



The Jurisprudence of Justice John Paul Stevens: The Constitutionality of Congressional Term Limits and the Presidential Line Item Veto

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Summary

Justice John Paul Stevens authored the majority opinions in both *U.S. Term Limits, Inc. v. Thornton* and *Clinton v. City of New York*, which struck down term limits for federal legislators and the federal Line Item Veto Act, respectively. While the Supreme Court seems unlikely to address the constitutionality of term limits or the line-item veto in the future, Justice Stevens's conclusion that the absence of constitutional provisions expressly authorizing the exercise of certain powers constitutes a denial of these powers seems likely to influence the Court in the future, particularly in cases involving what Justice Kennedy and others have characterized as "horizontal" or "vertical" separation of powers. Horizontal separation of powers questions involve the relationship between the three branches of the federal government (i.e., legislative, executive, judicial), while vertical separation of powers questions involve the relationship between the federal government, state governments, and individual citizens. In *Term Limits*, the majority held that states lack the power to impose term limits on Members of Congress because the Constitution grants them no such power. Similarly, in *Clinton*, the majority held that a federal statute allowing the President to "cancel" certain provisions of law was unconstitutional because "[t]here is no provision in the Constitution that authorizes the President" to do so. Under these precedents, it would appear that a constitutional amendment would be necessary to allow for either congressional term limits or the presidential line-item veto.

The opinions authored by Justice Stevens in *Term Limits* and *Clinton* are consistent with what commentators have characterized as his generally "pro federalist" approach to other issues, such as those involving the Commerce Clause, the Tenth Amendment, and the Fourteenth Amendment. For a more in-depth discussion of his approach to federalism, see CRS Report R41244, *The Jurisprudence of Justice John Paul Stevens: Selected Federalism Issues*, by (name redacted).

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Introduction

Justice John Paul Stevens authored the majority opinions in both *U.S. Term Limits, Inc. v. Thornton* and *Clinton v. City of New York*, which struck down term limits for federal legislators and the federal Line Item Veto Act, respectively.¹ While the Supreme Court seems unlikely to address the constitutionality of term limits or the line-item veto in the future,² Justice Stevens's conclusion that the absence of constitutional provisions expressly authorizing the exercise of certain powers constitutes a denial of these powers seems likely to influence the Court in the future, particularly in cases involving what Justice Kennedy and others have characterized as "horizontal" or "vertical" separation of powers.³ Horizontal separation of powers questions involve the relationship between the three branches of the federal government (i.e., legislative, executive, judicial), while vertical separation of powers questions involve the relationship between the federal government, state governments, and individual citizens.⁴ In *Term Limits*, the majority held that states lack the power to impose term limits on Members of Congress because the Constitution grants them no such power.⁵ Similarly, in *Clinton*, the majority held that a federal statute allowing the President to "cancel" certain provisions of law was unconstitutional because "[t]here is no provision in the Constitution that authorizes the President" to do so.⁶ Under these precedents, it would appear that a constitutional amendment would be necessary to allow for either congressional term limits or the presidential line-item veto.⁷

¹ *Clinton v. City of New York*, 524 U.S. 417 (1998); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). Term limits for state legislators and state line item veto statutes were not at issue in these cases, but have generally been upheld. See, e.g., *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999) (upholding term limits for state legislators); *Rush v. Ray*, 362 N.W.2d 479 (Iowa 1985) (upholding, but limiting, the line item veto authority of the governor of Iowa).

² Cf. Stanley H. Friedelbaum, *Term Limits, the State Courts, and National Dominion: The Vicissitudes of American Federalism*, 60 ALB. L. REV. 1567, 1580 (1997) ("It is unlikely that any further cases concerning term limits in any form will be considered by the United States Supreme Court.").

³ *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring) ("Separation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority. In this respect the device operates on a horizontal axis to secure a proper balance of legislative, executive, and judicial authority. Separation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised."); Kathleen M. Sullivan, *Dueling Sovereignities: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 91-92 (1995) (noting parallels between horizontal and vertical separation of powers cases).

