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A Taxonomy for Tax Loopholes

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ARTICLE

A TAXONOMY FOR TAX LOOPHOLES

*Heather M. Field**

ABSTRACT

Democrats, Republicans, media commentators and even academics denounce “tax loopholes.” Speakers may think that they are talking about the same things, but this Article demonstrates that people have widely divergent views about what tax loopholes are. Thus, people criticizing loopholes often talk past each other and engage in the tax equivalent of schoolyard name-calling. The response to this problem is not, however, to try to define the concept of “tax loopholes” with precision. Such an endeavor is pointless. Instead, this Article provides a taxonomy for translating the rhetoric of “tax loopholes” into more meaningful tax policy discourse. This taxonomy posits that any reference to a “tax loophole” should be understood in two dimensions—the tax policy objection and the target of the criticism. Using numerous examples from the popular/political discourse and the academic literature, this Article catalogs alternatives on each dimension. Categorizing any purported “tax loophole” using this taxonomy provides a more productive framing of whatever critique is implied by any use of the “loophole” label, thereby enabling the elevation of the quality of the conversation about the individual tax preference. This taxonomy may be particularly useful now, as the debate continues about the consequences of recently-enacted tax legislation.

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In addition, the taxonomy can be used in the aggregate to provide insight into how groups of people perceive the tax system. As an example, this Article applies the taxonomy to media references to tax loopholes (from CNN, Fox, the Wall Street Journal and the New York Times) during the 2016 presidential campaign, thereby revealing how narratives about tax loopholes varied by media source and ideological perspective.

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Appendix B—Dimension #2 (Responsible Party) Analysis of “Tax Loophole” Media Discourse During the 2016 Presidential Campaign.

I. INTRODUCTION

Politicians decry tax loopholes. Legislators, policymakers, media commentators, and academics call for action to close the tax loopholes that riddle our tax system. Most speakers use the term “tax loophole” without defining it, assuming (usually implicitly) that “when [they] speak of loopholes [they] mean pretty much what everybody else means.”¹

This Article demonstrates that people actually have widely divergent views about what tax loopholes are. They do not agree about which provisions constitute tax loopholes.² They do not agree about the policy concerns that motivate them to characterize something as a tax loophole.³ They do not agree about who is to blame for tax loopholes or the problems tax loopholes create.⁴ And they do not agree about what to do with the revenue that would be raised by closing tax loopholes.⁵ Often, critics of loopholes are not explicit about these details and let the negative connotation of the term “loophole” express condemnation without providing a substantive argument about why a tax preference is problematic or about how the problem could be remedied. Thus, the term “loophole” has, to a large degree, become the tax law equivalent of calling someone a “loser”—empty schoolyard name-calling.

This impedes real communication about tax reform. People are using the same term to denote dramatically different things. Thus, people talk past each other, without a real appreciation for the policy concerns that motivate each speaker. The “loophole” rhetoric obfuscates, avoiding detail, “indiscriminately lumping

1. Leo Katz, *A Theory of Loopholes*, 39 J. LEGAL STUD. 1, 2 (2010).

2. See *infra* Part II.A.

3. See *infra* Part III.A.

4. See *infra* Part III.B.

5. See *infra* notes 136–40 and accompanying text.

together . . . features of existing law [as] equally objectionable,”⁶ and thereby impeding people from being able to determine whether and to what extent they agree about tax reform. It condemns by association, without explanation:⁷ if the “loophole” label sticks, it can doom a tax provision without meaningful consideration of its merits.⁸ It diverts attention away from policy merits by focusing on impugning the character of anyone associated with the loophole.⁹ And it entrenches an “us versus them” mentality, pitting groups of people (whether divided by wealth, generation, political affiliation or otherwise) against each other.¹⁰ Each of these rhetorical strategies¹¹ hinders deeper, more substantive debate over the subject of, reasons for, and details of, recent and possible future tax reforms.

Commentators have criticized the “loophole” terminology before.¹² Most prominently, Professor Boris Bittker, in 1973,

6. Boris I. Bittker, *Income Tax “Loopholes” and Political Rhetoric*, 71 MICH. L. REV. 1099, 1127 (1973).

7. See, e.g., *infra* notes 211–216 and accompanying text.

8. See e.g., Stanley S. Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145, 1160 (1957).

9. See, e.g., Bittker, *supra* note 6, at 1127 (“loophole” rhetoric implies that failure to support loophole elimination is “a craven surrender to vested interests”).

10. See, e.g., President Barack Obama, Address by the President to a Joint Session of Congress (Sept. 8, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/09/08/address-president-joint-session-congress> (framing the loophole discourse by pitting oil companies against small business, and millionaires and billionaires against teachers and kids); Marjorie E. Kornhauser, *The Rise of Rhetoric in Tax Reform Debate: An Example*, 70 TUL. L. REV. 2345, 2366–70 (1996) (“loophole” rhetoric pits generations against each other).

11. These aspects of the “loophole” discourse reflect strategies of political rhetoric. See, e.g., PAUL CORCORAN, *POLITICAL LANGUAGE AND RHETORIC* xv (1979) (political language is used “not to stimulate thought, but to prevent it; not to convey information, but to conceal or distort it; not to draw public attention, but to divert or suppress it”); MICHAEL CALVIN MCGEE ET AL., *RECOGNIZING MICROSTRUCTURAL FALLACIES IN ARGUMENTATION AND PUBLIC ADVOCACY* 2, 6 (John Louis Lucaites ed., 2012) (1976), <http://www.indiana.edu/~c228/Fallacies.pdf> [<https://perma.cc/JZ25-THDD>] (the rhetorical strategy of encouraging people to draw conclusions from association rather than causation); ALEX C. PARRISH, *ADAPTIVE RHETORIC: EVOLUTION, CULTURE, AND THE ART OF PERSUASION* 35–50, 65 (2014) (arguing that rhetoric helps us “form and strengthen group identity”); Martin Reisingl, *Analyzing Political Rhetoric*, in *QUALITATIVE DISCOURSE ANALYSIS IN THE SOCIAL SCIENCES* 96–98 (RUTH WODAK & MICHAL KRZYZANOWSKI eds., 2008) (describing different persuasive strategies of political rhetoric, including appeals to emotion (*pathos*) and to character (*ethos*)); D.A. Strickland, *On Ambiguity in Political Rhetoric: Defeat of the Rat Control Bill in the House of Representatives, July 1967*, 2 CAN. J. POL. SCI. 338, 339 (Sept. 1969) (describing the rhetorical strategy of “obfuscation” in which “the putative motive is to avoid hard decision and to create the illusion of consensus” and which can involve “utterances which the [speaker] takes to be precisely and intentionally ambiguous”).

12. See, e.g., Kornhauser, *supra* note 10, at 2361, 2371; TAXPAYER ADVOCATE SERV., *The Complexity of the Tax Code*, 1 NAT’L TAXPAYER ADVOCATE ANN. REP. CONG. 3, 10 (2012), <http://www.taxpayeradvocate.irs.gov/2012-annual-report/downloads/most-serious-problems-tax-code-complexity.pdf> [<https://perma.cc/M2DG-CHHW>] [hereinafter *The Complexity of the Tax Code*] (“[T]he term ‘loophole’ has taken on a meaning that distorts discussion.”).

examined different types of “loopholes” that “dominate[d] the discussion of federal income tax reform” in an effort to “rescue the federal income tax from the superheated rhetoric of its populist friends.”¹³ Unfortunately, the “loophole” rhetoric persisted undiminished, in part (though certainly not entirely) because Professor Bittker focused on defining and describing the rhetoric and did not provide a strategy for overcoming it.¹⁴

This Article, in contrast, provides a methodology for translating the rhetoric of “tax loopholes” into meaningful tax policy discourse. Specifically, this Article argues for using a taxonomy to interpret any reference to a “tax loophole.” This taxonomy posits that any reference to a “tax loophole” should be understood in two dimensions—the normative tax policy objection and the party that is the target of the criticism.

Categorizing any purported “tax loophole” on these two axes provides a more productive framing of whatever critique is implied by the use of the term “loophole.” The taxonomy provides speakers with a framework for more explicitly articulating the substantive critique they intend to make, and it helps listeners ask good questions so they can ascertain the policy concerns implicated by someone who talks about loopholes. Moreover, it counteracts the rhetorical strategies mentioned above, thereby making more transparent (and less powerful) the use of the term “tax loophole” as a device to spin the political debate. More broadly, by breaking through the rhetoric of “loopholes” and reframing the discourse to be less superficial, more policy-oriented, and more actionable, it can elevate the quality of the conversation surrounding tax reform. The more we understand why different people favor or disfavor certain provisions and what they want done in response, the more we can engage in meaningful dialogue.

Admittedly, political rhetoric—including even tax loophole rhetoric—can have value. For example, rhetoric can provide a helpful shorthand for making complex policy issues salient to the public and can provide rallying cries around which coalition building can occur, possibly facilitating law reform.¹⁵ Stylistic framing, not just substantive merit, can affect whether an initiative succeeds. However, the rhetorical framing of an issue, particularly for an issue as important as tax reform, ought to be

13. Bittker, *supra* note 6, at 1102, 1127.

14. See *infra* pp. 118–19 (further distinguishing this Article from Professor Bittker’s).

15. See, e.g., Kornhauser, *supra* note 10, at 2371 (“Rhetoric is appropriate and inevitable as people try to convince each other that their vision of society is the correct one.”).

backed up by thoughtful, substantive policy arguments,¹⁶ which are sorely lacking in the current tax loophole rhetoric.

Yet it would be naïve, however, to think that the tax loophole rhetoric is the only hurdle to bipartisan tax reform¹⁷ or that the lack of consensus about how to change the tax law arises only because of a failure to communicate. There are legitimate, strongly held differences of opinion about the appropriate size of government, the appropriate degree of progressivity in the tax system, what activities the tax system should incentivize, and how effective those incentives are, etc. However, particularly as we reflect on recently-enacted tax legislation¹⁸ and as we discuss what planning opportunities and problems are created by the new law,¹⁹ what role the Treasury Department should play in curtailing such opportunities and solving such problems through regulatory guidance,²⁰ and what additional reforms this or a future Congress might pursue,²¹ it is better to strive for meaningful and substantive conversations about those differences than it is to continue unabated using the hollow “loophole” label.

Moreover, even if the insights provided by the taxonomy are not used to improve the discourse about recent or future tax legislation, the taxonomy still improves our ability to understand each other. This improved understanding is not limited to the interpretation of individual comments about loopholes. The taxonomy also provides insight into multi-speaker debates about particular tax preferences (e.g., the debate about the “carried

16. *Id.* (“Such a monumental issue as tax deserves a great deal of reasoned analysis and thought.”)

17. Although tax legislation was enacted at the very end of 2017, only Republicans voted for the bill; all Democrats and Independents voted against the bill. Final Vote Results for Roll Call 699, <http://clerk.house.gov/evs/2017/roll699.xml> [<https://perma.cc/935C-DCUN>] (showing the votes in the House of Representatives); Roll Call Vote 115th Congress 1st Session, Vote No. 323, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00323 [<https://perma.cc/J4BW-TREJ>] (showing the votes in the Senate).

18. Act of Dec. 22, 2017, Pub. L. No. 115–97 (to be codified in 26 U.S.C.) [hereinafter 2017 Tax Act].

19. See, e.g., Reuven S. Avi-Yonah et al., *The Games They Will Play: An Update on the Conference Committee Tax Bill*, SSRN (Dec. 18, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3089423; Natalie Kitroeff, *In a Complex Tax Bill, Let the Hunt for Loopholes Begin*, N.Y. TIMES (Dec. 27, 2017), <https://www.nytimes.com/2017/12/27/business/economy/tax-loopholes.html>.

20. See, e.g., Stephen E. Shay, *Treasury Can Close a Potential Loophole in the Treatment of Deferred Foreign Income in the Tax Cuts and Jobs Act – Will It Act?*, SSRN (Dec. 26, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3093379.

21. See, e.g., Dylan F. Moroses et al., *Extenders Will Wait Until 2018, Brady Says*, 158 TAX NOTES 65 (2018) (discussing possible technical corrections to the new tax law, legislation to extend other expiring tax provisions, and the possibility that “if Democrats were to win back the majorities in the House and Senate in the 2018 midterm elections, changes to the just-passed Republican tax bill would be more than likely”).

interest loophole”).²² And the taxonomy can be used, in the aggregate, to better understand groups of people and how they perceive the tax system (e.g., how the “tax loophole” discourse leading up to the 2016 presidential election differed among media sources with different ideological orientations).²³

Ideally, this Article’s taxonomy would replace the use of the term “loophole,” but unless and until the word “loophole” is eliminated from the discourse about taxes (a prospect about which I am not sanguine), the taxonomy at least translates the term “loophole” into more substantive concepts. Notably, this Article does not try to provide a definitive definition of “loophole.” The term “tax loophole” has no independent import, so defining it with precision has little value.²⁴ There is no “truth of the matter” as to whether a particular provision is or is not a “tax loophole.” Whether a tax preference merits “the appellation ‘loophole’ is a matter of viewpoint.”²⁵ Thus, it is more useful to provide a framework that provides insight into why the speaker judges the particular tax preference to be worthy of the pejorative “tax loophole” label.

One note about this Article’s terminology is warranted. Because this Article seeks to deconstruct the “tax loophole” terminology, this Article uses the more neutral terms “tax preference” or “tax benefit” to refer to tax-reduction opportunities that commentators might (or might not) categorize as “loopholes.” Although there is no perfectly neutral term, the use of the terms “tax preference” and “tax benefit” is merely intended to refer to a particular opportunity through which a taxpayer may reduce her tax bill (i.e., something that treats the taxpayer preferentially, conferring on her a personal monetary benefit). Unlike the term “tax loophole,” which connotes judgment, these terms are not intended to convey approval or disapproval of the relevant tax treatment; rather, they are intended to identify a situation that some might label as a “tax loophole,” so that the taxonomy can be applied.

The rest of this Article proceeds as follows: Part II surveys different definitions for the term “tax loophole” and argues against investing more effort in trying to reach a consensus definition for the term.

22. See *infra* Part IV.A.

23. See *infra* Part IV.B. (analyzing the “loophole” discourse from CNN, Fox, The Wall Street Journal, and The New York Times).

24. See *infra* Part II.B.

25. Surrey, *supra* note 8, at 1148; see also *infra* Part II.A.

Part III provides the taxonomy for translating “tax loophole” rhetoric into more meaningful discourse. Specifically, Part III.A categorizes the use of the term “loophole” by the normative policy objection implied by the use of the term, and Part III.B categorizes the use of the term “loophole” by the people who are the targets of the implied criticism. Using numerous examples from the popular/political discourse and the academic literature, Part III catalogs alternatives on each dimension.

Part IV demonstrates two applications of the taxonomy. Part IV.A uses the taxonomy to parse the competing concerns that motivate the multi-speaker debate about the “carried interest loophole.” Part IV.B conducts a study of CNN transcripts, Fox transcripts, Wall Street Journal articles, and New York Times articles referencing tax loopholes during the 2016 presidential campaign, and applies the taxonomy to these articles/transcripts in order to better understand how media outlets with different ideological perspectives discuss tax loopholes and the tax system.

Part V concludes this Article.

II. THE ELUSIVE MEANING OF “TAX LOOPHOLE”

Few commentators explicitly try to define the term “tax loophole.”²⁶ Most commentators, even in the academic literature, give a cursory definition²⁷ or merely imply a definition from the context in which they use the term.²⁸ This Part draws on this literature, whether or not it is explicit about the definition of “tax loopholes,” in order to demonstrate that commentators have dramatically different definitions of the term. Then this Part argues that the search for a precise definition is futile and should be abandoned in favor of the taxonomy provided in Part III.

A. What is a “Tax Loophole”?

The *Webster’s New World College Dictionary* provides insight into the origin of the term “loophole,” explaining that a “loophole” is “a hole or narrow slit in the wall of a fort, etc., for looking or

26. See, e.g., Bittker, *supra* note 6, at 1102–03, 1109, 1112–13; Monte Jackel, *Exploiting Tax Loopholes*, 139 TAX NOTES 669, 669 (2013); Linda Evans, *Obstacles to Federal Tax Reform: An Exploratory Inquiry Into the Fiscal Attitudes of a Small Group of Taxpayers*, 37 AM. J. ECON. & SOCIOLOGY 71, 74–79 (1978).

27. See, e.g., Katz, *supra* note 1, at 2.

28. See, e.g., Lawrence Zelenak, *The Loophole that Would Not Die: A Case Study in the Difficulty of Greening the Internal Revenue Code*, 15 LEWIS & CLARK L. REV. 469, 473–74 (2011) (implying that a loophole confers a benefit on people who were not anticipated beneficiaries).

shooting through.”²⁹ “The etymology of the term “loophole” traces to the arrow slits cut in medieval castle walls. The loophole provided a crack or perforation that permitted the archer to peer through and fire his weapon.”³⁰

As relevant today, Webster’s New World College Dictionary defines “loophole” to be “a means of escape; esp., a means of evading or escaping an obligation, enforcement of a law or contract, etc.”³¹ Similarly, Black’s Law Dictionary defines a “loophole” to be “[a]n ambiguity, omission, or exception (as in a law or other legal document) that provides a way to avoid a rule without violating its literal requirements; esp., a tax-code provision that allows a taxpayer to legally avoid or reduce income taxes.”³²

Thus, common uses of the term “tax loophole” refer to tax benefits that are available because of “statutory ambiguities and omissions,”³³ where a tax benefit is available due to a “[l]inguistic imperfection . . . [s]ome texts are too narrowly drawn . . . [o]ther texts seem overly broad and ambiguous”³⁴ or where a tax benefit is created as an unavoidable part of the process of writing and enacting laws.³⁵ Some commentators explain that “tax loopholes” are tax benefits that comply with “the letter of the law but simultaneously violat[e] its spirit.”³⁶ Similarly, some commentators, when defining “tax loopholes,” focus on Congress’s intent³⁷ by describing “tax loopholes” as tax preferences that were unintended or unanticipated by Congress,³⁸ including but not

29. *Loophole*, WEBSTER’S NEW WORLD COLLEGE DICTIONARY (5th ed., 2014), <http://www.yourdictionary.com/loophole#websters> [<https://perma.cc/NQ2W-BUTS>].

30. Daniel T. Ostas, *Corporate Counsel, Legal Loopholes, and the Ethics of Interpretation*, 18 TEX. WESLEYAN L. REV. 703, 704 (2012).

31. *Loophole*, *supra* note 29

32. *Loophole*, BLACK’S LAW DICTIONARY (10th ed., 2014).

33. Bittker, *supra* note 6, at 1102–09; *see also, e.g.*, Joshua Blank, *What’s Wrong With Shaming Corporate Tax Abuse*, 62 TAX L. REV. 539, 565 (2009) (relying on a dictionary definition of “loophole,” and understanding tax loopholes as “tax benefits that take advantage of such an ‘ambiguity or omission’ in the . . . tax law”).

34. Ostas, *supra* note 30, at 704–05.

35. Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339, 366 (2005) (“it simply is not possible to write tax laws that are devoid of all unintended loopholes”); Katz, *supra* note 1, at 17–25 (discussing how the legislative process makes it impossible to avoid creating loopholes).

36. Daniel T. Ostas, *Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy*, 46 AM. BUS. L.J. 487, 509 (2009); *see also, e.g.*, Katz, *supra* note 1, at 2 (“glitches in the formulation of a law . . . [that enable] clients [to] do things that appear to subvert its purpose”).

37. This definition assumes that Congressional intent can be readily ascertained, a task which sometimes presents challenges. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324–39 (1990).

38. *See, e.g.*, Senator Orrin Hatch, *Debunking the Myths of So-Called Tax*

limited to situations where “the Code has been applied to structures to which it was not intended”³⁹ or situations at “the intersection of different unrelated provisions of the tax code that produce an unanticipated tax advantage.”⁴⁰ Yet others focus on the role of tax advisers and on the planning required to take advantage of the tax benefit, defining tax loopholes to be tax planning opportunities or strategies discovered by “clever tax advisors.”⁴¹

There is overlap between these definitions. For example, a tax adviser might discover an ambiguity in a statute that could support an interpretation that is different than Congress may have intended. But these definitions are not entirely co-extensive. For example, the benefit of a tax provision could be unintended and unanticipated (e.g., because the technology to which it applies was not invented at the time Congress enacted the particular provision), but the application of that tax provision to the new context might be perfectly aligned with the spirit of the law. Or perhaps the tax benefit could be the product of how multiple perfectly clear and unambiguous rules intersect, albeit in a way that, in the aggregate, was unintended by Congress.

Moreover, several definitions and common uses of the term “tax loophole” directly conflict with the definitions above. Some commentators use the term “tax loophole” to include tax preferences that are deliberately provided by Congress and used by taxpayers as Congress intended.⁴² Some commentators focus on

Expenditures, UNITED STATES SENATE COMMITTEE ON FINANCE: RANKING MEMBER'S NEWS (Jul. 12, 2011), <https://www.finance.senate.gov/ranking-members-news/debunking-the-myths-of-so-called-tax-expenditures> [<https://perma.cc/UBU4-KAPJ>] [hereinafter SENATE FINANCE COMMITTEE] (“A loophole is something that Congress did not intend”); Sheldon D. Pollack, *Arenas of Federal Tax Policy*, 135 TAX NOTES 1499, 1505–06 (2012) (“unintended tax benefits”).

