to take advantage of the deduction,” the government's goal of increased charitable giving is achieved without actually foregoing any revenue collection. *Id.* at 1339–40.

efficiently). There is no role here for markets to play, and the government is unable to offer a complete response to the poverty question in its own right. Charities close the gap.

In contrast, the societal benefit that other types of charities offer is less acute the more charities are removed from the government's perceived societal role and the more a ready market already exists for the charity's services. The University of Alabama football team, for example, enjoys tax-exempt status under the University of Alabama's umbrella.²⁵⁷ There is no expectation that the government provide this type of service for the benefit of society. Moreover, the market already provides this service in the form of the National Football League. Thus, the following analysis is strongest if the charity fulfills a quasi-governmental role that markets have no interest to satisfy. The argument wanes as the charity's purpose moves outside the scope of what society expects the government to provide, and markets offer a substantially similar alternative.

With all this, consider a modified two-step analysis. Step one is to imagine decisions the taxpayer would make in a hypothetical pretax world. In doing so, at least initially, assume that a taxpayer has earmarked a certain amount of disposable income—say \$1,000—for giving to charitable, political, or other causes. Further, assume that this money is dedicated to a “greater cause” and any apportionment among charitable, political, and other causes would yield equal individual utility. That is to say, market forces do not compel decisions as much as personal preference for one charity over another, or political alignment with one candidate or cause rather than another.

In this example, some, but likely not all of the earmarked funds would be donated to charitable causes. All donations made to political or other causes not connected with charities represent resources that could have been, but were not, used to help charities fulfill their charitable purposes. This leaves charities short-handed and more prone to demise. This also requires the government to spread its limited resources even more thinly as it compensates for charities' diminished ability to fulfill their charitable purposes.

Under step two, calculate how the taxpayer deviates from this behavior in response to the perceived tax incentive. The taxpayer's behavioral response to the general awareness (correct or not) that tax benefit follows charitable giving will likely include a reapportionment of resources to those that yield the perceived tax benefit (even if not actually on account of hypersalience). It is noteworthy that this reapportionment causes no individual utility loss or deadweight loss. The taxpayer has simply shifted his or her giving from a myriad of options that provided equal individual utility to one option that provides more benefit to charities. Whether the taxpayer's understanding of the tax incentives was accurate is of no consequence

²⁵⁷ Richard Schmalbeck & Lawrence Zelenak, *The NCAA and the IRS: Life at the Intersection of College Sports and the Federal Income Tax*, 92 S. CAL. L. REV. 1087, 1097–98 (2019) (“Congress, the IRS, and the courts--have universally declared big-time sports to be sufficiently related to the educational enterprise to avoid the status of unrelated business activity.”).

here. There is no utility loss, and the government benefits from the substitution effect, as charities are better funded and equipped to fulfill their charitable purposes.

Now consider the effect of any efforts to quell hypersalience in this example. If a taxpayer's perception of the charitable contribution deduction were fully corrected (i.e., the charitable contribution deduction became fully salient, not hypersalient) such that taxpayers fully understood the relationship between charitable giving, itemized deductions, and the standard deduction, the incentive effects would be undermined and cause a reversion to step one. At step one, the taxpayer, with no perceived tax incentive, would simply apportion funds according to personal preference, perhaps with an inclination towards an even distribution. Perhaps even worse, with full cognition that no tax benefit follows her charitable giving, the taxpayer may reapportion funds away from charitable giving. In either case, the charitable sector's viability is undermined, while no positive change in individual utility is achieved. Under each of these scenarios, individual utility remains constant. Yet, charities, and in turn, the government that relies on charities to provide critical services in its stead, are worse off.

Critics of this analysis may inquire: what if the taxpayer sets aside \$1,000 to spend, but does not necessarily earmark it for giving (to charity or otherwise)? Rather, she has resolved that she will either donate the funds to charity or spend the amount on goods or services. With hypersalience in full effect and the perception of tax benefit in play, the taxpayer may well elect to donate funds that she would have otherwise spent—a clear distortionary effect. With hypersalience corrected and the taxpayer with full understanding of the charitable contribution deduction and its associated limitations, the taxpayer may choose to spend in lieu of giving because the taxpayer understands there is no benefit. In either case, the taxpayer parts with \$1,000.

Any deadweight loss here may well be justifiable if considered in light of the fact that the taxpayer is choosing between two desirable outcomes (if not from a purely economic perspective, then from a cognitive perspective). Hypersalience coaxed the taxpayer down a path that reduced her individual utility through the substitution effect, but not in the same way and so dramatically as eating an untaxed hot dog rather than a taxed hamburger. Rather, the taxpayer chooses between two equally acceptable alternatives, with hypersalience providing a nudge towards charitable giving. Any deadweight loss might be rationalized as the taxpayer elects to make a charitable donation, and the government indirectly benefits as charities are more ably financed to fulfill their charitable purposes—all without providing an actual subsidy (thanks to low salience limitations). If the taxpayer elects to spend, the government will indirectly suffer as the charity is less able to fulfill its charitable purpose.

A variation on this criticism exists with a different starting point: what of the circumstance where hypersalience incentivizes a person to give who would not have given at all with a correct understanding of the tax law—an outright distortion? This inefficient outcome is Faulhaber's primary concern in her call for curtailment of hypersalience.

She acknowledges hypersalience's benefits in the form of increased charitable giving²⁵⁸ and increased treasury efficiency.²⁵⁹ Hypersalience induces more charitable giving without actual government subsidy. The charitable contribution deduction, on its face, is economically inefficient, as it induces individuals to distort their behavior from what they would do in absence of the tax incentive. Yet, to some degree, this distortion was Congress's purpose in the promulgation of the charitable contribution deduction.²⁶⁰

For Faulhaber though, increased treasury efficiency does not offset hypersalience's costs. For example, she sees no way in which increased treasury efficiency can justify the misinformation, cognitive misperception, and enhanced tax illiteracy that follow hypersalience.²⁶¹ Compounding these effects are third-party marketers who amplify hypersalience as they act in their own self-interest (or at least the interests of the charity).²⁶² They tout their status as tax-exempt organizations and provide confirmation that taxpayer donations are deductible. These claims increase the salience of the deduction itself while limitations remain hidden in the background. Faulhaber inquires: in a climate of tax illiteracy, "does it make sense for third parties to spread information about deductions and the tax system as a whole?"²⁶³

Faulhaber responds in the negative with three alternatives to curtail hypersalience. The first two, she ultimately dismisses and really only entertains as academic questions. The third, however, she endorses and offers as the culminating policy recommendation of her article.

Faulhaber's first proposal to curtail hypersalience is to change the tax system so that hypersalience is impossible.²⁶⁴ That is, remove low-salience limitations connected to the charitable contribution deduction such that only the salient general awareness that tax benefit flows from charitable giving is accurate. The most severe limitation related to the charitable contribution deduction is the standard deduction. A nonitemizer charitable contribution deduction, under which a subsidy for charitable giving would be available for itemizing and non-itemizing taxpayers alike, may well fulfill this purpose.²⁶⁵

Faulhaber dismisses this idea out-of-hand based on the impact it would have on the public treasury and reconciliation with the standard deduction's purpose.²⁶⁶ From a government revenue collection standpoint, the non-itemizer charitable

²⁵⁸ Faulhaber, *supra* note 21, at 1340.

