

Nearly a week has gone by since the [Supreme Court's unexpected decision](#) to enlist in the latest effort to destroy the Affordable Care Act, and the shock remains unabated. "This is Bush v. Gore all over again," one friend said as we struggled to absorb the news last Friday afternoon. "No," I replied. "It's worse."

What I meant was this: In the inconclusive aftermath of the 2000 presidential election, a growing sense of urgency, even crisis, gave rise to a plausible argument that someone had better do something soon to find out who would be the next president. True, a federal statute on the books defined the "someone" as Congress, but the Bush forces got to the Supreme Court first with a case that fell within the court's jurisdiction. The 5-to-4 decision to stop the Florida recount had the effect of calling the election for the governor of Texas, George W. Bush. I disagreed with the decision and considered the contorted way the majority deployed the Constitution's equal-protection guarantee to be ludicrous. But in the years since, I've often felt like the last progressive willing to defend the court for getting involved when it did.

That's not the case here. There was no urgency. There was no crisis of governance, not even a potential one. There is, rather, a [politically manufactured argument](#) over how to interpret several sections of the Affordable Care Act that admittedly fit awkwardly together in defining how the tax credits are supposed to work for people who buy their health insurance on the exchanges set up under the law.

Further, the case the court agreed to decide, [King v. Burwell](#), doesn't fit the normal criterion for Supreme Court review. There is no conflict among the federal appellate circuits. (Remember that just a month ago, the absence of a circuit conflict led the justices to decline to hear seven [same-sex marriage](#) cases?) In the King case, a three-judge panel of the United States Court of Appeals for the Fourth Circuit, in Richmond, Va., unanimously upheld the government's position that the tax subsidy is available to those who buy insurance on the federally run exchanges that are now in operation in 36 states.

A panel of the United States Court of Appeals for the District of Columbia Circuit ruled 2-to-1 the other way, accepting the plaintiffs' argument that the language of the statute limits the tax subsidies to those who buy insurance through the state exchanges, which only 14 states have chosen to set up. The full appeals court quickly vacated the panel's judgment and agreed to rehear the case. The new argument was set for next month, and the briefs were already filed. The absence of a circuit conflict and an imminent rehearing by the country's most important court of appeals would, in the past, have led the Supreme Court to refrain from getting involved.

So no, this isn't Bush v. Gore. This is a naked power grab by conservative justices who two years ago just [missed killing](#) the Affordable Care Act in its cradle, before it fully took effect. When the court agreed to hear the first case, there actually was a conflict in the circuits on the constitutionality of the individual insurance mandate. So the Supreme Court's grant of review was not only unexceptional but necessary: a neutral act. The popular belief then that the court's intervention indicated hostility to the law was, at the least, premature.

Not so this time. There is simply no way to describe what the court did last Friday as a neutral act. Now that the justices have blown their own cover, I notice the hint of a slightly defensive tone creeping into the commentary of some of those who have been cheering the prospect of rendering the Affordable Care Act unworkable: that as a statutory case, without major constitutional implications, any problems for ordinary Americans that result from a ruling against the government can be fixed by Congress (where House Republicans have voted 50 times to repeal the entire law) or by the states themselves (36 of which failed to set up their own exchanges, thus requiring the federal government to step in as provided by the law).

Sure.

It bears repeating that what's at stake is whether the Affordable Care Act can continue on its successful trajectory or whether it will collapse into the "death spiral" it was structured to avoid. The reason goes back to the individual mandate, the constitutionality of which the Supreme Court upheld by a 5-to-4 vote two years ago. The policy reason for requiring everyone to carry health insurance is to guarantee a big pool of basically healthy people and to prevent what might otherwise be the smart strategic behavior of buying insurance only when illness strikes (behavior the law's "guarantee issue" provision would otherwise invite, since no one can be turned down on the basis of a pre-existing condition.)

The law is also designed to make insurance [affordable](#), with no one being required to spend more than 8 percent of his or her income of health insurance.

Federal income tax subsidies available on the exchanges are supposed to bring premium costs below that threshold; without the credits, many people would be exempt from the individual mandate and the law would fail.