⁴ Approaches to vertical separation of powers cases can differ as to whether, and to what degree, the states play a role in checking the power of the federal government vis-à-vis individual citizens. Justice Stevens's approach arguably would not accord states a significant role here, while Justice Thomas's approach would. Compare *Term Limits*, 514 U.S. at 837-38 (rejecting the notion that Members of Congress represent individuals through the states) with 514 U.S. at 859 ("[W]hile the majority is correct that the Framers expected the selection process to create a 'direct link' between Members of the House of Representatives and the people, ... the link was between the Representatives from each State and the people of that State.").

⁵ *Id.* at 800 ("Petitioners argue that the Constitution contains no express prohibition against state-added qualifications, and that [Arkansas's term limit amendment] is therefore an appropriate exercise of a State's reserved power to place additional restrictions on the choices that its own voters may make. We disagree ...").

⁶ *Clinton*, 524 U.S. at 438. See also *id.* at 439 ("There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition.").

⁷ Resolutions to amend the Constitution to allow for the presidential line item veto have been introduced in the 111th Congress (H.J.Res. 15, S.J.Res. 22). Additional bills referencing the "line item veto" in their titles have also been introduced (e.g., H.R. 1294, S. 524), but would not allow the President to "cancel" provisions of federal law in the same manner as the Line Item Veto Act of 1996. Rather, under these bills, the President would propose the repeal of "congressional earmarks" or the cancellation of "limited tariff benefits" or "targeted tax benefits," and Congress would give "expedited consideration" to legislation enacting these proposals.

U.S. Term Limits, Inc. v. Thornton

“Term limits,” or legal restrictions upon the number of terms that an individual may serve in an elected office, became a matter of significant public interest in the early 1990s, in part because of allegations that incumbents become less responsive to their constituents as they become more “entrenched.”⁸ Between 1990 and 1994, 23 states imposed term limits on elected officials,⁹ and by 1995, over 40% of the Members of Congress were ostensibly term limited.¹⁰ One of the states to enact term limits was Arkansas. On November 3, 1992, Arkansas voters adopted a ballot initiative amending the state constitution to impose term limits on members of the Arkansas legislature and prohibit the inclusion on the general election ballot of the names of otherwise-eligible candidates for the U.S. House of Representatives or Senate who had served a specified number of terms.¹¹ A state trial court found that the provisions concerning the inclusion of incumbents on ballots were unconstitutional because they violated the Qualifications Clauses of the U.S. Constitution.¹² The Arkansas Supreme Court affirmed,¹³ prompting the appeal to the U.S. Supreme Court that gave rise to Justice Stevens’s opinion for the majority in *U.S. Term Limits*.

Qualifications Clauses and *Powell v. McCormack*

Term Limits was the first case since *Powell v. McCormack*, which was decided six years before Justice Stevens joined the Court, to address the Qualifications Clauses of the U.S. Constitution. These clauses provide that

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen....

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.¹⁴

The *Powell* Court had relied upon historical evidence, including debates regarding qualifications for federal legislators at the constitutional convention, and “an examination of the basic principles

⁸ See, e.g., *Term Limits*, 514 U.S. at 784 (quoting the preamble to the Arkansas term limit amendment, which stated, “The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative.”).

⁹ David G. Savage, *High Court Bars States from Limiting Congressional Terms*, L.A. TIMES, May 23, 1995, at A1.

¹⁰ Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L. J. 1971, 1971 (1994).

¹¹ *Term Limits*, 514 U.S. at 784. Writing for the majority, Justice Stevens found that this ostensible ballot-access restriction constituted a de facto term limit because it represented “an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly.” 514 U.S. at 829 (internal quotations omitted). The dissent disagreed, noting that the challenged provisions would not bar incumbents from serving provided they were elected by write-in votes. 514 U.S. at 918 (Thomas, J., dissenting). The attempt to characterize the Arkansas amendments as a ballot access provision was significant because the Constitution expressly grants states the power to regulate the “Times, Places, and Manner of holding Elections.” U.S. Const. art. I, § 4, cl. 1.

