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John D. Leshy

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Public Lands:*Are U.S. Public Lands Unconstitutional?*¹

John D. Leshy

Overview

The question in the title has been raised with some persistence over the past few decades, most recently by a defendant facing charges for the armed takeover of a National Wildlife Refuge in Oregon in 2016, and by ranchers whose livestock graze on public lands.² To answer it, I dig deeply into the history of the public lands, going back to the very founding of the nation. I seek to show that arguments for unconstitutionality reflect a defective understanding of U.S. legal and political history; an extremely selective, skewed reading of numerous Supreme Court decisions and federal statutes; a much too narrow view of how much governing authority states have over activities taking place on U.S. public lands; and even a misuse of the dictionary.

At bottom, the claim that public lands are unconstitutional seeks to have the judiciary use the Constitution to determine how much (if any) land the United States may own in any state. For the courts to take on that responsibility would be a breathtaking departure from more than 225 years of practice where Congress has made that determination through the political process, and from more than 150 years of Supreme Court decisions deferring to Congress. It would also be contrary to the Court's often expressed reluctance to revisit settled public land law, upon which so many property transactions depend.

How the Nation's Founders Dealt with the Public Lands

The public lands began when seven of the original states-to-be ceded to the new nation claims they held to so-called western lands across the Appalachian Mountains. After that had been decided, the

1. Summarized and excerpted from John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499 (2018).

2. As used in this chapter, "public lands" refers to any lands to which the United States holds title. Congress has applied the term to different categories of land in different statutes—for example, sometimes including national forests and national parks, and sometimes not. A broad definition is appropriate when considering constitutionality because the pertinent part of the Constitution (the so-called Property Clause) speaks broadly of "the territory and other property belonging to the United States." U.S. CONST. Art. IV, § 3, cl. 2.

U.S. Constitution was drafted and ratified. Its Property Clause gives Congress “power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States.”³ The Constitution also contains an “Enclave Clause,” which gives the United States exclusive authority over the seat of the national government (the District of Columbia), and similar authority over “places purchased” with the consent of the pertinent state for military facilities and “other needful buildings.”⁴ This Clause has never had any significant impact on public-lands policymaking.

Public-Land Policy Up to the Civil War

In the late 1820s, a handful of members of Congress put forth an argument that the United States had a constitutional duty to give all public lands to the states. It gained no traction. Before 1845, Supreme Court decisions addressing public lands generally deferred to Congress. The most prominent was *United States v. Gratiot*⁵ in 1840, which unanimously upheld a congressional decision to keep lands in national ownership and allow minerals they contained to be developed through a leasing system.

Then, in 1845, in *Pollard v. Hagan*,⁶ the Court applied a notion that new states were admitted on an “equal footing” with existing states to conclude that, because the original states owned the beds of submerged lands under navigable waters, newly admitted states automatically gained ownership of such lands. (The idea of “equal footing” is not found in the Constitution, but appears in so-called enabling acts by which Congress admits new states to the Union.) The majority opinion in *Pollard* was written by Justice John McKinley, who earlier, as a Senator from Alabama, had failed to persuade Congress to support giving all public lands to states. McKinley’s opinion contained several grandiose, muddled *obiter dicta* that have in modern times become a mainstay of the argument that public lands are unconstitutional.

McKinley’s puzzling pronouncements must be read against the fierce political debate then taking place about Congress’s authority to abolish slavery in the territories and while admitting new states. McKinley, a slaveholder whom constitutional historian Carl Swisher

3. *Id.* The word “dispose” does not necessarily mean to transfer ownership. See Leshy, *supra* note 1, at 506–07.

4. U.S. CONST. Art. I, § 8, cl. 17.

5. 39 U.S. 526 (1840).