Congress assumed that most states would set up exchanges; most states, led by red-state governors, did not. Section 1321 of the law provides that when a state defaults, the secretary of health and

human services shall “establish and operate such Exchange within the State.” Clear enough: “such Exchange” implies, without explicitly saying so, that the federal exchange stands in for the missing state’s exchange and assumes its functions. But another section, 1401, explicitly makes the tax subsidies available to taxpayers and their dependents who buy insurance “through an Exchange established by the State.” Those challenging the law say this means “only the state” and that the I.R.S. is not authorized to give subsidies to the more than five million people enrolled through federally run exchanges.

These two provisions, part of a 900-page statute that was cobbled together without going through the usual House-Senate conference committee in which it might have been cleaned up, are the source of the confusion. The answer to the problem, as the Fourth Circuit panel found unanimously in the King case, is obvious. It’s a basic principle of administrative law that when a federal statute is ambiguous, courts defer to the agency’s interpretation — here, the I.R.S. regulation that makes the tax credits available without regard to whether the exchange is state or federal.

The 1984 decision that established this deference principle, [Chevron U.S.A. v. Natural Resources Defense Council, Inc.](#), is so central to the modern understanding of how the government works that it is among the most often invoked Supreme Court decisions of all time, cited in some 13,000 judicial decisions so far, a number that grows at the rate of about 1,000 a year. The tax provisions of the Affordable Care Act fall so naturally onto the “Chevron deference” landscape that it would take an agenda-driven act of judicial will to keep them out and to conclude that Congress enacted a law that contained the seeds of its own destruction.

Chief Justice [John G. Roberts Jr.](#) knows something about taxes. He saved the Affordable Care Act from his usual allies two years ago by his opinion deeming the individual mandate’s penalty provision to fall within Congress’s tax power. This case puts him back under what I can only assume is an unwelcome spotlight.

It takes the votes of four of the nine justices to accept a case. Certainly Justices [Anthony M. Kennedy](#), [Antonin Scalia](#), [Clarence Thomas](#), and [Samuel A. Alito Jr.](#) — the four who two years ago would have invalidated not only the individual mandate but the entire law — voted to hear King v. Burwell. (Michael A. Carvin, the plaintiffs’ lawyer, predicted as much last month, declaring in an [uninhibited interview](#) that the pending rehearing before an appeals court that has recently attained a majority of Democratic-appointed judges would be no deterrent to the justices who wanted to take the case. “I don’t know that four justices, who are needed here, are going to give much

of a damn about what a bunch of Obama appointees on the D.C. Circuit think,” he told a reporter from Talking Points Memo.)

An intriguing question is whether there was a fifth vote as well, from the chief justice. I have no idea, although I can't imagine why he would think that taking this case was either in the court's interest or in his own; just two months ago, at a public appearance at the University of Nebraska, he [expressed concern](#) that the “partisan rancor” of Washington could spill over onto the court.

Here's another possible scenario, just a theory: that the four, still steaming over what the right wing regards as the chief justice's betrayal two years ago, voted to hear *King v. Burwell* not only for its destructive potential, but precisely to put the heat on John Roberts. I hadn't really focused on this idea until I read [a piece](#) that John Yoo posted on National Review Online the day after the court granted the case. Professor Yoo, formerly of the Justice Department's Office of Legal Counsel and now at the University of California at Berkeley, wrote that the new case gave the chief justice “the chance to atone for his error in upholding Obamacare” and that “it will be the mission of his chief justiceship to repair the damage.” John Yoo — yes, the Bush administration lawyer whose “torture memos” attempted to justify that administration's “enhanced interrogation” policies — is a smart man, a former law clerk to Justice Thomas who remains well connected at the court. His choice of the words “atone” and “mission,” with their religious resonance addressed to the devoutly Catholic chief justice, is no accident.

So this case is rich in almost every possible dimension. Its arrival on the Supreme Court's docket is also profoundly depressing. In decades of court-watching, I have struggled — sometimes it has seemed against all odds — to maintain the belief that the Supreme Court really is a court and not just a collection of politicians in robes. This past week, I've found myself struggling against the impulse to say two words: I surrender.