²⁵⁹ *Id.* at 1339.

²⁶⁰ See Charles T. Clotfelter, *Tax-Induced Distortions in the Voluntary Sector*, 39 CASE W. L. REV. 663, 671 (1988).

²⁶¹ Faulhaber, *supra* note 21, at 1340.

²⁶² *Id.* at 1341–42.

²⁶³ *Id.* at 1341.

²⁶⁴ *Id.* at 1344.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

contribution deduction is infeasible.²⁶⁷ Moreover, it is unclear whether the deduction would lead to a corresponding uptick in charitable giving. Charitable giving springs from several motivating factors, one of which may be tax, but pure altruism plays its role as well. Many taxpayers who give to charity would give with or without a corresponding tax deduction (actual or perceived).

Faulhaber's intuition was confirmed in the early-1980s during the four years leading up to the Tax Reform Act of 1986.²⁶⁸ On an experimental basis, the non-itemizer charitable contribution deduction was phased in as a pilot program.²⁶⁹ It culminated in 1986, a year in which all charitable donations were deductible, itemizing or non-itemizing status notwithstanding.²⁷⁰

Though the non-itemizer charitable contribution deduction was nearly included in the Tax Reform Act of 1986, it was ultimately abandoned in the spirit of compromise.²⁷¹ In a separate article, I consider the history of the non-itemizer charitable contribution deduction and offer a modern-day assessment of its prospects for reinstatement.²⁷² In line with Faulhaber's thoughts, I ultimately find that concerns of economic necessity, fiscal viability, and measurable impact on the charitable sector render the non-itemizer charitable contribution deduction an imprudent tax subsidy.²⁷³ Data suggest that non-itemizers already give, and any marginal incentivizing effect the non-itemizer charitable contribution may have to

²⁶⁷ *Id.*

²⁶⁸ Pub. L. 99-514, 100 Stat. 2085 (1986).

²⁶⁹ The Economic Recovery Tax Act of 1981 created the direct charitable contribution deduction, an above-the-line charitable contribution deduction available to taxpayers who take the standard deduction. Pub. L. No. 97-215, 95 Stat. 172 (1981).

²⁷⁰ Economic Recovery Tax Act of 1981 § 121(a), 95 Stat. at 196–97.

²⁷¹ In lead up to the Tax Reform Act of 1986, House Bill H.R. 3838 included the direct charitable contribution deduction for nonitemizers with a minimum threshold of \$100, beyond which charitable gifts were deductible. *See* H.R. 3838, 99th Cong. §133 (1985). The Senate bill did not include a comparable provision. *See* 132 CONG. REC. 13677 (1986). In conference committee, the nonitemizer charitable contribution deduction was abandoned in the final version of the legislation. *See id.* at 13675–77. It is noteworthy that Senator Bob Packwood, who was among the group of senators who sponsored legislation giving rise to the direct charitable contribution deduction, chaired the Senate Finance Committee at the time. *Id.* at 13677. He reluctantly voted for the Senate's bill without extension of the nonitemizer charitable contribution deduction and later noted that each committee member sacrificed "something that he felt very dear about in order to achieve the common good" of lowering rates "to 15 percent for about 85 percent of taxpayers in this country." *Id.* This, at once, demonstrates the spirit of compromise and bipartisan support that beset the Tax Reform Act of 1986 and highlights, with stark contrast, the lack of cooperation and bipartisanship that led up to the Tax Cuts and Jobs Act of 2017.

²⁷² *See* Eric S. Smith, *A Historical Review and Prospective Modern-Day Assessment of the Non-Itemizer Charitable Contribution Deduction*, 14 ATA J. LEGAL TAX RES. 20 (2016) (discussing the build-up, demise, and prospects for future consideration of the non-itemizer charitable contribution deduction).

²⁷³ *Id.* at 42.

increase their charitable giving would pale in comparison to the government's cost for the subsidy.²⁷⁴

Faulhaber's second proposal to curtail hypersalience is for the government to initiate and sustain counterbalances to third-party marketers' pitches relating to the availability of the charitable contribution deduction.²⁷⁵ For example, the government might start an ad campaign geared towards taxpayer education or awareness.²⁷⁶ The campaign's focus would be ostensibly to emphasize the limits of the charitable contribution with an eye toward making the charitable contribution deduction (together with its limiting features) fully or close to fully salient.

Faulhaber acknowledges two negative byproducts of such a campaign effort. First, the government's focus on the complexities of the tax system could lower taxpayer morale.²⁷⁷ Second, the government's ad campaign would announce that a broadly popular tax provision is not only unavailable to most taxpayers but is effectively reserved for itemizers who tend to be more affluent.²⁷⁸ Penalties for third-party marketers who mislead donors in their effort to drum up support for their charity would suffer the same negative byproducts.

Faulhaber acknowledges that counterbalancing third-party charities' promotional efforts and the goal of a completely salient charitable contribution deduction are infeasible, yet her analysis implies at least two additional points that contravene an affirmative government response to hypersalience. The first relates to congressional intent: if hypersalience and its behavioral distortions were not purposeful outcomes stemming from the imposition of limitations on the charitable contribution deduction—in particular the standard deduction—then they are not unwelcome. The standard deduction was intended to approximate a certain amount of medical expenses, taxes paid, interest paid, and charitable giving. Available data revealed that, on average, taxpayers with income below \$5,000 gave 2.5% to charity, paid 2.5% interest on personal debt, and paid taxes of 4% to 5% to other governmental entities.²⁷⁹ The standard deduction was intended to be roughly equal to 10% of average adjusted gross income.²⁸⁰ The rationale was that many taxpayers would be in a better position with the standard deduction than with the sum of their other deductions.

²⁷⁴ See, e.g., *Giving USA 2018: Americans Gave \$410.02 Billion to Charity in 2017, Crossing the \$400 Billion Mark for the First Time*, GIVING USA, <https://givingusa.org/giving-usa-2018-americans-gave-410-02-billion-to-charity-in-2017-crossing-the-400-billion-mark-for-the-first-time/> [https://perma.cc/GY3D-A4S3] (last visited Aug. 3, 2018).

²⁷⁵ Faulhaber, *supra* note 21, at 1344.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 1345.

²⁷⁸ *Id.*

²⁷⁹ 78 CONG. REC. 4107 (statement of Rep. Gearhart) (1944).

²⁸⁰ Individual Income Tax Act of 1944, Pub. L. No. 78-315, § 9(a)(aa)(1)(B), 58 Stat. 231, 236 (1944).