6. 44 U.S. 212 (1845).

tactfully described as “no rebel against Southern institutions,”⁷ was writing in an era when justices typically did not circulate draft opinions to their colleagues, which meant, as historian G. Edward White has observed, that a majority opinion “usually represented only the view of one Justice,” giving it “diminished status” as precedent.⁸ McKinley’s sweeping *dicta* in *Pollard* were a portent of the Court’s infamous 1857 pro-slavery decision *Dred Scott v. Sandford*.⁹ There it ruled, among other things, that the Constitution’s Property Clause had very limited application, a view the Court never countenanced afterward.

*The Supreme Court’s Treatment of Congress’s Power
over Public Lands after the Civil War*

The eighteen leading Supreme Court decisions addressing the Property Clause since the Civil War have all upheld (mostly unanimously) congressional decisions setting public-land policy. A number of these describe Congress’s power as “without limitations,”¹⁰ and several involved congressional actions retaining ownership of large tracts of land inside states.¹¹

Over that same period, several Supreme Court decisions have substantially narrowed *Pollard*’s holding that new states automatically gain title to the beds of navigable waters upon admission to the Union.¹² Today, *Pollard* is regarded merely as establishing a kind of common-law default rule, where states are presumed to own submerged lands under waters that were navigable when they became states, but only if the national government had not previously conveyed those lands to others or reserved them for national purposes.

The Statehood Compact Theory

An argument related to the one based on *Pollard* is that new states are entitled to public lands because the United States allegedly pledged, in the so-called “compacts” admitting them to the Union, to completely divest itself of all land it owned within their borders. There are no facts

7. CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD: 1836-64 at 532 (1974).

8. G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1482–83 (2006).

9. 60 U.S. 393 (1857).

10. Leshy, *supra* note 1, at 545–50.

11. See, e.g., *Light v. United States*, 220 U.S. 523 (1911); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917).

12. *Id.* at 551–53.

to support that Congress ever made such a pledge. For example, nothing about the admission of Utah—currently the only state claiming that U.S. public lands may be unconstitutional—suggests this. To the contrary, the terms in the Utah Enabling Act¹³ that address public lands, as well as contemporary actions by the national government and the state, make clear that Congress intended to reserve plenary U.S. authority over public lands in Utah after its admission into the Union.¹⁴ (The relevant provisions of the Utah Enabling Act resemble those of all other states admitted to the Union starting with Ohio in 1803.)

“Equal Footing” and “Equal Sovereignty”

A handful of Supreme Court decisions like *Coyle v. Smith*¹⁵ address the idea that Congress’s power is limited by the notion that new states are admitted on an “equal footing” with existing states or that, as the Court put it in 2013 in its controversial 5-4 decision in *Shelby County v. Holder*,¹⁶ all states have “equal sovereignty.” *Coyle* and *Shelby County* had nothing to do with public lands; the former involved Congress’s fixing the location of a state’s capital in its Enabling Act, and the latter involved the “pre-clearance” provision of the Voting Rights Act of 1965. In other decisions, the Court has stated that the “equal footing” notion applies to political rights and obligations but not to lands or other property.¹⁷

If the “equal footing” idea were to be seen as inviting judicial inquiry about whether the presence of public lands in a state limits the state’s sovereign powers, the Court’s many decisions holding that states have considerable authority over activities carried out on public lands are instructive. States can tax and apply many of their laws to such activities.¹⁸ Indeed, the default rule is that the police power of the state extends to public lands until Congress legislates otherwise.¹⁹ The amount of public land in a state is, therefore, not a particularly useful measure of the scope of that state’s sovereignty. It is also relevant to such an inquiry that states derive some special benefits from the presence of public lands within their borders; for example, various

13. Utah Enabling Act, ch. 138, 28 Stat. 107 (1894).

14. Leshy, *supra* note 1, at 554–57.

15. 221 U.S. 559 (1911).

16. 570 U.S. 529 (2013).

17. *See, e.g.*, *Stearns v. Minnesota*, 179 U.S. 223, 244–46 (1900).

18. *See, e.g.*, *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981); *see also* Leshy, *supra* note 1, at 563–67.