¹² *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 353 (Ark. 1994).

¹³ *Id.* at 365.

¹⁴ U.S. Const. art. I, § 2, cl. 2 (qualifications of Representatives); art. I, § 3, cl. 3 (qualifications of Senators).

of our democratic system” to find that Congress lacked the power to impose additional qualifications upon its Members.¹⁵ However, the decision in *Powell* did not address whether states could impose additional qualifications upon Members, something that some commentators asserted was within states’ “reserved powers” under the Tenth Amendment.¹⁶ The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁷

Justice Stevens’s Opinion for the Majority

In *Term Limits*, Justice Stevens, writing for a majority of the Court, found that states also lack the power to impose additional qualifications upon Members of Congress.¹⁸ After reaffirming *Powell*, which he acknowledged was not dispositive,¹⁹ Justice Stevens concluded that the power to add qualifications could not have been reserved to the states by the Tenth Amendment because it did not exist prior to the ratification of the Constitution, which created Congress, and so was not within the “original powers” of the states.²⁰ Alternatively, he concluded that even if the states had possessed some original power to set Representatives’ qualifications, the “Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby ‘divested’ States of any power to add qualifications.”²¹

In so concluding, Justice Stevens relied on the text of the Constitution, which expressly delegates certain powers related to federal elections to the states (e.g., determining the time, place, and manner of federal elections);²² the Framers’ intent, as evidenced by the convention and ratification debates;²³ the post-ratification practice of the states;²⁴ and “democratic principles,” including the potential effect of allowing states to formulate diverse qualifications upon the

¹⁵ 395 U.S. 486, 541-48 (1969). In *Powell*, the Court found that Adam Clayton Powell, Jr., of New York had been unconstitutionally excluded from membership in the House after a House committee determined that he had wrongfully diverted House funds for personal use and made false reports regarding expenditures. 395 U.S. at 489-93.

¹⁶ See, e.g., *Joyner v. Mofford*, 706 F.2d 1523, 1528 (9th Cir. 1983) (“In *Powell* ..., the Supreme Court accepted this restrictive view of the Qualifications Clause—at least as applied to Congress.”) (emphasis added); *Stumpf v. Lau*, 839 P.3d 120, 129 (Nev. 1992) (Steffen, J., dissenting) (noting the possible reservation to the people of the right to enact “state constitutional provisions adding reasonable qualifications beyond those specified in the qualifications clauses”).

¹⁷ U.S. Const. amend. X.

¹⁸ *Term Limits*, 514 U.S. at 837.

¹⁹ *Id.* at 798 (“Our reaffirmation of *Powell* does not necessarily resolve the specific questions presented.”).

²⁰ *Id.* at 802 (relying on Justice Story’s conclusion that “the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. ... No state can say, that it has reserved, what it never possessed.”).

²¹ *Id.* at 800-01.

²² *Id.* at 804-05. Justice Stevens noted that the Constitution also expressly delegates to states the power to “appoint, in such Manner as the Legislature ... may direct, a Number of Electors.” *Id.* at 805. He contrasted these express delegations of power with the express limitations on states’ power vis-à-vis the federal legislature. *Id.* at 804 (noting that the Constitution gives Congress the “final say” in determining the qualifications of the representatives of the various states and requires that Members’ salaries be set by statute and paid from the U.S. Treasury).

²³ *Id.* at 806-15. See especially *id.* at 805 (“[T]he Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution.”).

²⁴ *Id.* at 815-19 (noting that Congress first considered a challenge to a Member’s qualifications in 1807 and its resolution of this challenge was subsequently construed to mean that states lacked the power to impose qualifications. The 1807 challenge involved William McCreery, a Representative from Maryland, who allegedly did not satisfy the state’s residency requirement. Congress resolved the challenge by finding that he met the putative state qualifications.

