Editor's Note : On Tuesday, there is a possibility of opinions at 10:00 a.m. We will be live-blogging beginning at 9:45 a.m. at this link, where you can sign up for an email reminder when the live blog begins.
On Tuesday, the justices will hear oral argument in *Seila Law v. Consumer Financial Protection Bureau*. Click to read our preview from Amy Howe.
On Tuesday, the justices will also hear oral argument in *Liu v. Securities and Exchange Commission*. Click to read our preview from Ronald Mann.

Breaking News : On Monday, the court released orders from the February 28 conference.
The justices agreed to take up a new challenge to the constitutionality of the Affordable Care Act's individual mandate.
The justices agreed to hear *U.S. Fish & Wildlife Service v. Sierra Club*, regarding whether an exemption from the Freedom of Information Act shields from a disclosure draft document prepared as required by the Endangered Species Act.
The justices agreed to hear *Borden v United States* to decide whether a crime that can be committed by being reckless can be a "violent felony" for purposes of the Armed Career Criminal Act.

Bradley Joondeph *Guest*
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A *Marbury* for our time

The following contribution to our post-decision symposium on the health care cases is written by Bradley W. Joondeph, Professor of Law Santa Clara Univeristy. He is also the author of the ACA Litigation Blog.

In yesterday's historic decision, Chief Justice Roberts's opinion for the Court held that the minimum coverage provision falls within Congress's power to impose a tax, and thus is constitutional. At the same time, he concluded that the mandate exceeded Congress's power to regulate interstate commerce, and that the Act's dramatic expansion of the Medicaid program is unconstitutional insofar as it jeopardizes the states' preexisting Medicaid dollars. In short, the Chief Justice upheld the entirety of the ACA, but with some important caveats.

The end product was—not to put too fine a point on it—brilliant. It was a brilliant act of judicial statesmanship that parallels another landmark decision, *Marbury v. Madison*.

Marbury is best known for its defense of judicial review, the authority of the Court to declare acts of Congress (and the executive branch) unconstitutional. But to really understand *Marbury*, one has to account for the relevant political context. In February 1803, Chief Justice Marshall knew that the Jefferson administration would have defied the Court's judgment in *Marbury* had the justices ordered Madison to grant Marbury his commission. (Indeed, the administration did not even dignify the proceedings by appearing. Only Marbury's side argued at the Court.) Thus, Marshall reached the Court's holding—that the Jefferson administration had acted unlawfully, and that the Court had the authority to say so—while ultimately concluding that the Court lacked jurisdiction, forcing it to dismiss the case. Marshall asserted the Court's authority in a muscular fashion, delineating the constitutional constraints on Congress and the President, but without actually challenging the other branches in a concrete fashion. He set down important constitutional markers while reaching an immediate result that favored the incumbent President, shielding the Court from significant political danger or the threat of retribution.

Of course, the analogy is imperfect. In the *Health Care Cases*, the danger to the Court was not as grave or immediate as it was in 1803. There was no chance that the President would simply ignore or disobey the Court's judgment. Indeed, a sizable majority of Americans would have supported the conclusion that the individual mandate was unconstitutional, making such a decision relatively safe in short term.

Yet there was a long-term danger to the Court lurking beneath the surface: the risk of staining itself with the appearance of partisanship. This risk was especially acute given some other recent decisions (most prominently, *Bush v. Gore* and *Citizens United*) and some others headed the Court's way (such as those involving the constitutionality of affirmative action and the Voting Rights Act). A steady string of 5-4 decisions on a range of controversial issues, cleaving perfectly along partisan lines, would jeopardize the Court's diffuse support—support that turns on the public's faith that

considerably more sincere than they did following *Citizens United*.

This lifting of the Court above the polarized, partisan fray is apt to prove quite valuable to its long-term institutional standing. The decision will largely immunize the Court, at least for some time, from Democratic attacks that the five Republican appointees are "conservative judicial activists." If the Court declares that all governmental affirmative action programs violate the Equal Protection Clause next spring in *Fisher v. University of Texas*, for instance, the predictable accusations of partisanship are less likely to stick. Yesterday's Case of the Century will stand as a highly salient counter-example.

At the same time, the Chief Justice established some important, conservative doctrinal beachheads. He reaffirmed or established (depending on your perspective) some potentially important limits on Congress's powers under the Commerce Clause, the Necessary and Proper Clause, and the General Welfare Clause. Congress cannot use the Commerce Clause to regulate commerce in a manner that *compels* people into commerce; it can only regulate existing commerce. Further, such regulation, even if "necessary," can never be "proper," no matter its importance to the proper functioning of a broader regulatory scheme. And the General Welfare Clause does not permit Congress to use the states' dependence on an existing conditional spending program as a means to forcing them to accept significant, *qualitative* changes to that program. Rather, states must be given the choice to accept or deny the funds associated only with the program's modifications—at least when the program is similar in size to Medicaid.

We can debate the significance of these limits. And whatever we think today, what really matters is how future majorities interpret the opinion. In all events, the Chief Justice stated clearly that the Obama administration's principal defense of the Act—as a regulation of interstate commerce—amounted to a regulatory overreach. He embraced the essence of the conservative constitutional argument—that Congress cannot uses its commerce power to regulate "inactivity." And in wrapping the Court in bipartisanship, he made it more difficult for liberals to attack the Court going forward.

Further, it is important to keep in mind a critical difference between yesterday's decision and some of the other controversial matters the Court has decided or will decide soon. Yesterday's opinion merely held that the ACA is *permissible*; a Republican Congress and President could repeal the Act *in toto* in January. By contrast, *Citizens United*—or decisions declaring affirmative action or Section 5 of the Voting Rights Act unconstitutional—could only be undone via a constitutional amendment or subsequent overruling. The policy result of yesterday's decision is much less permanent.

No doubt, liberals should be excited by yesterday's decision. The bottom line is that the most significant piece of social welfare legislation since the 1960s survived the exacting review of a conservative Supreme Court. In an age of growing economic inequality, the Court has upheld the biggest effort to redistribute income the since the end of the Great Society.

But no one should forget that, in the long run, it was the views of the Federalists—and Chief Justice Marshall in particular—that largely shaped the Nation. By cultivating the Supreme Court's institutional legitimacy, Marshall was able to pursue his nationalist visions, even while suffering transitory policy defeats to the Jeffersonians. Marshall saw that, as the Court's prestige grew, so, too, did the influence of his Court over the growing Nation.

The supporters of the ACA won big yesterday. But so did the Court—and, by extension, the Chief Justice. It was a stroke of judicial genius. A *Marbury* for our time.

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