The legislative history of the Individual Income Tax Act of 1944,²⁸¹ which promulgated the first iteration of the standard deduction, captures the concern of some members of Congress with a presumptive deduction. They noted a free-rider problem in the proposal. The taxpayer who would benefit most from the standard deduction was the one who was on the underside of the average—the miser who did not donate to charity, the fortunate one who did not pay taxes to any other taxing agencies, who did not pay interest or incur medical bills during the year. These taxpayers would receive “10 percent of the deduction to which they are not entitled.”²⁸² Meanwhile, those on the overside of the average who actually gave to charity, paid taxes, interest, and incurred medical expenses, received the exact same subsidy if the sum total of these expenses did not exceed the standard deduction amount.²⁸³

In the end, these concerns were not strong enough to deter Congress from passing the standard deduction into law, but the fact that Congress was aware of this inequity is telling. It is reasonable to suggest that since Congress took no affirmative steps to correct the overside of the average’s perception related to charitable giving, Congress played a key role in the perpetuation of hypersalience from the standard deduction’s initial iteration. For the government to then deploy resources, as Faulhaber suggests, to correct this misapprehension would erode what may well have been a happy byproduct of the standard deduction from the government’s perspective: increased charitable giving with no actual tax subsidy.

On a second front, government penalties in response to aggressive fundraising seem incompatible with the statutory rules for public charities. In order to maintain their tax-exempt status, public charities must demonstrate that they rely on a certain amount of public support.²⁸⁴ This requires concerted fundraising efforts. Failure to demonstrate adequate public support leads to reclassification as a private foundation. Bruce Hopkins notes the disadvantages of being classified as a private foundation

²⁸¹ Pub. L. No. 78-315, 58 Stat. 231.

²⁸² 78 CONG. REC. 4108 (statement of Rep. Gearhart) (1944).

²⁸³ *Id.*

²⁸⁴ See I.R.C. § 170(b)(1)(A)(vi) (2012). Non-institution type public charities, for example, public charities that are not churches, educational organizations, hospitals or governmental units, are required to demonstrate a certain level of public support in order to not be classified as private foundations. See *id.* at § 170(b)(1)(A). They will be considered public charities if they meet two support tests: 1) the one-third support test, and 2) the not-more-than-one-third support test. I.R.C. § 509(a)(2) (2012). Under the one-third support test, the organization must demonstrate that it normally receives more than one-third of its support in each tax year from any combination of gifts, grants, contributions, membership fees, and gross receipts from admissions, sales, services or the furnishing of facilities in an activity that is not an unrelated trade or business. *Id.* at § 509(a)(2)(A). Under the not-more-than-one-third test, the organization must show that it receives one-third or less of its support from the sum of gross investment income and the excess of the organization’s unrelated business taxable income over the amount of unrelated business income tax on that taxable business income. *Id.* at § 509(a)(2)(B).

“are several.”²⁸⁵ They include: (1) “the obligation to pay taxes on net investment income”;²⁸⁶ (2) “the probable inability of the organization to be funded by other private foundations”;²⁸⁷ (3) “a lesser degree of deductibility of charitable contributions to the organization”;²⁸⁸ (4) the limitation on in-kind donations of appreciated property related to valuation (confined to adjusted basis rather than fair market value);²⁸⁹ and (5) additional compliance requirements with a “broad range of onerous rules and limitations as to programs and investment policy.”²⁹⁰ All this aside, if charities are more concerned with providing accurate tax information than emphasizing why they are worthy of a potential donor’s gift, they will be less effective as charities and run the risk of becoming inviable over time.

Faulhaber’s final point amounts to her recommendation to address hypersalience: the government should limit statements made by private third-party beneficiaries about tax-deductibility.²⁹¹ Her rationale is that the government already imposes many limitations on charities, and restricting their marketing efforts could simply be another limitation.²⁹²

To implement this proposal, she renounces any wholesale prohibition on marketing, which could reduce the portion of the deduction that is already salient, to say nothing of the constitutional issues such a prohibition might ignite. Rather, she calls for a circular 230²⁹³ approach. Under this approach, charities are encouraged to be more accurate and forthright with respect to their marketing promises related to tax benefits.²⁹⁴ To gauge the current landscape of charitable organization promotion, Faulhaber conducted an informal survey of 500 randomly chosen charities and examined their marketing pitches.²⁹⁵ Some included a caution to “consult with their tax advisors.”²⁹⁶ Others qualified their promotional promises of tax benefits with the codicil, to the “extent provided by law.”²⁹⁷ Most promotional materials, however,

²⁸⁵ BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 346 (10th ed. 2011).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Faulhaber, *supra* note 21, at 1345.

²⁹² *Id.* at 1345–46.

²⁹³ Circular 230 comprises the regulations that govern practice before the Internal Revenue Service. *See* 31 C.F.R. §§ 10.0–10.101 (2019) (Gathering of the CFR’s required regulations to “Practice Before The Internal Revenue Service.”). Faulhaber’s reference to Circular 230 seems to suggest a less heavy-handed approach—the issuance of regulatory guidance—short of a statutory mandate. Faulhaber, *supra* note 21, at 1346.

²⁹⁴ Faulhaber, *supra* note 21, at 1346.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

offered no guidance and suggested no possibility of limitations associated with the actual deductibility of a charitable gift.²⁹⁸

Faulhaber predicts that this proposal would push the charitable contribution deduction closer to full salience, as potential donors become more aware of the associated limitations.²⁹⁹ To confirm the proposal's viability, she notes that McCaffery suggested a similar course of action in response to hidden taxes.³⁰⁰ Moreover, she finds her proposals consistent with general proposals that call for "asymmetric paternalism," which in this context stands for the idea that greater information will not hurt those who are already aware of the charitable contribution deduction; instead, it will likely change the knowledge level of those who are not aware of such limits.³⁰¹

Her final point of justification echoes a favorite refrain of behavioral economists: "significant changes in behavior may be achieved through a simple reframing of a situation."³⁰² Thus, little things such as requiring third-party marketers acting on behalf of charities to couch references to the availability of tax benefits with words like "may" or "might" or "possibly" go a long way; or promotional materials that encourage donors to consult their tax adviser; or a requirement that marketing materials refer explicitly to the fact that only a minority of taxpayers will itemize their deductions.³⁰³ Faulhaber suggests that these small adjustments may combine to correct the perception of at least some taxpayers, even if not completely eliminating hypersalience.³⁰⁴ She ultimately finds this type of proposal satisfying as it employs the parties whose actions have contributed to hypersalience in its resolution.³⁰⁵

Faulhaber acknowledges certain limitations with her proposal—most notably issues of free speech and increased monitoring costs for the government.³⁰⁶ She calls for careful structuring of any future law that follows her proposal to avoid constitutional concerns.³⁰⁷

Faulhaber's proposal, of course, is anathema to the exploitation of hypersalience. The case for exploiting hypersalience, however, may be strengthened when Faulhaber's proposal is subject to scrutiny. Such examination illustrates how difficult it would be to unwind or mitigate hypersalience.

The essence of Faulhaber's proposal calls on the government to tentatively regulate the speech of charities with the promulgation of best practices and

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 1347.

³⁰⁴ *Id.* at 1347.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

recommended promotional jargon.³⁰⁸ As discussed below, Faulhaber's approach—restrictive regulation of charities' speech—is on precarious footing both from a practical adherence perspective and from a constitutional standpoint.