“egalitarian ideal” embodied in the Constitution.²⁵ Justice Stevens also relied heavily on the precedent of *McCulloch v. Maryland*, an 1819 decision that noted that states cannot “surrender” powers they never had,²⁶ and *Garcia v. San Antonio Metropolitan Transit Authority*, a 1985 case holding that states retain sovereign authority “only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”²⁷ Justice Stevens had joined with the majority in *Garcia*, rejecting the argument that the powers reserved to the states by the Tenth Amendment impose certain affirmative limits upon Congress’s exercise of its enumerated powers.²⁸

Justice Thomas’s Dissenting Opinion

It is in treating constitutional “silence”—or the lack of provisions expressly authorizing states to impose additional qualifications on Members of Congress—as a denial of that power that Justice Stevens’s opinion for the majority arguably diverges most markedly from Justice Thomas’s dissenting opinion. Justice Thomas would, in contrast, treat “silence”—or the lack of provisions expressly prohibiting states from imposing additional qualifications—as proof that the states possess that power:

The Federal Government and the States ... face different default rules: Where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it.²⁹

This difference, in turn, reflects markedly different views of the breadth of states’ reserved powers under the Tenth Amendment, as well as markedly different approaches to what Justice Kennedy and other commentators have characterized as “vertical” separation of powers.³⁰ While Justice Thomas would construe the range of powers reserved to the states broadly in order to protect individuals from the federal government,³¹ Justice Stevens would construe the range of

²⁵ *Id.* at 819-22.

²⁶ *Id.* at 802 (quoting 17 U.S. 316, 430 (1819)). Justice Stevens construed *McCulloch* as rejecting “the argument that the Constitution’s silence on the subject of state power to tax corporations chartered by Congress implies that the States have ‘reserved’ power to tax such federal instrumentalities.”)

²⁷ *Id.* at 801 (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985)).

²⁸ 469 U.S. 528, 552 (1985) (upholding application of a federal law setting maximum hours and minimum wages to state and local government employees, in part, on the grounds that the states’ role in the selection of the executive and legislative branches of the federal government means that there is no need to fashion any discrete limitations on the objects of federal authority vis-à-vis “traditional state government functions”), *rev’g Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976) (finding that application of a federal law setting maximum hours and minimum wages to state and local government employees violated an “affirmative structural immunity” of the states). In contrast, Justice Thomas, writing for the dissent, distinguished *Garcia* from *Term Limits* on the grounds that “*Garcia* dealt with an entirely different issue: the extent to which principles of state sovereignty implicit in our federal system curtail Congress’ authority to exercise its enumerated powers. . . . The question raised by the present case, however, is not whether any principle of state sovereignty implicit in the Tenth Amendment bars congressional action that Article I appears to authorize, but rather whether Article I bars state action that it does not appear to forbid.” *Term Limits*, 514 U.S. at 852-53.

²⁹ *Term Limits*, 514 U.S. at 848 (Thomas, J., dissenting).

³⁰ See *supra* notes 3 and 4.

³¹ *Term Limits*, 514 U.S. at 857 (“In a range of cases concerning the federal/state relation, . . . this Court has deemed positions taken in Story’s commentaries to be more nationalist than the Constitution warrants.”); *id.* at 868 (“Even if one were willing to ignore the distinction between requirements enshrined in the Constitution and other requirements (continued...)”).

powers reserved to the states narrowly in order to protect the federal government from the states.³²

Clinton v. City of New York

Writing for the majority in *Clinton v. City of New York*, Justice Stevens relied upon a similar approach to “silence,” or the absence of constitutional provisions authorizing the President to amend or repeal statutes, in striking down the federal Line Item Veto Act of 1996.³³ Much like term limits, the line-item veto attracted significant popular attention in the 1990s because of concerns about alleged shortcomings in the democratic process, most notably “the persistent practice by Congress of attaching riders and other nongermane amendments to legislation as a means to impel enactment and avoid a veto.”³⁴ The Line Item Veto Act authorized the President to “cancel in whole ... (1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit” after considering the legislative history of the provisions and making certain determinations.³⁵ Some Members of Congress, among others, challenged the statute shortly after its enactment, but were found to lack standing because they had not alleged a “sufficiently concrete injury.”³⁶ Justice Stevens dissented here and would have recognized Members’ standing because “deprivation” of the “right to vote on the precise text that will ultimately become law” constitutes a sufficient injury “to provide every Member of Congress with standing to challenge the constitutionality of the statute.”³⁷ Shortly thereafter, however, President Clinton exercised his authority under the act to cancel an item of new direct spending and a limited tax benefit, thereby giving rise to the litigation in *Clinton*.³⁸ Standing remained an