19. *See, e.g.*, *Omaechevarria v. Idaho*, 246 U.S. 343, 346 (1918).

federal aid programs provide extra funds to states with larger amounts of public lands.²⁰

Other Problems

The claim that public lands are unconstitutional raises a number of other concerns. Just how much public landholding in a state might violate the Constitution, given that U.S. public lands comprise from near zero to more than 80% of the land in any one state? Is it relevant how those lands are managed, such as for recreation and preservation (e.g., national parks), or for forestry, mining, wildlife protection, or military purposes? Does the claim reach only land that is permanently held in U.S. ownership, and if so, how can “permanence” be determined, given the fact that one Congress can generally not bind another? What are the “judicially discoverable and manageable standards” that make this kind of constitutional claim justiciable?²¹ Also, because the United States has, without objection, owned a good deal of land in many states since they were admitted into the Union more than a century ago, is the claim stale? If a constitutional violation is found, what is the proper remedy—can the courts order Congress to enact a divestiture scheme?

Further, states and others who seek the assistance of courts in divesting the United States of public lands have always had a tried-and-true political remedy. For example, after the Supreme Court ruled in the late 1940s that the United States, and not the coastal states, owned the submerged lands adjacent to the nation’s coasts,²² the coastal states persuaded Congress to enact the Submerged Lands Act of 1953, which gave them title to the submerged lands within three miles of shore.²³

Conclusion

For well over two centuries, the national political process has determined the nation’s policy toward its public lands. An unbroken line of Supreme Court decisions since the Civil War has acknowledged how that process has led to large tracts of public lands being retained in national ownership and managed for broad public purposes, without casting any doubt on the national government’s constitutional authority to do just that.

20. Leshy, *supra* note 1, at 567–68.

21. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

22. *See, e.g., United States v. California*, 332 U.S. 19 (1947).

23. Or three leagues, in the case of Texas and that portion of Florida bordering the Gulf of Mexico. *See* 43 U.S.C. §§ 1301-15 (2012).

The nation's long experience with extensive public landholdings has created deeply held expectations built on this clear understanding that fundamental public land policy decisions are made through the political, and not the judicial, process. Accepting arguments that the public lands are unconstitutional would, by overthrowing that understanding, unsettle those expectations. If the judiciary were to assume responsibility for determining how much land the Constitution permits the national government to own in a state, the validity of thousands of federal laws could be thrown into doubt, calling into question hundreds of thousands if not millions of property transactions bottomed on those laws. Rather than start down such a perilous path, the courts should simply follow the Supreme Court's clear teachings, including its repeated admonition to be extremely reluctant to revisit settled public land law.²⁴

In short, the nation's founders wisely gave Congress, not unelected federal judges, the responsibility to direct the future of the nation's public lands. It is practically certain the U.S. Supreme Court would agree if asked.

Still, because the Constitution empowers Congress to turn public lands over to states or private interests if it so wishes, defenders of public lands should not be complacent. Those lands will remain in U.S. ownership only if it continues to command the support of the American people. Put a little differently, each new generation of Americans must decide for itself whether to support U.S. ownership of the public lands.

24. See, e.g., *United States v. Maine*, 420 U.S. 515, 527-38 (1975); *Leo Sheep v. United States*, 440 U.S. 668, 687 (1980).

Tax Law:*The Rhetoric of Tax Loopholes*¹

Heather M. Field

Legislators, policymakers, academics, and other commentators call for action to close the tax loopholes that riddle the U.S. tax system. But what is a “tax loophole?” Denouncers of tax loopholes actually have widely divergent views. Using the same “tax loophole” term to denote dramatically different things impedes real communication about tax reform, tax policy, and perceived tax abuses, and allows speakers to sidestep responsibility for articulating their true concerns. Thus, people criticizing loopholes (or the taxpayers who use them) often talk past each other and engage in the tax equivalent of schoolyard name-calling.

