

## Beyond the “Tax Loophole” Rhetoric

**Author :** Leigh Osofsky

**Date :** October 18, 2017

Heather Field, *A Taxonomy of Tax Loopholes*, 55 *Houston L. Rev.* (forthcoming 2018), available at [SSRN](#).

One of the many obstacles in the way of productive governance these days is people talking past each other. In the tax context, for instance, everyone seems to agree that we need to “simplify” the tax system and eliminate “tax loopholes.” But, people with very different agendas mean very different things when they use these loaded terms. And using the loaded terms, without elaboration, interferes with our ability to engage in serious policy conversations.

In *A Taxonomy for Tax Loopholes*, [Heather Field](#) identifies this phenomenon and attempts to push us beyond the “tax loophole” rhetoric. She explores the different ways that the term “tax loophole” is used, provides a framework that is designed to promote more transparent substantive debate, and uses her framework to bring greater clarity to contemporary debates about specific tax issues. While, as Field acknowledges, the term “tax loophole” is not going away any time soon, her approach nonetheless brings refreshing incisiveness to a discourse that is too often clouded by meaningless labels.

Field’s most radical move is arguing that we should stop using the “tax loophole” label altogether. She explains that, unlike other difficult-to-define terms like “tax shelter” and “tax expenditure,” classifying something as a “tax loophole” has no actionable consequences. Rather, the term “tax loophole” simply reflects the labeler’s subjective dislike of a particular outcome, and thus it is fruitless to persevere about what is, or is not, a “tax loophole.”

Having cleared away the distracting classification issue, Field argues that we should use a more robust framework for expressing the dissatisfaction that underlies the use of a “tax loophole” label. This framework should include: the normative policy objection (such as a concern regarding revenue, fairness, efficiency, complexity, or social policy) and a declaration of who is responsible (such as Congress, the President, Treasury, IRS, courts, or private parties). At bottom, Field’s framework is a call to replace the tax “loophole” label’s appeals to emotion with appeals to logic and analysis.” (P. 29.) The hope is that identifying the problem, who is responsible, and what can be done about it, can lead to substantive, actionable debate.

Beyond offering a taxonomy, Field illustrates how it can be used to improve analysis regarding particular tax provisions and to better understand perceptions of the tax system. She explores how greater analytical precision regarding the commonly decried carried interest “tax loophole” offers a number of concrete reform options, as well as barriers to such reforms. And, most interestingly in my view, she explores the use of the “tax loophole” label by major news organizations leading up to the 2016 election. In so doing, she uses elements of her taxonomy to tease out the organizations’ real, underlying concerns for what they label to be “tax loopholes.” Her findings include, for example, that more liberal news sources focused much more on fairness concerns regarding “tax loopholes,” whereas more conservative news sources focused much more on economic concerns regarding “tax loopholes.” She suggests that this coverage mirrors Clinton voters’ focus on inequality and Trump voters’ focus on the economy. From these and other findings, Field hypothesizes that the liberal and conservative media’s divergent discussions regarding “tax loopholes” may both have reflected and perpetuated the increasing polarization exhibited in American culture and on the political stage.

While Field seems well aware that the Article is unlikely to result in the banishment of the term “tax loophole,” she ends with the hope that this effort nonetheless may help us move beyond the echo chamber that increasingly comprises our understanding of tax policy issues. I sincerely hope that she is right. And, in that vein, Field’s article will

## Tax

The Journal of Things We Like (Lots)

<https://tax.jotwell.com>

---

hopefully not only enrich tax policy discussions, but also underscore an important role for academics, which extends well beyond the tax field. By deploying their training in the manner that Field has done in this Article, academics can offer an alternative to a national dialogue that is increasingly, and worryingly, comprised of buzzwords that merely serve to confirm what people already think.

Cite as: Leigh Osofsky, *Beyond the "Tax Loophole" Rhetoric*, JOTWELL (October 18, 2017) (reviewing Heather Field, *A Taxonomy of Tax Loopholes*, 55 **Houston L. Rev.** (forthcoming 2018), available at SSRN), <https://tax.jotwell.com/beyond-the-tax-loophole-rhetoric/>.