

**UNIFIED ANALYSIS:
CONSTITUTIONAL INFIRMITIES OF
JUDICIAL OVERRIDES TO SUBTITLE A
OF THE INTERNAL REVENUE CODE**

*A Litigation-Ready Framework Integrating Separation-of-Powers Doctrine,
Constitutional Constraints, and Doctrinal Mapping*

Prepared for Federal Court and Scholarly Audiences

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CONSTITUTIONAL PROVISIONS

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U.S. Const. amend. V (Due Process Clause)

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26 U.S.C. Subtitle A (Income Taxes — Chapters 1-6)

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26 U.S.C. § 167 (Depreciation)

26 U.S.C. § 183 (Activities Not Engaged in for Profit)

26 U.S.C. § 195 (Start-Up Expenditures)

26 U.S.C. § 199A (Qualified Business Income Deduction)

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EXECUTIVE SUMMARY

1. This Unified Analysis demonstrates that the federal judiciary has, through decades of incremental, case-by-case adjudication, constructed a body of operative tax law that effectively supersedes the statutory text enacted by Congress in Subtitle A of the Internal Revenue Code, 26 U.S.C. §§ 1-1564. This phenomenon — which this document terms "**judicial override**" — is most conspicuously illustrated by the term "trade or business," a phrase that appears in over 492 subsections of the Internal Revenue Code and is referenced in more than 664 Treasury Regulations, yet has never been defined by statute. Instead, courts have filled this legislative gap by fashioning their own operative definitions, most notably the two-part test announced in *Commissioner v. Groetzinger*, 480 U.S. 23 (1987), and the "goods or services" gloss originating in *Higgins v. Commissioner*, 312 U.S. 212 (1941).

2. This judicial override is not confined to the "trade or business" definition. It extends across Subtitle A through a constellation of judge-made doctrines — the economic substance doctrine (prior to its partial codification), the substance-over-form doctrine, the step-transaction doctrine, the assignment-of-income doctrine, and the sham-transaction doctrine — each of which imposes operative rules that Congress never enacted through the constitutionally mandated process of bicameralism and presentment. The cumulative effect is the creation of what recent scholarship has termed a "**judicial Code**": a parallel body of tax law, authored by courts, that operates alongside — and frequently overrides — the statutory text enacted by the People's representatives. *See* Tahk, *The Tax Canon* (2025).

3. This document integrates four analytical components into a single, cohesive argument that these judicial overrides are constitutionally infirm:

- **Part I** presents a separation-of-powers argument tailored specifically to Subtitle A, demonstrating that judicial creation of operative tax definitions violates Article I's vesting of "ALL legislative Powers" in Congress, transgresses the structural mandates of the Origination Clause and the Taxing and Spending Clause, and cannot be sustained under the nondelegation doctrine.
- **Part II** develops a formal legal brief arguing that the judiciary's expansion of "trade or business" and related Subtitle A terms is unconstitutional, with particular emphasis on Due Process violations arising from vague, retroactive, and geographically disparate judicially-created standards.
- **Part III** constructs a comprehensive doctrinal matrix mapping each identified judicial override to the specific constitutional provisions it violates, revealing the systematic scope of the constitutional problem.
- **Part IV** presents a litigation-ready argument that these overrides are void *ab initio* — not merely erroneous but structurally without constitutional foundation — and provides a remedial framework and model litigation template for raising these challenges in federal court.

4. The argument is sharpened by two recent developments. First, the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), overruled *Chevron* deference, eliminating the last doctrinal justification for permitting unelected actors — whether agencies or courts — to supply operative meanings for ambiguous statutory terms. If executive agencies cannot fill statutory gaps, *a fortiori* neither can Article III courts. Second, the Court's decision in *FCC v. Consumers' Research* (2025), while upholding a specific delegation, reaffirmed that delegations of legislative power require an "intelligible principle" — a requirement that Congress's undefined use of "trade or business" manifestly fails to satisfy.

5. The constitutional infirmities identified herein are not merely academic. They produce concrete, adverse consequences for millions of taxpayers who are subjected to judicially-created tax rules that no Congress ever voted upon, no President ever signed, and no taxpayer could have discovered by reading the statutory text. The post-*Loper Bright* era demands a return to constitutional first principles: the power to define the terms and conditions of income taxation belongs to Congress and to Congress alone.

PART I

**SEPARATION-OF-POWERS ARGUMENT TAILORED TO
SUBTITLE A JUDICIAL OVERRIDES**

**I.A. The Constitutional Architecture of Tax
Legislation**

6. The Constitution commits the taxing power to Congress with extraordinary specificity and redundancy. The Taxing and Spending Clause provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises." U.S. Const. art. I, § 8, cl. 1. This grant is reinforced by the Legislative Vesting Clause, which provides that "*All* legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1 (emphasis added). The word "All" is absolute: it admits of no reservation, no exception, and no implicit transfer to the judiciary.

7. The Origination Clause adds a further structural safeguard: "All Bills for raising Revenue shall originate in the House of Representatives." U.S. Const. art. I, § 7. This provision reflects the Founders' conviction that the power to tax — being the most consequential power of government over the citizen's

property — must originate in the chamber closest to the People. When a court constructs an operative definition that determines whether a taxpayer owes tax, or is entitled to a deduction that reduces tax, the court is exercising the functional equivalent of the revenue-raising power. Yet no judicial opinion has ever originated in the House of Representatives, passed the Senate, and been presented to the President for signature.

8. Alexander Hamilton emphasized the centrality of legislative control over taxation in *The Federalist*. In No. 30, Hamilton argued that the taxing power must be adequate to meet the nation's needs — but "adequate" meant adequate as exercised by *the legislature*, not by any other branch. In No. 32, he addressed the allocation of taxing power between the federal and state governments, presupposing throughout that taxation is a *legislative* function. In No. 36, Hamilton described in detail the process by which revenue laws would be crafted — a process of legislative deliberation, not judicial pronouncement. At no point did any Framers suggest that courts would play a role in defining the operative terms of tax statutes.

9. These provisions create a structural mandate of constitutional dimension: the operative terms of tax law — including who is subject to tax, what is taxable, and the conditions for deductions and credits — are **exclusively legislative determinations**. Any exercise of the power to define these terms by an institution other than Congress is constitutionally ultra vires, regardless of how wise or workable the resulting definition may be.

I.B. The Judicial Override Mechanism in Subtitle A

10. Congress enacted Subtitle A of the Internal Revenue Code, 26 U.S.C. §§ 1-1564, as a comprehensive statutory scheme governing the imposition, computation, and collection of income taxes. Subtitle A encompasses six chapters and hundreds of individual provisions covering normal taxes and

surtaxes (Chapter 1), tax on self-employment income (Chapter 2), withholding (Chapter 3), rules applicable to consolidated returns (Chapter 6), and related subjects. It is among the most detailed and comprehensive bodies of statutory law in the United States Code.