39. David J. Herzig, *Am I the Only Person Paying Taxes: The Largest Tax Loophole for the Rich – Exchange Funds*, 2009 MICH. ST. L. REV. 503, 509 (2009).

40. Pollack, *supra* note 38, at 1505–06.

41. PRES. ADVISORY PANEL ON FED. TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM 4–5 (2005), <https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Fix-Tax-System-2005.pdf> [<https://perma.cc/YAS8-BHT3>]; see also, e.g., Katz, *supra* note 1, at 2; Bittker, *supra* note 6, at 1109–12 (“[T]he term ‘loophole’ often also reflects the widely held view that tax experts have a magical power to reduce taxes.”); Jackel, *supra* note 26, at 669 (providing several definitions of tax loopholes, with the lawyer’s role being central to many).

42. See, e.g., Harry J. Rudnick, *A Better Design for Loopholes*, 7 CHALLENGE 24, 24 (1959) (referring to “important loopholes which have been deliberately provided by congress for the very purpose of permitting certain taxpayers [to benefit]”); Evans, *supra* note 26, at 74 (arguing that tax reformers, when referring to “tax loopholes” “are referring to any tax provision which is available to some and not to others . . . [including] all existing tax exemptions, deductions and credits”); see also Bittker, *supra* note 626, at 1112–13; Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law is Uncertain*, 27 VA. TAX REV. 241, 249 n.10 (2007) (“an intended tax loophole . . . describe[s] those provisions in the tax

those tax preferences deliberately provided to special interest groups or the wealthy.⁴³ Others employ a broader definition of “loophole” that encompasses *all* deliberately provided tax preferences, including the “mortgage interest [deduction], [exclusion for the value of] healthcare, [tax-deferred] buildup in pensions, [deduction for] property taxes, and [deduction for] charitable contributions.”⁴⁴ Indeed, some commentators treat all tax expenditures as “tax loopholes,”⁴⁵ but others strongly object to this definition of “loopholes,” explaining that “[t]ax expenditures are not loopholes”⁴⁶ or commenting that it is “impossible to understand how one can possibly characterize a specific and purposeful legislative enactment as . . . ‘a loophole.’”⁴⁷

Some go further to include as “loopholes” not only tax expenditures or tax benefits available through tax planning, but any “gaps in the tax base,”⁴⁸ “provisions that enable people to avoid any tax based on how they earn income or how they spend income,”⁴⁹ or, in the most expansive approach, anything that legally reduces tax.⁵⁰ This could include preferential capital gains

laws designed to subsidize certain activities.”).

43. See, e.g., Martin A. Sullivan, *Economic Analysis: Eliminate Everybody’s Loopholes Except Mine*, 134 TAX NOTES 922 (2012) (quoting an exchange about deliberately provided special interest provisions); Surrey, *supra* note 8, at 1148; AMERICANS FOR DEMOCRATIC ACTION, A GUIDE TO THE AMERICAN LOOPHOLE SYSTEM: THE ADA TAX REFORM MANUAL ii (1976) (explaining that “expenditure-loopholes [] increasingly have permitted the rich to use the tax system to get richer” and citing several intentionally enacted tax expenditures as evidence).

44. Meg Shreve, *Conversations: Bill Bradley*, 133 TAX NOTES 303, 305 (2011); see also, e.g., Paul H. Douglas, *The Problem of Tax Loopholes (Or: My Eighteen Years in a Quandary)*, 37 AM. SCHOLAR 21, 33–34 (1968) (criticizing, as “loopholes,” provisions such as the exclusion for interest on municipal bonds).

45. See, e.g., Shreve, *supra* note 44; see also Charles E. McLure Jr., *Ruminations on the Tax Reform Act of 1986*, 135 TAX NOTES 345, 346 n.7 (2012) (noting that terms such as “loopholes” and “tax preferences” are used interchangeably to denote deviations from the Haig-Simons definition of income); Anthony C. Infanti, *Tax Reform Discourse*, 32 VA. TAX REV. 205, 211, 241 (2012) (explaining that “tax expenditures . . . are commonly referred to as tax ‘loopholes’”).

46. Pollack, *supra* note 38; SENATE FINANCE COMMITTEE, *supra* note 38 (“Whether you agree with a particular tax expenditure or not, an honest debate requires recognition that tax expenditures were designed by Congress with economic or social goals in mind and are not inadvertent loopholes.”); John L. Buckley, *Tax Expenditure Reform: Some Common Misconceptions*, 132 TAX NOTES 255, 256–57 (2011) (similar).

47. Joseph R. Crosby, Letter to the Editor, *Let’s Be Clear on Definition of ‘Loophole,’* 26 STATE TAX NOTES 124 (2002).

48. David A. Weisbach, *Disrupting the Market for Tax Planning*, 26 VA. TAX REV. 971, 973 (2007).

49. Daniel J. Mitchell, *Everything You Need to Know about Deductions, Loopholes, and Special-Interest Tax Provisions*, CATO AT LIBERTY (Nov. 30, 2015), <https://www.cato.org/blog/everything-you-need-know-about-deductions-loopholes-special-interest-tax-provisions> [<https://perma.cc/38NM-J26Z>].

50. See, e.g., George F. James, Jr., *The Loophole-Closing Revenue Act of 1937*, 23 AM. BAR ASS’N. J. 759, 759 (1937) (“[D]evices within the letter of the revenue laws for the

rates,⁵¹ nonrecognition provisions,⁵² the failure of our income tax system to tax imputed income from owner-occupied housing,⁵³ and even the realization requirement (enabling assets to appreciate tax-free until disposition).⁵⁴

Given this wide range of definitions for the term “tax loophole,” it is understandable that some commentators criticize the use of the term as “suffer[ing] from . . . vagueness of . . . concept”⁵⁵ or as being “used quite loosely and without critical reflection.”⁵⁶ One commentator, valiantly trying to provide some guidance about what “tax loopholes” are, suggested that “loophole” could mean several things:

- The law provides for a designated result but it is apparent from the text of the law that the result was not intended by the drafters of the statute or regulation. Within this category would be mistakes written into the law by Congress or the IRS, or language that reads as the tax lawyer and his client intended but is not what the IRS or Congress intended the language to actually mean.
- The law provides for a specific result advocated by special interest groups, and the tax lawyer is merely taking advantage of

purpose of avoiding taxes . . .”).

51. See, e.g., James Kwak, *The Most Important Tax Break Is the One That Nobody Talks About*, THE ATLANTIC (Nov. 15, 2012), <https://www.theatlantic.com/business/archive/2012/11/the-most-important-tax-break-is-the-one-that-nobody-talks-about/265308> [<https://perma.cc/L2C2-5GAC>] (“The loophole for [preferential rates on] investment income is one of the biggest ones that exist . . .”).

52. See, e.g., Chuck Marr, *The Tax Loophole of 2016: Like-Kind Exchange*, CENTER ON BUDGET AND POLICY PRIORITIES (May 18, 2016), <http://www.cbpp.org/blog/the-tax-loophole-of-2016-like-kind-exchange> [<https://perma.cc/SH36-FPEK>] (condemning the nonrecognition provision of Section 1031 as a “major tax loophole that policymakers should close”).

53. See, e.g., American Bar Association, *Report on Reform of Federal Wealth Transfer Taxes Task Force on Federal Wealth Transfer Taxes*, 58 TAX LAW. 93, 294 (2004) (Dennis L. Belcher, Chair, & Mary Louise Fellows, Reporter) (“recogniz[ing] imputed income for personal use . . . [would] clos[e] a potentially major loophole . . .”); Gerard M. Brannon, *Tax Loopholes as Original Sin: Lessons from Tax History*, 31 VAND. L. REV. 1763, 1767–69 (1986) (discussing the non-taxation of imputed rents as one such “original sin”).

54. See, e.g., Brannon, *supra* note 53, at 1769–73 (discussing the realization requirement as another such original sin); *Sunday Morning Futures* (Fox television broadcast Jan. 17, 2016) (criticizing as a legal loophole/dodge, Warren Buffet’s ability to not pay current tax on his “unrealized capital gains,” implicitly due to the realization requirement).

55. Joseph P. McKenna, *Tax Loopholes: A Procedural Proposal*, 16 NAT’L TAX J. 63, 63 (1963).

56. Ostas, *supra* note 30, at 703.

what Congress or the IRS bestowed on taxpayers who can afford high-priced tax advice.

- The law provides for a specific result but only wealthy individuals and large corporations have sufficient income or assets to take advantage of the law.
- The common law doctrines of economic substance, sham, step transaction, substance versus form, etc., would prevent the intended result desired by the tax lawyer and the client but, because of the ambiguity in applying these doctrines to the facts at hand, it is concluded that these doctrines do not apply.
- The law is unclear as to the intended result and can be argued either way. Even though the intended result “is too good to be true,” the tax lawyer and his client take advantage of this gray area and implement the transaction after the lawyer gives a written opinion that the taxpayer should prevail.⁵⁷

These definitions are wide-ranging, including intended and unintended tax benefits and including tax benefits that are broadly available and that are only available for a limited group. Further, the author offers this list of definitions as merely “illustrative and not exclusive,”⁵⁸ meaning that, even to this author, “tax loopholes” could encompass an even broader array of tax preferences.

Given the wide range of possible definitions and the lack of consensus about a definition of “tax loophole,” some people use the term “tax loopholes” merely to refer to tax benefits provided “to some [people] and not to others”⁵⁹ or, more specifically, tax benefits that “are available to someone other than oneself.”⁶⁰ More generally, “the use of the appellation ‘loophole’ is [often merely] a

57. Jackel, *supra* note 26, at 669.

58. *Id.* at 669 n.2.

59. Evans, *supra* note 26, at 74.

60. *Id.* at 77, 79 (stating that people “tended not to see any *tax provision* they used to *avoid taxes* as a ‘loophole’”).

matter of viewpoint,”⁶¹ with “one person’s loophole [being] another person’s ‘benefit’”⁶² or even “another taxpayer’s lifeline.”⁶³ Indeed, “too often the term [tax loophole] means . . . some provision of the tax code which the speaker opposes.”⁶⁴

Commentary about the tax legislation enacted in late 2017 provides a recent example of the widely divergent definitions of the term “tax loophole.” Republican leaders touted their success in “clos[ing] wasteful loopholes” and enacting pro-growth tax reform.⁶⁵ In contrast, Democratic leaders condemned both the 2017 Tax Act’s failure to close existing loopholes and its creation of “huge new loopholes.”⁶⁶ Politicians spoke about the same new law, referred to the same new provisions and used the same “tax loophole” terminology, but they clearly meant very different things.

Despite the lack of consensus on the definition of “tax loophole,” there are a couple of parameters on which commentators generally agree.

First, most references to “loopholes” are pejorative and intend to express criticism.⁶⁷ There are limited circumstances in which

61. Surrey, *supra* note 8, at 1148.

62. Dave Rifkin, *An Overview of the “Tax Gap”*, 86 TAXES: THE TAX MAGAZINE 27 n.9 (2008).

63. *The Complexity of the Tax Code*, *supra* note 12, at 10.

64. McKenna, *supra* note 55, at 63; *see also, e.g., The Complexity of the Tax Code*, *supra* note 12, at 10 (“[T]axpayers and policymakers use the term ‘loophole’ to describe a tax expenditure that they do not agree with (or do not benefit from).”); Katherine Mangu-Ward, *Everything is Bad. Blame the Tax Code.*, N.Y. TIMES (Nov. 4, 2017), <https://www.nytimes.com/2017/11/04/opinion/sunday/republicans-taxes-loop-holes.html> (“[M]ost people tend to reserve that word [‘loophole’] for special tax treatment they don’t like.”).

65. Mitch McConnell, Senate Majority Leader, Remarks on the Senate Floor in Washington D.C. (Jan. 11, 2018), <https://www.republicanleader.senate.gov/newsroom/remarks/we-took-money-out-of-washingtons-pocket-and-put-it-back-in-the-pockets-of-the-families-who-earned-it> [<https://perma.cc/BF6B-XMND>]; *see also, e.g.,* White House Fact Sheets, *The Tax Cuts Act Follows through on President Donald J. Trump’s Promise of Middle Class Tax Cuts*, WHITEHOUSE.GOV (Dec. 20, 2017), <https://www.whitehouse.gov/briefings-statements/tax-cuts-act-follows-president-donald-j-trumps-promise-middle-class-tax-cuts/> [<https://perma.cc/BY3C-4J2D>] (“The Tax Cuts Act enacts pro-growth reform, putting American businesses on a level playing field with foreign competitors. . . . The Tax Cuts Act will eliminate dozens of special interest tax breaks and loopholes.”).

66. Ron Wyden, U.S. Senator, Statement at Conference Committee on Republican Tax Plan (Dec. 13, 2017), <https://www.finance.senate.gov/ranking-members-news/wyden-statement-at-conference-committee-on-republican-tax-plan> [<https://perma.cc/YK7R-W4U8>]; *see also, e.g.,* Chuck Schumer, U.S. Senator, Schumer Statement on GOP Tax Bill (Dec. 1, 2017), <https://www.democrats.senate.gov/newsroom/press-releases/schumer-statement-on-gop-tax-bill> [<https://perma.cc/2SZR-TFDQ>] (arguing that the tax bill will “swindle[e] the middle class and loosen[] loopholes for the wealthy”). *But see* Jonathan Curry, *White House Regrets Not Axing Carried Interest, Cohn Says*, 158 TAX NOTES 55 (2018) (citing a White House representative “affirm[ing] that Trump still views carried interest as a loophole” and acknowledging that the tax legislation did not fix it).

67. *See, e.g.,* Infanti, *supra* note 45, at 250 (“[T]ax ‘loopholes’—a pejorative term that evokes a gap in, or departure from, the theoretically appropriate tax base.”).

references to “loopholes” have positive connotations. This occurs, for example, when someone is trying to sell a tax benefit (or materials that provide the key to obtaining the tax benefit) to taxpayers.⁶⁸ And occasionally, the term “loophole” will be used with “a dash of admiration” for the tax adviser who figured out how to obtain the particular tax benefit.⁶⁹ Nevertheless, most uses of the term “loophole” bear negative connotations. The challenge, which will be tackled in Part III.A, is deciphering *why* the speaker is criticizing the particular tax preference.

Second, most references to “loopholes” accept that the tax benefit obtained is legal, or at least, that a colorable argument can be made that the tax benefit is legal. Occasionally, people will “fail[] to make a clear distinction between loopholes which are legal and acts of falsification which are not,”⁷⁰ and will assert that “[s]ome of the loopholes that have been used are not ‘true allowances’” and “don’t comply with existing law and IRS regulations.”⁷¹ Others suggest that “loopholes” might include tax benefits that would be illegal under current law *if only* judicial anti-abuse doctrines were more rigorously applied,⁷² or refer to both clearly legal provisions and provisions of dubious legality when discussing loopholes.⁷³ But generally, even critics of “tax loopholes” generally concede that the tax benefit, while objectionable, is legal (or at least arguably legal) under the applicable law.⁷⁴

68. See, e.g., DIANE KENNEDY, *LOOPHOLES OF THE RICH: HOW THE RICH LEGALLY MAKE MORE MONEY AND PAY LESS TAX* (2004); EVA ROSENBERG, *DEDUCT EVERYTHING!: SAVE MONEY WITH HUNDREDS OF LEGAL TAX BREAKS, CREDITS, WRITE-OFFS, AND LOOPHOLES* (2016).

69. Bittker, *supra* note 6, at 1102.

70. Evans, *supra* note 26, at 78–79.

71. Amy S. Elliott & Marie Sapirie, *Microsoft, Hewlett-Packard Called Out for Offshore Tax Practices*, 136 TAX NOTES 1506, 1506 (Sept. 24, 2012) (quoting Senator Carl Levin).

72. See, e.g., Jackel, *supra* note 26, at 669; see also generally Bittker, *supra* note 6, at 1110–11 (explaining that courts “regularly” use “judicial doctrines . . . to deflate ingenious and initially promising [loophole] schemes”); Ostas, *supra* note 36, at 510 (“Judicial attitudes toward the exploitation of legal loopholes can be somewhat ambivalent [Sometimes,] courts will condemn arguments based on loopholes as shams, frauds, and violations of law . . . [and] look[] through form to substance . . . [meaning that] sometimes arguments based on legal loopholes work; sometimes they do not.”)

73. See, e.g., Joe Thorndike, *Tax History – Civilization at a Discount: The Morality of Tax Avoidance*, 95 TAX NOTES 664, 664–65 (2002) (describing FDR’s “antiloophole crusade” as targeting both “legally suspect loopholes” and loopholes with “secure legal status”).

74. See Rifkin, *supra* note 62, at 27 n.9 (“A ‘loophole’ is *not* cheating, attending to evade taxes due and owing, failing to file a return, underreporting of income or an underpaying taxes due and owing.”); Evans, *supra* note 26, at 78–79 (treating legality as part of the baseline definition of loopholes); see also, e.g., Elliott & Sapirie, *supra* note 71 (quoting Senator Tom Coburn as “acknowledging that he did not like [the tax avoidance strategies referred to by his colleague as illegal loopholes]” but saying “the techniques are ‘properly legal tax avoidance’”).

Despite these two points of general agreement, a definition for “tax loophole” remains elusive.

B. *The (Lack of) Value in Defining “Tax Loophole”*

As illustrated by the foregoing, there is no consensus on the definition of “tax loophole.” Trying to define “tax loophole” presents challenges that are similar to (and intertwined with) those encountered when trying to define the closely-related concepts of tax shelters and tax expenditures.⁷⁵ Commentators and policymakers have spent considerable effort trying to define these terms, and the endeavors have proven controversial, spawning abundant literature on both tax shelters⁷⁶ and tax expenditures.⁷⁷

A critical difference, however, between the debate about the definition of tax loopholes and the debates about the definitions of tax shelters and tax expenditures is that the latter debates have meaningful consequences.

If a transaction is a “tax shelter,” then special penalty provisions,⁷⁸ disclosure and list-keeping requirements,⁷⁹ and

75. See, e.g., Deborah H. Schenk, *Foreword*, 55 TAX L. REV. 125, 127 (2002) (“The difficulty with defining shelters is that, like Justice Potter Stewart, we know them when we see them, but we apparently cannot agree either on what we are seeing or how to describe what we see.”); Logue, *supra* note 42, at 263 n.45 (“One of the biggest issues in the tax shelter literature, arguably the central issue in that debate, is the question of how to distinguish the unintended from the intended tax loopholes.”).

76. See, e.g., JOINT COMM. ON TAXATION, JCX-19-02, BACKGROUND AND PRESENT LAW RELATING TO TAX SHELTERS 2 (Mar. 19, 2002) (“[T]axpayers and tax administrators have struggled in determining the line between legitimate ‘tax planning’ and unacceptable ‘tax shelters.’”); David P. Hariton, *How to Define “Corporate Tax Shelter”*, 136 TAX NOTES 169, 169 (2012); Michael L. Schler, *Ten More Truths about Tax Shelters: The Problem, Possible Solutions, and a Reply to Professor Weisbach*, 55 TAX L. REV. 325, 328, 334–40 (2002) (describing several categories of tax shelters, but lamenting that “there is no established definition of the term”); Calvin H. Johnson, *What’s a Tax Shelter?* 68 TAX NOTES 879, 879 (1995) (“There is no consensus definition of a ‘tax shelter’ in the law or legal literature.”).

77. See, e.g., David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 972–82 (2004) (summarizing the debate about the definition of tax expenditures, and explaining that “the particular details [about what is included in the “normative tax base” and what constitutes a deviation therefrom] vary by individual tax expert”); Boris I. Bittker, *Accounting for Federal “Tax Subsidies” in the National Budget*, 22 NAT’L TAX J. 244, 244–47 (1969) (critiquing the scope of the tax expenditure concept); see also generally STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 6–7 (1973) (foundational work setting out the concept of tax expenditures); JOINT COMM. ON TAXATION, JCX-3-17, *ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2016–2020*, 1–20 (Jan. 30, 2017) (explaining that “[t]ax expenditures are defined under the Congressional Budget and Impoundment Control Act of 1974” and discussing the application of that definition).

78. See, e.g., I.R.C. §§ 6662(d)(2)(C), 6662A, 6694(a)(2)(C), 6700, 6707A, 6708.

79. See, e.g., I.R.C. §§ 6011, 6111, 6112.

standards of practice are imposed.⁸⁰ Some of the relevant provisions employ slightly different definitions of “tax shelter,” and many refer to “reportable transactions” rather than “tax shelters” per se.⁸¹ Further, the literature discussing “tax shelters” often includes a broader array of transactions than are specifically covered by the relevant statutory definitions.⁸² While the debate may be broader than the scope of the statutory provisions that apply to tax shelters and reportable transactions, classification of a transaction as a “tax shelter” could dramatically affect the taxpayer and the tax adviser. There is even a special office in the IRS (the “Office of Tax Shelter Analysis”) that “collects and analyzes information about abusive tax shelters and transactions, and coordinates LB&I’s [Large Business & International] tax shelter planning and operation . . . [in order to] tak[e] steps to combat abusive tax shelters and transactions.”⁸³

As to “tax expenditures,” the classification of a provision as such does not trigger any particular statutory rules, but the classification remains critically important.⁸⁴ If a tax provision is a “tax expenditure,” it is included in the Congressional Budget Office and Joint Committee on Taxation discussions and estimates of tax expenditures that members of Congress can use to better “understand the actual size of government, the uses to which government resources are put, and the tax and economic policy consequences that follow from the implicit or explicit choices made in fashioning legislation.”⁸⁵ That is, tax expenditures become, at least to some degree, subject to the “application of regular government budgetary analysis and scrutiny.”⁸⁶

80. See, e.g., 31 C.F.R. § 10.37(c)(2).

81. See, e.g., I.R.C. §§ 6111, 6662A, 6707.

82. See, e.g., David A. Weisbach, *Ten Truths about Tax Shelters*, 55 TAX L. REV. 215, 232 (2002) (discussing as “tax shelters” transactions that might “be viewed as omissions from the tax base” and not technically fit into the Code’s definition of tax shelter or reportable transaction); JOINT COMM. ON TAXATION, *supra* note 76, at 4–33 (discussing several tax provisions and judicial doctrines that are relevant to “tax shelters” as this concept is understood broadly).