(...continued)

that the Framers were content to leave within the reach of ordinary law, Story’s application of the *expressio unius maxim* takes no account of federalism.”). The references to “Story” here are to Justice Story, whose commentaries the majority quoted in several places, including the passage cited, *supra*, in note 20.

³² See, e.g., *Term Limits*, 514 U.S. at 808 (“The Framers feared that the diverse interests of the States would undermine the National Legislature.”); *id.* at 811 (“Given the Framers’ wariness over the potential for state abuse ...”); *id.* at 822 (“Permitting individual States to formulate diverse qualifications for their representatives would ... undermin[e] the uniformity and the national character that the Framers envisioned and sought to ensure.”). See also *id.* at 842 (Kennedy, J., concurring) “Nothing in the Constitution or The Federalist Papers ... supports the idea of state interference with the most basic relation between the National Government and its citizens.”). Several commentators have noted Justice Stevens’s reliance on the “organic theory of the Union,” rooted in *McCulloch*, and concomitant concerns regarding state interference in national concerns. See, e.g., Friedelbaum, *supra* note 2, at 1578; Robert F. Nagel, *The Term Limits Dissent: What Nerve*, 38 ARIZ. L. REV. 843, 844, 849 (1996) (construing the majority opinion as “battl[ing] with the notion that this nation is merely ‘a collection of states’”); Sullivan, *supra* note 3, at 110 (“The Court thus replayed the role it had first fashioned in *McCulloch*. In taking this role, the majority assumed that the vitality of the republic is constantly threatened by centrifugal forces, and the Court must be the ally of the other federal branches.”).

³³ *Clinton*, 524 U.S. at 438.

³⁴ Aaron D. Zibart, *Eulogizing the Line Item Veto Act: Clinton v. City of New York and the Wisdom of Presidential Legislating* 88 KY. L.J. 505, 512 (1999). See also Eric Stephen Schmitt, Note, *There Is No Joy in D.C., the Mighty Court Struck Out: An Analysis of Clinton v. City of New York, the Line Item Veto Act and the Court’s Failure to Uphold Constitutionally Legitimate Means to a Viable End*, 44 ST. LOUIS L.J. 167, 170 (2000) (noting that 43 out of 50 governors had the line item veto by the late 1980s).

³⁵ P.L. 104-130, 110 Stat. 1200 (Apr. 9, 1996) (codified at 2 U.S.C. § 691 et seq. (1994 ed., Supp. II)).

³⁶ *Raines v. Byrd*, 521 U.S. 811, 830 (1997). See also *Nat’l Treasury Employees Union v. United States*, 101 F.3d 1423, 1425-26 (D.C. Cir. 1996) (finding that the plaintiffs lacked standing because they had not suffered concrete injury).

³⁷ *Raines*, 521 U.S. at 837 (Stevens, J., dissenting).

³⁸ *Clinton*, 524 U.S. at 422-25.

issue in *Clinton*,³⁹ and Justice Stevens's opinion for the majority is cited more for its treatment of standing than for anything else.⁴⁰

Justice Stevens's Opinion for the Majority

Having found that the plaintiffs have standing, Justice Stevens, writing for the majority, proceeded to find the federal line-item veto unconstitutional because "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."⁴¹ In reaching this conclusion, Justice Stevens focused upon the Bicameralism and Presentment Clauses of the U.S. Constitution (Article I, Section 7, Clauses 2 & 3), which authorize Presidents to "return" bills that they disapprove of to Congress before they become law, but otherwise do not provide for Presidents to amend bills that have been enacted.⁴² He further noted that the historical materials support the conclusion that the failure of the Bicameralism and Presentment Clauses to provide for presidential "repeal" of statutes meant that the President could not exercise this power.⁴³