1. *Practical Adherence*

It is somewhat aspirational to expect that mere nudges toward more carefully tailored promotional language will elicit any meaningful responses from charities. As noted above, charities rely on public support to remain viable and to maintain their status as public charities. Without public support, the charity cannot fulfill its charitable purpose. It is difficult enough, even with the effects of hypersaliency operating in the background, to find donors.³⁰⁹ Voluntary compliance with a system that in any way creates the perception that donations to that charity might not be tax-deductible will be received coldly.

Consider the following hypothetical in light of circular 230-type guidance that calls for charities to be clearer about the tax benefits flowing from charitable donations. Charity A chooses to adhere to this policy. In all of its marketing materials and pitches, it includes the following disclaimer: "Donations to Charity A may be deductible. All donors should consult with their tax advisers to determine whether their donations are deductible. Only a minority of taxpayers actually receive a tax benefit from charitable giving."³¹⁰ Meanwhile, Charity B chooses not to adhere to circular 230-type guidance and continues to call for charitable support with a promise that "all donations to Charity B are tax deductible." With all else equal, potential donors with promotional materials from both charities in hand are more likely to give to Charity B. They may even wonder why Charity A's promise of tax benefit is qualified. All this would almost certainly deter Charity A from continuing in its efforts to increase donor awareness of the tax law related to charitable giving. There is just too much at stake in the charities' world to take that risk. In sum, encouragement is not likely enough to compel charities to self-monitor their speech.

In all likelihood, only an across-the-board statutory declaration that requires disclosure of the true nature of the charitable contribution deduction will meaningfully mitigate hypersaliency. Such an approach would level the playing field between Charity A and Charity B, but would also push the bounds of the First Amendment, as discussed in the next Section.³¹¹ Faulhaber's proposal of encouragement rather than blatant statutory regulation is sensitive to freedom of speech concerns but is unlikely to move charities to action. In ironic contrast,

³⁰⁸ See *id.* at 1346.

³⁰⁹ See Ray D. Madoff, *Congress's Assault on Charities*, N.Y. TIMES, Nov. 27, 2017, at A23. (noting that "for charities to function, they need an adequate flow of donations" and that the House and Senate's bills would "make the situation worse.").

³¹⁰ Faulhaber suggested each of these as possible terms for inclusion in Circular 230-type guidance. See Faulhaber, *supra* note 21, at 1346–47.

³¹¹ See discussion, *infra* Section V.A.2.; see also U.S. CONST. amend. I (granting the Constitutional right to free speech).

statutory regulation that compels charities to action could amount to unconstitutional burden on free speech.

2. *Constitutional Concerns*

A triumvirate of U.S. Supreme Court cases³¹² in the 1980s settled the modern-day framework within which government regulation (in the form of prior restraints,³¹³ required disclosures, and compelled statements) of “charitable appeals” are scrutinized. The first two cases set foundational principles.

In *Village of Schaumburg v. Citizens for Better Environment*,³¹⁴ the U.S. Supreme Court struck down a municipal ordinance “prohibiting the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for ‘charitable purposes.’”³¹⁵ In so doing, the Court made two critical determinations related to “charitable appeals for funds.”³¹⁶ First, it found that such appeals are not “commercial speech,” a category of less-protected speech.³¹⁷ Rather, because they “involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes,” they are a form of fully-protected free speech under the First Amendment.³¹⁸ As such, regulation of solicitations for charitable financial support must be measured “with due regard” for the reality that these types of solicitation are “characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues.”³¹⁹

Second, and flowing from the finding that charitable appeals are entitled to full First Amendment protection, the Court in *Village of Schaumburg v. Citizens for Better Environment* applied its most rigorous form of judicial review, strict scrutiny,³²⁰ to determine whether the ordinance violated the First Amendment. The Court acknowledged the municipality’s interests in protecting its residents from

³¹² See Errol Copilevitz, *The Historical Role of the First Amendment in Charitable Appeals*, 27 STETSON L. REV. 457, 457–61 (1997).

³¹³ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1011–12 (5th ed. 2015). Erwin Chemerinsky identifies licensing requirements in order to speak as “the classic type of prior restraint” and notes that the Supreme Court upholds such laws “only if the city has an important reason for licensing” and “there must be clear standards leaving almost no discretion to the licensing authority.” *Id.*

³¹⁴ 444 U.S. 620 (1980).

³¹⁵ *Id.* at 622.

³¹⁶ *Id.* at 632.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ See *id.* at 636. “Under strict scrutiny, a law will be upheld *if it is necessary to achieve a compelling government purpose.*” CHEMERINSKY, *supra* note 313, at 566. A compelling government purpose must be “vital” to be necessary, and the law must be the “least restrictive or least discriminatory alternative” to achieve the government’s compelling purpose. *Id.* at 567. Additionally, under strict scrutiny, the government bears the burden of proof. *Id.*

“fraud, crime and undue annoyance,” but ultimately found them inadequate to satisfy constitutional muster given the ordinance’s “direct and substantial limitation on protected activity.”³²¹

The second case, *Sec’y of State v. Joseph H. Munson Co.*,³²² involved a similar prior restraint to the ordinance at issue in *Schaumburg*, but in *Munson* a Maryland statute included a provision for waiver in circumstances where the percentage limitation would “effectively prevent a charitable organization from raising contributions.”³²³ Notwithstanding this flexibility, the Court found that the Maryland statute imposed a “direct restriction on protected First Amendment activity” that could not be justified under strict scrutiny.³²⁴ The Court also voiced concern that the statute created “an unnecessary risk of chilling free speech.”³²⁵

Riley v. National Federation of the Blind,³²⁶ the culminating case in this line, applied *Schaumburg* and *Munson* to a North Carolina statute that required disclosure of certain information related to the percentage of raised funds that actually flowed through to the charity from the professional fundraiser’s efforts.³²⁷ In its analysis, the Court confirmed that required disclosure and compelled statements in connection with charitable appeals, just as prior restraints, would be subject to the test for “fully protected expression:” strict scrutiny.³²⁸ The Court went on to hold that compelling statements of fact is a form of compulsion that burdens protected speech.³²⁹ It was then North Carolina’s burden to show that the regulation was necessary to achieve a compelling government purpose and that the statute was the least restrictive or least discriminatory alternative to achieve that purpose.³³⁰

As a compelling government purpose, North Carolina cited the “importance of informing donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to the professional fundraisers goes in greater-than-actual proportion to benefit charity.”³³¹ The Court found that these interests were not as weighty as the State argued and that the means to address them were “unduly burdensome and not narrowly tailored.”³³²

³²¹ *Schaumburg*, 444 U.S. at 636.

³²² 467 U.S. 947 (1983).

³²³ *Id.* at 952.

³²⁴ *Id.* at 967–68.

³²⁵ *Id.* at 968.

³²⁶ 487 U.S. 781 (1988).

³²⁷ *See id.* at 785. The statute required that professional fundraisers disclose to potential donors, before any charitable appeal, “the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity is unconstitutional.” *Id.* at 782. The case also involved a limitation associated with fees collected in exchange for fundraising services, which the Court also struck down for chilling speech “in direct contravention of the First Amendment’s dictates.” *Id.* at 794.