83. INTERNAL REVENUE SERVICE, ABUSIVE TAX SHELTERS AND TRANSACTIONS (2017), <https://www.irs.gov/businesses/corporations/abusive-tax-shelters-and-transactions> [<https://perma.cc/MSY5-6R4H>].

84. Weisbach & Nussim, *supra* note 77, at 973–74 (“[M]uch rides on such differences in definition: If a particular deduction or credit falls within the bounds of the normative tax base, none of the consequences of being a tax expenditure applies, while if it falls outside of the normative tax base, all of the consequences apply.”).

85. JOINT COMM. ON TAXATION, *supra* note 77, at 1; see also, e.g., CONGRESSIONAL BUDGET OFFICE, THE DISTRIBUTION OF MAJOR TAX EXPENDITURES IN THE INDIVIDUAL INCOME TAX SYSTEM (May 2013).

86. Weisbach & Nussim, *supra* note 77, at 974 n.49.

In contrast, the classification of a tax benefit as a “tax loophole” has no similar statutory, regulatory, or policy import. No penalties, reporting obligations, ethical rules, budgetary analyses or other substantive impact arises from classifying a tax preference as a “tax loophole.” Fights about whether something is or is not a “tax loophole” are pure rhetoric—classification in an effort to frame the discussion a particular way. There seems to be no objective truth of the matter. Even if there is, commentators cannot agree on what it is, and it lacks material consequence. To the extent the term “loophole” has meaning, it is primarily subjective, with the meaning coming from the speaker’s reasons for labeling something as a “tax loophole.”

Thus, spending more effort trying to define “tax loophole” is pointless. Doing so wastes energy on a definitional question with no consequences. If we stop trying to apply the “loophole” label to certain preferences, we could stop debating whether or not the classification as a “loophole” is appropriate. All of that time and effort could be used more productively by focusing on the underlying merits of why a speaker seeks to categorize any particular tax preference as a “loophole.”

The “loophole” rhetoric must be reframed. Forty-five years ago, Professor Boris Bittker argued something similar in the only other article that directly confronts the definition of “loophole” and its use in political rhetoric.⁸⁷ He sought to “rescue the federal income tax from the superheated rhetoric of its populist friends,” referring largely to the use of term “loopholes.”⁸⁸ Yet, given the frequent use of the term “tax loophole” in today’s tax reform discourse, policymakers and commentators clearly failed to heed his warning.

So why might this Article make more of a difference?

Professor Bittker took a definitional approach to his inquiry. His article discussed different ways in which people conceived of loopholes—as “statutory ambiguities and omissions,” as “tax avoidance tactics,” as “erosion, preferences, and other euphemisms”—and carefully considered whether the term “loophole” is appropriately applied to each of these categories.

In contrast, this Article eschews the definitional approach because what matters is not the aptness of the “loophole” label. What matters is the reason a speaker has chosen to affix the “loophole” label. Thus, rather than doing what Professor Bittker did and trying to improve the use of the label by providing a better, more thoughtful description of “tax loopholes,” this Article

87. Bittker, *supra* note 6, at 1102, 1127.

88. *Id.* at 1127.

provides a method for translating any application of the label into a substantive policy discussion.

Moreover, this Article's approach can be used not only to understand individual uses of the term "tax loophole," but also to understand the discourse in the aggregate. This provides insights into the perspectives of groups who talk about tax loopholes. Thus, even if the taxonomy advanced in this Article is not ultimately utilized by speakers who condemn tax loopholes, it can be used as a tool to review, code, and analyze what different groups of people care about and who they blame when they talk about "tax loopholes." Thus, regardless of whether this Article's taxonomy impacts the discourse any more than Professor Bittker's article forty-five years ago, the taxonomy still serves as a tool to help us learn something about ourselves as a society.

III. A TAXONOMY FOR TRANSLATING "TAX LOOPHOLE" RHETORIC

Any reference to a "tax loophole" can be translated into a more substantive policy discourse by asking two questions: What is the normative policy objection? And who is responsible for the problem?

By reframing any purported "loophole" along these two dimensions, a speaker can explain, and a listener can understand, what underlies the speaker's criticism of the particular provision. Thus, this part elaborates on each dimension for understanding the term "tax loophole." For each question, this part catalogs common answers, which are gleaned from analyses of academic, practitioner, and news articles, political speeches, television media transcripts, and other materials that use the term "tax loophole." Together, this provides a taxonomy for translating "tax loophole" rhetoric into more substantive discourse.

One caveat is warranted before delving into the taxonomy. The taxonomy advanced herein, with its two dimensions and multiple categories within each dimension, arguably replaces one labeling system (the term "tax loophole") with another labeling system. The labeling system advanced in the taxonomy, however, has a much stronger foundation, is more easily understood, demands explanations for the application of the label, and is designed to be actionable. Specifically (and as will be explained in greater detail below), the list of potential normative policy objections is based in vast literature about fundamental tax policy norms, which imbues the labels used in this part of the taxonomy with more well-established meaning.⁸⁹ And the categories for

89. See *infra* notes 92, 104, 122, 141, & 144.

assigning responsibility are all identifiable players (either individuals or groups of individuals) that interact with the tax system,⁹⁰ whose rights and responsibilities are reasonably well-defined, by the Constitution (for the different branches of government relevant to the tax system), by the Internal Revenue Code (for tax advisers and taxpayers), by the rules of ethics and standards of practice applicable to tax advisers, or otherwise. These players can take action in response to critique and can be held accountable if they do not.

Ultimately, the taxonomy's categorization system,⁹¹ although it lacks the political appeal of the "tax loophole" label, explicitly reveals the substance and target of the speaker's critique. Thus, the taxonomical approach can move the discourse beyond mere name-calling and can lay a foundation for a more meaningful discussion.

A. *Dimension #1—What is the Normative Policy Objection?*

One or more specific normative policy critiques typically underlie any use of the term "tax loophole." Occasionally, the term may be bandied about without careful thought about the policy concern that makes the particular tax preference worthy of condemnation. I suspect that, more frequently, the speaker, by affixing the "loophole" label, has concluded that a particular preference violates one or more norms of good tax policy, but she may let the rhetorical power of the term imply her condemnation without elaborating about her reasons.

The taxonomy demands explicitness. Any condemnation of a loophole should be clear about the normative policy critique. What norm of good tax policy is (arguably) violated by the tax preference?

There are many potential answers to this question. Speakers use the term "loophole" to express concern about revenue reduction, unfairness, complexity, economic inefficiency, lack of neutrality, lack of efficacy (typically for provisions intended to

90. C. EUGENE STEUERLE, CONTEMPORARY U.S. TAX POLICY 15–19 (2008) (describing the "parts of the government [that] have some responsibility for tax policy").

91. It is important to distinguish between (i) a feature that, if present, results in a particular tax preference being labeled as a "loophole" (i.e., a definition of a "loophole"), and (ii) the identification of a feature that causes a particular provision that has already been labeled as a "loophole" to be problematic (i.e., a taxonomical category for a loophole). The former is a definition, the goal of which is to determine whether a particular tax preference has the feature, and if it does, label the preference as a loophole. The latter is what this taxonomy seeks to do, to understand why something that has already been labeled a "loophole" is troubling to the labeler. In the former, the "loophole" labeling is the end, whereas in the latter, the "loophole" labeling is just the beginning.

achieve a social policy goal, although sometimes speakers object to the social policy goal itself), other concerns, and combinations of the foregoing.

This part draws on numerous examples throughout the academic literature and the popular/political discourse to catalog and explain each of the above potential policy problems (and variations thereon) that underlie different uses of the term “tax loophole.” In doing so, this part highlights questions relevant to each category in an effort to further the particular substantive discourse. Of course, the definition of each of these policy norms is, itself, slippery (some more than others), and different people will make different trade-offs among them. However, the below demonstrates the wide range of policy concerns that people could be expressing when labeling a tax preference as a “loophole,” and the below illustrates how very different substantive conversations could ensue if only speakers actually named the policy norm that they believe is violated by the “loophole.”

1. *Revenue Impact.* A common policy concern articulated or implied by those concerned about loopholes is loss of revenue.⁹² This concern motivates, at least in part, the labeling as “loopholes” tax benefits such as (i) deferral of taxes on foreign income, inversions, and other cross-border planning strategies that reduce taxes paid by, and revenue raised from, multinational enterprises;⁹³ (ii) corporate deductions that allow corporations’ effective tax rates to be well below the nominal marginal rate;⁹⁴ (iii) tax expenditures, such as the mortgage interest deduction, that, if eliminated, would be “the biggest revenue raisers;”⁹⁵ (iv) capital gains rate preference that, if eliminated, could raise

92. See, e.g., Douglas, *supra* note 44, at 24 (“[L]oopholes . . . enabled large quantities of income to slip through the tax net.”); see also generally STEUERLE, *supra* note 90, at 15, 19–22 (discussing “taxes as a means of financing government”); JOEL SLEMROD & JON BAKLJA, *TAXING OURSELVES: A CITIZEN’S GUIDE TO THE DEBATE OVER TAXES* 13–16 (2008) (discussing how taxes finance government operations).

93. See, e.g., Jonathan D. Rockoff et al., *Pfizer Walks Away From Allergan Deal*, WALL ST. J. (Apr. 6, 2016, 5:26 PM), <https://www.wsj.com/articles/pfizer-walks-away-from-allergan-deal-1459939739> (inversions result in the “departure of tax receipts”); Jeff Sommer, *A Stranded \$2 Trillion Overseas Stash Gets Closer to Coming Home*, N.Y. TIMES, (Nov. 4, 2016), <https://www.nytimes.com/2016/11/06/your-money/strategies-corporate-cash-repatriation-bipartisan-consensus.html>. After the 2017 Tax Act, the specific cross-border tax reduction strategies described as “loopholes” will change because the rules have changed, but commentators continue to use the “loophole” label to describe tax reduction opportunities for multinational enterprises available after the 2017 tax legislation. See, e.g., Shay, *supra* note 20.

94. See, e.g., David Kocieniewski, *U.S. Business Has High Tax Rates but Pays Less*, N.Y. TIMES (May 2, 2011), <http://www.nytimes.com/2011/05/03/business/economy/03rates.html>.

95. See, e.g., Shreve, *supra* note 44, at 305 (quoting Bill Bradley).

hundreds of billions of dollars;⁹⁶ and (v) the deferral of tax on like-kind exchanges, which “cost[s] the government billions a year”;⁹⁷ among many other tax preferences.⁹⁸

Calling these preferences “loophole” as an expression of concern about foregone revenue assumes a particular baseline from which the revenue is lost.⁹⁹ The relevant baseline depends on the particular “loophole.” For example, the above-mentioned tax preferences are only revenue reducing when compared to the revenue that would be collected under the following baselines: (i) comprehensive current taxation on worldwide income (before the 2017 tax legislation) or a largely territorial business taxation system with an unavoidable/unmanipulable transition rule and fully effective anti-abuse rules (after the 2017 tax legislation); (ii) full corporate income taxation at the stated marginal rates; (iii) the “normal tax” as that concept is used in the tax expenditure analysis; (iv) taxation of all income at ordinary rates; and (v) full current taxation on all dispositions, respectively.

Thus, when concern about revenue is the policy objection, we must ask what the speaker’s baseline is for determining that there is revenue loss, and we should ask why that baseline is the right one from which to judge the provision. Returning to the first example (regarding U.S. multinational corporations), someone who supported a territorial rather than a worldwide tax system before the 2017 tax legislation¹⁰⁰ might have objected to the “loophole” characterization of inversions and other tax planning efforts that reduce the U.S. tax owed on income earned abroad. Such efforts might not have been particularly objectionable to such a person; rather, they might have constituted self-help to mitigate the impact of an overbroad tax system.¹⁰¹ Thus, inquiring about the relevant baseline for “loopholes” criticized as revenue-reducing

96. See, e.g., Kwak, *supra* note 51 (arguing that “[i]f you really want to raise revenues, the Holy Grail . . . [is] taxing investment income like ordinary income” and citing an estimate of \$440 billion raised over five years).

97. See, e.g., Marr, *supra* note 52.

98. See, e.g., Tom McGee, *U.S. Sales Tax: An Unfair Arbiter of Winners*, WALL ST. J. (Aug. 16, 2016, 2:00 PM), <https://www.wsj.com/articles/u-s-sales-tax-an-unfair-arbiter-of-winners-1471370436> (lamenting the revenue lost due to the lack of sales taxes on online retail sales, which the author calls a “loophole”).

99. See, e.g., JOINT COMM. ON TAXATION, *supra* note 77, at 21 (describing the relevant baseline for measuring the magnitude of tax expenditures).

100. See, e.g., H.R. REP. NO. 115-409, at 370 (2017) (explaining the House bill’s provisions that would move the U.S. from a worldwide taxation system to a largely territorial system in order to improve the global competitiveness of U.S. businesses).

101. Cf., CNN RADIO, *The Language of the Loophole* (Nov. 23, 2012), <http://cnnradio.cnn.com/2012/11/23/the-language-of-the-loophole/> (Libby Lewis paraphrasing George Lakoff, saying, “conservatives, in general, see tax loopholes as a good thing, because for people who think taxes are bad, then something that lets you avoid taxes is good”).

turns a debate about whether inversions are properly labeled “loopholes” into a debate about the design of the U.S. international tax system, which, while still complicated and challenging, is more substantive.

Sometimes the revenue concern about “loopholes” is expressed not on an aggregate basis (i.e., for the fisc), but rather on a taxpayer-by-taxpayer basis, where a tax preference enables an individual taxpayer to reduce its taxes (and thus reduce the revenue collected from it).¹⁰² Whether the revenue concern is raised from a macro (aggregate revenue reduction) or micro (individual taxpayer tax reduction) perspective, baseline questions remain—against what baseline is the taxpayer’s tax burden being compared? And why is that the right baseline?

The conversation spurred by these questions can continue with follow-up questions such as: Are there countervailing policy considerations that might outweigh this revenue loss? What would be done with additional revenue collected if the purported “loophole” were closed?¹⁰³ And how much revenue does the government need (i.e., what is the appropriate size/function of government)?

2. *Fairness.* Fairness is also a common concern explicitly or implicitly raised by references to “tax loopholes.” Fairness, of course, is an elusive concept that can be challenging to define, and this difficulty spawned a large amount of literature.¹⁰⁴ Thus, not surprisingly, when the term “loophole” is used to imply a fairness critique of a particular tax benefit, speakers mean a variety of different things.

Speakers may mean that the benefit is available to some taxpayers and not others.¹⁰⁵ Or, more particularly, they may mean

102. See, e.g., Liz Moyer, *Treasury Plans Additional Rules to Deter Inversions*, N.Y. TIMES (Nov. 18, 2015), <https://www.nytimes.com/2015/11/19/business/dealbook/treasury-plans-additional-rules-to-deter-inversions.html?mcubz=3> (“A takeover [that takes advantage of a loophole] could allow Pfizer to cut its 25 percent tax rate by moving its headquarters to Europe.”).

103. See *infra* notes 136–40 and accompanying text.

104. See, e.g., C. Eugene Steuerle, *And Equal (Tax) Justice for All?*, in TAX JUSTICE: THE ONGOING DEBATE (Joseph Thorndike & Dennis J. Ventry, Jr., eds.) (2002) (discussing different concepts of tax equity); SLEMROD & BAKIJA, *supra* note 92, at 57–98; Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT’L TAX J. 139 (1989); Paul A. McDaniel & James R. Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, 1 FLA. TAX REV. 607 (1993); Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. OF TAX POL’Y 221 (1995).

105. See, e.g., Bill Bradley, *Tax Reform is a Team Sport*, BLOOMBERG BUSINESSWEEK, (Apr. 7, 2011, 4:00 PM), <https://www.bloomberg.com/news/articles/2011-04-07/bill-bradley-tax-reform-is-a-team-sport> (loopholes “reduce taxes for their lucky beneficiaries but leave

fairness in the traditional horizontal equity sense—that the benefit is available to some taxpayers and not to other *similarly situated* taxpayers.¹⁰⁶ Sometimes the fairness concern is less about *similar* taxpayers and more about a *particular set* of taxpayers who benefit from the preference as compared to all other taxpayers who do not share that benefit. For example, the rich benefit from a preference but the middle/lower classes do not, as with step-up basis upon death and the capital gains preference;¹⁰⁷ corporations, businesses, or large multinational enterprises benefit from the preference but individuals do not, as with the (pre-2017 Tax Act) ability to reduce taxable income through inversions;¹⁰⁸ certain “favored” businesses benefit but other businesses do not, as with the limited application of sales taxes to online purchases, which some argue favors online merchants over brick-and-mortar merchants,¹⁰⁹ and as with the new deduction for qualified business income,¹¹⁰ which is available to businesses that provide “favored” services but disallowed to other businesses;¹¹¹ special interests (such as the real estate industry,¹¹² the fund and finance

the rest of us paying more”).

106. See, e.g., Joseph J. Thorndike, *Tax History: Stanley Surrey Knew a Thing or Two about Loopholes*, 138 TAX NOTES 663 (2013) (discussing provisions that violated Stanley Surrey’s test for identifying undesirable special tax provisions: “They all violated canons of horizontal equity, or what Surrey called simply fairness. ‘The income-tax burden should as far as possible apply equally to persons with the same dollar income.’”); Douglas, *supra* note 44, at 304 (positing a similar test).

107. These provisions technically apply to all taxpayers, but they have been critiqued as loopholes on the grounds that the rich get the vast majority of the benefit. See, e.g., BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 98 n.15 (1999) (citing Section 1014 as an example a “loophole that benefit[s] the wealthy.”); Kwak, *supra* note 51 (calling the capital gains preference a loophole for the wealthy).

108. See, e.g., Liz Moyer, *Pfizer and Allergan Deal Comes with an Extensive Prenup*, N.Y. TIMES (Nov. 24, 2015), <https://www.nytimes.com/2015/11/25/business/dealbook/pfizer-and-allergan-deal-comes-with-an-extensive-prenup.html> (quoting Senator Franken as saying, “[i]nversions are a terrible deal for the American taxpayer . . . Large companies use loopholes to get around paying their fair share of taxes, which is something middle-class Americans cannot do”); *Hillary Clinton’s Pfizer Follies*, WALL ST. J. (Nov. 26, 2015, 4:57 PM), <https://www.wsj.com/articles/hillary-clintons-pfizer-follies-1448575026> (loopholes “disadvantage small businesses and domestic firms that cannot game the international tax system”).

109. See, e.g., McGee, *supra* note 98.

110. 2017 Tax Act § 11011(a) (to be codified at 26 U.S.C. § 199A).

111. See Avi-Yonah et al., *supra* note 19, at 8–9.

112. See, e.g., James B. Stewart, *Tax Cuts for Americans Like Trump*, N.Y. TIMES (Sept. 2, 2016), <https://www.nytimes.com/2016/09/02/business/economy/if-trump-gets-his-way-real-estate-will-get-even-more-tax-breaks.html> (“[there are] major loopholes in the existing tax code that treat real estate developers as a special privileged class”); Paul Sullivan, *How the Tax Code Rewrite Favors Real Estate Over Art*, N.Y. TIMES (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/your-money/taxes-real-estate.html> (arguing that it is unfair that the 2017 Tax Act preserves the like-kind “exchange loophole” for real estate investors but not art investors).

industries,¹¹³ or the oil industry)¹¹⁴ benefit from the preference but other industries do not,¹¹⁵ or people with good lawyers benefit from the preference but others do not, as with sophisticated estate planning strategies.¹¹⁶ And sometimes, the fairness critique reflects a combination of these slightly different meanings.

Although the fairness critiques of “tax loopholes” vary, each asserts that some group is benefitting while another group is not, and each implies that it is inappropriate for the tax law to favor the former over the latter. Thus, in order to flesh out the speaker’s fairness critique more clearly, when the critique implied by the “loophole” label is about fairness, we should ask the speaker to be clear about the groups of taxpayers she is comparing—who is benefitting and who is not—and we should ask why the speaker believes that the difference in treatment is not appropriate.

A different version of a fairness critique implied by the term “loophole” focuses on situations where two groups of taxpayers are being treated alike and the speaker believes they should be treated differently.¹¹⁷ This version of the fairness critique is somewhat less common in the “loophole” discourse, but speakers sometimes assert that some group of taxpayers who were not intended to benefit from (or should not benefit from) a tax preference are, somehow, legally benefitting along with the appropriate beneficiaries.¹¹⁸ For example, some argue that it is unfair that

113. See, e.g., Alan J. Patricof, *Close My Tax Loophole*, N.Y. TIMES (Aug. 26, 2016), <https://www.nytimes.com/2016/08/27/opinion/close-my-tax-loophole.html?mcubz=1> (arguing that the “carried interest loophole” contributes to a “political and cultural environment [that] is marred by a toxic belief . . . that the world of high finance unjustly supersedes [ordinary Americans’] rights, needs and wants”); 2016 Democratic Party Platform, at 13 (July 21, 2016), http://www.presidency.ucsb.edu/papers_pdf/117717.pdf [<https://perma.cc/EL7H-FC98>] (“[W]e will shut down the “private tax system” for those at the top, immediately close egregious loopholes like those enjoyed by hedge fund managers . . .”).