Commentators have criticized the “loophole” rhetoric before. Most prominently, Professor Boris Bittker, in 1973, examined different types of loopholes in an effort to “rescue the federal income tax from the superheated rhetoric of its populist friends.”² Yet loophole rhetoric has continued unabated, perhaps in part (though certainly not entirely) because of the focus on defining and describing tax loopholes.

Rather than continuing that focus, I attempt to overcome the rhetoric by providing a strategy for translating tax-loophole rhetoric into meaningful tax-policy dialogue. Specifically, I argue that any reference to a “tax loophole” can be understood by identifying the substantive policy critique implied by the term’s use and by identifying the party that is the target of the criticism. Understanding any purported tax loophole using these two inquiries provides a more productive framing of whatever concern is implied by the “tax loophole” terminology.

What do people mean when they refer to “tax loopholes?”

Most commentators merely imply a definition of the term “tax loophole” from the context in which they use the term. Although the term “tax loophole” generally carries a negative connotation, the implied definitions are otherwise often inconsistent.

1. Summarized and excerpted from Heather M. Field, *A Taxonomy for Tax Loopholes*, 55 HOUS. L. REV. 545 (2018).

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

Some suggest that tax loopholes are benefits that arise from ambiguities or omissions in statutory language, where a tax benefit complies with the literal language of the law but violates its spirit, or where a tax preference is otherwise inconsistent with congressional intent. And some commentators imply that tax loopholes are merely unintended tax-planning opportunities devised by clever tax advisers. Others use the term “tax loophole” to refer to tax-reduction opportunities that are explicitly provided by Congress and used by taxpayers as Congress intended (e.g., deductions for home-mortgage interest, state and local taxes, and charitable contributions). Some go further to include as a tax loophole any feature of the system that legally reduces tax, including preferential capital-gains rates and the “realization” requirement that enables assets to appreciate tax-free until disposition. Still others focus on the beneficiaries, labeling as “tax loopholes” any tax benefits available to special-interest groups or the wealthy, tax benefits available to some groups and not others, or tax benefits provided to some taxpayers but not to the speaker. Ultimately, whether something is a tax loophole is often merely a matter of viewpoint—a tax preference that the speaker does not like.

How can “tax loophole” rhetoric be translated into a productive dialogue?

Ultimately, trying to define the term “tax loophole” with precision is pointless because the term has no independent significance. No tax penalties, reporting obligations, or other consequences arise under the law because someone classifies a tax preference as a loophole. Thus, rather than debating about whether a tax preference warrants the “loophole” appellation, it is much more productive to try to understand why a speaker judges the tax preference to be worthy of the pejorative “tax loophole” label.

Any reference to a “tax loophole” can be translated into a more substantive policy conversation by asking two questions: What is the policy objection? And who is responsible for the problem? Using academic, practitioner, and news articles, political speeches, television-show transcripts, and other materials that use the term “tax loophole,” I catalogued common answers to these two questions.

A. *What is the policy critique?*

Implicit in many uses of the “tax loophole” terminology is a concern about loss of revenue. When the policy concern is about

revenue, several substantive questions follow: What is the speaker's baseline for determining that the purported loophole causes a revenue loss? Why is that baseline the correct one from which the provision's impact should be measured? Are there good reasons to accept this revenue loss? What would be done with the additional revenue collected if the purported loophole were closed?

Fairness is also a common concern that motivates speakers to describe tax preferences as loopholes. Of course, fairness can be an elusive concept that is difficult to define. Thus, speakers should be specific about their fairness concerns: Which groups of taxpayers are being compared? Who is benefiting from the tax loophole and who is not? And why should the groups receive the same tax benefit (or not)?

Sometimes, the concern underlying a purported "tax loophole" is distortion of taxpayer behavior; taxpayers will alter their economic decisions to benefit from the loophole, leading to misallocation of resources and adversely affecting economic growth.³ These implied economic-growth arguments are sometimes tied to the other actions (e.g., lowering tax rates across the board or investing in education or infrastructure) that could be taken to foster economic growth if the loophole is closed. If the problem with a loophole is its impact on the economy, it is important to answer several questions: How does the tax preference distort behavior? How does the distortion impede growth? And exactly what change would improve the economy and how?