³²⁸ *Id.* at 796.

³²⁹ *Id.* at 797–98.

³³⁰ *Id.* at 800.

³³¹ *Id.* at 798.

³³² *Id.*

The Court further highlighted particularly troublesome aspects of legislation that require affirmative disclosure in general. It noted that even though “factual information might be relevant to the listener . . . a law compelling its disclosure would clearly and substantially burden the protected speech.”³³³ What is more, “compelled disclosure will almost certainly hamper the legitimate efforts” to raise money.³³⁴

These cases move the current narrative forward in two ways. First, they explain the wisdom in Faulhaber’s circular 230-type approach. Encouraged disclosure, rather than required disclosure, has surer footing under the First Amendment. Yet, as discussed above, this type of regulatory nudge is unlikely to effectively resolve hypersalience. Second, these cases provide a sequence of analyses to gauge federal legislation that would compel charitable entities to disclose the likelihood of deductibility in their charitable appeals.

Continuing the hypothetical from above, assume that Congress passes legislation that compels all charities to make the following disclosure in their charitable appeals: “Donations to Charity A may be deductible. All donors should consult with their tax advisers to determine whether their donations are deductible. Only a minority of taxpayers actually receive tax benefit from charitable giving.” At the outset, under *Schaumburg*, charitable appeals are entitled to full protection under the First Amendment from any burden this legislation may impose. Under *Riley*, that protection extends to required disclosures and compelled statements such as these.

Does the resolution or mitigation of hypersalience in the context of the charitable contribution deduction rise to the level of a compelling (or vital) government purpose? To be sure, taxpayer education and awareness are worthwhile endeavors. The more Congress and the IRS can work in concert to better inform taxpayers with respect to the tax ramifications of their decisions, the better. Yet, hypersalience-induced taxpayer error is not necessarily the result of either Congress’s or the IRS’s failure to educate. Information on the interplay between the charitable contribution deduction and the standard deduction is available to taxpayers who choose to avail themselves of it on the IRS’s website. A misunderstanding occurs because taxpayers fall into the cognitive trap of assuming that awareness of the charitable contribution deduction connotes full understanding without further investigation.

In *Riley*, North Carolina’s interest in promulgating its statute was to inform donors and “dispel the alleged misperception.”³³⁵ The lack of awareness in North Carolina related to professional fundraisers and their proportional share of donations. This is analogous to concerns related to hypersalience. Corrective legislation to address hypersalience would inform taxpayers regarding the true nature of the charitable contribution deduction and thereby dispel their misperception. In *Riley*, this purpose was held “not as weighty as the State asserts”³³⁶

³³³ *Id.*

³³⁴ *Id.* at 799.

³³⁵ *Id.* at 783.

³³⁶ *Id.* at 798.

and was not considered compelling or vital. It seems reasonable to conclude that the government's interest in unwinding hypersalience would similarly not rise to the level of a compelling government purpose.

Even if resolution of cognitive error associated with hypersalience, however, were considered a compelling government purpose, the government would likely struggle to show that compelled statements and required disclosures are the least restrictive means to achieve that purpose. Throughout the *Schaumburg-Munson-Riley* line of cases, the Court found less intrusive ways to achieve the government's purpose without burdening speech. In *Schaumburg*, the Court suggested that the municipality's interest in preventing fraud could be addressed with "penal laws used to punish such conduct directly."³³⁷ In *Munson*, the Court found the means chosen to accomplish Maryland's objective to prevent fraud was too imprecise and created an unnecessary risk of chilling free speech.³³⁸ In *Riley*, North Carolina's statute was unduly burdensome and not narrowly tailored.³³⁹ The Court was particularly concerned about the hampering effect required disclosure would have on legitimate efforts to raise money.

In terms of the required disclosures proposed here, Faulhaber's first two suggestions to unwind hypersalience provide ready examples of less restrictive alternatives that would not burden free speech. Congress could appropriate funds to create public awareness that most charitable donations are not tax-deductible—something akin to a public service announcement. Alternatively, Congress could cure hypersalience if it allowed all non-itemizers to deduct their charitable contributions. These approaches, even though not viable for reasons Faulhaber acknowledges above, are nevertheless available to unwind hypersalience without burdening or chilling speech, or otherwise hampering a charity's legitimate efforts to raise money.

3. *Current Regulation for Charities and Analysis*

Consider all this in light of the fact that a critical mass of charities already deploys significant resources to ensure compliance with the tax law. Charities must file an annual Form 990 that, depending on the size of the charity, may require substantial disclosures regarding donors, income, and expenses, among other data.³⁴⁰ This requires careful record keeping and potentially a significant amount of resources. In the end, it seems that few charities would have additional bandwidth or capacity to correct misunderstandings of the tax law—especially when such actions may deter potential donors from giving.

Even then, and perhaps more relevant given Faulhaber's proposal, charities' speech is already subject to restrictions. For example, charities are restricted from

³³⁷ *Vill. of Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 637 (1980).

³³⁸ *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 968 (1983).

³³⁹ *Riley*, 487 U.S. at 800.

³⁴⁰ I.R.C. § 6033(a)(1) (2012).

intervening, either in favor of or in opposition to, political campaigns for public office.³⁴¹ Some consider this to be an unconstitutional burden on free speech.³⁴² Additional regulation that affects the speech of charities would likely draw similar ire.

In the end, the question of whether to correct hypersalience or exploit it from a market salience perspective may come down to balancing. Consider the costs and benefits associated with curtailment of hypersalience. The benefits include a more literate and correctly-informed tax base with respect to charitable giving. Taxpayers would have full awareness of the tax ramifications of their charitable giving. The costs include potentially unconstitutional burdens on free speech, more onerous compliance burdens on the already heavily-regulated charities sector, curtailed charitable giving leaving charities less able to fulfill their charitable purposes, and the government on the hook to make up the shortfall. As a whole, the benefits from curtailing hypersalience do not seem to offset the associated costs.

Exploiting hypersalience by maintaining the *status quo* leaves the benefits that Faulhaber's proposal promises untapped. Taxpayers generally remain unaware of the limitations associated with charitable giving. They walk down a misinformed path that, in spite of their perception, leads to no real tax benefit. Yet the offsetting benefits are still substantial. Taxpayers may give more to charity than they would have otherwise. In at least some circumstances, as explored above, this reallocation of earmarked funds for a "greater cause" may lead to zero individual utility loss. Moreover, charities are on firmer footing to fulfill their charitable purposes. In turn, the government does not have to fill in the charitable sector's underfunded gap. A reasonable argument can be made that these benefits justify an exploitation of the American taxpayer's cognitive error.

This argument is further bolstered when considered in light of the TCJA, which with its augmented standard deduction, widens the gap between charitable giving and realizable tax benefit. The American Enterprise Institute predicts that the TCJA will reduce household charitable giving by \$17.2 billion in 2018 alone.³⁴³ It estimates that four-fifths of this decline will be driven by an increase in the number of taxpayers who claim the standard deduction. All this suggests that, in light of tax reform, charities need all the help they can get. If that help comes as taxpayers misperceive the current tax laws and give more to charity, so be it.³⁴⁴ If it comes in 2026 (or even sooner if a Democrat-controlled Congress unwinds relevant parts of

³⁴¹ I.R.C. § 501(c)(3) (2012).