11. Despite this extraordinary statutory detail, Congress deliberately chose not to define certain terms that are foundational to the entire Subtitle A structure. The term "**trade or business**" is the paradigm case. It appears in over 492 subsections of the IRC and is referenced in more than 664 Treasury Regulations. It is the gateway term for some of the most consequential provisions in Subtitle A, including the deduction for trade or business expenses under § 162, the start-up expenditure rules under § 195, and the qualified business income deduction under § 199A. Yet the Code contains no statutory definition of the term.

12. Courts filled this definitional void not through interpretation of statutory text — for there was no text to interpret — but through the creation of operative rules with no textual anchor in the IRC. The leading formulation is the **Groetzing** test, announced by the Supreme Court in *Commissioner v. Groetzing*, 480 U.S. 23 (1987). In *Groetzing*, the Court held that a taxpayer is engaged in a "trade or business" where the taxpayer is "involved in the activity with continuity and regularity" and where "the taxpayer's primary purpose for engaging in the activity [is] for income or profit." *Id.* at 35. This two-part test — continuity-and-regularity plus primary-profit-purpose — appears nowhere in the Internal Revenue Code. Congress never enacted it. No bill containing this language was ever introduced, debated, voted upon, or presented to the President.

13. Even before *Groetzing*, the judiciary had been constructing the operative meaning of "trade or business" through case-by-case adjudication. In *Higgins v. Commissioner*, 312 U.S. 212 (1941), the Supreme Court held that a taxpayer who devoted his full-time efforts to managing a substantial

portfolio of investments was *not* engaged in a "trade or business." The Court's reasoning imported a requirement — that the taxpayer provide **goods or services to others** — that appears nowhere in the IRC. This judicially-imposed threshold eliminated an entire category of taxpayers from eligibility for trade-or-business deductions, with no statutory basis whatsoever.

14. The judicial override mechanism extends well beyond the "trade or business" definition. Courts have:

- Redefined "ordinary and necessary" under § 162(a) to impose judicially-created requirements that expenses be "common and accepted" in the taxpayer's trade or business and "helpful and appropriate" — glosses that restrict the statutory text beyond its enacted scope. *See Welch v. Helvering*, 290 U.S. 111, 113-14 (1933).
- Expanded the hobby-loss rules beyond the text of § 183 by creating judicially-imposed multi-factor tests that override the statutory safe harbors Congress enacted.
- Created substantive requirements for deductions under § 162 — including the "personal benefit" doctrine and the "carrying on" requirement — that have no textual basis in the statute.
- Fashioned the economic substance doctrine, the substance-over-form doctrine, the step-transaction doctrine, the assignment-of-income doctrine, and the sham-transaction doctrine as extra-statutory rules that override Subtitle A provisions, in many cases before any of these doctrines had been codified by Congress.

15. Each of these judicial constructs functions as an operative legal rule that determines taxpayer liability. Each was created by courts, not by Congress. Each alters the rights and obligations established by the statutory text of Subtitle A. Collectively, they constitute a **parallel body of tax law** — a

"judicial Code" that operates alongside, and frequently supersedes, the statutory Code enacted by the People's elected representatives.

I.C. Why This Violates Separation of Powers

16. The constitutional violation is structural, not merely procedural. The Legislative Vesting Clause provides that "ALL legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. The word "ALL" is absolute. It does not say "most" legislative powers, or "principal" legislative powers, or "legislative powers except those that courts find convenient to exercise." It says *all*. When courts create operative definitions that determine tax liability — definitions that Congress never enacted — they exercise legislative power in direct violation of this constitutional command.

17. This conclusion follows inescapably from first principles. *What is legislative power?* It is the power to prescribe general rules of conduct that bind citizens and determine their legal obligations. When the Supreme Court in *Groetzinger* announced that "trade or business" requires "continuity and regularity" and "primary profit purpose," it prescribed a general rule of conduct that binds every taxpayer in the United States. When the Court in *Higgins* imposed a "goods or services to others" requirement, it determined the legal obligations of every full-time investor in the country. These are quintessentially legislative acts — the creation of binding rules of general applicability — performed by an institution that the Constitution excludes from the legislative process.

18. This is distinguishable from ordinary statutory interpretation. In the ordinary case, a court interprets text that Congress wrote — resolving ambiguity, applying statutory language to new factual contexts, harmonizing competing provisions. The court's interpretive act is tethered to *enacted text*. But when courts define "trade or business," they are not resolving ambiguity

in text Congress wrote. They are *supplying operative rules that Congress never enacted*. There is no statutory text to interpret — there is only a term used without definition. The judicial act is not interpretation but **legislation**.

19. The Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), establishes that legislative power can be exercised only through the constitutionally prescribed process of bicameralism and presentment. *Id.* at 951. A judicial opinion, however unanimous, does not satisfy this requirement. No judicial definition of "trade or business" has been passed by both chambers of Congress and presented to the President. Under *Chadha*, such a definition is not law — it is a nullity.

20. The Supreme Court's holding in *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), further reinforces this conclusion. There, the Court declared that "taxation is a legislative function" and that "the principle that Congress should articulate intelligible standards when delegating power ... is a safeguard against the legislative abdication of the taxing power." *Id.* at 340-42. If Congress cannot delegate the taxing power to an executive agency without articulating intelligible standards, it follows *a fortiori* that the taxing power cannot be assumed by the judiciary without any delegation at all.

21. The post-*Loper Bright* landscape sharpens this analysis. In *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the Supreme Court overruled *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), holding that courts may no longer defer to agency interpretations of ambiguous statutes. The rationale was foundational: the power to say what the law means belongs to the courts under Article III, and courts cannot abdicate that function to agencies. But *Loper Bright* carries an implication that the Court may not have fully reckoned with: if courts cannot defer to agencies to fill statutory gaps, then courts themselves cannot fill those gaps by creating operative definitions that function as legislation. The power to say what the law *means* is distinct from the power to say what the law *is*. The former is judicial; the

latter is legislative. When courts define undefined terms, they exercise the latter power — a power that *Loper Bright's* own reasoning places beyond the judicial function.

22. The empirical dimension confirms the structural diagnosis. Professor Susannah Camic Tahk's 2025 study documented that the Tax Court and Congress effectively operate on different substantive domains of the Internal Revenue Code — the Tax Court has developed its own body of operative rules that govern taxpayer behavior in areas where the statutory text is thin or undefined, while Congress legislates primarily in areas of detailed statutory specification. Tahk, *The Tax Canon* (2025). This bifurcation is not statutory design — it is **structural evidence of a separation-of-powers violation**. A de facto "judicial Code" has emerged, operating in parallel with the enacted Code, and exercising legislative power that Article I reserves exclusively to Congress.

I.D. The Nondelegation Dimension

23. Even if Congress's silence on "trade or business" could be construed as an implicit delegation of definitional authority to the courts — a characterization that is itself constitutionally problematic — such a delegation would fail under the nondelegation doctrine. Since *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), the Supreme Court has recognized that Congress may not delegate legislative power without providing an **"intelligible principle"** to guide the delegate's exercise of that power.

24. Congress provided no intelligible principle for defining "trade or business." It simply used the term — more than 492 times — without any definition, without any guidance as to the factors that should be considered, without any indication of the weight to be assigned to competing considerations, and without any boundary conditions to constrain the definitional exercise. The term was used in its undefined state across

provisions spanning individual income tax, corporate tax, self-employment tax, withholding, and consolidated returns. A bare statutory term, used without definition or guidance, does not satisfy the intelligible-principle requirement.