Another, somewhat less common, critique implied by the term "tax loophole" is about needless complexity that hinders both compliance and enforcement. Again, this policy concern can be fleshed out: How does the loophole add complexity and thus compliance and enforcement challenges and costs? Why is that complexity not justified by other policy benefits of the tax preference? How would a change simplify tax law and reduce the adverse consequences caused by the loophole?

Whatever the underlying policy concern, speakers should be explicit about the substantive critiques causing the speaker to label a particular tax benefit as a "loophole."

B. *Who is the target of the criticism?*

In addition, the "tax loophole" terminology often casts blame on a particular party, faulting them for the existence or perpetuation of the

3. See C. EUGENE STEUERLE, CONTEMPORARY U.S. TAX POLICY 12–13 (2008).

loophole or condemning them for using or facilitating the use of the loophole. The blameworthy party should be explicitly identified.

Congress is the most frequent target of speakers who criticize “loopholes.” Congress is blamed for creating loopholes and for failing to close them. Some critics fault the individual members of Congress for being incompetent drafters, for exercising bad judgment, and even for selling out to special interests, misusing their position of trusts, or otherwise lacking character. Other critics place more blame the imperfect lawmaking process, in which loopholes are created because of political compromise, public-choice problems, or the inherent difficulty in drafting rules. Ultimately, given the range of ways Congress can be critiqued for loophole problems, speakers should be explicit about what they believe Congress has done to create or entrench the loophole, explain whether they blame the people or the process and why, and then articulate how Congress should respond.

Tax loopholes are also sometimes blamed on members of the executive branch. Presidents are faulted for lack of leadership in closing loopholes. The Treasury Department is blamed for drafting regulations that create loopholes and failing to promulgate regulations that would close loopholes. And the IRS is criticized for ineffective enforcement that allows loopholes to persist.

In limited circumstances, courts are blamed for creating loopholes by interpreting the law too generously or for enabling loopholes to persist by failing to interpret the law in a way that takes legislative intent into account and overcomes clear drafting problems.

Some of the most frequent targets of criticism in the “tax loophole” discourse are not government actors but the taxpayers themselves, their lobbyists, and their advisors. Taxpayers, particularly rich and powerful taxpayers, are criticized for using their influence and campaign contributions to get tax loopholes inserted into or retained in the tax code. Others condemn taxpayers who use loopholes because their use of loopholes adversely affects tax morale, creates perceptions of unfairness, undermines voluntary compliance, and otherwise causes the policy problems discussed above. In addition, those who criticize taxpayers for using loopholes often do so to impugn the character or judgment of the taxpayer who uses the loophole, commonly in an effort to defeat that taxpayer in an election. These critiques often use vitriolic language that conveys strong moral condemnation. And tax-loophole critics also blame tax advisors, without whom taxpayers could not use the loopholes most effectively.

Various parties can be blamed for tax loopholes, so speakers should be explicit about which party is being blamed and how that party’s actions contribute to the loophole. Often, however, the party

that is the target of the loophole critique is not the party who is (or should be) expected to fix the problem. For example, taxpayers are unlikely to stop using loopholes on their own. Thus, when identifying the target of the tax loophole criticism, it is also important to identify whether that party or another should respond and how.

What is the benefit of the “tax loophole” translation effort?

References to “tax loopholes” can be translated into more substantive policy conversations by identifying the particular tax provision at issue, identifying the policy problems created by the loophole, and identifying the targets of criticism implied in the “tax loophole” label.