114. See, e.g., President Barack Obama, Press Conference by the President (Feb. 15, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/02/15/press-conference-president> (“[W]e shouldn’t provide special treatment to the oil industry when they’ve been making huge profits and can afford to further invest in their companies without special tax breaks that are different from what somebody else gets.”).

115. See, e.g., Joseph J. Thorndike, *175 Years of Tax Planks and Party Platforms: Democratic Edition*, 151 TAX NOTES 1754 (2016) (discussing “benefits and loopholes [preserved by special interests] ‘at the expense of the average taxpayers’”).

116. *America’s Royals Exploit Tax Loopholes*, MSNBC (Dec. 19, 2013), <http://on.msnbc.com/1cSzFe3> (calling an estate planning strategy “a whopping, shocking, loophole” that . . . was “first discovered and exploited” by an “enterprising lawyer”); Jay A. Soled & Mitchell Gans, *Sales to Grantor Trusts: A Case Study of What the IRS and Congress Can Do to Curb Aggressive Transfer Tax Techniques*, 78 TENN. L. REV. 973, 1012 (2011) (the “wealthiest slice of taxpayers . . . have ample resources to secure professional advice and to devise ways to minimize their transfer tax burdens”).

117. That is, there is a vertical equity problem. See McDaniel & Repetti, *supra* note 104, at 608.

118. See, e.g., William Hoffman, *Black Liquor: The Loophole that Won’t Quit*, 143 TAX

SUV owners are benefiting from depreciation deductions that were not intended for them,¹¹⁹ and some argued that it was unfair that taxpayers who were in the U.S. illegally were benefiting from the child care tax credit when that credit should not apply to them.¹²⁰ In these contexts, the speaker should again be clear about the comparison groups (i.e., among those who benefit, who should and who should not), and the speaker should be able to articulate why only one of the two groups should be eligible for the tax preference.

The foregoing merely reflects an application of the literature about the meaning of fairness to the “loophole” discourse.¹²¹ This application, however, offers a structure for inquiring about why someone has labeled a particular tax preference as an unfair “loophole”—identification of fairness as the primary policy concern and specification about the speaker’s perspective about which taxpayers are and ought (or ought not) to be favored (and why). This structure advances the substantive policy conversation, which may ultimately broaden to include more fundamental questions about the discussants’ perspectives about the appropriate degree of progressivity in the tax system and about income/wealth inequality.

3. *Neutrality, Efficiency, & the Economy.* Sometimes the primary critique implied by the “tax loophole” label is about neutrality and efficiency.¹²² That is, the problem with the existence of a particular tax benefit is that it distorts behavior because taxpayers seeking to reduce taxes will alter their economic/business decisions in order to obtain that benefit, resulting in inefficiency.¹²³ Commentators argue, for example, that

NOTES 18 (Apr. 7, 2014) (criticizing the availability of an alternative fuels tax credit for a context that was not intended by Congress).

119. See, e.g., Zelenak, *supra* note 28, at 470–77; Roberta F. Mann, *On the Road Again: How Tax Policy Drives Transportation Choice*, 24 VA. TAX REV. 587, 640 (2005).

120. See, e.g., *Bill Set Forth to Close \$4B Tax Loophole*, FOX NEWS (May 24, 2012), <http://video.foxnews.com/v/1655287701001/bill-set-forth-to-close-4b-taxloophole/#sp=show-clips>. The 2017 Tax Act responded to this critique by modifying the child tax credit so that it is only available for a child with a social security number, which would prevent taxpayers from claiming the child tax credit for children who are in the U.S. illegally. 2017 Tax Act § 11022 (to be codified at 26 U.S.C. § 24(h)(7)).

121. See *supra* note 104.

122. See, e.g., SLEMROD & BAKIJA, *supra* note 92, at 131–34 (defining neutrality as a concern); STEUERLE, *supra* note 90, at 12–13 (defining efficiency as a concern); LOUIS KAPLOW, *THE THEORY OF TAXATION AND PUBLIC ECONOMICS* 53–150 (2008).

123. See Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law is Uncertain*, 27 VA. TAX REV. 241, 249 (2007); see also, e.g., *Sunday Morning Futures*, (Fox television broadcast Jan. 17, 2016) (“[Y]ou don’t want [rich and productive workers] always spending their time trying to find loopholes . . . [a better plan] keep[s] the tax arbitrage[r]s from spending all their time [] trying to get around tax.”); *Hillary Clinton’s Pfizer Follies*, *supra* note 108 (loopholes that encourage multinational enterprises to keep money offshore

“[e]very tax loophole, every deduction is a barnacle that slows down economic efficiency.”¹²⁴ Absent the “holes” in the tax law through which a taxpayer might try to fit herself, she would just proceed directly toward her economic goals rather than contort her behavior.¹²⁵ On the other hand, sometimes the behavioral change is exactly what is intended. That is, the tax preference is intended to distort behavior in a desirable way, increasing the economic return to an action that produces positive externalities and thereby leading to a more (not less) efficient allocation of resources.¹²⁶

A related critique implied by the use of the term “loophole” is that a particular tax benefit is bad for the economy.¹²⁷ This can be because the provision “doesn’t perform an economically useful function,”¹²⁸ because the provision’s revenue loss exceeds the societal benefit of the tax preference, or most commonly, because the preference leads to a misallocation of resources that will reduce overall economic and job growth in the U.S. in the long run.¹²⁹ Indeed, commentators often argue that eliminating loopholes is a critical part of spurring economic growth;¹³⁰ for example, Republicans repeatedly made this argument as part of

“distort[s] incentives for investment”).

124. *Fox News: Special Report with Bret Baier* (Fox television broadcast Apr. 18, 2016), <https://grabien.com/file.php?id=88252> [<https://perma.cc/TX2U-GHHB>].

125. President Barack Obama, Remarks by the President to the Chamber of Commerce (Feb. 7, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/02/07/remarks-president-chamber-commerce> (because of “loopholes and carve-outs,” “you’ve got too many companies ending up making decisions based on what their tax director says instead of what their engineer designs or what their factories produce”).

126. SLEMROD & BAKIJA, *supra* note 92, at 133.

127. See, e.g., Jackie Calmes, *Carried Interest Tax Break Divides Again After Trump Revives the Issue*, N.Y. TIMES (Sept. 18, 2015), <https://www.nytimes.com/2015/09/19/business/carried-interest-tax-break-divides-again-after-trump-revives-the-issue.html> (articulating a debate about whether the tax treatment of carried interest facilitates entrepreneurial risk-taking, which benefits the economy, with President Obama arguing that “this tax loophole . . . is not in any demonstrable way improving our economy”).

128. Meg Shreve, *Conversations: Sen. Carl Levin*, 144 TAX NOTES 765, 767 (2014).

129. See, e.g., *From Hillary Clinton’s Promises to Policies*, N.Y. TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/17/opinion/from-hillary-clintons-promises-to-policies.html> (implying that a “loophole” encourages multinational businesses to keep money offshore, inhibiting “timely investment of available funds [in the U.S. economy]”); Matt Flegenheimer & Amy Chozick, *Hillary Clinton Makes Dire Predictions for Economy if Donald Trump Wins*, N.Y. TIMES (June 21, 2016), <https://www.nytimes.com/2016/06/22/us/politics/hillary-clinton-speech-economy.html> (loopholes “encourage companies to move jobs overseas”).

130. See, e.g., Rand Paul, *Blow Up the Tax Code and Start Over*, WALL ST. J. (June 18, 2015, 7:09 PM), <https://www.wsj.com/articles/blow-up-the-tax-code-and-start-over-1434582592> (arguing that eliminating loopholes and lowering the tax rate would be “an economic steroid injection . . . [that] the Tax Foundation estimates that in 10 years it will increase gross domestic product by about 10%, and create at least 1.4 million new jobs.”).

the push for tax reform in 2017.¹³¹ On the other hand, purported loopholes are sometimes defended on economic grounds, with arguments that the tax preference is critical to economic prosperity,¹³² supports the growth of small businesses,¹³³ and/or enables U.S. businesses to survive,¹³⁴ particularly in the global marketplace.¹³⁵

Sometimes the argument connecting the loophole and the economy depends on what other actions would be made possible by closing the loophole. For example, Senator Bernie Sanders argued that revenue generated from closing international tax planning loopholes could be used “to rebuild our infrastructure and create up to 13 million jobs”¹³⁶ and President Obama argued that closing loopholes would enable us to “invest[] in things like education and job creation and job training that we know grow the economy for everybody.”¹³⁷ In contrast, for example, some argue that closing international tax planning loopholes could enable us to lower U.S. corporate tax rates,¹³⁸ which would encourage corporations to “bring that money back here [, . . . which would] explode the economy because there’s trillions of dollars sitting on the sideline because the [current tax] environment is not one that is conducive to investment.”¹³⁹ Similarly, during the recent tax

131. See, e.g., Committee on Ways and Means, *Unified Framework for Fixing Our Broken Tax Code* 3 (Sept. 27, 2017), https://waysandmeansforms.house.gov/uploadedfiles/tax_framework.pdf [<https://perma.cc/443N-UDTZ>]; H.R. REP. NO. 115-409, at 188, 190, 191, 296 (2017) (justifying several proposed tax law changes as “part of [the] larger effort toward tax reform which broadens the tax base, closes loopholes, and grows the economy.”).

132. See, e.g., *A Stealth Death Tax Increase*, WALL ST. J. (Sept. 5, 2016, 6:46 PM), <https://www.wsj.com/articles/a-stealth-death-tax-increase-1473115618> (arguing that closing a purported estate planning loophole creates “economic destruction” and results in a “less prosperous society”).

133. See, e.g., President George W. Bush, Remarks in Canton, Ohio (Oct. 22, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/10/20041022-12.html> (arguing that what Senator Kerry characterized as loopholes are actually tax benefits that help small businesses).

134. See, e.g., *Hillary Clinton’s Pfizer Follies*, *supra* note 108 (“[I]f not for the loopholes, many companies couldn’t bear to pay the federal corporate income tax rate of 35%, which is the highest in the developed world.”).

135. President Barack Obama, Remarks and a Discussion with the Business Roundtable (Mar. 12, 2009), <http://www.presidency.ucsb.edu/ws/index.php?pid=85849> [<https://perma.cc/95AE-QY87>] (“IBM CEO Palmisano arguing that purported loopholes “help American competitiveness”).

136. Democratic Candidates Debate in Durham, New Hampshire (Feb. 4, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=111471> [<https://perma.cc/MQK6-W7KQ>].

137. President Barack Obama, Remarks on Tax Code Reform and an Exchange with Reporters (Apr. 5, 2016), <http://www.presidency.ucsb.edu/ws/?pid=117088> [<https://perma.cc/3HB3-9FKJ>].

138. Amanda M. Grossman & Steven D. Grossman, *Closing Tax Loopholes or Lowering the Tax Rate*, 147 TAX NOTES 1195, 1195 (June 8, 2015) (discussing this commonly posited trade-off).

139. *Fox News* (Fox television broadcast Feb. 29, 2016); see also, e.g., Paul, *supra* note 130.

reform push, Speaker of the House Paul Ryan argued, more generally, that “closing loopholes . . . allows you to lower tax rates,” which will result in “stronger economic growth” and “a healthier economy.”¹⁴⁰

As with most major tax policy questions, there are serious debates about what tax provisions, tax base, and tax rates currently hinder economic growth and about what changes would most effectively increase growth.¹⁴¹ Thus, to the extent the term “loophole” is used to critique a tax preference as distortionary, economically inefficient, and/or anti-growth, the speaker should be clear about exactly how the tax preference distorts behavior, why that distortion is problematic, how the speaker proposes to change the tax preference, and why that change (coupled with what other actions) would improve economic growth. And this discussion should consider issues of incidence and the dynamic impacts of potential changes on efficiency, behavioral responses and growth.¹⁴²

4. *Complexity.* One additional, albeit slightly less common, critique implied by the use of the term “loophole” is about needless complexity,¹⁴³ which makes it harder for the government to enforce the law and for taxpayers to comply with the law.¹⁴⁴ The concern is that, with loopholes, the government ends up wasting resources to enforce the nuances of the tax preference or is unable to enforce the rules effectively due to lack of resources,¹⁴⁵ and the taxpayers incur time, legal fees, and transaction costs in order to obtain the tax benefit, and may not ultimately apply the law correctly.¹⁴⁶

140. Press Release, Rep. Paul Ryan, A Stronger Economy, a Healthier Middle Class (Oct. 16, 2017), <https://paulryan.house.gov/news/documentsingle.aspx?DocumentID=398763> [<https://perma.cc/RLU2-TBWN>].

141. See, e.g., SLEMROD & BAKIJA, *supra* note 92, at 112–57 (summarizing the discourse about the relationship between taxes and economic growth); STEUERLE, *supra* note 90, at 22–25 (describing “taxes as an instrument of economic policy”).

142. For example, who really benefits from purported growth-enhancing efforts to close corporate tax loopholes?

143. President Barack Obama, 2014 State of the Union Address (Jan. 28, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address> (“[O]ur Tax Code is riddled with wasteful, complicated loopholes.”); Hillary Clinton’s Pfizer Follies, *supra* note 108 (adding loopholes is how legislators “built a monstrosously complicated tax code”).

144. See, e.g., SLEMROD & BAKIJA, *supra* note 92, at 159–88 (discussing simplicity as a policy norm and its connection to compliance and enforcement); STEUERLE, *supra* note 90, at 14–15.

145. See, e.g., Omri Y. Marian, *Meaningless Comparisons: Corporate Tax Reform Discourse in the United States*, 32 VA. TAX. REV. 133 (2012) (discussing an argument that, because of “loopholes and preferences,” “the corporate tax system is far too complex, making . . . administration inefficient”).

146. See, e.g., President George W. Bush, Remarks Accepting the Presidential

As with prior categories of normative policy objections to “loopholes,” the concern can be fleshed out through specificity about the objection. If complexity is the critique implied by the “loophole” label, the speaker should explain why the particular preference adds complexity, why that complexity is not justified by other benefits of the preference, what adverse (compliance/enforcement) consequences arise from the complexity, and how a change would simplify the code and thus reduce those adverse consequences.

5. *Social Policy Objection.* Another (but less common) critique implied by the use of the term “loophole” is an objection to the social policy objective of the particular tax benefit or an objection to the way in which that social policy goal is achieved through the Code.

For example, commentators who decry green energy tax subsidies as “loopholes” generally object to some aspect of the underlying environmental policy.¹⁴⁷ This may be because they do not support governmental investment in green energy either directly or indirectly (e.g., through encouragement/subsidization of private investment in green energy);¹⁴⁸ some because they believe that subsidies undermine the efficiency and cost-effectiveness of the industry and its products.¹⁴⁹ Or some critics of green energy “loopholes” may support governmental investment in green energy but may not believe that the tax code

Nomination (Sept. 2, 2004), <http://www.presidency.ucsb.edu/ws/index.php?pid=72727> [<https://perma.cc/DA94-GHM5>] (“[T]he current tax code, which is a complicated mess, filled with special interest loopholes, saddling our people with more than 6 billion hours of paperwork and headache every year.”); *The Better GOP Agenda*, WALL ST. J. (July 4, 2016, 6:46 PM), <https://www.wsj.com/articles/the-better-gop-agenda-1467672372> (discussing a reform proposal that “would eliminate so many other credits and loopholes that . . . most taxpayers could fill out their annual returns on a 14-line postcard. This simplicity adds to the political appeal of reform.”).

147. See, e.g., *Jack Lew’s Flee America Plan*, WALL ST. J. (July, 17, 2014, 3:16 PM), <https://www.wsj.com/articles/jack-lews-flee-america-plan-1405553160> (referring to “companies [that] are able to exploit loopholes (especially green-energy subsidies)”); *The Next Tax Increase*, WALL ST. J., Jan. 15, 2013, at A16 (criticizing President Obama for proposing “tens of billions of dollars worth of additional ‘corporate loopholes,’ including for his billionaire buddies in the green-energy business”); Republican Candidates Debate in Tampa, Florida (Sept. 12, 2011), <http://www.presidency.ucsb.edu/ws/index.php?pid=96683> [<https://perma.cc/S6YD-98EZ>] (Newt Gingrich saying, “And I thought to myself, doesn’t [Obama] realize that every green tax credit is a loophole?”).

148. See, e.g., Nicolas Loris, *EFEP A Eliminates Corporate Welfare and Corporate Dependence*, THE HERITAGE FOUNDATION (Jan. 15, 2013), <http://www.heritage.org/environment/report/efepa-eliminates-corporate-welfare-and-corporate-dependence> [<https://perma.cc/6GKW-4SQ6>] (“[G]overnment policies intervening in the economy [of the energy sector] should be removed . . . [in order to] allow for a more market-based energy economy that benefits economically viable producers and, ultimately, consumers with reliable, affordable energy.”).

149. See Patrick Jenevein, *Wind-Power Subsidies? No Thanks.*, WALL ST. J. (Apr. 1, 2013), <https://www.wsj.com/articles/SB10001424127887323501004578386501479255158>

is the right way to encourage investment in green energy, or they may believe that imposing higher taxes on disfavored (non-green) energy sources would more efficiently encourage investment in green energy (i.e., as opposed to providing tax breaks for green energy).¹⁵⁰ And yet others may believe that tax benefits, in theory, should be used to encourage the use of green energy but that the existing tax benefits for green energy are ineffective (i.e., failing to spur desired investments) or poorly designed (allowing unintended beneficiaries to take advantage of the benefit).¹⁵¹

This type of social policy critique is often just a subset of one (or more) of the earlier policy concerns (e.g., that the preference results in the loss of too much revenue, is unfair because it favors one set of taxpayers over another set that should be treated equally, or distorts behavior in a way that is inefficient). However, it is worth mentioning this category explicitly because many tax preferences are driven by some social policy goal.¹⁵²

6. *Conclusion about Dimension #1 (Policy Concern).* Other normative policy objections, beyond those listed above, might motivate concerns about “loopholes,” and often, the use of the term “loophole” reflects multiple policy concerns.¹⁵³ Indeed, one commentator remarked that “[e]gregious tax loopholes add complexity, create inefficiency and destroy fairness all at once.”¹⁵⁴ The taxonomy can accommodate this. If a speaker objects to a purported “loophole” on more than one normative policy ground or on a policy basis not listed above, she need only name the multiple (or other) policy concerns. The taxonomy works as long as the speaker is explicit about the policy concern(s).

Explicitly identifying the normative policy objection(s) that motivates the criticism of a particular “loophole” reduces the rhetorical power of the “loophole” label. This dimension of the

150. See generally MOLLY F. SHERLOCK & JEFFREY M. STUPAK, CONG. RESEARCH SERV., R43206, ENERGY TAX POLICY: ISSUES IN THE 114TH CONGRESS 5, 24 (June 15, 2016) (providing some support for this approach).

151. See, e.g., Hoffman, *supra* note 118 (regarding the alternative fuels tax credit).

152. See, e.g., I.R.C. § 21 (2017) (allowing the dependent care services credit); I.R.C. § 24 (2017) (allowing the child tax credit); I.R.C. § 25A (2017) (allowing educational tax credits); I.R.C. § 32 (2017) (allowing the earned income tax credit); I.R.C. § 170 (2017) (allowing the charitable deduction); I.R.C. § 213 (2017) (allowing the medical expense deduction).

153. See, e.g., *Hillary Clinton's Pfizer Follies*, *supra* note 108 (raising revenue, economic/neutrality, fairness, and complexity concerns); David Leonhardt, *The Big Companies That Avoid Taxes*, N.Y. TIMES (Oct. 18, 2016), <https://www.nytimes.com/2016/10/18/opinion/the-big-companies-that-avoid-taxes.html> (raising fairness and economic/neutrality concerns).

154. Alan S. Blinder, *A Fairness Agenda for Winning Over Angry Voters*, WALL ST. J., (Oct. 2, 2015, 6:47 PM), <https://www.wsj.com/articles/a-fairness-agenda-for-winning-over-angry-voters-1443739670>.

taxonomy reveals information about the underlying policy concerns that the “loophole” label conceals, and this dimension of the taxonomy stimulates thought about the normative merits of a tax preference that the “loophole” label inhibits.¹⁵⁵ And it replaces (at least to some degree) the “loophole” label’s appeals to emotion with appeals to logic and analysis.¹⁵⁶ As a result of the foregoing, this dimension of the taxonomy can counteract illusions of consensus by revealing the details of the relevant policy concerns, thereby allowing listeners to individually assess the degree to which they agree or disagree with the speaker’s characterization of and concerns about the purported loophole.¹⁵⁷

B. Dimension #2 – Who is Responsible?

Often, the use of the term “tax loophole” also casts blame on someone in particular, either faulting that party for the existence of the “loophole” or condemning that party for using or facilitating the use of the “loophole.” The blameworthy party differs depending on the context, with responsible parties including both governmental actors (Congress, the President, the Treasury, the IRS, or courts) and private parties (taxpayers, their lobbyists, or tax advisors).