³⁴² See, e.g., Julie Zauzmer, *The Republicans' Tax Bill Would Let Ministers Endorse Political Candidates*, WASH. POST (Nov. 2, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/11/02/the-republicans-tax-bill-would-let-ministers-endorse-political-candidates/?noredirect=on&utm_term=.48f6e5bf5a12 [<https://perma.cc/FR9S-979A>].

³⁴³ ALEX BRILL & DERRICK CHOE, AM. ENTER. INST., CHARITABLE GIVING AND THE TAX CUTS AND JOBS ACT 1-2 (June 18, 2018), <https://www.aei.org/wp-content/uploads/2018/06/Charitable-Giving-and-the-Tax-Cuts-and-Jobs-Act.pdf> [<https://perma.cc/8PLP-KFR3>].

³⁴⁴ See *id.* (discussing individual misperception of the tax system and charitable giving by source).

the TCJA), when hypersalience is retrenched within the American taxpayer's cognitive biases, this Article asserts that Congress should let hypersalience run its course. The benefits of hypersalience are too great relative to the costs of its curtailment.

B. Political Salience

Political salience, just as economic or market salience, deals with public awareness—for purposes of this discussion, public awareness of government action giving rise to the tax law. The primary distinction between the two versions of salience, as described above in Part IV, Section A, is the direction in which the public response is measured. Market salience measures public awareness and corresponding behavioral response to government action as measured in the market. Political salience measures public awareness and corresponding behavioral response to government action as registered through the political process.³⁴⁵ In the tax context, political salience gauges the political response to the adoption of a tax or tax provision. Schenk extrapolates from empirical work on salience to suggest that political response to various tax provisions should vary with their salience. Thus, low-salience taxes will garner less political response than high salience taxes.

As noted above, Schenk justifies the exploitation of political salience with two fundamental political constructs: (1) the state has the power to levy taxes; and (2) the state has an appropriate need for revenue.³⁴⁶ If these statements are true, then it is proper for the state to choose a form of taxation that is most palatable to its citizens.

Consider Schenk's constructs recrafted in light of revenue-reducing tax provisions like the charitable contribution deduction: (1) the state has the power to wield tax incentives; and (2) the state has an appropriate need to ensure that charities are adequately funded to fulfill their charitable purposes. If these statements are true, then it is proper for the state to create a tax incentive that will create the broadest level of charitable giving.

The citizenry generally wants public goods and revenues to increase, but without a simultaneous increase in taxes. In contrast, and more realistically, the citizenry generally acknowledges the role that charities play in society and expects the government to provide some sort of subsidy to that end. Thus, a tax benefit for charitable giving is generally accepted as sound tax policy.³⁴⁷

Schenk justifies her framework as an instrumentalist argument: that exploiting political salience bias may achieve an important end—the generation of revenues for the federal government with the least psychological pain.³⁴⁸ A similar

³⁴⁵ Schenk, *supra* note 10, at 273.

³⁴⁶ *Id.* at 284.

³⁴⁷ See Donald L. Sharpe, *Unfair Business Competition and the Tax on Income Destined for Charity: Forty-Six Years Later*, 3 FLA. TAX REV. 367, 379 (1996).

³⁴⁸ Schenk, *supra* note 10, at 284.

instrumentalist argument might be made here: exploiting hypersalience achieves the important end of maximizing charitable giving, all while *maximizing* psychological gain. Taxpayers do not seem to operate with the same aversion to losses when giving to charity. Charitable giving is laudable and aspirational. Altruism plays its role, and when taxpayers “lose money” by donating to charity it is not the same as losing money by paying taxes. They experience the psychological benefits of giving to charity—sometimes called the “warm glow” effect.³⁴⁹ This effect is enhanced by the perception that tax liability is reduced, thus creating the optimal circumstance for the taxpayer’s psychological gain.

In counterpoint, an effort to unwind hypersalience would take a psychological toll on taxpayers. If the charitable contribution deduction were fully salient, such that taxpayers were fully aware that their charitable giving might go without the government’s approbation in the form of a tax deduction, not only would taxpayers be less inclined to give, purely altruistic giving would be tainted. The warm glow would dim. Taxpayers might wonder why Congress only feels inclined to provide tax benefits in response to charitable giving for the relative few who itemize and tend to be more affluent.

Schenk places certain preconditions on Congress’s exploitation of political salience. What follows is a correlative analysis that measures the extent to which the exploitation of hypersalience can be justified on similar or analogous grounds. This analysis suggests that the government is already exploiting hypersalience from a political perspective. Thus, the argument here is one that calls for maintenance of the *status quo*: the limitations associated with the actual charitable contribution deduction serve meaningful purposes in the context of generating public support for charity and providing the government’s tacit approval for philanthropic activity.

1. Schenk’s Framework

The culmination of Schenk’s paper is that the politics of taxation make it impossible for Congress to raise tax rates directly, even while additional revenue is needed to fund government activities.³⁵⁰ In this political climate, it is appropriate and justifiable for Congress to consider and adopt low-salience taxes to overcome the political-economy of the tax legislation problem.³⁵¹ This justification comes in three components related to the general concepts of: loss aversion, budget deficits, and political rhetoric.

³⁴⁹ William T. Harbaugh, Ulrich Mayr, & Daniel R. Burghart, *Neural Responses to Taxation and Voluntary Giving Reveal Motives for Charitable Donations*, 316 *SCIENCE* 1622, 1624 (2007).

³⁵⁰ Schenk, *supra* note 10, at 297.

³⁵¹ *Id.*

(a) *Loss Aversion*

Though it generally operates in the subconscious, as noted above, the basic human aversion to losses is strong and well-documented.³⁵² Schenk posits that the disutility from paying taxes is even greater than the general aversion associated with other types of losses.³⁵³ For example, semantics matter here: calling a forced payment a fee rather than a tax quells the negative reaction that is commonly associated with paying taxes.³⁵⁴ Schenk uses the amplified loss aversion bias to justify the use of low salience taxes.

The loss aversion principle relates differently to the charitable contribution deduction and hypersalience. Nearly since the ratification of the Sixteenth Amendment, some iteration of the charitable contribution deduction has been a factor in the tax formula.³⁵⁵ It might not be too hyperbolic to suggest that this is a fundamental tax deduction. This, in part, is the reason that the deduction is hypersalient: its existence, or the general awareness that tax benefit follows charitable giving, is taken for granted within the mindset of the American taxpayer.

Unwinding hypersalience is cognitively akin to rescinding the tax deduction for charitable giving. If taxpayers become broadly aware of the limitations associated with the charitable contribution deduction and that for a majority of taxpayers, charitable giving serves only an altruistic end, they will feel as if something that was once theirs has been taken away. This, in some ways, would feel like a new and very salient tax that would expend political capital that could otherwise be used to actually increase taxes to fund government activities.