Justice Stevens also relied upon *INS v. Chadha*, a 1983 decision which held that "[r]epeal of statutes, no less than enactment, must conform with [Article] I."⁴⁴ Justice Stevens had joined with the majority in *Chadha*, striking down legislation that allowed Congress to exercise the "legislative veto," or revoke certain executive branch decisions without enacting legislation (i.e., with the vote of a chamber or committee). Because he viewed cancellation of certain provisions of enacted statutes as tantamount to their repeal, he found *Chadha* dispositive.⁴⁵ Justice Stevens further found that the present case was distinguishable from *Field v. Clark*, an 1892 decision upholding the constitutionality of the Tariff Act of 1890, because the Tariff Act authorized the President to decline to spend funds appropriated under the act, while the Line Item Veto Act authorized the President to "cancel" certain provisions of other enacted statutes.⁴⁶

³⁹ Compare *id.* at 425-35 (finding that plaintiffs have standing) with *id.* at 453 (Scalia, J., dissenting) (finding that certain plaintiffs lack standing).

⁴⁰ See, e.g., *Lac Du Flambeau Flambeau Band v. Norton*, 422 F.3d 490 (7th Cir. 2005); *Freedom from Religion Found., Inc. v. Obama*, 2010 U.S. Dist. LEXIS 18108 (W.D. Wisc. Mar. 1, 2010); *Katin v. Nat'l Real Estate Info. Servs.*, 2009 U.S. Dist. LEXIS 31398 (D. Mass. Mar. 31, 2009). See also Schmitt, *supra* note 34, at 185 ("It should be noted ... that although *Clinton* will be remembered as the 'line item veto case,' its impact on the law of standing will be equally significant."). Justice Stevens's opinion is also sometimes cited for its approach to statutory interpretation. See, e.g., *United States v. Middleton*, 231 F.3d 1207 (9th Cir. 2000).

⁴¹ *Clinton*, 524 U.S. at 438. See also *id.* at 439 ("[C]onstitutional silence on this profoundly important issue [is] equivalent to an express prohibition.").

⁴² *Id.* at 438-39 ("The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part.").

⁴³ *Id.* at 439-40 (quoting the writings of the first President, George Washington, to show that the Bicameralism and Presentment Clauses were initially understood as requiring that the President either "approve all the parts of a Bill, or reject it in toto.").

⁴⁴ *Id.* at 440 (quoting *Chadha*, 462 U.S. 919, 951 (1983)).

⁴⁵ *Id.* The dissenting justices, in contrast, would have characterized the Line Item Veto Act as authorizing the President to decline to spend certain funds, rather than repeal certain provisions of law. See, e.g., *id.* at 474-75 (Breyer, J., dissenting) ("[T]he Act does not delegate to the President the power truly to *cancel* a line item expenditure (returning the legal status quo to one in which the item had never been enacted). Rather, it delegates to the President the power to decide *how* to spend the money to which the line item refers.").

⁴⁶ *Id.* at 442-47.

Dissenting Opinions by Justice Breyer and Justice Scalia

Justice Stevens declined to reach the separation of powers argument that formed one basis for the lower court's decision striking down the line-item veto⁴⁷ and played a prominent role in the two dissenting opinions. Justice Breyer, in contrast, found that the act did not violate "Separation of Powers principles" and constituted a proper delegation of legislative power to the President,⁴⁸ while Justice Scalia reached similar conclusions on somewhat different grounds.⁴⁹ The separation of powers concerns here were "horizontal ones," focused on "maintain[ing] the tripartite structure of the Federal government ... by providing a 'safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'"⁵⁰ While Courts have struck down certain "encroachments" by one branch upon the powers of another,⁵¹ they have also permitted Congress, in particular, to delegate some of its legislative power to other branches provided the delegation is "under the limitation of a prescribed standard."⁵²