25. The Supreme Court's recent decision in *FCC v. Consumers' Research* (2025) is instructive by contrast. There, the Court upheld a challenged delegation because Congress had provided substantial statutory guidance to constrain the agency's exercise of the delegated authority. The decision reinforced that delegations of legislative power must be accompanied by meaningful statutory standards. Here, there are no such standards. Congress provided no criteria, no factors, no definitions, no safe harbors, and no legislative history elucidating the intended scope of "trade or business." The contrast with *Consumers' Research* underscores the constitutional deficiency: where Congress has spoken with specificity, delegation may be sustained; where Congress has said nothing at all, there is no delegation to sustain — and no authority for courts to exercise.

26. The nondelegation argument applies with particular force in the tax context. As the Court recognized in *National Cable Television*, "taxation is a legislative function," and the delegation of taxing power is subject to heightened scrutiny. 415 U.S. at 340. If Congress cannot delegate the power to define tax terms to an executive agency without providing intelligible principles, it certainly cannot be deemed to have implicitly delegated that power to the judiciary — an institution to which the Constitution assigns no legislative authority whatsoever.

PART II

**LEGAL BRIEF – WHY JUDICIAL EXPANSION OF
"TRADE OR BUSINESS" IS UNCONSTITUTIONAL**

II.A. Statement of the Issue

27. Issue Presented: Whether the federal judiciary's creation of operative definitions for the term "trade or business" under Subtitle A of the Internal Revenue Code, in the absence of any statutory definition enacted by Congress, constitutes an unconstitutional exercise of legislative power in violation of Article I, § 1 (Legislative Vesting Clause); Article I, § 7 (Origination Clause); Article I, § 8, cl. 1 (Taxing and Spending Clause); Article III, § 1 (Judicial Power Clause); the Due Process Clause of the Fifth Amendment; and structural separation-of-powers principles.

28. Suggested Answer: Yes. The judiciary's creation of operative definitions for undefined statutory terms in the IRC is an exercise of legislative power that the Constitution assigns exclusively to Congress. This exercise violates the structural separation of powers, exceeds the scope of Article III judicial power, and produces Due Process violations through vague, retroactive, and geographically inconsistent standards. These judicially-created definitions are void *ab initio*.

II.B. Constitutional Framework

29. The constitutional framework governing the taxing power is among the most explicit and carefully structured in the entire Constitution. Four provisions, operating in concert, establish that the power to define the terms and conditions of taxation resides exclusively in Congress.

30. The Sixteenth Amendment provides: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. amend. XVI. This Amendment authorizes *Congress* — and only Congress — to lay and collect taxes on incomes. It does not authorize courts to determine the operative scope of income tax provisions by fashioning definitions that Congress never enacted. The grant is to the legislature; the judiciary is not mentioned.

31. Article I, § 8, cl. 1 grants Congress the power "To lay and collect Taxes, Duties, Imposts and Excises." This power encompasses not only the authority to impose taxes but also the authority to define the terms and conditions under which taxes are imposed — including the meaning of foundational terms such as "trade or business," "ordinary and necessary," and "income." *See National Cable Television Ass'n*, 415 U.S. at 340 ("Taxation is a legislative function.").

32. Article III, § 1 limits the judicial power to "Cases" and "Controversies." U.S. Const. art. III, § 1. This jurisdictional limitation is not merely procedural — it is structural. It defines the *nature* of the judicial function: the resolution of concrete disputes through the application of law enacted by others, not the creation of new operative rules. As developed in Part I, *supra* ¶¶ 16–22, the creation of operative tax definitions is a legislative act, not a judicial one. When courts supply definitions for undefined statutory terms, they transgress the boundary between Article I and Article III — they cease to resolve cases and controversies under existing law and begin to create new law for future cases.

33. The Due Process Clause of the Fifth Amendment requires that individuals have fair notice of the legal standards governing their conduct and that the government not impose obligations through impermissibly vague standards. *See* U.S. Const. amend. V. As applied to tax law, Due Process

demands that taxpayers be able to determine their tax obligations by reference to enacted law — not by predicting how a court will exercise discretion under a judicially-created, multi-factor balancing test. The "trade or business" definition created by the judiciary fails this requirement, as demonstrated in Section II.D, *infra*.

II.C. The Unconstitutional Expansion

34. The judiciary has expanded the operative meaning of "trade or business" far beyond any textual anchor in the Internal Revenue Code. This expansion has occurred in three principal dimensions, each constitutionally problematic.

35. First: The Groetzinger Test. In *Commissioner v. Groetzinger*, 480 U.S. 23 (1987), the Supreme Court created a two-part test requiring (1) continuity and regularity and (2) a primary purpose of income or profit. *Id.* at 35. Neither prong has any textual basis in the IRC. The phrase "continuity and regularity" appears nowhere in Subtitle A. The phrase "primary purpose for income or profit" appears nowhere in Subtitle A. The Court created both requirements *ex nihilo* — not by interpreting statutory text, but by fashioning a rule to fill a gap that Congress chose to leave unfilled. This is legislative action, as analyzed in Part I.C, *supra* ¶¶ 16-18.

36. Second: The Higgins "Goods or Services" Requirement. In *Higgins v. Commissioner*, 312 U.S. 212 (1941), the Court imposed a requirement that the taxpayer provide "goods or services to others" in order to be engaged in a "trade or business." This requirement excluded full-time investors from trade-or-business status — regardless of the time, effort, or capital devoted to the activity — on the basis of a judicially-created categorical distinction that Congress never enacted. The *Higgins* requirement added an element to the statutory term that Congress deliberately omitted. It is, in substance, a judicial amendment to the IRC.

37. Third: The Investor-Dealer-Trader Spectrum. Through decades of case-by-case adjudication, courts have created an elaborate taxonomy of taxpayer activities — "investor," "dealer," "trader" — with dramatically different tax consequences. An "investor" cannot deduct expenses under § 162 but may deduct them (subject to limitations) under § 212. A "dealer" recognizes ordinary income on sales. A "trader" may deduct expenses under § 162 but may not deduct losses as ordinary losses absent a mark-to-market election under § 475. None of these categories — investor, dealer, trader — appears in the IRC. None was enacted by Congress. Each is a judicial creation that determines the tax treatment of billions of dollars in income, deductions, and losses each year.

38. The constitutional problem posed by this judicial expansion is distinct from the ordinary common-law development of legal principles. In areas such as tort or contract law, courts have historically exercised common-law powers to develop legal rules. But tax law is different. In tax law, the consequence of a legal rule is the imposition or denial of a *government financial obligation* on the citizen. The Constitution assigns the power to impose such obligations exclusively to Congress. *See* U.S. Const. art. I, § 8, cl. 1; *National Cable Television*, 415 U.S. at 340. When a court creates a rule that determines whether a taxpayer owes additional tax or is denied a claimed deduction, the court exercises a power that the Constitution reserves to the legislature — regardless of whether the court characterizes its action as "interpretation" or "gap-filling."