(b) *Budget Deficits*

Schenk considers the budget crisis in which the United States operates as a second justification for exploiting low-salience taxes—reasoning that rings even truer with the promulgation of the TCJA, which according to Congressional Budget Office estimates, will increase the budget deficit by around \$12 trillion.³⁵⁶

³⁵² Thaler and Sunstein suggest that “losing something makes you twice as miserable as gaining the same thing makes you happy.” THALER & SUNSTEIN, *supra* note 145, at 33.

³⁵³ Schenk, *supra* note 10, at 298.

³⁵⁴ *Id.*

³⁵⁵ See U.S. CONST. amend. XVI. Though not immediately after, but in relative quick succession to ratification of the 16th Amendment, the War Revenue Act of 1917 included a deduction for contributions to “corporations or associations organized and operated exclusively for religious, charitable, scientific or educational purposes, or to societies for the prevention of cruelty to children or animals.” War Revenue Act, H.R. 4290, 65th Cong. § 1201(2), 40 Stat. 300, 330 (1917).

³⁵⁶ CONG. BUDGET OFF., *supra* note 121, at 4. Summary Table 2 notes that over the period 2019–2028, projected revenues will be \$44.2 trillion relative to \$56.6 trillion of outlays. *Id.* at 4 tbl.2.

This justification could be a subset to or consequence of the tax aversion concept. As noted above, once a government program is in place, it is hard to take away. The second solution, raising revenue, generally faces bleak prospects in light of the citizenry's general and strong aversion to tax increases. Schenk elaborates on and explains this conundrum and goes as far as to suggest that the current political climate makes it impossible to increase rates or expand the base in a direct and salient way.

In line with a low-salient tax provision that raises revenue, the charitable contribution deduction's hypersalient feature gives rise to charitable giving that has no fiscal note³⁵⁷ and does not impede revenue raising. That is, the rationale for Congress's affirmative use of low-salience taxes applies with equal force to the exploitation of hypersalience in the context of the charitable contribution deduction. Congress needs to raise revenue. It also has an interest in the viability of charities. In general proportion to the charitable sector's shortfall, the government must either fund the difference or let the charitable activity go unfulfilled. To the extent hypersalience compels charitable giving without having to actually follow-through with the corresponding tax subsidy, revenue-raising occurs and charities are funded—two outcomes that would be mutually exclusive but for hypersalience. Given the calamitous tone of predicted government shortfalls, and the unlikely prospects of cutting spending and raising revenue, play on taxpayers' cognitive biases is warranted.

To apply Schenk's point related to the government's financial solvency analogously, many charities are not on the firmest of financial footings. Unlike the federal government, charities cannot run budget deficits in near perpetuity and remain viable. To compound things, the TCJA has undermined charitable fundraising and set charities up to struggle for the near future. Organizational spending cuts are viable prospects, but charities tend to run lean (especially those that rely on broad-based volunteer efforts) and it seems they would not have the wherewithal to absorb spending cuts. Operating under the TCJA, it would not be unreasonable for Congress to leave whatever hypersalience grows in the interim uncorrected.

³⁵⁷ See AM. LEGIS. EXCH. COUNCIL, FISCAL NOTE ACT, <https://www.alec.org/model-policy/fiscal-note-act/> [<https://perma.cc/U5J7-66UW>] (last modified Jan. 9, 2013) (explaining that during the legislative process, a bill is assigned a fiscal note—an estimate of how much it will cost the government if it goes on to become law). For example, a non-itemizer charitable contribution deduction would have a very large fiscal note that would likely derail its prospects for ever becoming law.

(c) *Political Rhetoric and the Impossibility of Raising Taxes Directly*

Schenk considers four ways in which political rhetoric serves as a barrier to the raising of taxes.³⁵⁸ The fourth—that the poisonous atmosphere with respect to taxes prevents increasing taxes directly—is examined here.³⁵⁹ This factor relates to and informs the question of political capital and the wisdom of unwinding hypersalience.

Schenk's premise is that political rhetoric makes it impossible to discuss taxes publicly in a direct and salient way.³⁶⁰ She attributes this toxic atmosphere to two factors: (1) the obsession with marginal tax rates; and (2) the political impossibility of adopting any legislation that could be framed as raising taxes.³⁶¹ Her first point is a consequence of the high-salience/low-salience dynamic. Politicians and citizens alike tend to latch on to elements of the tax law that readily distill to political talking points. The tax rates outside the context of the tax rate brackets provide a ready example. Schenk notes that this clinging to the most salient elements of the tax law and using them as political devices to manipulate the voting public's perception as it relates to the tax rates has effectively muffled any conversation of raising revenue through changes in the tax brackets.³⁶²

To the second factor, the mere suggestion that proposed legislation could raise taxes is an effective death knell. A recent example provides confirmation. The Marketplace Fairness Act of 2013³⁶³ was intended to respond to the online sales and use tax conundrum. Subject to certain limitations for small businesses, online retailers would be required to collect sales and use taxes on online purchases.³⁶⁴ In turn, the States would be subject to certain simplification and uniformity measures. This would have been a response to the Supreme Court's invitation decades earlier for Congress to provide some sort of regulation in the context of remote sales and the collection of sales and use tax.³⁶⁵ Even though this legislation was a federal mechanism by which states would collect state-level sales and use taxes, it was portrayed in certain circles as a "new," "national online sales tax."³⁶⁶ The bill

³⁵⁸ Schenk, *supra* note 10, at 298. The three other points related to political rhetoric and the impossibility of raising taxes directly relate to 1) interest group politics, 2) institutional barriers, and 3) mitigating factors and their unlikelihood of occurrence. *Id.* at 300–06.

³⁵⁹ *Id.* at 309.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ Marketplace Fairness Act of 2013, S. 336, 113th Cong. (2013).

³⁶⁴ *See id.* § 2(b).

³⁶⁵ *Quill Corp. v. North Dakota*, 504 U.S. 298, 308 (1992). Congress's inaction on this front precipitated the Court's overturning of *Quill's* physical presence standard in *Wayfair v. South Dakota*, 138 S. Ct. 2080, 2093 (2018).

³⁶⁶ *See, e.g., Internet Tax a Boom or Bust?: What People Are Saying about a Possible National Online Sales Tax*, USA TODAY (Apr. 29, 2013, 04:46 PM EST), <https://www.usatoday.com/story/opinion/2013/04/29/internet-tax-a-boom-or-bust-for-small-business-column/2121893/> [<https://perma.cc/BXU6-7MJA>].

failed,³⁶⁷ ostensibly in part, because politicians had no interest in running for reelection having voted for a “national online sales tax.”

All this is to suggest that political capital, as it relates to tax increases, is precious: it will cost a substantial amount to increase taxes even slightly. The political cost diminishes, and feasibility increases, when the salience of the tax increase decreases. This is the crux of Schenk’s contention for the exploitation of low-salience taxes.

The question of undoing hypersalience then, to some extent, is a question of whether Congress can afford to use up the associated political capital. If the charitable contribution deduction were to become fully salient, it could easily be perceived as a tax increase. After all, a deduction that taxpayers previously perceived was theirs, will feel as if it has been rescinded. Such a perceived increase in taxes would use up political capital and the limited (if any) political tolerance taxpayers have for tax increases. To make the idea even more politically untenable, this would all occur without realizing any corresponding benefit in the form of increased revenues.