However, although he did not reach the issue, Justice Stevens's approach may suggest that certain delegations are impermissible unless expressly authorized in the Constitution, or even that certain manifestations of the separation of powers provided for in the Constitution are unalterable without a constitutional amendment. While he acknowledged that the Line Item Veto Act authorized the President to "effect the repeal of laws," Justice Stevens nonetheless stated,

The fact that Congress intended such a result is of no moment. Although Congress presumably anticipated that the President might cancel some of the items in the Balanced Budget Act and in the Taxpayer Relief Act, Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution.⁵³

⁴⁷ *Id.* at 448 ("[B]ecause we conclude that the Act's cancellation provisions violate Article I, § 7, of the Constitution, we find it unnecessary to consider the District Court's alternative holding that the Act 'impermissibly disrupts the balance of powers among the three branches of government.'").

⁴⁸ *Id.* at 479-96 (Breyer, J., dissenting).

⁴⁹ *Id.* at 465-69. Justice Scalia focused particularly upon the fact that Presidents have historically claimed and exercised authority to withhold appropriated funds even without being expressly authorized by Congress to do so. He viewed this authority as differing in name only from the authority allegedly given to the President by the Line Item Veto Act.

⁵⁰ *Id.* at 482 (Breyer, J., dissenting) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

⁵¹ *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down a statute that authorized a legislative branch official to impose certain budget reductions on the President in the event that the budget exceeded allowable deficits); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 (1982) (holding that Congress cannot give Article III "judicial" power to an Article I judge); *Myers v. United States*, 272 U.S. 52 (1926) (Congress cannot limit the President's power to remove an executive branch official).

⁵² *United States v. Chicago, M., St. P. & P. R. Co.*, 282 U.S. 311, 324 (1931). *See also* *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (holding that the Constitution permits only those delegations where Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."). Some commentators have suggested that the Court looks less favorably upon congressional delegation of legislative power than it formerly did. *See, e.g.*, Hugo Hecl, *What Has Happened to the Separation of Powers?* in *SEPARATION OF POWERS AND GOOD GOVERNMENT* 131, 136 (Bradford P. Wilson & Peter W. Schramm eds., 1994).

⁵³ *Clinton*, 524 U.S. at 445-46.

Justice Stevens's Legacy

Justice Stevens's treatment of constitutional "silence" in separation of powers cases arguably constitutes one of his legacies,⁵⁴ in part, because the majority opinion in *Term Limits* came after the Court's decision in *United States v. Lopez* and can be seen as limiting the "antifederalist revival" that some commentators saw occurring with *Lopez* and the *Term Limits* dissent.⁵⁵ In *Lopez*, a majority struck down a federal law that prohibited the possession of guns within 1,000 feet of a school, in part, on the grounds that the absence of limits on federal power would unacceptably obliterate the "distinction between what is truly national and what is truly local."⁵⁶ The *Term Limits* dissent took a similar approach to federal power, asserting that the federal government may exercise only those powers enumerated in the Constitution, while state governments may exercise all powers not denied to them in the Constitution or elsewhere (e.g., state constitutions).⁵⁷

Although the *Lopez* majority opinion and the *Term Limits* dissent were generally read at the time as portending a possible resurgence of Tenth Amendment-based or other limitations on federal power,⁵⁸ this resurgence arguably has not extended beyond the Court's Commerce Clause jurisprudence, at least to date. Some cases, most notably *United States v. Morrison*, later found the enactment of particular federal statutes exceeded Congress's Commerce powers.⁵⁹ The Tenth Amendment, in contrast, has arguably remained "dormant" as a source of substantive limitations

⁵⁴ This view is shared by some commentators. See, e.g., Friedelbaum, *supra* note 2, at 1576 (crediting Justice Stevens's opinion in *Term Limits* with introducing an "updated version of American federalism"); Sullivan, *supra* note 3, at 108 ("[T]he majority in *Term Limits* can be expected to continue to invalidate state laws that burden federal citizens, even in the absence of express or implied congressional preemption.").

