For Justice Kennedy it was his questions, for Chief Justice Roberts it was his silence...

Today the Supreme Court heard oral argument in *King v. Burwell* [2], where it will decide whether federal health insurance exchanges, operating in 34 states, can offer subsidies to middle and low income purchasers of insurance under the Affordable Care Act (ACA).

Simply put, the Court must decide whether it agrees with the Internal Revenue Service (IRS) that the following statutory language, “established by the State,” can include federal exchanges too.

All eyes and ears were on Justice Kennedy and Chief Justice Roberts during the argument. Justice Kennedy is the Court’s “swing” Justice, and Chief Justice Roberts crucially concluded in the first Supreme Court challenge to the ACA that the individual mandate is a constitutional “tax.”

The moment of the argument most likely to be focused on until the Court resolves this case by the end of June was Justice Kennedy asking Michael Carvin, the challengers’ attorney, not once but twice whether a “serious constitutional problem” or a “serious constitutional question” would arise if the Court concluded that federal exchanges could not offer subsidies. Wouldn’t states then be “coerced” into establishing exchanges to “avoid disastrous consequences”?

Justice Kennedy went on to ask a number of questions of the federal government’s attorney Solicitor General Donald Verrilli too including, at the very end of the argument, whether it made sense to give the IRS the big task of interpreting this statute when billions of dollars are at stake.

After General Verrilli responded that when statutes are ambiguous, agencies are tasked with interpreting them whether they raise questions big or small, Chief Justice Roberts chimed in asking whether a subsequent administration could change an agency interpretation. By not asking a question at the heart of this case, not much can be read into his question.

More generally, the argument veered back and forth from the Justices trying to determine the best interpretation of the statute to the Justices asking about the practical problems that would arise if subsidies weren’t available. Unsurprisingly, the liberal Justices generally asked questions of the challengers’ attorney and the conservative Justices asked questions of the Solicitor General.

Justice Kagan led the questioning of the challenger’s attorney and Justices Scalia and Alito peppered the Solicitor General with questions. Notably, Justice Scalia asked the Solicitor General whether Congress would really just do nothing if the Court ruled against the federal government. And Justice Alito asked why so few states with federal exchanges filed a brief supporting the federal government.

Both sides tried to claim that in this case federalism was on their side.