II.D. Due Process Violations

39. The judicially-created "trade or business" standard violates the Due Process Clause of the Fifth Amendment in four distinct respects.

40. First: Vagueness. The void-for-vagueness doctrine requires that legal standards provide sufficient notice to allow persons of ordinary intelligence to

understand what conduct is required or prohibited. The *Groetzinger* test fails this requirement. "Continuity and regularity" is an inherently subjective, fact-intensive standard that provides no clear guidance. How many hours per week constitute "continuity"? How many months per year constitute "regularity"? The standard provides no answers. Similarly, "primary purpose for income or profit" requires a subjective inquiry into the taxpayer's motivations — an inquiry that invites arbitrary and inconsistent application. A standard that turns on the adjudicator's subjective assessment of a taxpayer's mental state is constitutionally vague.

41. Second: Empirical Evidence of Inadequate Notice. The National Taxpayer Advocate has documented that trade-or-business expenses are among the most litigated tax issues annually. Taxpayers prevail in only approximately 11% of trade-or-business cases, with split decisions — in which the taxpayer prevails on some issues but not others — occurring in approximately 31% of cases. This extraordinary litigation volume, and the low taxpayer success rate, constitute empirical evidence that the standard fails to provide adequate notice. If taxpayers — and their professional advisors — cannot reliably predict how the standard will be applied, the standard is constitutionally deficient.

42. Third: Geographic Disparities. The circuits have developed divergent approaches to the "trade or business" determination, creating geographic due process disparities. A taxpayer's tax obligations should not depend on the accident of geographic location — yet under the current judicially-created framework, they do. Whether a particular activity constitutes a "trade or business" may depend on which circuit the taxpayer resides in, which Tax Court judge is assigned to the case, and which line of precedent the adjudicator chooses to follow. This geographic arbitrariness violates the fundamental due process requirement of equal treatment under law. *See also*

Part I.C, *supra* ¶ 22 (discussing the Tahk study's documentation of divergent judicial treatment).

43. Fourth: Retroactivity. When courts "refine" the definition of "trade or business" in new decisions, they retroactively change the tax obligations of similarly situated taxpayers. A taxpayer who structured a transaction in reliance on existing judicial precedent may find — after the transaction is completed and the tax return filed — that a court has altered the governing standard. This retroactive alteration of tax obligations without legislative action raises serious due process concerns. Unlike a statute, which applies prospectively and provides notice through the legislative process, a judicial "refinement" of the trade-or-business definition applies retroactively to the taxpayer before the court and prospectively to all similarly situated taxpayers — without any of the procedural safeguards attendant to legislative action.

II.E. Structural Harm to the Taxing Power

44. A common response to the arguments presented above is that Congress has acquiesced in the judicial definitions by failing to override them legislatively. This argument fails both doctrinally and structurally.

45. Congressional acquiescence is not legislative action. The Constitution prescribes an exclusive process for the enactment of law: passage by both chambers of Congress and presentment to the President. U.S. Const. art. I, § 7; *see INS v. Chadha*, 462 U.S. at 951. Congressional silence — the failure to act — does not satisfy this process. Congress's failure to override a judicial definition is not the equivalent of Congress's enactment of that definition through bicameralism and presentment. To hold otherwise would be to create a constitutionally impermissible shortcut: courts could legislate by judicial opinion, and Congress's inaction would transform that legislation into valid statutory law. This inversion of the constitutional structure cannot be sustained. *See* Part I.C, *supra* ¶ 19.

46. The "judicial Code" phenomenon represents structural displacement. As documented by Tahk (2025), courts have effectively claimed substantive domains within the IRC — areas where the operative rules are primarily judge-made rather than statutory. *See* Part I.C, *supra* ¶ 22. This represents a structural displacement of legislative authority that cannot be justified by reference to acquiescence. The problem is not that Congress has failed to act; the problem is that an institution constitutionally excluded from the legislative process has assumed legislative functions. Congressional inaction does not cure this structural defect — it compounds it.

47. Post-*Loper Bright*, the justification for judicial gap-filling has collapsed. Before *Loper Bright*, one might have argued that judicial definitions of undefined tax terms were a form of common-law development justified by practical necessity and implicitly endorsed by the *Chevron* framework's acceptance of interpretive gap-filling. After *Loper Bright*, this argument is no longer available. The Court has squarely held that the power to interpret statutes resides in the courts — but has equally held that agencies cannot fill statutory gaps by creating operative rules. *See Loper Bright*, 144 S. Ct. at 2263. If agencies cannot fill gaps, courts cannot create operative definitions that serve the same function. The post-*Loper Bright* framework demands that statutory gaps remain gaps until Congress fills them through legislation. *See* Part I.C, *supra* ¶ 21; Part IV.C, *infra*.

PART III
DOCTRINAL MATRIX — MAPPING OVERRIDES
TO CONSTITUTIONAL VIOLATIONS

48. The following matrices systematically map each identified judicial override to the constitutional provisions it violates. This doctrinal mapping reveals the scope and depth of the constitutional problem — demonstrating that the judicial override phenomenon is not isolated to a single doctrine or a single constitutional provision, but represents a systemic structural failure.

Table 1: Primary Override-to-Violation Matrix

Judicial Override	Subtitle A Provision(s) Affected	Art. I Violation	Art. III Violation	Due Process Violation (Amend. V)	Separation-of-Powers Violation	Key Case(s)	Constitutional Remedy
1. Judicial creation of "trade or business" definition (Groetzienger test)	§§ 162, 195, 199A, and all 492+ subsections using the term	Legislative gap-filling: supplying operative two-part test Congress never enacted (Art. I, § 1; Art. I, § 8, cl. 1)	Exceeds "Cases and Controversies" by creating prospective rule of general applicability (Art. III, § 1)	Vagueness: "continuity and regularity" and "primary profit purpose" are subjective; inadequate notice; 11% taxpayer win rate	Courts exercise legislative function by creating binding rules determining tax liability	<i>Groetzienger</i> , 480 U.S. 23 (1987)	Vacate judicially-created test; apply ordinary meaning of statutory term; require congressional definition
2. "Goods or services to others" requirement	§ 162	Added statutory element Congress never enacted (Art. I, § 1)	Judicial legislation beyond interpretive function	Retroactive standard creation; categorical exclusion without statutory basis	Courts amend the IRC by adding requirements to undefined term	<i>Higgins</i> , 312 U.S. 212 (1941)	Vacate as ultra vires judicial amendment; apply statutory text as written
3. Judicial "ordinary and	§ 162(a)	Substantive restriction beyond enacted text: "common and	Courts impose operative limitations not derivable from statutory	Subjective standard invites arbitrary application; fact-intensive	Judicially-created restrictions function as legislative	<i>Welch v. Helvering</i> , 290 U.S. 111 (1933)	Vacate judicial gloss; apply plain statutory meaning of