By identifying the party who is being blamed for the problem of the “loophole,” we can better understand what critique the speaker is making and what remedy the speaker is seeking. Thus, this dimension of the taxonomy asks: who is to blame for the “tax loophole”?

The question of who the speaker believes is responsible for the existence of, and normative tax policy problems created by, the loophole is admittedly slightly different from the question of which party should take action in response. Indeed, the party that caused the alleged problem may not be the party that is in the best position to fix it. However, the second dimension of the taxonomy focuses on the identification of the party criticized for the creation, perpetuation, or exploitation of loophole. This is because the “loophole” discourse that criticizes a specific party focuses more on causation than on response. Moreover, the question of which party should respond (and how) is incorporated into the taxonomy as a

155. Cf. CORCORAN, *supra* note 11, at xv (explaining that political rhetoric is used “not to stimulate thought, but to prevent it; not to convey information, but to conceal or distort it”).

156. Cf. Reissigl, *supra* note 11, at 97–98 (describing different persuasive strategies of political rhetoric, including appeals to emotion (*pathos*)).

157. Cf. Strickland, *supra* note 11, at 339 (describing the rhetorical strategy of “obfuscation” in which “the putative motive is to avoid hard decision and to create the illusion of consensus”).

follow-up question for discussion after the party that created the problem has been identified.

This part again draws on numerous examples throughout the academic literature and the popular/political discourse, this time in order to catalog and discuss common targets of the critique made by speakers who use of the term “tax loophole.” Congress and the taxpayers themselves are the two most common targets of criticism, but this part first discusses all governmental parties that are criticized for the problem of loopholes and then turns to the private parties.

1. *The Legislative Branch.* Congress (or, at the state level, the state legislature) is one of the primary targets of speakers who decry loopholes in the tax code, but the critiques vary.

Some critiques condemn Congress for *creating* loopholes,¹⁵⁸ while others condemn Congress for *failing to close* loopholes.¹⁵⁹ Either way, speakers generally expect Congress to close the loophole once it has been identified.¹⁶⁰

When criticizing Congress for the creation and perpetuation of loopholes, some critics fault the *people*, either individual members of Congress or Congress as a whole, while others fault the lawmaking and political *process*. Although there is some overlap, this distinction can affect both the specific action needed to close the loophole and the likelihood that that action will be taken and will be successful.

Criticisms of the *people* sometimes condemn Congress (and members thereof) for being incompetent, suggesting that Congress does a bad job of drafting the laws because of “drafting ineptitudes” or otherwise.¹⁶¹ A related critique condemns Congress for exercising bad judgment when intentionally creating (or failing to fix) a loophole. For example, candidates for political office who served in Congress are commonly criticized for their failure to

158. See, e.g., *Hillary Clinton’s Pfizer Follies*, *supra* note 108 (faulting Democrats, with some help from Republicans, for creating a “monstrously complicated tax code” by adding all sorts of special loopholes); Wyden, *supra* note 66 (blaming Republicans for creating “huge new loopholes”).

159. See, e.g., James B. Stewart, *Trump Lands a Blow Against Carried Interest Tax Loophole*, N.Y. TIMES (Sept. 18, 2015), <https://www.nytimes.com/2015/09/18/business/wit-trump-as-foe-carried-interest-tax-loophole-is-vulnerable.html> (blaming Congress for not taking action on the “carried interest loophole” despite efforts by President Obama); Matthew Goldstein & Tiffany Hsu, *2 Provisions of Tax Bill Could Have Little Impact*, N.Y. TIMES, Nov. 18, 2017, at A12 (faulting the authors of both the House and Senate tax bills for failure to close the “carried interest loophole”).

160. See, e.g., SENATE FINANCE COMMITTEE, *supra* note 38 (“A loophole is something that Congress . . . would generally shut down, at least going forward, once it learned of the loophole.”).

161. Bittker, *supra* note 6, at 1107; see also *supra* note 34 and accompanying text (discussing various types of drafting problems that create loopholes).

close loopholes as part of an argument that these candidates do not deserve (re)election.¹⁶² In particular, political candidates that speak out against a “loophole” may be criticized as hypocrites for supporting the loophole while previously in office.¹⁶³ These remarks get quite personal and can reflect a high degree of moral condemnation,¹⁶⁴ implying that Congress (either as a group or as individuals) is corrupt¹⁶⁵—having sold out to the special interests and misusing their position of trust—or is otherwise lacking in character.¹⁶⁶ Representative comments include assertions that (a) “[w]hen giant companies wanted more tax loopholes, Washington got it done”¹⁶⁷ and (b) “small businesses have been chosen to bear this burden [(the high dollar cost of closing particular loopholes)] because they haven’t purchased influence from the Clinton financial empire.”¹⁶⁸ The loophole discourse condemning lobbyists, discussed in Part III.B.4, reinforces the narrative that legislators can be swayed into creating or preserving loopholes by influence peddlers.

On the other hand, some are less offended by members of Congress and suggest that “loopholes,” although created and

162. See, e.g., President Barack Obama, Remarks by the President on the Economy in Parma, Ohio (Sept. 8, 2010), <https://obamawhitehouse.archives.gov/the-press-office/2010/09/08/remarks-president-economy-parma-ohio> (using the support of loopholes to attack Congressman Boehner).

163. See, e.g., Barack Obama, Remarks in Janesville, Wisconsin: “Keeping America’s Promise” (Feb. 13, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=77032> [<https://perma.cc/9U56-53J7>] (“Before she started running for President [and came out against a particular loophole], Senator Clinton actually voted for [the] loophole.”).

164. See, e.g., Jeff Sommer, *A Tax-Cutting Move That Pfizer Can Hardly Resist*, N.Y. TIMES (Nov. 15, 2015), <https://www.nytimes.com/2015/11/15/your-money/a-tax-cutting-move-that-pfizer-can-hardly-resist.html> (lamenting Congress’s failure to close loopholes for U.S. multinational corporations and quoting Professor Edward Kleinbard as saying, “[t]here is a moral imperative here [that] falls on the shoulders of Congress”).

165. See, e.g., Paul Krugman, *Passing Through to Corruption*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/opinion/republicans-taxes-corruption.html> (suggesting that Senator Bob Corker may have changed his vote (to “yes”) on the tax bill because of the addition of a “loophole” for real-estate businesses that would benefit him personally).

166. See Mangu-Ward, *supra* note 64 (“Special tax treatment [provided via loopholes] is a crucial way for [politicians] to maintain, and disguise, their power . . . [L]oopholes are the most underrated locus of political power. Politicians use the tax code to reward their friends, punish their enemies and cut deals with their colleagues.”) *But see* Surrey, *supra* note 8, at 1155–56 (offering less dystopian explanations for Congress’s actions, including “The Congressman’s Desire To Be Helpful”).

167. *CNN Live Event/Special* (CNN television broadcast Jul. 25, 2016), <http://www.cnn.com/TRANSCRIPTS/160725/se.02.html>.

168. Mary Wertheim, Letter to the Editor, *Clinton’s College Fix is Expensive and Flawed*, WALL ST. J., Sept. 21, 2016, at A12; see also, e.g., Senator John Edwards, The Moral Test of Our Generation, Remarks at St. Anselm’s College in Manchester, New Hampshire (Oct. 29, 2007), <http://www.presidency.ucsb.edu/ws/?pid=77247> [<https://perma.cc/MXY8-FB6V>] (“[T]ax loopholes . . . are not going to be closed, all because Democrats—our party—wanted their campaign money.”).

retained by Congress, reflect flaws in our lawmaking and political process. That is, loopholes are an unavoidable and understandable product of imperfect humans working in an imperfect lawmaking system.¹⁶⁹ The political/popular and academic discourses are full of explanations about why the lawmaking process, by its very nature, results in loopholes. These include “mismatch theory, which says that loopholes arise out of the unavoidable under- and over-inclusiveness of rules,”¹⁷⁰ political compromise,¹⁷¹ or public choice problems pursuant to which the voices of vocal minority seeking the creation or protection of a “loophole” triumph over the quieter voices of a diffuse majority.¹⁷²

Some critiques condemn both the process and the people, for example, by suggesting that loopholes are created by intentional agenda manipulation by legislators, whereby legislators introduce “irrelevant items into the agenda” to influence “the relative position of alternatives [in a voting process],” enabling loopholes to get adopted (and/or not removed).¹⁷³ Similarly, concerns that political gridlock and obstructionism entrench loopholes condemn both the people who engage in this behavior and the process that allows it.¹⁷⁴ The recent tax legislation process provides another example. Many commentators argued that “new loopholes ripe for exploitation” would be created as a result of the “rush to

169. See, e.g., Logue, *supra* note 35, at 366.

170. Katz, *supra* note 1, at 17.

171. See, e.g., Stewart, *supra* note 159 (suggesting that the “carried interest loophole” has not been closed in part because proposals to close it have been repeatedly used as bargaining chips in budget negotiations); see generally Surrey, *supra* note 8, at 1152–53 (discussing tax legislation as a product of legislative and political compromises).

172. See, e.g., Stewart, *supra* note 159 (quoting Professor Daniel Shaviro suggesting a public choice explanation for the persistence of the “carried interest loophole”); see generally Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 906 (1987) (discussing the significant role that interest groups play in legislation).

173. Katz, *supra* note 1, at 17.

174. See, e.g., Jackie Calmes, *Drug Merger Reignites Tax Reform Discussion*, N.Y. TIMES (Nov. 23, 2015), <https://www.nytimes.com/2015/11/24/business/drug-merger-reignites-tax-reform-discussion.html> (suggesting that the Republican-controlled Congress’s failure to undertake an “overhaul of the loophole-laden corporate tax code” is driven by the politics of wanting to preserve a “signature issue”); James B. Stewart, *How Much Does Donald Trump Pay in Taxes? It Could Be Zero*, N.Y. TIMES (Aug. 11, 2016), <https://www.nytimes.com/2016/08/12/business/how-much-does-donald-trump-pay-in-taxes-it-could-be-zero.html> (lamenting the lack of progress on loophole closing “given the gridlock over tax reform”).

passage”¹⁷⁵ and “reckless speed”¹⁷⁶ with which the 2017 Tax Act was enacted. These were more than critiques of the lawmaking process; they were also critiques of the Republican leaders who pushed for hasty passage of the 2017 Tax Act with little transparency and no bipartisan buy-in.¹⁷⁷

Ultimately, when the criticism is of the people that comprise Congress, some commentators merely expect the people to do better,¹⁷⁸ but often the goal is to oust the particular lawmaker(s).¹⁷⁹ Where the criticism is that loopholes are created and retained through aspects of the lawmaking process that are difficult to overcome, the desired response is less clear. Perhaps the remedy is to restructure our lawmaking system or for legislators to work harder to try to overcome these obstacles, but given the pervasiveness of the obstacles, the likelihood of success may be low.

Given the range of ways in which Congress can be critiqued for the problem of loopholes, speakers who hold Congress responsible should clearly articulate what Congress has done to create or entrench the loophole problem; should explain whether the critique is primarily about the people, the process, or both; and should elaborate on the specific problem with the people or the process that leads to the loophole problem. That provides the foundation for discussing how the speaker expects Congress to respond and for assessing the likelihood that Congress will take the desired action.

175. Letter from Senator Robert Menedez et al. to Senator Orrin Hatch and Representative Kevin Brady (Dec. 8, 2017), <https://www.democrats.senate.gov/imo/media/doc/Letter%20to%20Conferees%20Final%20Signed%20PDF.pdf> [<https://perma.cc/K5TT-RHSW>]; see, e.g., Patricia Cohen, *Haste on Tax Measures May Leave a Trail of Loopholes*, N.Y. TIMES (Nov. 13, 2017), <https://www.nytimes.com/2017/11/13/business/economy/corporate-tax.html> (“[T]he rush to ‘get it done’ . . . [could create] new and unforeseen complexity, loopholes and glitches [that] could come back to haunt tax collectors and taxpayers.”).

176. Jacob Leibenluft & Chye-Ching Huang, *GOP Process Designed to Obscure Tax Plan’s Effects*, CENTER ON BUDGET AND POLICY PRIORITIES 6–7 (Nov. 28, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/11-28-17tax.pdf> [<https://perma.cc/JW3N-YRKY>].

177. See, e.g., *id.*; Letter from Representative Terri A. Sewell to Representative Paul Ryan and Senator Mitch McConnell (Dec. 14, 2017), https://sewell.house.gov/sites/sewell.house.gov/files/Sewell%20Letter%20to%20McConnell%20and%20Ryan%20Urging%20Delay%20on%20Tax%20Consideration_0.pdf [<https://perma.cc/4JV4-CC26>] (urging Republican leaders to delay the vote on the tax legislation—a request that they did not honor).

178. See, e.g., Sommer, *supra* note 164 (quoting Professor Kleinbard implying that Congress should act to close loopholes for U.S. multinational corporations in order to respond to the “moral imperative here”).

179. See, e.g., Obama, *supra* note 162 (arguing against re-electing Republicans).

2. *The Executive Branch: The President, the Treasury Department & the IRS.* Occasionally, the problem of “tax loopholes” is blamed at least partly on members of the executive branch.

Presidents, who often make campaign promises to close loopholes,¹⁸⁰ are faulted for lack of leadership on stewarding loophole-closing tax reform through Congress¹⁸¹ or for failing to direct the Treasury Department to close loopholes via regulatory action.¹⁸²

The Treasury Department is blamed for drafting regulations that (either intentionally or because of various drafting problems, unintentionally¹⁸³) create loopholes or for failing to revise or enact regulations that close loopholes.¹⁸⁴ These critiques imply that the Treasury Department has failed to effectuate the will of Congress and that the Treasury has shirked its responsibilities (a) by drafting regulations that allow more taxpayers to avail themselves of a particular statutory benefit than Congress intended¹⁸⁵ or (b)

180. See, e.g., Barack Obama, Speech on Middle Class Tax Fairness (Sept. 18, 2007), <http://www.presidency.ucsb.edu/ws/index.php?pid=93261> [<https://perma.cc/UAP5-RKBV>] (“I’ll end the preferential treatment that’s built into our tax code by eliminating corporate loopholes and tax breaks.”); Donald J. Trump, Remarks to the Detroit Economic Club (Aug. 8, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=119744&st=loophole&st1=> [<https://perma.cc/9X8V-BTZQ>] (“[W]e will eliminate the Carried Interest Deduction and other special interest loopholes.”).

181. See, e.g., *Fox News: Special Report with Bret Baier* (FOX television broadcast Apr. 18, 2016), <https://grabien.com/file.php?id=88252> [<https://perma.cc/L9MT-UNY4>] (“[I]t [loophole closing and reducing rates] needs leadership. You’ve got to have a president who campaigns on it, insists on it . . . It’s not impossible, but it is without a president.”); Calmes, *supra* note 174 (“Mr. Obama has hardly made corporate tax reform [including corporate loophole closing] a priority”); Helaine Olen, *At the Core of the GOP Tax Plan: A Huge Broken Promise by Trump*, WASH. POST (Dec. 4, 2017), https://www.washingtonpost.com/blogs/plum-line/wp/2017/12/04/at-the-core-of-the-gop-tax-plan-a-huge-broken-promise-by-trump/?utm_term=.684d8343f90c (faulting President Trump for “dodg[ing]” responsibility for fulfilling a campaign promise to close the “carried interest loophole”).

182. See, e.g., Gretchen Morgenson, *Ending Tax Break for Ultrawealthy May Not Take Act of Congress*, N.Y. TIMES (May 6, 2016), <https://www.nytimes.com/2016/05/08/business/ending-tax-break-for-ultrawealthy-may-not-take-act-of-congress.html> (discussing President Obama’s failure to instruct the Treasury Department to close the carried interest tax loophole).

183. Many of the same drafting problems that plague Congress can also affect the Treasury Department when they draft regulations). See *supra* notes 34 and 161 and accompanying text.

184. See, e.g., Andrew Ross Sorkin, *When It Comes to Tax Avoidance, Donald Trump’s Just a Small Fry*, N.Y. TIMES (Oct. 4, 2016), <https://www.nytimes.com/2016/10/04/business/dealbook/when-it-comes-to-tax-avoidance-donald-trumps-just-a-small-fry.html> (implicitly criticizing the Treasury Department for the “loopholes” created by the entity classification regulations for hybrid foreign entities).

185. See, e.g., Emily Cauble, *Was Blackstone’s Public Initial Offering Too Good To Be True?: A Case Study in Closing Loopholes in the Partnership Tax Allocation Rules*, 14 FLA. TAX REV. 153, 169–88 (2013) (arguing that the partnership tax allocation regulations create a loophole); Sarah Muller, *‘Exclusively’ vs. ‘Primarily’: IRS Law a ‘Disaster Waiting to Happen’*, MSNBC (May 23, 2013), <http://www.msnbc.com/the-last-word/exclusively-vs>

by failing to draft regulations that would stop unintended beneficiaries of “loopholes” from being able to continue to avail themselves of the tax benefit.¹⁸⁶ On the other hand, the Treasury is also occasionally criticized for overstepping in its efforts to close loopholes.¹⁸⁷ As with critiques of Congress, critiques of the Treasury Department’s role in the problem of “loopholes” can accuse the people involved of moral failings,¹⁸⁸ such as inappropriately succumbing to the influence of lobbyists.¹⁸⁹

Further, the Internal Revenue Service is criticized for ineffective enforcement that allows purported “loopholes” to persist.¹⁹⁰ The IRS is encouraged to take stronger or more strategic¹⁹¹ enforcement action in order to “attack[] specific loopholes in the tax code,”¹⁹² including by invoking the economic substance doctrine and other similar doctrines, to curtail taxpayer

(Senator Baucus arguing that a loophole in Section 501(c)(4) is created because the language in the regulations is more liberal than that in the statute).

186. See Bittker, *supra* note 6, at 1102–03 (discussing the challenge faced by the Treasury upon discovering loopholes that are legislative errors); see also Morgenson, *supra* note 182 (lamenting that the Treasury has not “taken an interest” in closing the “carried interest loophole” through regulatory action, and suggesting that the Treasury shirks its responsibilities by “punting” on the issue).

187. See, e.g., *A Stealth Death Tax Increase*, *supra* note 132 (arguing that, in its effort to close an estate planning “loophole,” the Treasury’s regulations will create “economic destruction”); Noam Scheiber & Patricia Cohen, *For the Wealthiest, a Private Tax System That Saves Them Billions*, N.Y. TIMES (Dec. 30, 2015), <https://www.nytimes.com/2015/12/30/business/economy/for-the-wealthiest-private-tax-system-saves-them-billions.html> (noting that some trade groups argued that the “proposed rules tightening the hedge fund insurance loophole are too onerous”).

188. See, e.g., *How U.S. Treasury’s Tax Loophole Mistake Saves Companies Billions Each Year*, REUTERS (May 30, 2013) <https://www.reuters.com/article/usa-tax-checkthebox/insight-how-u-s-treasurys-tax-loophole-mistake-saves-companies-billions-each-year-idUSL2NOE90RO20130530> (discussing Treasury’s role in creating and perpetuating the “check the box” “loophole,” and criticizing “Washington’s ‘revolving door’ culture of policy-making and lobbying” as self-serving, explaining that “[s]ome of the bureaucrats who helped to write the rule went on to work for corporations that used it to lower their tax bills.”).

189. See, e.g., *CNN Live Event/Special*, *supra* note 167 (“When enormous Wall Street banks wanted new regulatory loopholes, Washington got it done.”).

190. See, e.g., Zachary R. Mider, *Accidental Tax Break Saves Wealthiest Americans \$100 Billion*, BLOOMBERG (Dec. 16, 2013), <https://www.bloomberg.com/news/articles/2013-12-17/accidental-tax-break-saves-wealthiest-americans-100-billion> (faulting the IRS for its unsuccessful challenge to the GRAT “loophole”); James R. Hagerty, *PricewaterhouseCoopers Executives Grilled at Senate Hearing Over Caterpillar’s Taxes*, WALL ST. J. (Apr. 1, 2014), <https://www.wsj.com/articles/pricewaterhousecoopers-executives-grilled-at-senate-hearing-over-caterpillars-taxes-1396375134?tesla=y> (Senator Carl Levin pushing for tougher IRS enforcement to close loopholes).

191. See, e.g., Jasper L. Cummings, *Are Judges Just English Teachers?*, 151 TAX NOTES 1553, 1553 (2016) (criticizing the IRS’s strategy in a tax shelter case that the taxpayer won).

192. Richard Rubin, *Hillary Clinton Targets Tax Hikes at the Very Top*, WALL ST. J. (Oct. 7, 2016), <https://www.wsj.com/articles/hillary-clinton-targets-tax-hikes-at-the-very-top-1475863171>.

attempts to exploit loopholes.¹⁹³ Similarly, state tax enforcement agencies are encouraged to do more, including by working together (e.g., through information sharing) to “fight abusive tax-avoidance schemes” and close loopholes.¹⁹⁴

Given the different players in the executive branch that might be held responsible for the problem of loopholes and given the different critiques and desired responses, it is again important for a speaker who condemns loopholes to be explicit about whom she blames for the problem, how that party has failed, and what that party (or another) should do in response. Although there is ample criticism of the role of the executive branch in the problem of loopholes, some are optimistic about the Treasury’s ability to enact administrative guidance and the IRS’s ability to enforce that guidance in order to close loopholes; as Justice Breyer said during the oral arguments for the *Home Concrete* case, “If you live by loopholes, you will die by regulation.”¹⁹⁵

3. *The Judicial Branch.* Sometimes the blame for “loopholes” is cast on courts and the way in which they interpret the law. Again, the critiques vary. Sometimes the critique is about courts interpreting the law too generously, in a way that creates an exception or that allows favorable treatment to which the speaker objects.¹⁹⁶ Other times, the critique is about courts failing to interpret the law in a way that overcomes a clear drafting problem.¹⁹⁷ The speaker suggests that the courts enable the persistence of a “loophole” by employing a literalist interpretation rather than an interpretation that incorporates legislative intent; instead, the speaker suggests that the court should decide that a particular tax preference violates the law under the economic

193. See, e.g., Soled & Gans, *supra* note 116, at 999–1000 (discussing the IRS’s use of the economic substance doctrine to “defeat abusive tax-minimization strategies”).

