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Schrodinger's Tax: Opening The 'Obamacare' Box

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Quantum physicist Erwin Rudolf Josef Alexander Schrodinger was a piker compared to U.S. Supreme Court Chief Justice John Roberts. Schrodinger's famous thought experiment sought to show that a cat could be alive and dead simultaneously, so long as it remained sealed in a box with poison that might or might not have been released.

Schrodinger assumed, however, that once an observer peered into the box, the superposition would collapse and the cat would be found to be either alive or dead.

But law can be more subtle than quantum physics, and John Roberts is a magus of the law. Not for him a simple-minded binary finding that the individual mandate was or was not a tax. Instead, when he peered into the Obamacare box, he perceived both conditions simultaneously, a tax and a nontax coexisting in two stable states. This happy discovery allowed him to:

1. Bypass the statutory ban on adjudicating the validity of uncollected taxes, since the individual mandate was not a tax;
2. Join his conservative brethren to hold that, as a nontax, the individual mandate was not authorized by the constitution's commerce clause; but then
3. Demonstrate his bipartisan statesmanship by joining the liberal wing to preserve the individual mandate as constitutionally authorized tax.

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For those few souls, such as your author, who enjoy legal reasoning for its own sake, the Roberts shuffle was a thing of beauty. For most others, it was the type of legal sophistry that makes killing all the lawyers seem a reasonable suggestion.

So how did he do it? Like most bravura performances, it was built of common elements, put together in a striking way.

First, Roberts is a textualist, mostly, anyway. That sect finds truth in the language and structure of statutes and disregards so-called legislative history, the things legislators say but do not enact. The chief justice's opinion did not mention his interpretive philosophy, but he quietly gave no weight to the fact that supporters of the health care bill had assured fellow legislators and the world that the individual mandate absolutely and positively was not a tax in any way, shape or form. And justices of the liberal wing of the court, who often find legislative history fascinating, quietly rode along on his opinion on that point.

Second, the ban on adjudicating the validity of uncollected taxes is statutory, while the power to tax is granted by the constitution. Congress has pretty much a free hand with statutes and can amend or limit them at will. Because the enacted legislative text explicitly called the individual mandate a penalty rather than a tax, Roberts took U.S. Congress at its word.

Because Congress had decreed that the individual mandate not be regarded as a tax, he accepted that direction for purposes Congress was free to control. Thus, the statutory ban on pre-collection review fell away, and the chief justice was free to consider the constitutional challenges to the individual mandate penalty.

Ordinary people might have assumed that, because the individual mandate was a penalty and not a tax, the only question was whether the constitution authorized such a penalty. But they are not Chief Justice John Roberts.

The third critical ground of his opinion is that Congress cannot avoid the constitution by merely manipulating statutory language. Politicians are shameless, and if constitutional restrictions could be evaded by fanciful language, the constitution would mean little.

Thus, for constitutional purposes, the substance of a statute generally controls, not merely labels. If a statute walks, quacks and swims like a duck, it is a duck under the constitution, even if Congress calls it a turkey and provides "this turkey is not a duck."

This is where the opinion gets really subtle. Roberts concluded that the structure and function of the individual mandate were ambiguous. It had many characteristics of a penalty and some of a tax.

This triggered the doctrine of constitutional avoidance — courts will try hard to give a statute a constitutional meaning, even if that is not the most plausible interpretation. The theory is that Congress is required to obey

the constitution and should be presumed to avoid unconstitutional legislation.

In theory, this doctrine does not allow the courts to force a square peg into a round hole, but a precise fit is not required and, in practice, hexagonal and octagonal pegs regularly get forced.

Because the individual mandate looked most like a penalty, Roberts first considered whether it was a necessary and proper exercise of the constitutional power to regulate commerce. He concluded that justification would not work. So he turned to the taxing power justification.

At this point, Roberts came closest to cheating. On its face, the individual ,andate seemed to impose a requirement — get coverage — and then impose a punishment for violating the law. Read that way, it was no tax.

But the government's brief solemnly represented that getting coverage or paying the "penalty" were merely two different ways of complying with the law. A person could freely choose to pay instead of getting coverage and, in doing so, that person would not be a lawbreaker. And persons who, because they were poor or Indians or such, were exempt from the penalty were also, in reality, exempt from the individual mandate. If they did not get coverage, they still were not lawbreakers. Read that way, the individual mandate could be considered a tax.

Precedent for relying on such assertion in the government's brief is weak, particularly when the statutory text makes the claim tenuous. But it happens from time to time. Quoting the government's representation and making clear he was relying upon it, Roberts gritted his teeth and drove the tax peg home. The individual mandate thus was and was not a tax, all at the same moment.

The chief justice made clear that he was making an extraordinary effort to save the statute. Often when the doctrine of constitutional avoidance is invoked, the courts avoid any actual constitutional holding. They merely point to possible constitutional concerns to justify a strained reading of the statute.

Roberts, however, said that he was able to construe the individual mandate as a tax only because he had concluded that it otherwise would fail. This made his narrow construction of the commerce clause essential to his final ruling and, when read with the opinions of the four other conservative justices, gave rise to a binding holding on the point, not mere dicta that later courts can freely disregard.

Of course, even holdings can be overruled, as the *Citizens United* case demonstrates. But liberal justices, who are trying to hold onto the many doctrinal innovations of the last half-century, find themselves forced to advocate that decided matters stay decided.

Roberts' opinion is not the first time a legal cat has lived and died simultaneously. For example, to overcome the doctrine of sovereign immunity and allow federal courts to restrain unconstitutional state action, the

venerable doctrine of Ex parte Young pretends that state officers are subject to personal suit while, at the same time, recognizing they really are being sued in lieu of their state.

But such paradoxical legal outcomes typically have a strong and obvious motivation. What led Roberts to work so hard to create a Schrodinger tax is not clear at the moment, and may never be.