Judicial Override	Subtitle A Provision(s) Affected	Art. I Violation	Art. III Violation	Due Process Violation (Amend. V)	Separation-of-Powers Violation	Key Case(s)	Constitutional Remedy
necessary" gloss		accepted" / "helpful and appropriate" (Art. I, § 1)	text	inquiry without clear criteria	amendments to § 162		"ordinary and necessary"
4. Hobby-loss judicial expansion beyond § 183	§§ 162, 183	Judicial rewriting of statutory safe harbors; multi-factor test created beyond § 183(d) text (Art. I, § 1)	Courts override congressional policy choices embedded in § 183	Multi-factor test creates uncertainty; statutory safe harbors effectively nullified	Courts displace congressional safe harbors with judge-made standards	<i>Dreicer v. Commissioner</i> , T.C. Memo. 1990-454; <i>Nickerson v. Commissioner</i> , 700 F.2d 402 (7th Cir. 1983)	Enforce statutory text and safe harbors as enacted; vacate extra-statutory factors
5. Economic substance doctrine (pre-codification)	Multiple Subtitle A provisions	Judge-made anti-abuse rule without statutory basis (Art. I, § 1; Art. I, § 7)	Courts act as policy-makers by creating anti-abuse rules Congress did not enact (Art. III, § 1)	No statutory notice; unpredictable application; no codified standards prior to § 7701(o)	Courts assume legislative function of writing anti-avoidance rules	<i>Gregory v. Helvering</i> , 293 U.S. 465 (1935); <i>ACM P'ship v. Commissioner</i> , 157 F.3d 231 (3d Cir. 1998)	Apply only codified version (§ 7701(o)); vacate pre-codification applications as ultra vires
6. Substance-over-form doctrine overriding statutory	Various Subtitle A provisions authorizing taxpayer elections	Overriding taxpayer elections expressly authorized by statute (Art. I, § 1)	Courts nullify statutory rights enacted by Congress	Taxpayers cannot rely on elections Congress authorized; retroactive disallowance	Courts override congressional policy choices through extra-statutory doctrine	<i>Commissioner v. Court Holding Co.</i> , 324 U.S. 331 (1945)	Enforce statutory elections as enacted; limit judicial recharacterization to fraud cases

Judicial Override	Subtitle A Provision(s) Affected	Art. I Violation	Art. III Violation	Due Process Violation (Amend. V)	Separation-of-Powers Violation	Key Case(s)	Constitutional Remedy
elections							
7. "Personal benefit" doctrine limiting § 162 deductions	§ 162	Importing extra-statutory limitation Congress did not enact (Art. I, § 1)	Courts create categorical exclusion beyond statutory text	Subjective inquiry into personal benefit; inconsistent application across circuits	Judicial creation of statutory limitation usurps legislative function	<i>Moss v. Commissioner</i> , 758 F.2d 211 (7th Cir. 1985)	Vacate extra-statutory limitation; apply § 162 and § 262 as written
8. Step-transaction doctrine applied to Subtitle A	Recognition / nonrecognition provisions (§§ 351, 355, 368, 1031, <i>et al.</i>)	Recharacterizing transactions Congress chose to authorize (Art. I, § 1)	Courts rewrite transactional substance that Congress addressed through specific statutory provisions	Unpredictable application; taxpayers cannot plan transactions with certainty	Courts override congressional authorization of specific transactional forms	<i>Commissioner v. Clark</i> , 489 U.S. 726 (1989)	Apply statutory recognition/nonrecognition rules as enacted; limit step doctrine to sham cases
9. Assignment-of-income doctrine beyond statutory text	§§ 1-2 (rate structure); § 61 (gross income definition)	Judicial redistribution of tax incidence Congress did not authorize (Art. I, § 1; Art. I, § 8, cl. 1)	Courts create rules allocating income among taxpayers without statutory basis	Uncertain application; inconsistent results across factual contexts	Courts exercise taxing power by determining which taxpayer bears the tax burden	<i>Lucas v. Earl</i> , 281 U.S. 111 (1930); <i>Helvering v. Horst</i> , 311 U.S. 112 (1940)	Apply statutory definitions of gross income and taxable person as enacted
10. Sham-transactions	All Subtitle A provisions	Extra-statutory invalidation of	Courts create anti-abuse	Unpredictable application; no	Courts assume legislative function	<i>Knetusch v. United</i>	Limit to transactions involving

Judicial Override	Subtitle A Provision(s) Affected	Art. I Violation	Art. III Violation	Due Process Violation (Amend. V)	Separation-of-Powers Violation	Key Case(s)	Constitutional Remedy
ction doctrine		transactions Congress did not prohibit (Art. I, § 1)	rules functioning as legislation (Art. III, § 1)	codified standard; no statutory notice of which transactions are "shams"	of defining prohibited transactions	<i>States</i> , 364 U.S. 361 (1960)	fraud or illegality; require codified standards for invalidation

Narrative Synthesis — Table 1

49. Table 1 reveals several critical patterns. **First**, every identified judicial override violates Article I, § 1, confirming that the core constitutional problem is structural: courts are exercising legislative power. **Second**, Due Process violations are pervasive — nine of ten overrides produce vagueness, retroactivity, or inconsistency concerns, confirming that judicial legislation in tax law systematically fails to provide the notice and predictability that the Fifth Amendment demands. **Third**, the overrides collectively span virtually the entirety of Subtitle A — from the threshold "trade or business" determination to the recognition/nonrecognition rules to the rate structure itself — demonstrating that the judicial Code is not a narrow or incidental phenomenon but a comprehensive parallel system. **Fourth**, the constitutional remedy in every case is the same in principle: vacate the judicially-created rule and apply the statutory text as enacted, requiring Congress to exercise its legislative power if additional rules are needed. This uniformity of remedy reflects the uniformity of the underlying constitutional violation. *See* Part IV.D, *infra* ¶¶ 67-71.

Table 2: Constitutional Provision Cross-Reference

Constitutional Provision	Principle	Category of Overrides Constrained	Cross-Reference to Override Nos. (Table 1)
Article I, § 1 (Legislative Vesting Clause)	"ALL legislative Powers" vested in Congress; no legislative power may be exercised by the judiciary	All judicial gap-filling: creation of operative definitions, tests, and standards not enacted by Congress	Overrides 1-10
Article I, § 7 (Origination Clause)	All revenue bills must originate in the House of Representatives	Judicial creation of revenue-affecting rules: doctrines that expand or contract the tax base, alter deduction eligibility, or recharacterize taxable transactions	Overrides 1, 2, 5, 8, 9
Article I, § 8, cl. 1 (Taxing and Spending Clause)	Congress shall have power to "lay and collect Taxes"; taxation is exclusively a legislative function	Judicial expansion or contraction of the tax base; judicial redefinition of taxable activities, deductible expenses, or tax-favored transactions	Overrides 1, 2, 3, 9
Article III, § 1 (Judicial Power Clause)	Judicial power limited to "Cases and Controversies"; courts may not exercise legislative functions	Judicial creation of prospective rules of general applicability; courts acting as policy-makers in tax administration	Overrides 1, 5, 6, 8, 10
Fifth Amendment (Due Process Clause)	Fair notice; prohibition of vague, retroactive, and geographically disparate standards	Vague multi-factor tests; subjective standards; circuit-dependent outcomes; retroactive "refinement" of judge-made rules	Overrides 1, 2, 3, 4, 5, 6, 7, 8, 9, 10
Sixteenth Amendment	Congress authorized to tax incomes; scope of income taxation limited to what Congress enacts	Judicial expansion of taxable income beyond statutory definitions; judicial contraction of deductions below statutory allowances	Overrides 1, 2, 3, 9

Narrative Synthesis — Table 2

50. Table 2 demonstrates that the constitutional infirmities of judicial overrides are not confined to a single constitutional provision. Rather, each override implicates *multiple* constitutional constraints simultaneously. The Article I, § 1 violation is universal — every override involves the exercise of

legislative power by the judiciary. The Due Process violation is nearly universal — nine of ten overrides produce notice deficiencies. These patterns confirm that the problem is not one of isolated judicial overreach but of a **systematic structural failure** in the allocation of governmental power over taxation.