194. See, e.g., LeAnn Luna, *Corporate Tax Avoidance Strategies and States’ Efforts to Prevent Abuses*, J. MULTISTATE TAX’N & INCENTIVES, May 2004, at 6, 17 (discussing the partnership between many states and the IRS “to share information” about “abusive transactions”).

195. Kristin E. Hickman, *Home Concrete: Impressions from the Oral Argument*, 134 TAX NOTES 579, 582 (2012) (quoting Justice Breyer).

196. See, e.g., Rebecca O’Toole & Sabrina Lai, *Treasury Makes Waves with New Valuation Discount Proposals*, 153 TAX NOTES 81, 82 (2016) (discussing the courts’ approval of valuation discounts, which arguably enabled “loopholes” in estate/gift tax laws); Claire Y. Nash & James Parker, *VCSP Amnesty Unlikely to Reduce Employment Tax Gap*, 138 TAX NOTES 620, 624 (2013) (discussing the courts’ interpretation of Section 530 as “provid[ing] a loophole through which taxpayers that have misclassified workers can escape penalties . . . and also can avoid the payment of employment taxes”).

197. See, e.g., Bittker, *supra* note 6, at 1105–08 (discussing when and whether courts “come to the rescue by holding that the letter of the law is not controlling, and that the legislative purpose . . . must prevail over the scrivener’s deficiency”).

substance doctrine or under common law doctrines such as step transaction or sham transaction.¹⁹⁸

On the other hand, others suggest that it is not the responsibility of courts to overcome statutory language that creates loopholes,¹⁹⁹ or that, even when courts try to interpret the law in a way that closes (or prevents) loopholes, courts' efforts have "[n]ot [worked out] well at all."²⁰⁰

Given the foregoing, where courts are blamed for a loophole, the speaker should be specific about what she believes the court should have done differently; the authority that would enable the court to take a better approach; and why the court, rather than another party such as Congress, ought to address the problem.

4. *Taxpayers (Including Their Lobbyists)*. Some of the most frequent targets of criticism in the "tax loophole" discourse are taxpayers themselves. Taxpayers are criticized both for their role in the lawmaking process (i.e., the creation and retention of loopholes) and for their use of loopholes.

A common critique is that taxpayers (particularly the rich, powerful, and connected, whether individuals or corporations) and their lobbyists use their position, influence, and campaign contributions²⁰¹ to get tax preferences that benefit them inserted into the tax code²⁰² and to protect those tax preferences from being removed.²⁰³ Other commentators who condemn taxpayers for the

198. See, e.g., Cummings, *supra* note 191 at 1553, 1557–59 (criticizing a recent court decision for its literalist approach that resulted in a taxpayer victory in a tax shelter case); see also *supra* note 72 (discussing different judicial approaches to loopholes).

199. See, e.g., Frank Lee, *You Must Remember This: A DISC is not a DISC, Its Fee Is But a Lie*, 148 TAX NOTES 1395, 1399 (2015) ("[W]hen the IRS or the court cannot articulate a technically sound legal theory on which to disregard the language of a statute—as much as we may all agree that the statute creates an unintended loophole—some of us would still argue that it is the exclusive province of Congress to rewrite the statute.").

200. Katz, *supra* note 1, at 5.

201. See, e.g., Stewart, *supra* note 159 (quoting Professor Daniel Shaviro for the proposition that "one reason the [carried interest] loophole has survived as long it has [is because] '[t]he group that benefits may be small, but they're rich and they give a lot of money' to politicians"); Edwards, *supra* note 168 ("[T]ax loopholes . . . are not going to be closed, all because Democrats—our party—wanted their campaign money.").

202. See, e.g., Paul, *supra* note 130 ("[M]ost of the loopholes in the tax code were designed by the rich and politically connected."); Barack Obama, *Keeping America's Promise* (Feb. 13, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=77032> [<https://perma.cc/GR3R-3F76>] ("[O]ur tax code . . . has been rigged by lobbyists with page after page of loopholes that benefit big corporations and the wealthiest few."); see also generally Surrey, *supra* note 8, at 1160–61 (discussing the role of lobbyists in getting special interest tax provisions enacted).

203. See, e.g., Eric Lipton & Liz Moyer, *Hospitality and Gambling Interests Delay Closing of Billion-Dollar Tax Loophole*, N.Y. TIMES (Dec. 20, 2015), <https://www.nytimes.com/2015/12/21/us/politics/hospitality-and-gambling-interests-delay-closing-of-dollar1-billion-tax-loophole.html> ("[L]obbyists swooped in to add 54 words that temporarily preserved a loophole sought by the hotel, restaurant and gambling

problem of “loopholes” are less concerned about lobbyists and are more concerned about the taxpayers who avail themselves of the particular tax preference.²⁰⁴

Speakers seem to have a few different concerns and goals when criticizing taxpayers for using, or lobbying for the creation or retention of, loopholes.

One concern is the impact on tax morale, perceptions of fairness,²⁰⁵ and tax compliance. Specifically, the taxpayer, by lobbying for loopholes or by using loopholes for “tax avoidance [particularly when the taxpayer is some high-profile taxpayer such as Donald Trump] undermines the entire tax system, which rests on the foundation that every citizen pays a fair share.”²⁰⁶ This type of behavior “deepens public cynicism about the tax system”²⁰⁷ and encourages other taxpayers to seek out loopholes.²⁰⁸

A second concern is that the taxpayers cause the normative policy problems discussed in the first dimension of the taxonomy. Most commonly, the concern is about taxpayers’ role in exacerbating unfairness—that when rich taxpayers use their wealth to hire lobbyists to create/protect loopholes or to hire sophisticated tax advisers to find and help them exploit loopholes that are not available to most taxpayers (who lack the resources to hire such sophisticated tax advisers), these rich taxpayers

industries”); President Barack Obama, Statement on Private Equity Firms (Oct. 9, 2007), <http://www.presidency.ucsb.edu/ws/?pid=90976> [<https://perma.cc/W8K9-UJ7K>] (asserting that Congressional inaction on the carried interest loophole is a result of lobbyists); Curry, *supra* note 66 (blaming the failure to close the “carried interest loophole” at least in part on a “political system in which hedge funds and private equity investors have outsized influence in both the House and Senate”).

204. See, e.g., Steven Davidoff Solomon, *Corporate Inversions Aren't the Half of It*, N.Y. TIMES (Feb. 9, 2016), <https://www.nytimes.com/2016/02/10/business/dealbook/corporate-inversions-arent-the-half-of-it.html> (“American companies that have inverted are particularly poor expatriates, willing to take aggressive acts to exploit this tax loophole.”); Norman Eisen & Richard W. Painter, *The White House Rule: No Tax Returns, No Job*, N.Y. TIMES (Oct. 6, 2016), <https://www.nytimes.com/2016/10/07/opinion/the-white-house-rule-no-tax-returns-no-job.html> (noting that, during the Bush and Obama administrations, use of loopholes “doomed” political nominees, and criticizing “[s]ome corporate directors and chief executives [who try] . . . to justify selfish decisions to use loopholes”).

205. See, e.g., *O'Reilly Factor* (Fox Broadcast June 22, 2015), <https://perma.cc/8DGP-U9GW> (“Americans know it’s a corrupt system. Americans know that the rich in the end will not pay the rates that are posted because they have the lobbyists.”).

206. James B. Stewart, *How Donald Trump Turned the Tax Code Into a Giant Tax Shelter*, N.Y. TIMES (Oct. 2, 2016), <https://www.nytimes.com/2016/10/03/business/how-donald-trump-turned-the-tax-code-into-a-giant-tax-shelter.html>.

207. Greg Ip, *Apple's Tax Avoidance Illustrates Gap Between Law and Economics*, WALL ST. J. (Sept. 7, 2016, 12:16 PM), <https://www.wsj.com/articles/apples-tax-avoidance-illustrates-gap-between-law-and-economics-1473264984> (discussing Apple’s use of loopholes).

208. See Logue, *supra* note 42, at 249 (“Once an unintended loophole is found to work for one taxpayer, there is a natural tendency for others to use it as well.”).

create unfairness; they get tax benefits that other similarly situated taxpayers do not merely because they are already rich, thereby making the rich richer.²⁰⁹ Occasionally, taxpayers' use of loopholes is criticized for exacerbating other policy problems. For example, one commentator criticized taxpayers for "pursuing financial engineering" strategies that take advantage of loopholes rather than fixing "troubled core businesses,"²¹⁰ implying that the taxpayers' pursuit of loopholes misallocates resources and creates economic inefficiency.

A third, and very common, objective for those who criticize taxpayers for their use of loopholes is to impugn the character or judgment of the particular taxpayer(s) who uses the loophole. This criticism often uses vitriolic language and conveys strong moral condemnation, with commentators asserting that the taxpayers are perpetrating a "scam"²¹¹ and are "irresponsible,"²¹² "unsavory,"²¹³ "selfish,"²¹⁴ "unpatriotic,"²¹⁵ cheaters,²¹⁶ and more. Some of this rhetoric is merely about association²¹⁷—linking the bad connotation of "loopholes" with a particular person to suggest that the person is also bad. This often arises in attacks on political candidates/nominees who used "loopholes" in their personal

209. See Scheiber & Cohen, *supra* note 187 ("There's this notion that the wealthy use their money to buy politicians; more accurately, it's that they can buy . . . tax policy The wealthy can also avail themselves of a range of esoteric and customized tax deductions Almost all are outside the price range of the average taxpayer We do have two different tax systems, one for normal wage-earners, and another for those who can afford sophisticated advice."); *Legal View* (CNN television broadcast Apr. 5, 2016), <http://transcripts.cnn.com/TRANSCRIPTS/1604/05/lvab.01.html> ("[P]eople, if they've got enough lawyers and enough accountants [can use loopholes like inverting] to wigg[e] out of responsibilities that ordinary citizens are having to abide by.").

210. Rob Cox, *Pfizer's Deal for Allergan is a Dubious Milestone*, N.Y. TIMES (Dec. 1, 2015), <https://mobile.nytimes.com/2015/12/02/business/dealbook/pfizers-deal-for-allergan-is-a-dubious-milestone.html>.

211. *The Situation Room* (CNN Broadcast Sept. 29, 2015), <http://www.cnn.com/TRANSCRIPTS/1509/29/sitroom.01.html> (regarding those who use the carried interests "loophole").

212. *Legal View*, *supra* note 209 (regarding the inversion of "loophole").

213. Eisen & Painter, *supra* note 204 (regarding use of loopholes by nominees for political appointments).

214. *Id.*

215. *Id.*; see also President Barack Obama, The President's Weekly Address (July 26, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/07/26/weekly-address-closing-corporate-tax-loopholes>.

216. See Ostas, *supra* note 36, at 509–10 (using a loophole to "rationalize breaches of formal law properly interpreted").

217. See generally MCGEE, *supra* note 11, at 2 (describing association as a causal fallacy); Dan Kurland, *How Language Really Works: The Fundamentals of Critical Reading and Effective Writing* (2000), http://www.criticalreading.com/inference_association.htm [<https://perma.cc/W484-ND86>] ("Association invokes ideas and feelings through a particular reference.").

taxes.²¹⁸ In these contexts, slightly more specific allegations include that the use of loopholes by these individuals demonstrates that they are unworthy of support because they are hypocrites (i.e., for using loopholes but then campaigning that they will close loopholes),²¹⁹ bad role models,²²⁰ selfish and greedy,²²¹ and lacking “commitment to the public good,”²²² among other character flaws.

The response desired by someone who blames taxpayers for the problem of “loopholes” depends on which critique the speaker means. If the concern is about *lobbying*, the response could include for lobbyists to stop lobbying and for taxpayers to stop paying lobbyists to lobby (seemingly unlikely); for members of Congress to better withstand the efforts of lobbyists;²²³ or for Congress to change the laws in order to limit lobbying.²²⁴ If the concern is about the taxpayers’ *use* of the loopholes, a range of responses could also result. For example, when political candidates are attacked for their use of loopholes, speakers clearly hope that voters will not support the candidates. For other taxpayers, the speaker might hope that the taxpayer and other similar taxpayers decide not to use the loopholes in the future. But unless a taxpayer becomes subject to a huge amount of negative publicity that pressures the taxpayer into changing course, taxpayers are unlikely to stop using loopholes. As one commentator remarked, “[s]ometimes using loopholes in the tax laws can get sketchy, but most of us would use them if we had the opportunity.”²²⁵ Or the speaker

218. See, e.g., Vice-Presidential Debate (Oct. 5, 2004), <http://www.debates.org/index.php?page=october-5-2004-transcript> [<https://perma.cc/BH5N-EW3C>] (featuring Vice-President Cheney and Senator Edwards trading barbs about the other’s use of tax loopholes implicitly trying to impugn each other’s character).

219. See, e.g., Richard Rubin, *Clinton Seeks Big Jump in Estate Tax*, WALL ST. J. (Sept. 22, 2016, 7:58 PM), <https://www.wsj.com/articles/clinton-seeks-big-jump-in-estate-tax-1474588735> (quoting a spokesman for Trump as saying “It is the height of hypocrisy for Hillary Clinton to offer an even more dramatic hike in the death tax at the same time she uses exotic tax loopholes reserved for the very wealthy to exempt her Chappaqua estate”).

220. See, e.g., Eisen & Painter, *supra* note 204 (suggesting that the “unsavory use of tax loopholes” is contrary to the notion that “many of us want to set an example that teaches our children the responsibilities as well as the enormous benefits of being an American”).

221. See, e.g., James B. Stewart, *Keep the Returns, Trump; Just Give Us a Few Figures*, N.Y. TIMES (Sept. 29, 2016), <https://www.nytimes.com/2016/09/30/business/2-numbers-can-answer-the-donald-trump-tax-question.html> (criticizing Trump for not calling to close any loopholes that would affect him).

222. Arthur Russell, Letter to the Editor, *The Uproar Over Trump’s Taxes*, N.Y. TIMES, Oct. 4, 2016, at A22.

223. See *supra* note 178 and accompanying text.

224. See, e.g., Obama, *supra* note 203 (arguing, as part of his condemnation of the “carried interest loophole,” for “the strongest lobbying reform in history”).

225. Courtney Calvert, Letter to the Editor, *The Uproar Over Trump’s Taxes*, N.Y. TIMES, Oct. 4, 2016, at A22; *The Five* (Fox News Broadcast Feb. 8, 2016),

might look toward other parties for solutions, hoping that either Congress (or the Treasury Department) will change the tax code (or regulations) to prevent taxpayers from using the tax preference²²⁶ or that tax advisors will stop (or will be required to stop) assisting taxpayers in the pursuit of loopholes.²²⁷

Ultimately, when holding taxpayers themselves responsible for the problem of “tax loopholes,” it is important for speakers to specify which actions of the taxpayer are problematic, why the actions create a problem, and what they hope the taxpayers (or others) will do in response.

5. *Tax Advisors.* Critics of taxpayers who use loopholes also suggest that tax advisors deserve blame.²²⁸ This is because taxpayers would not know of or be able to avail themselves of the loopholes without the “enterprising”²²⁹ and “smart lawyers [who] pour[] over the tax code like a bunch of sleuths looking for [loopholes,]”²³⁰ and who use “magical power”²³¹ to “devis[e] strategies to get around [taxes]”²³² and “around the intent of the law.”²³³ Indeed, in some discourse surrounding the 2017 Tax Act, tax advisors are portrayed as practically salivating over the opportunity to find and exploit loopholes created by new laws.²³⁴

Commentators who blame tax advisors for the problem of loopholes imply that tax planning is an amoral (or perhaps immoral) vocation in which people who are too clever profit by finding ways to undermine the tax law,²³⁵ and they imply that

<http://video.foxnews.com/v/4745058009001/?#sp=show-clips> (objecting to a private person using a legal opportunity for their own benefit is “like saying [you’re] not going to use this tax loophole because some conservatives don’t like the tax loophole. You’re still going to take it.”).

226. See, e.g., Sommer, *supra* note 164 (condemning taxpayers for using the inversion “loophole” but arguing that it is Congress’s responsibility to stop taxpayers from being able to invert).

227. See *infra* Part III.B.5.

228. See, e.g., *Legal View*, *supra* note 209 (“[P]eople, if they’ve got enough lawyers and enough accountants [can use loopholes like inverting] to wigg[e] out of responsibilities that ordinary citizens are having to abide by.”); Evans, *supra* note 26, at 78 (“[L]oopholes are something which must be located by tax experts—specifically tax lawyers.”).

229. MSNBC, *supra* note 116.

230. CNN RADIO, *supra* note 101.

231. Bittker, *supra* note 6, at 1109.

232. Mider, *supra* note 190.

233. CNN RADIO, *supra* note 101; see also, e.g., Katz, *supra* note 1, at 2 (“[C]lever lawyers . . . help their clients do things that appear to subvert [the law’s] purpose.”).

²³⁴ See, e.g., Kitroeff, *supra* note 19 (“Already, lawyers and accountants are eyeing several provisions that investors and companies could potentially exploit.”).

235. See, e.g., Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N.Y. TIMES (Apr. 27, 2012), <http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html> (“Apple . . . has been particularly talented at identifying legal tax loopholes and hiring accountants who, as much as iPhone

facilitating the use of loopholes makes the facilitator complicit in offensive taxpayer behavior (especially if the facilitator earns a share of the taxpayer's tax benefit).²³⁶ Ultimately, beyond moral condemnation, critics suggest that tax advisor behavior is problematic because it creates inequities²³⁷ and other policy problems²³⁸ discussed in the first part of the taxonomy.

In response, critics might want tax advisors to stop facilitating "loophole" tax planning. They are unlikely to stop, however, because tax planning is their livelihood,²³⁹ and many believe that "lawyers rarely have to feel bad about using [loopholes]."²⁴⁰ Thus, critics might instead hope that Congress or the Treasury will increase the ethical standards of practice for tax advisors in order to curtail loophole-facilitating behavior by tax advisors.²⁴¹

6. Conclusion about Dimension #2 (Responsible Party).

Critics often blame multiple parties for the problem of loopholes, and a common combination is to blame both taxpayers and Congress.²⁴² As with the first dimension of the taxonomy, multiple blameworthy parties can be accommodated by this Article's taxonomy.²⁴³ Regardless of which party (or parties) a critic of "loopholes" holds responsible for the problem of loopholes, she should clearly identify the blameworthy party, specify the party's actions that make the party culpable, explain why the actions are problematic, and articulate what she wants the party (or some other party) to do in response.

Being explicit about the parties who are to blame and from whom action is desired moves the conversation from rhetoric to

designers, are known for their innovation."); Scheiber & Cohen, *supra* note 187, at A14 ("Among tax lawyers and accountants, 'the best and brightest get a high from figuring out how to do tricky little deals").

236. See, e.g., Jenny Strasburg et al., *Deutsche Bank Headquarters Raided in Tax-Fraud Probe*, WALL ST. J. (June 9, 2015), <https://www.wsj.com/articles/deutsche-bank-confirms-headquarters-searched-by-police-1433843564> (condemning a bank that "earned a share of whatever profit their clients earned" for its involvement in facilitating the use of the tax loophole).

237. See, e.g., Logue, *supra* note 35, at 366; Scheiber & Cohen, *supra* note 187.

238. See, e.g., Logue, *supra* note 42, at 249 ("inefficiency" and "maldistribution of resources").

239. But see Heather M. Field, *Aggressive Tax Planning & the Ethical Tax Lawyer*, 36 VA. TAX REV. 261, 268, 282 (2017) (discussing how tax advisers can still pursue their livelihoods as tax planners but not engage in what they consider to be aggressive "loophole lawyering").

240. Katz, *supra* note 1, at 2.

241. See, e.g., Linda M. Beale, *Tax Advice Before the Return: The Case for Raising Standards and Denying Evidentiary Privileges*, 25 VA. TAX. REV. 583, 604-05 (2006); Jackel, *supra* note 26, at 670.

242. See, e.g., *Hillary Clinton's Pfizer Follies*, *supra* note 108; Stewart, *supra* note 159.

243. See *supra* Part III.A.6.

potential solutions—who is being requested to do what? Then, a conversation can be had about whether that is the right party to respond, how exactly that party should respond, whether the response is likely to curtail the identified loophole, and more. Moreover, these details help overcome the rhetorical strategy of using mere association with loopholes to condemn a particular party.²⁴⁴ If speakers explain why the responsible party is worthy of criticism and what normative policy problems that party has created, listeners will be better able to assess whether they agree that the responsible party is truly worthy of criticism.