⁵⁵ Sullivan, *supra* note 3, at 102 (characterizing this revival as one "of uncertain scope and consequence"). See also Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1 (describing the dissenting Justices in *Term Limits* as approaching "something radically different from the modern understanding of the Constitution"); Jeffrey Rosen, *Terminated*, NEW REPUBLIC, June 12, 1995, at 12 (suggesting that the dissenters are questioning "the legacy of Reconstruction"); Chris Marks, Comment, *U.S. Term Limits, Inc. v. Thornton and United States v. Lopez: The Supreme Court Resuscitates the Tenth Amendment*, 68 U. COLO. L. REV. 541, 541 (1997) ("In the 1994-95 Term, ... the U.S. Supreme Court resuscitated the long dormant Tenth Amendment."). Justice Stevens's opinion in *Term Limits* has also influenced lower courts in determining whether particular ballot access or other provisions constitute "impermissible indirect attempts" to impose additional qualifications on Members of Congress. Courts relying on *Term Limits* here have construed its holding that "a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly" as establishing a two-part test for identifying such attempts. See, e.g., *Gralike v. Cook*, 191 F.3d 911 (8th Cir. 1999) (striking down an amendment to the Missouri Constitution that would have required ballots to carry labels noting that particular legislators "disregarded voters' instruction on term limits"); *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000) (striking down a California law that required congressional candidates to live in the state for a certain time before the election); *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002) (upholding a Georgia law requiring that federal candidates obtain signatures from a certain percentage of registered voters to appear on the ballot).

⁵⁶ *Lopez*, 514 U.S. 549, 567 (1995). Justice Stevens dissented in *Lopez*.

⁵⁷ See *supra* note 29 and accompanying text. Justice Kennedy is the only Justice to have voted with the majority in both *Lopez* and *Term Limits*.

⁵⁸ See, e.g., Marks, *supra* note 55, at 541; Sullivan, *supra* note 3, at 102. See also Sullivan, *supra* note 3, at 106 ("Narrow interpretation of Congress's commerce power is the flip side of imposing on Congress an external, federalism-based constraint: both protect the states from the reach of federal legislative power.").

⁵⁹ 529 U.S. 598 (2000) (finding that Congress lacked authority to enact the Violence against Women Act under either the Commerce Clause or the Fourteenth Amendment. This Commerce Clause jurisprudence has itself arguably been somewhat limited by *Raich v. Gonzales*, which held that the Commerce Clause allows Congress to ban home-grown cannabis even in states that have approved its use for medicinal purposes. *Raich*, 545 U.S. 1 (2005)).

on federal power, notwithstanding the *Term Limits* dissent.⁶⁰ Justice Stevens also played a significant role in other cases taking what commentators have characterized as a generally “pro federalist” approach to interpreting the Commerce Clause, the Tenth Amendment, and the Fourteenth Amendment. For a more in-depth discussion of his approach to federalism, see CRS Report R41244, *The Jurisprudence of Justice John Paul Stevens: Selected Federalism Issues*, by (name redacted).

Justice Stevens’s opinion in *Clinton* arguably expanded on the treatment of constitutional “silence” in *Term Limits*, suggesting that, at least in certain cases, lack of constitutional provisions authorizing the exercise of particular powers precludes delegation of these powers to another branch of the federal government, notwithstanding the consent of the branch delegating the power.⁶¹

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⁶⁰ *Contra* Marks, *supra* note 55, at 570 (“More significant and immediate change will most likely be seen in cases falling outside the Commerce Clause. The Court may find ways, through a resuscitated Tenth Amendment, to empower states on such issues as immigration or affirmative action.”).

⁶¹ *See, e.g.*, Sullivan, *supra* note 3, at 93; Zibart, *supra* note 34, at 511 (characterizing Justice Breyer’s opinion, in contrast, as “embrac[ing] more diffuse notions of the boundaries between the federal branches”); Henry L. Chambers, Jr. & Dennis E. Logue, Jr., *Separation of Powers and the 1995-1996 Budget Impasse*, 16 ST. LOUIS U. PUB. L. REV. 51, 55 (1996) (“Unfortunately, the Court may show similar disregard for carefully negotiated political agreements which probe the boundaries of the separation of powers.”).

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