51. The cross-referencing also reveals an important asymmetry: while Article I constraints apply to all ten overrides, the Article III and Origination Clause constraints apply most acutely to the overrides that create *prospective rules of general applicability* (overrides 1, 5, 8, 10) and those that most directly affect revenue (overrides 1, 2, 5, 8, 9). This asymmetry suggests that litigators should tailor their constitutional arguments to the specific override being challenged — leading with Article I, § 1 in all cases, but emphasizing Article III and Origination Clause arguments where the override most clearly resembles prospective legislation. *See* Part IV.E, *infra* ¶¶ 74-79 (model litigation framework).

PART IV

LITIGATION-READY ARGUMENT — WHY JUDICIAL OVERRIDES OF SUBTITLE A STATUTORY TEXT ARE VOID

IV.A. Standard of Review and Jurisdictional Framework

52. Constitutional challenges to judicial doctrine are reviewed **de novo**. No deference is owed to a lower court's determination that its own precedent is constitutionally valid. The question whether a judicial doctrine exceeds

Article III authority or invades Article I prerogatives is a pure question of constitutional law, subject to independent appellate review.

53. Jurisdictional basis. Constitutional challenges to judicial overrides of Subtitle A may be raised in multiple forums. A taxpayer who has been assessed a deficiency based on a judicially-created standard may petition the United States Tax Court under 26 U.S.C. § 6213(a) and raise the constitutional challenge as a defense. Alternatively, a taxpayer who has paid the assessed tax may file a refund claim and, if denied, bring suit in the United States District Court under 28 U.S.C. § 1346(a)(1) or the United States Court of Federal Claims under 28 U.S.C. § 1491(a)(1). In each forum, the taxpayer may argue that the judicially-created standard is constitutionally void and that the tax assessment must be determined by reference to the statutory text alone.

54. Standing. A taxpayer who has been denied a deduction, assessed additional tax, or subjected to penalties based on the application of a judicially-created standard has suffered a concrete, particularized injury in fact that is fairly traceable to the challenged doctrine and redressable by a favorable decision. The standing requirements of Article III are satisfied.

IV.B. The Voidness Argument

55. The central argument of this Part is that judicial overrides of Subtitle A statutory text are **void *ab initio*** — not merely erroneous, but structurally without constitutional foundation. This argument rests on three premises.

56. First Premise: An act beyond the constitutional power of the actor is void, not voidable. This principle is foundational to American constitutional law. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall established that an act repugnant to the Constitution is void. *Id.* at 177. This principle applies with equal force to judicial acts: when a

court exercises power that the Constitution assigns to another branch, the resulting order or doctrine has no constitutional foundation and is void — not merely subject to correction on appeal, but void *ab initio* as an act *ultra vires*.

57. Second Premise: When a court creates an operative tax definition, it exercises legislative power. As demonstrated in Parts I and II, *supra*, the creation of operative definitions for undefined statutory terms in the IRC is a legislative act — the prescription of binding rules of general applicability that determine taxpayers' financial obligations to the government. This act is distinguishable from interpretation: interpretation presupposes enacted text; the creation of definitions where Congress provided none is legislation. *See supra* ¶¶ 16–18, 34–38.

58. Third Premise: A court's exercise of legislative power is ultra vires regardless of the wisdom of the rule created. The separation of powers is structural, not prudential. It does not depend on whether the judicial rule is wise or unwise, workable or unworkable, consistent with congressional intent or contrary to it. The question is institutional: *who* has the constitutional authority to create the rule? The Constitution answers this question unambiguously: Congress. U.S. Const. art. I, § 1. A court's exercise of this power is therefore *ultra vires* — and the resulting "law" is void — regardless of its substantive merits.

59. The Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011), reinforces this analysis. In *Stern*, the Court held that Article III limits on the judicial power cannot be circumvented by characterizing a legislative or executive act as a judicial act. *Id.* at 484. The principle applies directly here: when a court creates an operative tax definition, the act does not become judicial merely because a court performs it. The act is legislative in substance, and no amount of judicial framing can transform it into a legitimate exercise of Article III power.

60. Conclusion: Judicial overrides of Subtitle A statutory text satisfy all three premises. They (1) exceed the constitutional power of the actor (the judiciary has no legislative power), (2) constitute legislative acts (creation of binding rules of general applicability determining tax obligations), and (3) are ultra vires regardless of their merits. They are therefore void *ab initio* — null from the moment of their creation — and no taxpayer is bound by them.

IV.C. The Post-Loper Bright Framework

61. The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), fundamentally altered the doctrinal landscape in which these arguments are raised. The decision eliminated *Chevron* deference, holding that courts, not agencies, bear the responsibility of interpreting statutes. But the decision's logic extends further than the Court may have intended — and it provides the doctrinal foundation for the arguments advanced in this document.

62. The *Loper Bright* syllogism. The Court's reasoning proceeds as follows: (i) the power to interpret statutes is a core judicial function under Article III; (ii) agencies cannot exercise this function because they are not Article III courts; (iii) therefore, when a statute is ambiguous, the court must determine its best meaning — not defer to the agency's interpretation. *Loper Bright*, 144 S. Ct. at 2261-63.

63. But this syllogism has a corollary that undermines the very practice of judicial gap-filling. If the reason agencies cannot fill statutory gaps is that gap-filling involves the creation of operative legal rules — a legislative function that agencies lack constitutional authority to perform — then courts cannot fill those gaps either, because *courts also lack legislative authority*. The power to interpret is the power to ascertain what Congress enacted. It is not the power to supply what Congress did not enact. When a statute uses a term without defining it, and no textual or structural inference yields a

determinate meaning, the interpretive function is exhausted. What remains is a legislative gap — and the Constitution assigns the power to fill legislative gaps to Congress, not to the courts.

64. The proper remedy for an undefined statutory term. After *Loper Bright*, when courts encounter an undefined statutory term, the constitutionally proper course is one of two alternatives: (1) apply the ordinary public meaning of the term at the time of enactment, without judicially-created glosses or multi-factor tests; or (2) if the ordinary meaning is insufficient to resolve the case, hold that the provision cannot be applied as a basis for imposing tax liability or denying a claimed deduction until Congress supplies a definition. Either course is consistent with the constitutional structure. Both are preferable to the current practice of judicial legislation.