C. *Putting the Dimensions of the Taxonomy Together*

Often, both dimensions of the taxonomy are needed to understand a use of the term “loophole” because a critic condemning “loopholes” is both implying a policy objection to the tax preference and casting blame for that policy problem on someone in particular. By teasing out the details of any reference to a “loophole” using both of these axes, the critique becomes substantive—focused on the policy concerns that motivate the critique—and potentially actionable—focused on which party should do what in response.

The benefit of the taxonomy, however, at least for purposes of translating individual “loophole” references into actionable and substantive discussion, also requires the identification of the specific tax preference to which the speaker objects. Too often, however, speakers rely on “mystery meat,”²⁴⁵ referring to generic loopholes and relying on exhortations that they will (or others should) “close tax loopholes” without identifying those purported loopholes with any specificity,²⁴⁶ even when expressly requested to provide details.²⁴⁷ These references to generic loopholes, even if

244. See *supra* notes 9, 217 and accompanying text.

245. Paul Krugman, *Clash of Republican Con Artists*, N.Y. TIMES (Mar. 4, 2016), <https://www.nytimes.com/2016/03/04/opinion/clash-of-republican-con-artists.html> (criticizing Paul Ryan’s budget proposals as “completely reliant on ‘mystery meat’ . . . [and as] claim[ing that] trillions of dollars in revenue can be collected by closing unspecified tax loopholes”).

246. See, e.g., Hillary Clinton, Remarks at Curtis Hixon Waterfront Part in Tampa, Florida (Oct. 26, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=119693> [<https://perma.cc/5FTS-FUSC>] (“we’re going to close the [unspecified] loopholes and make sure no multimillionaire ever pays a lower tax rate than a nurse or a teacher or a police officer or a firefighter.”); Donald J. Trump, Remarks to the Detroit Economic Club (Aug. 8, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=119744> [<https://perma.cc/W77R-WVZ2>] (“[W]e will eliminate the Carried Interest Deduction and other [unnamed] special interest loopholes that have been so good for Wall Street investors . . .”).

247. See, e.g., Michael O’Brien, *In Virginia Debate, Cuccinelli Tries to Close the Gender Gap*, MSNBC (Sept. 25, 2013), <http://www.msnbc.com/the-daily-rundown/va-debate-cuccinelli-tries-close-the> (discussing the Virginia gubernatorial debate and explaining that

coupled with the articulation of specific policy concerns and the explicit identification of responsible parties, stymie meaningful discussion because listeners do not know which loophole is at issue. And generic “loophole” references obfuscate, thereby creating a sense of artificial agreement among listeners, each of whom might have very different ideas about which “loopholes” create the particular policy concern and can be addressed by the particular party.²⁴⁸ Thus, there is an important third element to the taxonomy. Specifically, in order for the taxonomy to translate rhetoric about individual “loopholes” into substantive and actionable debate, the specific tax preference must be identified.

IV. APPLYING THE TAXONOMY

Although Part III’s explanation of the taxonomy focused on interpreting individual statements that condemn “tax loopholes,” the utility of the taxonomy is not limited to improving the discourse with an individual speaker.

The taxonomy can also be used to understand and improve multi-speaker debates about particular tax preferences. In addition, the taxonomy can be used in the aggregate, even without identification of particular tax preferences, to better understand groups of people and how they perceive the tax system. This part will briefly illustrate both of these additional applications of the taxonomy.

A. *To Multi-Speaker Debates about Particular Tax Preferences: Understanding the Debate about the “Carried Interest Loophole”*

The taxonomy provides insights into the debate surrounding the “carried interest loophole,” pursuant to which private equity and venture capital fund managers generally pay taxes at preferential long-term capital gains rates on income they earn on account of the stake in a fund that they received in exchange for providing services to that fund.²⁴⁹ The 2017 Tax Act changed this

“[w]hen pressed to specify which tax loopholes he would close to finance his tax cut plan, Cuccinelli responded: ‘There’s literally scores of them.’”

248. See, e.g., Peter Nicholas, *Hillary Clinton Calls for \$2 Billion in Alzheimer’s Research, Cure by 2025*, WALL ST. J. (Dec. 22, 2015) <https://www.wsj.com/articles/hillary-clinton-calls-for-increase-in-alzheimers-research-funding-1450821851> (“The campaign didn’t provide specifics of how she would cover the cost of the expanded [Alzheimer’s] research, other than to say she has called for tax-law changes that would close corporate loopholes and raise taxes on wealthier Americans.”).

249. See generally JOINT COMM. ON TAXATION, 110TH CONG., JCX-62-07, PRESENT LAW AND ANALYSIS RELATING TO TAX TREATMENT OF PARTNERSHIP CARRIED INTERESTS AND RELATED ISSUES PART I 21–26 (Sept. 4, 2007).

historic tax treatment of carried interests only slightly by requiring a three-year (rather than only one-year) holding period in order for the holder of the carried interest to benefit from preferential long-term capital gains rates.²⁵⁰

There is a large academic literature about the tax treatment of “carried interests,”²⁵¹ and this issue has been picked up in the popular and political discourse. Some of this broader discourse refers to the tax treatment of “carried interests” as a “loophole” and calls for reform. Using the taxonomy to parse the recent popular/political discourse about “carried interest loopholes”²⁵² provides insight into the substantive concerns that resonate among those in the broader public who apply the “loophole” label to the tax treatment of “carried interests” and the actions that these commentators want taken.

Specifically, on the first dimension of the taxonomy, critics of the “carried interest loophole” appear most concerned about fairness.²⁵³ However, the details of the fairness concern vary somewhat, with some speakers more concerned that the *rich*²⁵⁴ are receiving an unjustified benefit, others more concerned that a *special interest*, namely the private equity and venture capital fund industry,²⁵⁵ is receiving an unjustified benefit. Although some express concerns about both,²⁵⁶ Donald Trump, for example, seemed to draw a distinction between the rich and the fund

250. 2017 Tax Act § 13309 (to be codified at 26 U.S.C. § 1061).

251. See generally Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. Rev. 1 (2008); Heather M. Field, *The Real Problem with Carried Interests*, 65 HAST. L.J. 405 (2014); David A. Weisbach, *The Taxation of Carried Interests in Private Equity*, 94 VA. L. REV. 715, 719 (2008).

252. This discussion focuses only on articles and commentary that describe the tax treatment of carried interests as a “loophole.” There is a larger discourse that uses more neutral terminology, but because the goal of this Article is to translate the loophole discourse into substantive conversation, this part of the Article focuses only on those commentaries that characterize the tax treatment of carried interest as a “loophole.”

253. See, e.g., Michael M. Grynbaum, *De Blasio Returning to the National Political Stage*, N.Y. TIMES (Sept. 30, 2015), <https://www.nytimes.com/2015/10/01/nyregion/de-blasio-returning-to-the-national-political-stage.html> (“[E]liminating tax loopholes for the income of some investment managers [can help combat inequality].”); Patricof, *supra* note 113 (closing the “carried interest loophole” “comes back to a question of fairness”).

254. See, e.g., Morgenson, *supra* note 182 (closing the “carried interest loophole” “would take away an enormous benefit enjoyed almost exclusively by some of the country’s wealthiest people . . . The carried interest loophole contributes substantially to the increase in top-end inequality in the United States”).

255. See Albert R. Hunt, *G.O.P. Debates Fail to Give Voters Basic Details*, N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/us/politics/gop-debates-fail-to-give-voters-basic-details.html?smid=pl-share> (“Mr. Trump stresses that he would end the carried interest tax loophole benefitting private-equity and hedge fund executives.”).

256. Stewart, *supra* note 159 (discussing the “carried interest loophole” as benefiting both the “hedge fund guys” and the “wealthiest Americans”).

industry,²⁵⁷ and the proposals he advanced as a candidate, in the aggregate, sought to close the “carried interest loophole” for the fund industry while at the same time bringing down overall rates on the wealthy.²⁵⁸ Others discuss (often in addition to the fairness concern) the opportunity to raise a large amount of revenue by closing this loophole.²⁵⁹ And yet some defend the purported “loophole” primarily on the grounds that the tax treatment of carried interests “foster[s] entrepreneurial risk-taking” and benefits the economy.²⁶⁰

Parsing out these different policy concerns underlying the debate about the “carried interest loophole” provides useful insight about the precise loophole-closing strategy that would respond to the policy concern. For example, to the extent that the real concern is about *rich* people paying tax at rates that are too low, then perhaps the appropriate response is to increase the long-term capital gains rate, or even the ordinary income tax rate, for all high-income people.²⁶¹ But to the extent that the concern is really about the *fund industry* unjustly benefiting from a tax preference, perhaps the appropriate response is to prevent the application of the partnership tax rules (i.e., the operative tax rules that work together to produce the objectionable result) to funds or to more strictly regulate the fund industry.²⁶² And if the concern really is revenue, again, more comprehensive reform (e.g., increasing

257. See, e.g., Nicholas Confessore, *9 Times Donald Trump Complained About Taxes*, N.Y. TIMES (Oct. 2, 2016), <https://www.nytimes.com/2016/10/03/us/politics/trump-taxes-twitter.html?smid=pl-share> (highlighting seemingly conflicting tweets from Donald Trump, one arguing that taxes on hedge fund managers have to go up, and another arguing that the wealthy pay too much tax); Hunt, *supra* note 255 (noting that while Trump advocated closing the “carried interest loophole” that benefits the fund industry, he “tried to camouflage [his] plans’ heavy tilt in favor of the more affluent”).

258. See, e.g., Albert R. Hunt, *The Debate Over Taxes That Isn’t Happening*, N.Y. TIMES (Aug. 21, 2016), <https://www.nytimes.com/2016/08/22/us/politics/donald-trump-hillary-clinton-the-debate-over-taxes-that-isnt-happening.html?smid=pl-share> (“Mr. Trump says he will end the tax loophole that lets some private equity and hedge fund executives pay a lower capital gains rate on earned income. But his plan would allow many of these executives to pay personal taxes at the 15 percent corporate rate, which would do the same thing”).

259. See, e.g., Stewart, *supra* note 159. (“Estimates of how much revenue closing the loophole would raise vary . . . The Treasury estimates it would raise \$18 billion over 10 years; Professor Fleischer contends it would be 10 times that much, \$180 billion.”).

260. Calmes, *supra* note 127 (citing arguments of the Private Equity Growth Capital Council); see also Steven B. Klinsky, *The Carried Interest Loophole? What Loophole?*, N.Y. TIMES (July 15, 2016), <https://www.nytimes.com/2016/07/16/business/dealbook/the-carried-interest-loophole-what-loophole.html> (defending the tax treatment of carried interests).

261. Field, *supra* note 251, at 429–30, 437–38.

262. *Id.* at 434–36, 438–39; see also, e.g., Gina Chon, *Critics Are Lining Up to Oppose Changes to Dodd-Frank Law*, N.Y. TIMES (Sept. 9, 2016), <https://www.nytimes.com/2016/09/10/business/dealbook/critics-are-lining-up-to-oppose-changes-to-dodd-frank-law.html> (when discussing possible closure of the carried interest “loophole,” also suggesting regulating the fund industry).

LTCG rates for all high-income taxpayers or reforming how partnership tax law treats compensatory grants of equity interests) would likely be more responsive than a very narrowly targeted new code section.²⁶³ That is, given the particular policy concerns articulated or implied by critics of the “carried interest loophole,” it is not clear that the most frequent tax reform proposal²⁶⁴—a very narrowly targeted new code section—is the right response. Moreover, none of these policy concerns is meaningfully addressed by the 2017 Tax Act’s change to the holding period required for the owner of a carried interest to benefit from preferential long-term capital gains rates.²⁶⁵

On the second dimension of the taxonomy, commentators condemn various parties. They blame governmental parties—Congress for not closing the loophole,²⁶⁶ the Treasury Department for not closing the loophole or for taking the position that they lack the authority to close the loophole,²⁶⁷ the President for not showing sufficient leadership or initiative to get the tax treatment of carried interest changed.²⁶⁸ And they blame private parties—members of the fund industry for using the loophole²⁶⁹ and for lobbying to prevent its closure.²⁷⁰ This lack of consensus about who is to blame for the existence and retention of the “carried interest loophole” suggests that there may not be a clear path to a solution.

263. Field, *supra* note 251, at 436–37.

264. See, e.g., In the Red Act of 2016, S. 2677, 114th Cong. (2016); Cut Unjustified Tax Loopholes Act, S. 268, 113th Cong. (2013) (both proposing to add new Section 710, which would be very narrowly tailored).

265. See James B. Stewart, *Tax Loophole for the Rich that Won't Die*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/business/carried-interest-tax-loophole.html> (“[T]he primary argument against the carried interest loophole isn’t that those who benefit from it don’t hold their assets long enough.”).

266. See, e.g., *id.*; Stewart, *supra* note 159 (noting “efforts to kill [carried interest tax reform] in Congress”); Goldstein & Hsu, *supra* note 159 (faulting the House and Senate for failing to close the “carried interest loophole” as part of the 2017 tax legislation).

267. See, e.g., Morgenson, *supra* note 182, at 2 (lamenting Treasury’s assessment that it “cannot eliminate the carried interest tax benefit by itself” because Treasury’s inaction “means nothing is likely to be done”).

268. See *id.* at 1–2 (“[Closing the carried interest loophole is] something that Obama could accomplish,” but lamenting that he has not gotten the Treasury to act); Olen, *supra* note 181 (faulting President Trump for not pushing Congress to close the “carried interest loophole” as part of the 2017 tax legislation).

269. See, e.g., Confessore, *supra* note 257 (quoting Donald Trump attacking the “hedge fund guys ([and] gals)” for using the “carried interest loophole” so that they “pay[] practically nothing”).

270. Scheiber & Cohen, *supra* note 187 (citing the role of lobbyists in preserving the tax treatment of carried interests); Stewart, *supra* note 159 (same); Alan Rappoport, *Trump Promised to Kill Carried Interest. Lobbyists Kept It Alive.*, N.Y. TIMES (Dec. 22, 2017) <https://www.nytimes.com/2017/12/22/business/trump-carried-interest-lobbyists.html> (citing White House officials, who blamed lobbyists for the failure of the 2017 Tax Act to close the “carried interest loophole”).

Indeed, although the 2017 Tax Act made many sweeping changes to the U.S. tax law, this recent legislation did not close the “carried interest loophole.”

Ultimately, even this very brief inquiry into how the term “tax loophole” has been used among recent media and political commentators in the “carried interest” debate reveals a broad range of policy concerns implicated and parties to blame. And this divergence in views about the policy problems with, and responsibility for, the “carried interest loophole” may help explain why it has been so challenging for policymakers to agree on and implement responsive reform.

B. In the Aggregate: Understanding the Media Discourse Leading Up to the 2016 Presidential Election

The taxonomy can also be used in the aggregate, even without references to specific “loopholes,” in order to better understand groups of people and how they perceive the tax system.

To illustrate this function, I applied the taxonomy to the tax loophole discourse in two television news media sources (CNN and Fox) and in two print media sources (Wall Street Journal and New York Times) during the 2016 presidential campaign.

This part briefly describes the methodology for this study, and then describes the insights gleaned from this study. The results of the study are reflected in Appendix A (dimension #1) and Appendix B (dimension #2).

1. Methodology. The four sets of media sources—CNN transcripts, Fox transcripts, Wall Street Journal (“WSJ”) articles, and New York Times (“NYT”) articles—were selected based on the Pew Research Center’s 2014 study about political polarization in the media,²⁷¹ the results of which are quite similar to the Pew Research Center’s very recent report about media news sources used leading up to the 2016 presidential election.²⁷² According to Pew, CNN and Fox News are the most common sources of news about government and politics in the U.S.²⁷³ Fox News has been

271. PEW RESEARCH CENTER, POLITICAL POLARIZATION & MEDIA HABITS: FROM FOX NEWS TO FACEBOOK, HOW LIBERALS AND CONSERVATIVES KEEP UP WITH POLITICS AT 3–4 (Oct. 21, 2014), <http://www.journalism.org/2014/10/21/political-polarization-media-habits/> [https://perma.cc/7A2F-6LGS] [hereinafter PEW 2014].

272. PEW RESEARCH CENTER, TRUMP, CLINTON VOTERS DIVIDED IN THEIR MAIN SOURCE FOR ELECTION NEWS AT 3–4 (Jan. 18, 2017), <http://www.journalism.org/2017/01/18/trump-clinton-voters-divided-in-their-main-source-for-election-news/> [https://perma.cc/DCN4-TJR4] [hereinafter PEW 2017].

273. PEW 2014, *supra* note 271, at 4, 11–12; PEW 2017, *supra* note 272, at 3–4.

the primary news source among conservatives,²⁷⁴ and was the top news source among Trump voters, with 40% of Trump voters naming Fox News as their “main source” for news about the 2016 campaign.²⁷⁵ Although no single news source dominates for voters on the left, CNN has been a primary news source among liberals,²⁷⁶ and CNN was the top news source among Clinton voters, with 18% of Clinton voters naming CNN as their “main source” of news about the 2016 campaign.²⁷⁷

Although many voters used television to get their election news, news websites, social media platforms, radio and print were also common sources of news.²⁷⁸ Material from social media platforms and radio is difficult to aggregate, so I focused on other media resources. Given that liberals use a broad range of news sources, I added the New York Times, which is also a highly trusted and commonly used news source among those on the left.²⁷⁹ For balance, I included the Wall Street Journal, which is the only news source in Pew’s 2014 report that was more trusted than distrusted by all ideological groups,²⁸⁰ and which has an audience that is “relatively evenly distributed across the [ideological] continuum”—quite unlike most news sources.²⁸¹ Thus, these four sets of news sources include two with relatively liberal audiences (with the New York Times audience being meaningfully more liberal than CNN’s), one (WSJ) with a relatively balanced audience, and one (Fox) that is the dominant news source for relatively conservative audiences.²⁸²

To search, I used Lexis’s Wall Street Journal and New York Times databases, and I used Westlaw’s databases of CNN and Fox transcripts. For the CNN and Fox transcripts, I used the entire broadcast network transcripts rather than just the transcripts from any one program broadcasted on the particular network.²⁸³

274. *Id.*

275. PEW 2017, *supra* note 272, at 3.

276. PEW 2014, *supra* note 271, at 4, 11–12.

277. PEW 2017, *supra* note 272, at 3.

278. *Id.* at 6.

279. PEW 2014, *supra* note 271, at 4–5, 14–15.

280. *Id.* at 5.

281. *Id.* at 10.

282. *Id.* at 9 (showing each news source’s position on an ideological continuum).

283. For the CNN Network Broadcast Transcripts, Westlaw describes the coverage as follows: “Transcripts from CNN & CNNH cable network news programs, both from the US and Internationally. Coverage may vary by program. Content also available by program database.” For the Fox Network Broadcast Transcripts, Westlaw describes the coverage as follows: “Transcripts from a broad range of FOX network news and entertainment programming. Most databases update daily based on availability of new programs. Coverage varies by source. Content also available by program database.” Note that the Fox transcripts include transcripts from Sean Hannity’s and Bill O’Reilly’s programs that are

Within these four databases, I searched for “tax! /3 loophole!”²⁸⁴ between June 8, 2015, and November 8, 2016. This period covers the vast majority of the presidential campaign, and, in particular, it includes Donald Trump’s entire campaign, which began on June 16, 2015.²⁸⁵

I then applied the taxonomy to each search result, using the context and the language surrounding the reference to tax loopholes in order to infer which normative policy concern(s) (if any) were suggested in the remarks and in order to infer which party (or parties) (if any) the remarks suggested were responsible for the tax loophole problem.

Based on the foregoing, I coded each search item on each of the two dimensions of the taxonomy, using the categories described in Part III. Several caveats are warranted about the coding. First, the coding required many judgment calls because speakers were rarely as explicit as the taxonomy recommends, but most search results had some language that suggested the speaker’s or author’s perspective on “loopholes.” The frequency of judgment calls means that there is imprecision in the data. However, I reviewed and coded all of the articles/transcripts myself, trying to handle judgments about close calls similarly across all materials and media sources. Second, some items provided very strong evidence of a particular policy concern or responsible party, and others provided relatively weak evidence. Similarly, most items expressed a concern about a particular policy issue or critiqued a responsible party, but a few expressed praise. The coding does not distinguish between the strength or directionality (positive or negative) of the comments about the particular policy issue or responsible party.²⁸⁶ Third, many items raised multiple policy concerns or implicated multiple responsible

broadcast on Fox. The database may not have 100% of the transcripts from the CNN and Fox programs, but as long as the omissions are not skewed to omit particular types of news-related programs, any omissions should not meaningfully affect the insights gleaned from this study.

284. I searched for tax and loophole within three words of each other because this picked up a large enough number of results to enable a meaningful analysis. At larger proximity ranges (e.g. within five words or within ten words), there were many more results, but these searches produced a lot more noise, picking up articles or transcripts that used both words but not together; that is, the item was not about tax loopholes.

285. Donald J. Trump, Remarks Announcing Candidacy for President (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>.

