



## Individual Mandate A Tax Or A Penalty

Posted by [Brian Darling](#) (Diary)

Wednesday, July 4th at 7:00PM EDT

For conservatives, the debate over whether the individual mandate in ObamaCare is called a tax or a penalty has become a litmus test for the Romney campaign's conservative credentials. It should not.

Eric Fehrnstrom, Spokesman for Mitt Romney, said on MSNBC earlier this week that Romney "believes that what we put in place in Massachusetts was a penalty, and he disagrees with the court's ruling that the mandate was a tax." There is nothing inherently non-conservative about this statement. Believing that the individual mandate is not a tax is consistent with Justices Scalia, Kennedy, Thomas and Alito's opinion that the individual mandate is not a proper exercise of the federal government's taxing power.

Today, Mitt Romney walked back Fehrnstrom's statement with his own declaration that the individual mandate in ObamaCare is a tax. Conservatives should not be so hung up on the declaration of the individual mandate being called a tax or a penalty. The goal is complete and total repeal of ObamaCare.

Romney can call the individual mandate a tax or a penalty as long as he stays committed to full repeal.

Some conservatives can't accept Chief Justice John Robert's declaration that the individual mandate is a tax, therefore constitutional. If you accept that the ObamaCare individual mandate is a tax, then you have accepted Robert's twisted interpretation of the plain language of ObamaCare calling the individual mandate a "penalty." You also have to accept that this new sweeping mandate forcing citizens to purchase private sector health insurance as a proper exercise of the federal government's taxing power.

Ilya Shapiro of the CATO Institute wrote on [Scotusblog](#) that Robert's put a new spin on the word "tax."

Well, as even Fox News and CNN now know, Chief Justice John Roberts put a new gloss on Congress's taxing power just as he rediscovered the meaning of the Commerce, Necessary and Proper, and Spending Clauses. In 13 cryptic pages, Roberts fashioned a

not-quite-silk purse out of a sow's ear, salvaging—to continue the porcine metaphor—Obamacare's bacon from the constitutional flames. That is, the Chief Justice recharacterized a provision explicitly stating that people “shall” obtain health insurance or pay a “penalty” into a “choice,” a “tax citizens may lawfully choose to pay in lieu of buying health insurance.”

Furthermore, it makes little sense for the individual mandate not to be a tax for purposes of application of the Anti-Injunction Act, an act that strips the Courts of jurisdiction to hear tax cases until a tax is levied, yet a constitutional use of Congress' taxing power. It is understandable for some conservatives, this one included, to hold to the belief that the individual mandate is not a constitutional exercise of the taxing authority of the federal government. Four right thinking justices on the U.S. Supreme Court agree.

Senator Rand Paul (R-Kentucky) put out a [press statement](#) after that he believes ObamaCare to still be unconstitutional.

Just because a couple people on the Supreme Court declare something to be “constitutional” does not make it so. The whole thing remains unconstitutional. While the court may have erroneously come to the conclusion that the law is allowable, it certainly does nothing to make this mandate or government takeover of our health care right. Obamacare is wrong for Americans. It will destroy our health care system. This now means we fight every hour, every day until November to elect a new President and a new Senate to repeal Obamacare.

If the Supreme Court replaced a conservative with a liberal and repealed the holdings in Heller and McDonald that the Second Amendment to the Constitution is an individual right applied to the States, the Second Amendment would not be abolished. The natural right of people to protect themselves would still be constitutional. The Court would not recognize the right, but it would still exist. There are freedoms that are not subject to the whims of nine justices on the Supreme Court.

The Supreme Court does not have the last word on this subject. The opinion of the Court may stand for generations, yet the people can send a new slate of federally elected officials to repeal the law. The people can repeal ObamaCare, even after the Supreme Court has declared it constitutional. Members of Congress and the President take an oath to the Constitution and they may have a different interpretation of the Constitution's authorized taxing power than four Supreme liberals and Chief Justice Roberts.

That is why many conservatives are reluctant to embrace the idea that the mandate is a tax. It feels like an embrace of the Robert's opinion in the ObamaCare case. It feels wrong to embrace an idea that many would have laughed at a week ago. Calling the ObamaCare individual mandate a tax is a political ploy to attack ObamaCare. I am ok with that, but don't believe that conservatives need to embrace the idea for fear of this embrace being used in the future to justify a further expansion of the taxing power of the federal government.

Some conservatives want a wholesale tactical pivot to concede that the individual mandate in ObamaCare is a tax for the purposes of attacking it politically, and to make it easier to repeal. It is much easier to attack the ObamaCare individual mandate politically if you can call it a tax.

Today, they got their wish. Mitt Romney said that the individual mandate is a tax. Romney then used this as an opportunity to hammer Obama for breaking his promise not to hike taxes on the middle class.

Romney, as quoted in the [L.A. Times](#) said that the individual mandate is a tax hike on the middle class.

While I agreed with the dissent, that's taken over by the fact that the majority of the court said it was a tax and therefore it is a tax. They have spoken. There's no way around that. You can try and say you wish they'd decided it a different way, but they didn't. They concluded it was a tax, that's what it is, and the American people know that. There's no way around that. You can try and say you wish they'd decided it a different way, but they didn't. They concluded it was a tax, that's what it is, and the American people know that President Obama has broken the pledge he made. He said he wouldn't raise taxes on middle-income Americans."

The President's Solicitor General argued that the individual mandate was a tax. By virtue of the fact that the Supreme Court accepted Obama's arguments, this is evidence that President Obama has broken [his promise](#) to the American people not to hike taxes on the middle class.

It also makes it easier to repeal ObamaCare if you can use the budget reconciliation procedures in Congress to repeal the mandate under the preferential treatment used for tax measures under the expedited procedures of reconciliation. Most important being the end run around the filibuster in the Senate.

Keith Hennessey writes in the [Wall Street Journal](#) that reconciliation procedures in the Senate can be used to repeal the bulk of ObamaCare as a way to avoid a filibuster in the Senate and pass the bill with a simple majority.

If a President Romney has cohesive and coordinated majorities in the House and Senate, a reconciliation bill could repeal the Affordable Care Act's Medicaid expansion, insurance premium and drug subsidies, tax increases (all 21 or them), Medicare and Medicaid spending cuts, its long-term care insurance program known as the Class Act, and its Independent Payment Advisory Board, a 15-member central committee with vast powers to control health-care and health markets. Chief Justice John Roberts ruled that the financial penalty enforcing the individual mandate is within Congress's constitutional power to "lay and collect Taxes," and that the mandate and penalty are inextricably linked. This should suffice to enable repeal, through reconciliation, of both the individual and employer mandates, and their respective penalty taxes.

Conservatives can disagree with Chief Justice John Robert's declaration that the individual mandate in ObamaCare is a tax for constitutional purposes, yet can still attack it as a tax for the sole purpose of repealing it using reconciliation's expedited procedures. There is no need to pretend consistency on this point when the end goal is for a complete repeal of ObamaCare through any means necessary. This law needs to be repealed no matter how much crying comes from the left of using reconciliation for the purposes of full repeal of ObamaCare.

The bottom line is that conservatives need to not get hung up on the terminology used by Romney. The individual mandate and every single word of ObamaCare needs to be repealed. Call it a tax — call it a penalty — call it whatever you want. Call it whatever gets you to full repeal.