65. This does not create a regulatory vacuum. The objection will be raised that vacating judicial definitions will create chaos in tax administration. This objection is overstated. First, Congress is fully capable of enacting definitions for currently undefined terms — it has demonstrated this capacity repeatedly by codifying judicial doctrines (as it did with the economic substance doctrine in § 7701(o)). Second, the ordinary-meaning approach provides a workable standard in the vast majority of cases. Third, and most fundamentally, practical convenience cannot justify constitutional violations. The separation of powers exists precisely to prevent the concentration of governmental power — even when concentration would be more efficient. As Justice Scalia observed, the separation of powers was not designed for efficiency; it was designed for liberty.

66. The post-*Loper Bright* framework thus provides a new doctrinal foundation for challenging judicial overrides. Before *Loper Bright*, a taxpayer challenging a judicial definition faced the objection that courts have always interpreted statutes. After *Loper Bright*, the taxpayer can respond: the Court

itself has recognized that interpretation and gap-filling are constitutionally distinct functions, that gap-filling is legislative, and that no institution other than Congress may perform it. The arguments in Parts I and II of this document are therefore not merely academic — they are directly supported by the Supreme Court's most recent articulation of the separation between interpretation and legislation. *See supra* ¶¶ 21, 47.

IV.D. Remedial Framework

67. If the arguments in this document are accepted, the following remedies are appropriate.

68. Vacatur of ultra vires judicial definitions. Judicial definitions that add elements not found in the statutory text of Subtitle A should be vacated as ultra vires exercises of legislative power. This includes, *inter alia*, the *Groetzing* two-part test, the *Higgins* "goods or services" requirement, and the *Welch* gloss on "ordinary and necessary." *See* Table 1, *supra*. Vacatur is the appropriate remedy for an act beyond the constitutional power of the actor — the act is void, and the judicial order implementing it should be set aside. *See supra* ¶¶ 55–60.

69. Relief for affected taxpayers. Taxpayers who were denied deductions, assessed deficiencies, or subjected to penalties based on judicially-created requirements that Congress never enacted should be entitled to file amended returns or refund claims. The statute of limitations on refund claims, 26 U.S.C. § 6511, may limit retroactive relief — but for taxpayers within the limitations period, full relief should be available. For taxpayers outside the limitations period, equitable tolling arguments may be appropriate where the constitutional violation was not recognized at the time the return was filed.

70. Prospective application of statutory text. Going forward, courts should apply only the statutory text of Subtitle A as written, without judicially-

imposed glosses, multi-factor tests, or extra-statutory doctrines. Where the statutory text uses a term without defining it, courts should apply the ordinary public meaning of the term at the time of enactment. Where ordinary meaning is insufficient to resolve the case, courts should hold that the provision cannot be applied to the taxpayer's detriment until Congress supplies a definition. *See supra* ¶ 64.

71. Congressional invitation. This document does not argue that the terms currently defined by judicial override should remain undefined forever. Rather, it argues that the *institution* that defines these terms matters — constitutionally, structurally, and for purposes of democratic accountability. Congress should be invited — and, through appropriate judicial opinions, encouraged — to exercise its legislative power by enacting definitions for currently undefined terms. Congress has the institutional competence, the constitutional authority, and the democratic legitimacy to perform this function. Courts do not.

IV.E. Model Litigation Framework

72. This Section provides a structured template for raising the constitutional arguments developed in this document in active litigation.

Suggested Causes of Action / Grounds for Relief

73. The following grounds for relief are available, depending on the procedural posture and forum:

- 1. Constitutional defense in Tax Court deficiency proceeding** (26 U.S.C. § 6213(a)): The assessment is based on a judicially-created standard that exceeds constitutional authority; the statutory text, properly applied, entitles the taxpayer to the claimed deduction or tax treatment.

2. **Refund suit in District Court or Court of Federal Claims** (28 U.S.C. §§ 1346(a)(1), 1491(a)(1)): The taxpayer paid tax assessed under an unconstitutional judicially-created standard and is entitled to a refund of the overpayment.
3. **Declaratory relief** (where available): A declaration that the judicially-created standard is void *ab initio* as an ultra vires exercise of legislative power.

Key Allegations

74. Any complaint or petition raising these arguments should include the following key allegations:

4. The taxpayer engaged in an activity or transaction that, under the plain text of the applicable Subtitle A provision, entitles the taxpayer to the claimed deduction, credit, or tax treatment.
5. The IRS denied the claimed treatment based on a standard, test, or doctrine created by the judiciary — not by Congress.
6. The judicially-created standard adds operative requirements that do not appear in the statutory text.
7. Congress never enacted the judicially-created standard through the constitutionally required process of bicameralism and presentment.
8. The judicially-created standard constitutes an exercise of legislative power in violation of Article I, § 1; Article I, § 7; Article I, § 8, cl. 1; and the structural separation of powers.
9. The judicially-created standard violates the Due Process Clause of the Fifth Amendment by failing to provide adequate notice, by operating retroactively, and/or by producing geographically inconsistent results.

10. Under *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), gap-filling is a legislative function that neither agencies nor courts may perform.
11. The judicially-created standard is void *ab initio* under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the taxpayer is entitled to relief based on the statutory text alone.

Anticipated Counterarguments and Rebuttals

75. Counterargument 1: Congressional acquiescence. The government will argue that Congress has acquiesced in judicial definitions by failing to override them. *Rebuttal:* Congressional silence is not legislative action. Acquiescence does not satisfy the requirements of bicameralism and presentment. *See INS v. Chadha*, 462 U.S. at 951; *see also supra* ¶¶ 44–45. Moreover, the acquiescence argument proves too much: if congressional silence could validate judicial legislation, then any judicial usurpation of legislative power would become constitutional simply by the passage of time. This cannot be the law.

76. Counterargument 2: Stare decisis. The government will argue that decades of precedent support the judicial definitions. *Rebuttal:* Stare decisis is not a constitutional command — it is a prudential doctrine. It cannot override constitutional structure. Where precedent is premised on an unconstitutional exercise of power, stare decisis does not insulate it from challenge. *See Loper Bright*, 144 S. Ct. at 2273 (overruling *Chevron* notwithstanding forty years of precedent). The constitutional infirmity is structural and ongoing — every application of a judicially-created tax definition is a fresh violation of the separation of powers.

77. Counterargument 3: Practical necessity. The government will argue that vacating judicial definitions will create chaos in tax administration. *Rebuttal:* Practical convenience is not a constitutional principle. The

separation of powers was designed for liberty, not efficiency. Moreover, the practical objection is overstated: Congress is fully capable of enacting definitions, as it has demonstrated by codifying the economic substance doctrine. The transition can be managed through prospective application and a reasonable legislative window. *See supra* ¶ 65.

78. Counterargument 4: Ordinary common-law development. The government will argue that courts have always developed the common law and that judicial definitions of tax terms are part of this tradition. *Rebuttal:* Tax law is constitutionally distinct from common-law subjects. The Constitution assigns the taxing power exclusively to Congress through multiple, reinforcing provisions. *See supra* ¶¶ 6–9. The common-law analogy fails because tax law involves the imposition of government financial obligations — a function the Constitution reserves to the legislature. *See supra* ¶ 38.