286. Further, the coding does not tease out the extent to which the tax loophole rhetoric is used constructively (e.g., to advance tax reform) or destructively (e.g., to bully or denigrate another person). That would be an interesting inquiry, perhaps providing insight into political civility and attitudes, but that would be challenging and the coding already makes many difficult judgment calls.

parties, and the items were coded accordingly.²⁸⁷ Fourth, where an item failed to provide enough information to infer a policy concern or responsible party, I coded the item as “unable to determine.” As discussed further below, this occurred with much greater frequency on the responsible party dimension of the taxonomy. Fifth, within the search results from a given database, there were occasionally multiple results that included very similar (even identical) language, often quoting a politician’s speech. However, if the items were really separate (e.g., a different article with a different title on a different day, or a different transcript of a different show that aired at a different time), the items were coded as distinct search results.²⁸⁸ Even though the language used was the same, the repetition in a separate document reflects more emphasis on the same concerns; different readers/listeners might have heard it, and the repetition reinforces the importance of the concerns in the overall discourse provided by that media source.

One additional note at this point is about the number of search results obtained. Although taxes were a common topic for all media sources (though much more common on CNN and Fox than in the WSJ or the NYT),²⁸⁹ the tax loophole rhetoric was invoked relatively infrequently, both as a percentage of articles/transcripts that mentioned taxes²⁹⁰ and as a percentage of

287. This explains why, on Appendices A and B, the percentages of items within a media source reflecting the particular concern sum to more than 100%.

288. See, e.g., Katie Thomas & Chad Bray, *Pfizer Faces Limited Options After Its Deal With Allergan*, N.Y. TIMES (Apr. 6, 2016), <https://www.nytimes.com/2016/04/07/business/dealbook/pfizer-allergan-merger.html> (“President Obama said on Tuesday that the new rules would help prevent companies from taking advantage of ‘one of the most insidious tax loopholes out there, fleeing the country just to get out of paying their taxes.’”); Michael J. de la Merced & Leslie Picker, *Pfizer and Allergan Said to End Merger as Tax Rules Tighten*, N.Y. TIMES (Apr. 5, 2016), <https://www.nytimes.com/2016/04/06/business/dealbook/tax-inversion-obama-treasury.html> (same); *CNN Newsroom* (CNN television broadcast Aug. 18, 2016) (quoting Clinton as saying “[h]e’s even created a new tax loophole that we call the Trump loophole”); *CNN: Anderson Cooper 360* (CNN television broadcast Aug. 17, 2016) (same).

289. Searching for “tax!” during the relevant time period provides a frame of reference for how frequently each media source mentions taxes (i.e., without regard to whether they invoke the loophole rhetoric). Mentions of tax (in general) on CNN (5,765 out of total 9,621 transcripts (59.9%)) and Fox (1,604 out of 3,264 total transcripts (49.1%)) were much more frequent than mentions of tax in the NYT (9,474 out of more than 60,000 total articles (less than 15.8%)) or the WSJ (6,165 out of more than 40,000 total articles (less than 15.5%)).

290. Among search results for the relevant period that mentioned tax (i.e., retrieved by a search for “tax!”), 1.21% of the CNN transcripts invoked the loophole rhetoric (i.e., were retrieved by a search for “tax! /3 loophole!”) (70 out of 5,765), 1.18% of transcripts from Fox invoked the loophole rhetoric (19 out of 1,604), and 1.07% of NYT articles invoked the loophole rhetoric (101 out of 9,474). WSJ invoked the loophole rhetoric at a much lower rate; only 0.63% (39 out of 6,165) of the WSJ articles that mentioned tax also invoked the loophole rhetoric.

all articles/transcripts from the relevant time period.²⁹¹ This was true across all media sources, but the WSJ invoked the tax loophole rhetoric at a much lower rate than the other media sources.²⁹² Despite the infrequency of use of the loophole rhetoric, using the taxonomy to deconstruct how the different media sources used the rhetoric does provide some insight into the tenor of the different media sources' discourses about taxes and tax reform.

2. *Results.* The application of the taxonomy to the "tax loophole" discourse leading up to the 2016 election reveals stark differences in the focus of different media sources.

Briefly, the more left-leaning media, when discussing tax loopholes, emphasized fairness concerns with relatively little attention to economic concerns, whereas the right-leaning media placed much heavier emphasis on economic concerns. There was also a difference between print and television media sources, with print media raising revenue concerns much more frequently than television media when discussing tax loopholes. There was less divergence among the media sources on the issue of which party was responsible for "loopholes." All placed significant blame on taxpayers, with Congress being the second-most frequent target of criticism, but the print media emphasized Congress's role slightly more.

The numerical results are provided in the appendices, and the details and implications of these results are discussed in the remainder of this part.

i. Policy Concerns. The "tax loophole" discourse among the more liberal sources, CNN and the New York Times, focuses much more on fairness than on the economy.²⁹³ Seventy-five percent of the CNN transcripts where a policy concern was discernable raised a fairness issue, whereas only 19% raised a concern about efficiency, neutrality or economic growth.²⁹⁴ Similarly, 60% of the

291. The tax loophole concept (i.e., based on the "tax! /3 loophole!" search) was raised most frequently in the CNN transcripts (out of 9,621 of total transcripts from the relevant time period, 70 raised tax loopholes within the parameters of the search (0.728%)). The Fox transcripts invoked the tax loophole concept slightly less frequently (out of the 3,264 total transcripts from the relevant period, 19 raised tax loopholes within the parameters of the search (0.582%)). Yet, the frequency with which tax loopholes were raised on CNN and Fox was much higher than the frequency with which tax loopholes were raised in either the NYT (101 out of more than 60,000 total articles from the relevant time period, so less than 0.17%) or the WSJ (39 out of more than 40,000 total articles from the relevant time period, so less than 0.098%).

292. See *supra* notes 290–291.

293. See *infra* Appendix A. This entire part is based on Appendix A.

294. *Id.*

NYT articles with a discernable policy concern²⁹⁵ raised a fairness issue, whereas only 14% raised a concern about efficiency, neutrality or economic growth.²⁹⁶ The balance was quite different among the Fox transcripts—50% of transcripts with a discernable policy concern raised a concern about efficiency, neutrality or economic growth.²⁹⁷ Fifty-six percent (56%) of the Fox transcripts with a discernable policy concern raised a fairness concern, but given the relatively high frequency of economic issues, the balance of the tax loophole discourse on Fox was much different than it was on CNN and in the NYT.²⁹⁸ For viewers/readers, the difference in the experience was likely even starker than the numbers reveal because some Fox transcripts that raised fairness concerns did so as part of criticizing the Democrats and their fairness arguments.²⁹⁹ The WSJ discourse about “tax loopholes” was also more balanced than CNN and the NYT as between fairness concerns (38% of articles with a discernable policy concern) and economic concerns (26%).³⁰⁰

The result revealed from the application of the taxonomy to the media discourse about “tax loopholes” leading up to the presidential election—that liberal media emphasized fairness and that the conservative media was more concerned than the other media sources about the economy—is not surprising given analyses of voter concerns in the 2016 presidential campaign, which suggested that many Trump voters voted based on economic considerations and many Clinton voters were more motivated by concerns about inequality.³⁰¹ This Article’s application of the taxonomy to the tax loophole discourse, however, adds to our understanding of the presidential election because it provides evidence of the very different news media experiences that voters of different ideological perspectives may have had leading up to the election. These very divergent media narratives about “tax

295. All percentages are determined with reference to the number of items where a policy concern was discernable.

296. See *infra* Appendix A.

297. See *id.*

298. The impact of these discussions on viewers does, however, have to be understood with reference to the how frequently the tax loophole rhetoric arises in each media source. See *supra* notes 289–91.

299. See, e.g., *The Five* (Fox television broadcast Apr. 18, 2016), <http://www.foxnews.com/transcript/2016/04/18/clinton-sanders-want-wealthy-to-pay-fair-share-taxes.html>. Recall that the taxonomy identifies the topic of the policy conversation but does not distinguish between an article/transcript that raises a policy issue to argue that the policy concern is a problem or to argue that the policy concern is not a problem.

300. See *infra* Appendix A.

301. See, e.g., Joan C. Williams, *What So Many People Don't Get About the U.S. Working Class*, HARV. BUS. REV. (Nov. 10, 2016), <https://hbr.org/2016/11/what-so-many-people-dont-get-about-the-u-s-working-class>.

loopholes” may have influenced, or at least reinforced, voter preferences about which policy issues matter the most, and thus may have contributed to our increasingly polarized discourse about government and politics in the U.S. Of course, this study is limited and relates only to the “tax loophole” discourse, which, while only a small part of the overall media discourse,³⁰² may be a microcosm of the broader political discourse among the different media sources.

Policy concerns about complexity, social policy, and other issues were rarely mentioned, if at all, but both print media—the WSJ and the NYT—had quite high percentage (67% and 63% respectively)³⁰³ of articles that raised revenue concerns. These numbers include revenue concerns raised either on an aggregate basis (i.e., to the fisc) or on a taxpayer-by-taxpayer basis (i.e., the ability of a taxpayer to reduce its taxes, which in turn reduces governmental revenue). Many of these articles raised revenue concerns in addition to other policy concerns. In contrast, the television media transcripts from CNN and Fox raised revenue concerns with a much lower frequency (25% and 19% respectively).³⁰⁴ Perhaps this is due to the more deliberate, and often longer, discussions in the print media as compared to often more extemporaneous discussions that appear to be reflected in the many of the TV news program transcripts. Also, a significant percentage of the WSJ and NYT references to revenue are to taxpayer-by-taxpayer revenue reduction, as opposed to approaching the issue from the perspective of the fisc.³⁰⁵ Focusing only on the items that approach revenue reduction from the perspective of the fisc result in lower frequency of revenue concerns, but the frequency is still higher among the sampled print media (NYT 30%, WSJ 38%) than among the sampled television media (CNN 16%, Fox 12.5%).³⁰⁶

302. See *supra* notes 289–91.

303. See *supra* note 287 and accompanying text (explaining why percentages within a media source add up to more than 100%).

304. See *infra* Appendix A.

305. See, e.g., Moyer, *supra* note 102; John S. Mitchell, Letter to the Editor, *Only the Big Boys Pay Less Tax and Can Flee*, WALL ST. J., Feb. 3, 2016, at A10 (“[B]ig American corporations” use “incentives, loopholes and dodges” to ensure that they “pay nowhere near the 35% tax rate.”).

306. Of the 62 NYT articles that raised a revenue concern, 29 raised the concern from the perspective of the fisc (29 out of 98 total NYT articles with a discernable policy concern is 29.6%). Of the 26 WSJ articles that raised a revenue concern, fifteen raised the concern from the perspective of the fisc (15 out of 39 total WSJ articles with a discernable policy concern is 38.4%). Of the 16 CNN transcripts that raised a revenue concern, 10 raised the concern from the perspective of the fisc (10 out of 64 total CNN transcripts with a discernable policy concern is 15.6%). Of the 3 Fox transcripts that raised a revenue concern, two raised the concern from the perspective of the fisc (2 out of 16 total Fox transcripts with

ii. Responsible Parties. There is less divergence among the media sources on the issue of the parties responsible for the tax loophole problems. All sources had at least 60% of articles/transcripts with a discernible responsible party suggesting that the taxpayers themselves (including through their lobbyists) were blameworthy.³⁰⁷ The television media blamed the taxpayers (82% of CNN transcripts with a discernible responsible party blaming taxpayers, and 75% of Fox transcripts³⁰⁸) slightly more frequently than did the print media (68% of NYT articles, and 60% of WSJ articles).³⁰⁹ The legislative branch was the second-most blameworthy party across all media sources, with print media blaming the legislature (35% of NYT articles and 37% of WSJ articles) slightly more frequently than television media (20% of CNN transcripts, and 25% of Fox transcripts).³¹⁰ The executive branch and tax advisors were blamed relatively rarely, with almost no blame cast on the courts.³¹¹

What is striking about these results is the very heavy emphasis, across media sources, on the taxpayers themselves as a party that bears responsibility for “tax loopholes.” And although some of these materials blame lobbyists acting on behalf of taxpayers,³¹² much of the discourse focuses on the actual taxpayers for their use (or abuse) of loopholes.³¹³

Caution is warranted, however, when interpreting these results because the articles and transcripts are particularly underdeveloped on the responsible party dimension of the taxonomy. This is partly illustrated by the high percentage of total

a discernable policy concern is 12.5%).

307. See *infra* Appendix B.

308. Unless otherwise stated, all percentages are determined with reference to the number of items where responsible party was discernable.

309. See *infra* Appendix B.

310. See *id.*

311. Commentators in academic literature and tax practitioner publications are more concerned about the role of the courts. See *supra* notes 196–200.

312. Of the 54 NYT articles that held taxpayers responsible for loopholes, 9 implicated lobbyists and 45 implicated taxpayers themselves; thus only 11% of the 80 total NYT articles with a discernable responsible party implicated lobbyists. Of the 18 WSJ articles that held taxpayers responsible for loopholes, 5 implicated lobbyists and 13 implicated taxpayers themselves; thus only 17% of the 30 total WSJ articles with a discernable responsible party implicated lobbyists. Of the 36 CNN transcripts that held taxpayers responsible for loopholes, 2 implicated lobbyists and 34 implicated taxpayers themselves; thus only 4.5% of the 44 total CNN transcripts with a discernable responsible party implicated lobbyists. Of the 9 Fox transcripts that held taxpayers responsible for loopholes, 2 implicated lobbyists and 7 implicated taxpayers themselves; thus only 17% of the 12 total Fox transcripts with a discernable responsible party implicated lobbyists.

313. Of articles/transcripts with a discernable responsible party, 56% of NYT articles (45 of 80), 43% of WSJ articles (13 of 30), 77% of CNN transcripts (34 of 44), and 58% of Fox transcripts implicated taxpayers themselves. *Id.*

search results for which a responsible party could not be determined from the text (22.6% of NYT search results, 25% of WSJ search results, and 37% of both CNN and Fox transcripts in the search results).³¹⁴ As a result, there are relatively low numbers of items that were codable on this dimension, especially for the Fox transcripts.

Even where a responsible party is identifiable, however, the results provide only part of the picture for two reasons.

First, many articles/transcripts that suggested taxpayers bore responsibility also suggested that there was a problem with the system that enabled taxpayers to use loopholes, but the articles were not clear enough to determine the identity of the party on whom that blame fell.³¹⁵ Had the source documents been clearer about the party that bore responsibility for the existence of the tax regime that allows taxpayers to use loopholes, the numbers could have looked much different, likely with more blame on Congress. Thus, the results of this study should not be read to suggest that speakers/authors from these media sources believe that taxpayers are the *only* ones responsible for loopholes. There is clearly more blame to assign, but where commentators place such blame is unclear.

One way to glean some insight about which branches of government commentators believe bear responsibility for the loophole problem is to look at the *relative* allocations of responsibility made by each media source's articles/transcripts. Doing so reveals that although commentators across all media sources most frequently blame Congress,³¹⁶ the commentators on Fox blame the executive branch more frequently than do the other media commentators (40% of Fox transcripts where a *branch of government* was identifiable as a responsible party assigned blame to the executive branch, compared to 25% of such CNN transcripts, 15% of such NYT articles, and 14% of such WSJ articles).³¹⁷ The numbers of articles considered in this part of the analysis are, in

314. The percentages of undeterminable items were much lower in the first dimension of the taxonomy. See *infra* Appendix A. The indeterminacy of so many items in the second part of the taxonomy arose, in large part, because many items lamented the problem of loopholes, but did not give any meaningful indication about who caused the problem or who ought to fix it.

315. See, e.g., *From Hillary Clinton's Promises to Policies*, *supra* note 129 (not clear which branch of government is to blame for the rules that allow the problematic loophole-using behavior by taxpayers); Patricof, *supra* note 113 (same).

316. Of articles/transcripts where a branch of government was identifiable as a responsible party, 85% of such NYT articles (28 of 33), 79% of WSJ articles (11 of 14), 75% (9 of 12) of CNN transcripts, and 60% (3 of 5) of Fox transcripts blamed the legislature or members thereof. See *infra* Appendix B.

317. See *infra* Appendix B.

some cases, quite low, so these results may not be particularly robust. Nevertheless, these results are not surprising because Fox reflects a more conservative perspective,³¹⁸ and in the months leading up to the election, the executive branch was led by a member of the Democratic party. Thus, this analysis is consistent with the expected narrative.

Second, many articles that blamed taxpayers for using loopholes were relatively clear that some *other party* was expected to fix the problem.³¹⁹ For example, articles often discussed presidential candidates' plans to close loopholes to prevent taxpayers from taking advantage of loopholes,³²⁰ but that does not necessarily imply that the presidential candidate blames the prior president for the problem or thinks the prior president should have solved the problem. And that also does not necessarily mean that the presidential candidate thinks that he or she will ultimately be solely (or even largely) responsible for fixing the problem; perhaps he or she means that he or she will get Congress or the Treasury to fix the problem.

Thus, the results of this study should not be read to suggest that media commentators expect taxpayers to solve the loophole problem.³²¹ Although the taxonomy provides relatively little insight on who different commentators expect to fix the problem, the results provide a useful starting place for understanding how commentators from across the political spectrum assign blame for tax loopholes. An understanding of the perceived source of the problem is an important part of finding solutions.

V. CONCLUSION

This Article's taxonomy for tax loopholes provides a strategy for cutting through the "loophole" rhetoric to reveal substance—

318. See *supra* notes 274–75 and accompanying text.

319. See, e.g., Amy Chozick, *Hillary Clinton Twists the Knife in Trump's Tax Proposals*, N.Y. TIMES (Aug. 17, 2016), <https://www.nytimes.com/2016/08/18/us/politics/hillary-clinton-twists-the-knife-in-donald-trumps-tax-proposals.html> (advocating for several loophole closing changes to prevent taxpayers from taking advantage, but not specifying who was responsible for the current law or who should enact the change).

320. See, e.g., *id.*; Michael C. Bender and Colleen McCain Nelson, *Trump Digs In Over Taxes, Blames an "Unfair" System*, WALL ST. J. (Oct. 4, 2016, 12:42 AM), <https://www.wsj.com/articles/donald-trump-digs-in-over-taxes-blames-an-unfair-system-1475538309> (Clinton "calling out bad corporate actors" and arguing for "closing tax loopholes" but not specifying which parties are responsible for the current law or for fixing it).

321. See *supra* Part III.B. (explaining that the taxonomy focuses on identifying the party responsible for causing the problem, not for fixing the problem). Had the taxonomy coded the articles and transcripts on the latter metric, even fewer articles/transcripts would have been codable. Thus, we get more information by coding based on the party responsible for causing the problem, even if that information is ultimately incomplete.

substance about the policy concerns that motivate the application of the “tax loophole” label and substance about the implied critique about who is responsible for the problem of “tax loopholes.” Ideally, this taxonomy can overcome the empty name-calling inherent in the use of the term “loophole” and can advance more policy-based and actionable debate about perceived flaws in the tax system. That hope may not be realistic in the current political environment. But even if the taxonomy fails to change the tenor of the discourse about individual “loopholes,” it can reveal larger political narratives, helping us to learn something about ourselves as a society and about how different groups within our society understand the flaws of the tax system.

Appendix A

Dimension #1 (Policy Concern) Analysis of “Tax Loophole” Media Discourse During the 2016 Presidential Campaign

	NYT Articles	CNN Transcripts	WSJ Articles	Fox Transcripts
Total items in search results	102*	70	40*	19
# unable to determine policy concern	4	6	1	3
Total items with explicit/implicit policy concern	98	64	39	16

	NYT Articles	CNN Transcripts	WSJ Articles	FOX Transcripts
Revenue	62 63%	16 23%	26 67%	3 19%
Fairness	59 60%	48 73%	15 38%	9 56%
Efficiency, neutrality & economic growth	14 14%	12 19%	10 26%	8 50%
Complexity	0 0%	1 2%	3 8%	1 6%
Social policy	0 0%	0 0%	0 0%	0 0%
Other	0 0%	0 0%	0 0%	1 6%

*There were 101 search results for NYT and 39 search results for WSJ, but each included a single search result that included 2 letters to the editor both of which addressed tax loopholes. For purposes of this analysis, each letter was treated as a separate result, yielding 102 NYT results and 40 WSJ results.
 **Percentages add up to more than 100% because some articles/transcripts reflected multiple policy concerns.

Appendix B

Dimension #2 (Responsible Party) Analysis of “Tax Loophole” Media Discourse During the 2016 Presidential Campaign

	NYT Articles	CNN Transcripts	WSJ Articles	FOX Transcripts
Total Items in search results	102**	70	40*	19
# unable to determine responsible party	22	26	10	7
Total Items with explicit/implicit responsible party	80	44	30	12

	NYT Articles	CNN Transcripts	WSJ Articles	FOX Transcripts
Legislative Branch***	28	9	11	3
Executive Branch	5	3	2	2
Courts	0	0	1	0
Taxpayers	54	36	18	9
Tax Advisors	3	2	3	0
Other	12	1	1	0
	% of articles holding particular party responsible (out of total # of articles with resp. parties)**	% of transcripts holding particular party responsible (out of total # of transcripts with resp. parties)**	% of articles holding particular party responsible (out of total # of articles with resp. parties)**	% of transcripts holding particular party responsible (out of total # of transcripts with resp. parties)**
	35%	20%	37%	25%
	6%	7%	7%	17%
	0%	0%	3%	0%
	68%	82%	60%	75%
	4%	5%	10%	0%
	15%	2%	3%	0%

**There were 101 search results for NYT and 39 search results for WSJ, but each included a single search result that included 2 letters to the editor both of which addressed tax loopholes. For purposes of this analysis, each letter was treated as a separate result, yielding 102 NYT results and forty WSJ results.
 ***Percentages add up to more than 100% because some articles/transcripts reflected multiple responsible parties.
 ****Includes both the U.S. Congress and state legislatures.