A. Improving the tax-policy discourse.

This approach provides any tax-loophole critic with a framework for more explicitly articulating their critique. And when speakers persist with unexplained “tax loophole” rhetoric, the translation strategy helps listeners ask good questions to elicit the policy concerns and desired responses of someone who talks about loopholes. This strategy for teasing out the substance behind any speaker’s use of the “tax loophole” label reveals information about the source of the speaker’s concern that the “loophole” label conceals, stimulates thought about meaningful policy issues that the “loophole” label inhibits, elevates logic and analysis over the “loophole” label’s appeals to emotion and rhetoric, enables listeners to assess the degree to which they agree with the speaker’s characterization of the purported “loophole,” and moves the “tax loophole” conversation beyond rhetoric to potential solutions. As a result, the discourse can be made less superficial, more policy-oriented, and more actionable.

Admittedly, political rhetoric—including even “tax loophole” rhetoric—can have value, for example, as a rallying cry around which coalitions can be built. Further, “tax loophole” rhetoric is far from the only hurdle to bipartisan tax reform. However, to advance meaningful conversations about tax policy, any “tax loophole” rhetoric should be backed up by thoughtful, substantive policy arguments, which are sorely lacking in today’s tax-loophole discourse.

B. *Understanding societal perceptions about the tax system.*

Even if insights provided by the “tax loophole” translation effort are not used to improve the tax-policy discourse, the translation strategy still improves the ability to understand attitudes toward taxation more broadly. Specifically, the translation strategy can be used, in the aggregate, to better understand groups of people and how they perceive the tax system.

To illustrate, I applied this approach to the tax-loophole discourse in the transcripts from two television-news media (CNN and Fox) and in articles from two print-news media (*Wall Street Journal* and *New York Times*) during the 2016 presidential campaign.⁴ I searched these four sources for “tax! /3 loophole!” for the period between June 8, 2015, and November 8, 2016. For each result, I used the context and language surrounding each tax-loophole reference to code it by the normative policy concerns that were suggested in the remarks and by the party (or parties) the remarks implicitly blamed for the tax-loophole problem. The application of the translation strategy to the “tax loophole” discourse leading up to the 2016 election reveals stark differences in the focus of different media sources.

Briefly, print media raised revenue concerns much more frequently than television media when discussing tax loopholes. And, when discussing tax loopholes, the more left-leaning media emphasized fairness concerns with relatively little attention to economic concerns, whereas the right-leaning media placed much heavier emphasis on economic concerns. This result 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.⁵ This analysis of the tax-loophole discourse, however, adds to our understanding of the presidential election because it provides evidence

4. These sources were selected based on the Pew Research Center’s 2014 study about political polarization in the media and the Pew Research Center’s 2017 report about media news sources used leading up to the 2016 presidential election. 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); PEW RESEARCH CENTER, TRUMP, CLINTON VOTERS DIVIDED IN THEIR MAIN SOURCE FOR ELECTION NEWS at 3–4 (Jan. 18, 2017). I sought to use the most widely used news sources that appealed to a voters at different places on the ideological spectrum.

5. 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).

of the very different news media experiences that voters of different ideological perspectives may have had leading up to the election. These divergent media narratives about tax 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 United States.

The media sources diverged less on the issue of which party was responsible for loopholes. Among results where a responsible party was identifiable,⁶ a majority placed significant blame on taxpayers, with Congress being the second-most frequent target of criticism. Many articles that blamed taxpayers for using loopholes, however, implied that some other, usually unnamed, party was expected to fix the problem. Although commentators were often unclear about which party they believed should fix the tax-loophole problem, insights into the perceived source of the problem provide an important step toward finding solutions.

* * * * *

Ultimately, this article provides a strategy for cutting through the “tax loophole” rhetoric and revealing the substance and source of the underlying concerns. Ideally, this strategy can overcome the empty “loophole” language, advance more policy-based and actionable discourse, and reveal larger political narratives, helping us to learn something about U.S. society and about how different groups perceive the flaws of the tax system.

6. A responsible party could not be determined for a significant minority of the search results (22% of the *New York Times* search results, 25% of the *Wall Street Journal* results, and 37% of the CNN and Fox News results).