Strategic Considerations

79. Litigators raising these arguments should consider the following strategic factors:

12. **Forum selection:** United States District Courts (after full payment) may be preferable to Tax Court for constitutional challenges, as district courts exercise Article III jurisdiction and may be more receptive to structural constitutional arguments. The Court of Federal Claims is also a viable option, particularly for large refund claims.
13. **Case selection:** The strongest test case is one where (a) the taxpayer clearly satisfies the statutory text but (b) was denied the claimed treatment based solely on a judicially-created requirement, and (c) the amount in controversy is sufficient to justify appellate litigation. The *Higgins* fact pattern — a full-time investor denied trade-or-business

deductions despite devoting substantially all working time to the activity — remains a compelling vehicle.

14. **Appellate strategy:** The goal should be to create a circuit split that compels Supreme Court review. Filing in circuits that have not recently reaffirmed the challenged doctrines may increase the likelihood of a favorable panel.

15. **Coordination with amicus support:** Scholarly amicus briefs — particularly from tax law professors who have written on the judicial Code phenomenon — can be invaluable in educating courts about the structural dimensions of the argument.

16. **Legislative engagement:** Parallel efforts to encourage Congress to enact statutory definitions strengthen the litigation position by demonstrating that the legislative alternative is viable and that judicial gap-filling is unnecessary.

CONCLUSION

80. This Unified Analysis has demonstrated, through four integrated and cross-referencing components, that the federal judiciary's decades-long practice of creating operative definitions for Subtitle A terms that Congress chose not to define is constitutionally infirm. The infirmity is structural: courts have exercised legislative power in violation of Article I's vesting of "ALL legislative Powers" in Congress. The infirmity is institutional: courts have exceeded their Article III authority by creating prospective rules of general applicability rather than resolving cases under existing law. The infirmity is practical: the judicially-created standards are vague, retroactive,

geographically inconsistent, and fail to provide the notice that the Fifth Amendment demands.

81. The doctrinal matrix in Part III reveals that these infirmities are not isolated — they pervade at least ten major categories of judicial override, spanning virtually the entirety of Subtitle A. The constitutional violations are consistent, cumulative, and systematic. They reflect not occasional judicial overreach but the emergence of a **parallel judicial Code** that operates alongside the statutory Code enacted by Congress — a structural displacement of legislative authority without constitutional warrant.

82. The post-*Loper Bright* era demands a reckoning. The Supreme Court has recognized that statutory interpretation and gap-filling are constitutionally distinct functions — that interpretation belongs to the courts, but gap-filling is legislative. If executive agencies cannot fill statutory gaps, *a fortiori* neither can courts. The logical consequence is that judicially-created definitions for undefined Subtitle A terms — from the *Groetzinger* test to the substance-over-form doctrine — are void *ab initio* as ultra vires exercises of legislative power.

83. These conclusions are not merely academic. They have concrete consequences for the millions of taxpayers who, each year, are subjected to judge-made tax rules that no Congress ever voted upon, no President ever signed, and no citizen could have discovered by reading the United States Code. The principle at stake is foundational: in a constitutional republic, the power to define the citizen's tax obligations belongs to the People's elected representatives — and to them alone.

84. The remedy is not chaos. It is constitutional restoration. Congress is fully capable of enacting definitions for currently undefined terms, as it has demonstrated by codifying the economic substance doctrine and by legislating with extraordinary specificity throughout Subtitle A. What is required is not that these terms remain undefined, but that they be defined by

the *constitutionally authorized institution*. This document provides the analytical framework, the doctrinal mapping, and the litigation template for achieving that constitutional restoration — one case, one challenge, one principle at a time.

APPENDIX A

GLOSSARY OF KEY TERMS

Judicial Override

The practice by which a court creates, through case-by-case adjudication, an operative legal rule that determines taxpayer rights or obligations under the Internal Revenue Code, where the rule is not derived from enacted statutory text but is instead supplied by the court to fill a gap left by Congress. Distinguished from statutory interpretation, which presupposes enacted text that the court construes.

Operative Definition

A legal definition that functions as binding law — determining whether a taxpayer is subject to tax, entitled to a deduction, or required to satisfy a particular legal standard. An operative definition prescribes the conditions under which statutory provisions apply. When created by a court rather than enacted by Congress, an operative definition constitutes a judicial override.

Legislative Gap-Filling

The act of supplying legal rules to address matters that Congress did not address in enacted statutory text. Legislative gap-filling is a legislative function — the creation of new law to govern situations not covered by existing law. It is constitutionally distinct from statutory interpretation, which

ascertains the meaning of enacted text. When courts engage in legislative gap-filling, they exercise legislative power in violation of Article I, § 1.

Ultra Vires

Latin: "beyond the powers." An act that exceeds the constitutional or statutory authority of the actor. An ultra vires act is void — not merely voidable or subject to correction, but null from inception — because the actor lacked the power to perform it. A judicial act that constitutes an exercise of legislative power is ultra vires under the Constitution's separation of powers.

Void Ab Initio

Latin: "void from the beginning." A legal act that is null and without legal effect from the moment of its creation, as distinguished from an act that is voidable (valid until set aside by a competent authority). An act beyond the constitutional power of the actor is void *ab initio* under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This document argues that judicially-created tax definitions are void *ab initio* because they constitute exercises of legislative power by an institution lacking legislative authority.

Bicameralism and Presentment

The constitutionally mandated process for enacting legislation: passage by both the House of Representatives and the Senate, followed by presentment to the President for signature or veto. U.S. Const. art. I, § 7. Under *INS v. Chadha*, 462 U.S. 919 (1983), legislative power may be exercised only through this process. Judicial opinions do not satisfy the requirements of bicameralism and presentment.

Intelligible Principle

Under the nondelegation doctrine, Congress may delegate authority to another branch only if it provides an "intelligible principle" to guide and constrain the exercise of the delegated power. *See Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825). The absence of an intelligible principle renders a

delegation unconstitutional. This document argues that Congress's use of the term "trade or business" without definition provides no intelligible principle and therefore cannot constitute a valid delegation of definitional authority to the courts.

Judicial Code

A term describing the body of operative legal rules created by courts through case-by-case adjudication of tax disputes, operating in parallel with the statutory Internal Revenue Code enacted by Congress. The concept is derived from the empirical research of Professor Susannah Camic Tahk (2025), who documented that the Tax Court and Congress effectively operate on different substantive domains within the IRC, creating a de facto bifurcation of tax law between statutory and judicial sources.

Chevron Deference

A framework of judicial deference to agency interpretations of ambiguous statutes, established in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and overruled by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Under *Chevron*, courts deferred to reasonable agency interpretations of ambiguous statutory terms. After *Loper Bright*, courts must independently determine statutory meaning. This document argues that *Loper Bright's* elimination of deference-based gap-filling extends to judicial gap-filling as well.

Subtitle A

Subtitle A of the Internal Revenue Code, 26 U.S.C. §§ 1-1564, comprising the federal income tax provisions. Subtitle A encompasses six chapters governing the imposition, computation, and collection of income taxes on individuals, corporations, and other entities. It is the primary subject of the judicial overrides analyzed in this document.