2. *Schenk’s Recommendation*

Schenk’s paper concludes with a summary of the circumstances in which it is appropriate for Congress to consider the use of low-salience taxes. A conclusion of the discussion of political salience in the context of hypersalience and the charitable contribution deduction is offered here in parallel analyses.

Schenk contends that there are situations where low-salience taxes may enable the government to achieve otherwise worthy goals, subject to certain conditions: (1) the process must be reasonably transparent; and (2) information with respect to the low-salience tax provision must be readily available.³⁶⁸ Similarly, there are situations where hypersalient tax deductions may enable (or at least enhance) the government’s ability to achieve otherwise worthy goals. In the context of the charitable contribution deduction, hypersalience compels taxpayers to give more to charity. Consistent with Schenk’s conditions, the process through which the charitable contribution deduction was promulgated, together with the standard deduction, was reasonably transparent. A simple Google search will provide more information as to the history of these two provisions than most taxpayers would ever need to become aware of the associated limitations. Moreover, information with respect to the interplay of the standard deduction and the itemized deductions is available on the IRS’s website.³⁶⁹

³⁶⁷ *Senate Introduces Marketplace Fairness Act of 2015*, SALES TAX INSTITUTE (Mar. 16, 2015), <https://www.salestaxinstitute.com/resources/senate-introduces-marketplace-fairness-act-2015> [<https://perma.cc/GT8U-QNZ8>].

³⁶⁸ Schenk, *supra* note 10, at 310.

³⁶⁹ *Itemized Deductions, Standard Deduction*, INTERNAL REVENUE SERV., <https://www.irs.gov/faqs/itemized-deductions-standard-deduction> [<https://perma.cc/BG73-6N8K>] (last updated Sept. 20, 2019).

Schenk's conclusion is that if these conditions are satisfied, there is no convincing argument that it would be wrong for the government to take error into account by effectively using politically pleasing taxes or provisions.³⁷⁰ She notes that salience is exogenous.³⁷¹ That is, it is caused by external forces or factors outside the tax provision, namely the inability or unwillingness of taxpayers to engage System 2 and fully understand or react to given provisions. Thus, an attempt to minimize the perceived burden of tax is not wrong per se.³⁷²

In like fashion, why should the government go out of its way to correct any cognitive error connected to hypersalience, when the result is increased charitable giving with no corresponding decrease in tax revenues? Hypersalience is also exogenous because it is caused by the external third parties that Faulhaber described.³⁷³ Taxpayers rely on System 1 to perceive the tax deduction but could engage System 2 and properly understand the associated limitations, as the information is readily available.³⁷⁴ That cognitive tendencies compel them not to explore the ins-and-outs of the charitable contribution deduction requires no corrective action from Congress.

Schenk notes that the politics of taxation are a good illustration of when exploiting the cognitive bias in favor of low-salience taxes would be effective and appropriate.³⁷⁵ Similarly, the system in which we operate, under which the federal government has outsourced critical societal functions and responsibilities to charities, creates an ideal atmosphere for exploiting cognitive bias in favor of any hypersalience connected to the charitable contribution deduction.

VI. POLICY RECOMMENDATION

This discussion culminates with a policy recommendation of congressional restraint in the face of hypersalience. There are cogent arguments from both market and political salience perspectives that Congress should not intervene to correct the cognitive error that may be attributable to hypersalience.

A. Market Salience

In the context of market salience, when balancing the costs associated with curtailment relative to the benefits of leaving hypersalience intact, the benefits of leaving hypersalience intact seem to prevail. Concerns of curtailment include the prospects of unconstitutional burdens on speech, overregulation, and an overall less viable charities sector. Meanwhile, exploitation of taxpayer cognitive bias can be

³⁷⁰ Schenk, *supra* note 10, at 310.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ See Faulhaber, *supra* note 21, at 1328–30.

³⁷⁴ As a reminder, System 1 reacts, interprets, and otherwise manages daily existence. See KAHNEMAN, *supra* note 145, at 20–22. Only when compelled by a difficult task is System 2 engaged to generate concerted effort towards that task. *Id.* at 21–24.

³⁷⁵ Schenk, *supra* note 10, at 310.

justified in that it compels taxpayers to give, including in circumstances that would lead to zero utility loss, thus improving the charitable sector's viability. In corresponding measure, the government is relieved of either making up any shortfall or leaving the charitable effort undone.

B. Political Salience

From a political salience perspective, exploitation of hypersalience is justifiable. Taxpayers generally experience a warm glow effect when they give to charity. The perception that tax benefit flows from charitable giving only works to enhance that effect. Moreover, the heuristic of loss aversion would engage if Congress undertook measures to mitigate or remedy hypersalience. Thus, if hypersalience were corrected, it would be tantamount to a new tax (or at least the denial of perceived tax benefit). In an era of political polarization and massive deficits, Congress can ill afford to expend constrained and precious political capital in this way. It is simply too hard to increase taxes to expend political capital, unwinding taxpayer cognitive bias.

This reasoning falls in line with Schenk's precursors to the exploitation of hidden taxes: transparent processes and readily available information. Taxpayers, should they choose to do so, can find a wealth of information on the charitable contribution deduction. The information is there for the taking. Taxpayers, in general, are cognitively unwilling—they will rely on System 1 as long as possible before engaging System 2. Congress should not spend political capital in an attempt to make the charitable contribution deduction a System 1 problem.

VII. CONCLUSION

The standard deduction and its mutually exclusive relationship to tax benefited charitable giving enjoyed a moment in the spotlight during the lead up to the TCJA. This spotlight has moved to other subjects, and with time, the preexisting general awareness of the charitable contribution deduction will likely survive, while its limitations, including its status relative to non-itemizers, will fade. Awareness, after all, requires reinforcement.

It is just as reasonable to expect that the TCJA's days are limited (politically or statutorily)—at least as compared to the Tax Reform Act of 1986. The TCJA was rammed through Congress on a starkly partisan vote, which all but ensures the tax law will undergo substantial reform sooner rather than later, as Democrats respond with their own tax legislation or provisions expire by statute.³⁷⁶

As this occurs, the charitable contribution deduction may take on an even more hypersalient status as the media and charities alike proclaim its revival—creating the impression that more taxpayers will now be able to deduct their charitable giving. This Article recommends that Congress should refrain from correcting any existing

³⁷⁶ Thomas Kaplan & Alan Rappeport, *Senate Overcomes Hiccups to Advance Tax Overhaul in 51-48 Vote*, N.Y. TIMES, Dec. 20, 2017, at A15.

or ensuing cognitive bias associated with the deductibility of charitable giving. The costs of correction—including potentially unconstitutional burdens on free speech, more onerous compliance burdens on the already heavily-regulated charities sector, and curtailed charitable giving leaving charities less able to fulfill their charitable purposes—are too high to correct from a market salience perspective, and the political capital expended is too great from a political salience perspective to do otherwise.