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Nobody's Health-Care Plan, Including Obama's, Has a Mandate. But They Do Have *Tax* Provisions

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Obamacare does not have a mandate. Wait: Has Marco Rubio proposed an individual mandate?

The Cato Institute's Michael Cannon and James Capretta of AEI have engaged in a spirited and informative point-counterpoint on that question here at NRO.

Cannon writes that Rubio's Obamacare-replacement plan is built "around an individual mandate."

Capretta responds by noting that Rubio proposes to repeal *all* of Obamacare, including "the requirement that all Americans buy government-approved health insurance," commonly known as the individual mandate.

So who's right? Let's begin by analyzing the semantics and pointing out that, *technically*, Obamacare no longer has a . . .

MANDATE. It is true that section 1501(b) of the statute created section 5000A(a) of the Internal Revenue Code, which imposes a "requirement to maintain minimum essential coverage" on virtually everyone lawfully present in the U.S. It is also true that no less than John Roberts declared the mandate to be unconstitutional in *NFIB v. Sebelius*. The majority of the Court held that "the individual mandate is not a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause." Obamacare's individual mandate is, technically speaking, a dead letter.

When we say that Obamacare has a mandate, what we really mean is that it legally requires uninsured people to pay a . . .

TAX PENALTY. While Roberts held that Congress cannot regulate inactivity, he also held that it can *tax inactivity*. Specifically, Congress can levy a tax on the uninsured. When Capretta and other supporters of the Rubio proposal say that it doesn't have a mandate, they mean that it doesn't *impose a tax penalty* on people who decline to purchase coverage. When Cannon says it has a mandate, he means it offers those who do obtain coverage a . . .

TAX PREFERENCE. Under Rubio's proposal, people whose employers don't sponsor medical coverage would be eligible for tax credits when they buy health insurance. Unlike how

Obamacare works, in Rubio’s plan, those credits would not be income-related and would be roughly equivalent to the tax breaks people with job-based coverage receive.

The Rubio credit, Cannon argues, creates a backdoor tax penalty. He reasons that those who buy coverage get a reward (in the form of a tax break), while those who don’t are ineligible for such reward. Not getting a reward is, Cannon believes, a punishment, which equates to a mandate.

Cannon is correct in observing that all tax preferences create winners and losers. Under current law, those who have employer-sponsored coverage, qualify for Obamacare tax credits, or contribute to HSAs get tax breaks that others don’t. That would lead naturally to the conclusion that all tax preferences for health care should be eliminated. But then Cannon throws a nasty slider. He supports tax preferences (specifically, an exclusion from federal income and payroll taxes) for deposits into “large health savings accounts” (HSAs). People could use those tax-sheltered funds to buy insurance and pay their medical expenses.

So when Cannon says that Rubio has a mandate like that in Obamacare, he is really saying that the tax preferences Rubio favors look a whole lot more like Obamacare’s tax credits than Cannon’s tax-advantaged “large HSAs” do.

To sum up: Nobody’s plan has a mandate, only Obamacare has a tax penalty, and all God’s children want tax preferences.

Pulling Americans from Obamacare’s wreckage should be among the next president’s most urgent priorities. Costs are rising, choices contracting, and regulation metastasizing. Reform will not be easy to achieve. Replacing Obamacare will require open and robust discussion, a process that is more likely to succeed if we’re all speaking the same language and using words to inform, not inflame.

In that spirit, I offer this table as a guide to future conversations on this subject.

	Tax Preference?	Tax Penalty?	Mandate?
Obama	YES	YES	NO
Rubio proposal	YES	NO	NO
Cannon’s large HSAs	YES	NO	NO