THE CONTAGION OF CONSTITUTIONAL AVOIDANCE*

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Terri Schiavo passed away on March 31, 2005. In the weeks leading up to her death, what was once a wrenching personal matter for Ms. Schiavo's family and loved ones transformed into a political and legal drama that gripped much of the nation and garnered attention around the world. There was much about Ms. Schiavo's case to sadden any of us, regardless of one's political or religious views. Everyone should be troubled, however, by the fact that virtually all members of the legislative, executive and judicial branches involved in enacting or applying the "Act for the relief of the parents of Theresa Marie Schiavo" (also referred to as "Terri's Law")[1] seemingly ignored serious questions about the law's constitutionality, and in so doing avoided their responsibilities as constitutional interpreters.

Constitutional interpretation by the legislative and executive branches has been the subject of robust discussion by academicians and other commentators in recent years.[2] Some (myself included) have urged non-judicial actors to take more seriously their roles as interpreters of the Constitution and in dialogue about its meaning and application.[3] For us, this aspect of the Schiavo matter should have been disheartening. That the judiciary seemingly joined in the avoidance of hard constitutional questions is all the more disappointing.

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1. *See* Pub. L. No. 109-3, 119 Stat. 15 (2005).

2. *See, e.g.*, Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959 (2004); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045 (2004); Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673; Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HAST. CONST. L.Q. 359 (1997).

3. *See* Gant, *supra* note 2.

Legislators and executive branch officers take oaths to "support" the Constitution,[4] while the President swears to "preserve, protect and defend" the Constitution.[5] As I have argued elsewhere, at a minimum these pledges obligate officials to consider for themselves the meaning of the Constitution and its connection to their work, not simply rely on the judiciary.[6]

In Congress's haste to pass Terri's Law, it gave remarkably little consideration to whether the legislation was consistent with various constitutional provisions and principles. The law provides:

> The United States District Court for the Middle District of Florida shall have jurisdiction to hear, determine and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withdrawing or withholding of food, fluids, or mental treatment necessary to sustain life.[7]

The Senate undertook no substantive evaluation of the law, and passed it without debate after behind the scenes wrangling over the provisions of the bill.[8] A review of the Congressional Record memorializing House deliberation reveals but a few terse references to the legislation's constitutionality, and most of those were by opponents of the bill. The only remotely substantive attention paid to constitutional issues appears in what is described as a "supplemental legislative history" offered by James Sensenbrenner,[9] Chairman of the House Judiciary Committee,

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4. *See* U.S. CONST. art. VI, § 3.

5. *See* U.S. CONST. art. II, § 1, cl. 8.

6. *See* Gant, *supra* note 2, at 422 n.297; Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 627 n.261 (1999); *see also* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1262 (2004) ("[I]f any clause of the Constitution fairly could be construed as vesting a power of constitutional interpretive supremacy . . . in any one branch, the Presidential Oath Clause has the best claim to having made such an assignment; and that assignment appears to be to the President, not the judiciary."); Robert F. Blomquist, *The Presidential Oath, The American National Interest and A Call for Presiprudence*, 73 UMKC L. REV. 1 (2004) (discussing the history, meaning and implications of the Presidential Oath).

7. *Supra* note 1, § 1. The final stage of the legal case regarding Ms. Schiavo commenced with Congress's passage of Terri's Law, after a voice vote in the Senate, and a hurriedly convened, Sunday evening session of the House of Representatives. President Bush signed the bill into law after being awakened by aides in the early morning hours on March 21, 2005.

8. Senator Wyden predicted that the Supreme Court would find the law unconstitutional. *See* 151 Cong. Rec. S2928 (2005).

9. *See* 151 Cong. Rec. H1703 (2005).

who argued that the bill is consistent with Supreme Court precedent because it does not "'reopen [] (or direct [] the reopening of) final judgments in a whole class of cases [or] in a particular suit,'"[10] and "presents no problems regarding retrospective application."[11] Congressman Sensenbrenner did not address any of the other potential constitutional objections to the law, nor does it appear those were given consideration by others in Congress.[12]

Despite the unusual nature of Terri's Law and the circumstances of its enactment, the statement released by the President immediately after he signed the bill mentioned nothing about the constitutional issues,[13] and no White House officials offered public comment on the constitutionality of the new law. Although it is impossible to know what discussions occurred in the West Wing before the President signed it, there is no indication that the President or those who advise him evaluated any of the difficult constitutional questions raised by Terri's Law. The Department of Justice compounded the President's silence by submitting a "Statement of Interest" brief to the federal district court in support of Ms. Schiavo's parents which asserted that Terri's Law "confers jurisdiction" on the district court without acknowledging any of the constitutional issues (or explaining why the law does not run afoul of the Constitution).

Unfortunately, the track record of legislative and executive branch participation in dialogue about constitutional meaning is

10. *Id.* (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995)).

11. *Supra* note 9 (relying on Landgraf v. USI Film Products, 511 U.S. 244, 269–70 (1994) and contending that Terri's Law merely effects a change of tribunal to federal court rather than creates new legal consequences for events before its enactment).

12. Although it is beyond the scope of this article to analyze and offer conclusions about whether Terri's Law is constitutional, there are a number of potential infirmities that warrant consideration, including those related to the Tenth Amendment/federalism principles, separation of powers, the equal protection clause, prohibitions against bills of attainder and ex post facto laws, and interference with the right to refuse unwanted medical treatment (*see, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990)).

13. *See* President's Statement on S. 686, Allowing Federal Courts to Hear the Claim of Terri Schiavo (Mar. 21, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/03/20050321.html. Among articles generally discussing non-judicial interpretation of the Constitution, several specifically address presidential and executive branch obligations and performance as interpreters of the Constitution. *See, e.g.*, J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS. 91 (2005); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005) (discussing constitutional interpretation by the Department of Justice's Office of the Solicitor General and Office of Legal Counsel); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Michael Stokes Paulsen, *Protestantism and Comparative Competence*, 83 GEO. L.J. 385 (1994).

uneven, at best.[14] As a predictive matter, it is not surprising that the task of evaluating the constitutionality of Terri's Law was passed to the courts with little more than a scintilla of serious deliberation.[15] Nevertheless, we might have hoped that the extraordinary nature of Terri's Law would have prompted extra vigilance in ensuring adherence to the Constitution.[16]

More surprising, however, is that the habit of avoiding constitutional scrutiny seems to have afflicted the judiciary as well in this case. In response to the motion for a temporary restraining order and injunctive relief filed by Ms. Schiavo's parents hours after the President signed Terri's Law, attorneys for Michael Schiavo challenged the statute's constitutionality on a number of grounds (including that it violated the due process and equal protection clauses as well as the Tenth Amendment, and that Congress exceeded it powers under the Constitution in enacting the law).[17] Despite these arguments, and despite noting "there may be substantial issues concerning the constitutionality of the Act," the district court simply *presumed* the statute constitutional and proceeded to address the merits of the request.[18]

On appeal, the Eleventh Circuit panel reviewing the district court's denial of a temporary restraining order and preliminary injunction noted Mr. Schiavo's claim that Terri's Law was unconstitutional, but like the district court assumed the issue away, explaining that "[f]or purposes of determining whether temporary or preliminary injunctive relief is appropriate, we indulge the usual presumption that congressional enactments are constitutional."[19]

The two cases relied on by the courts in explaining their decisions merely to assume the statute's constitutionality and address the merits of the motion, without evaluating their jurisdic-

14. *See* Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry Into Legislative Attitudes, 1959-2001*, 29 LAW & SOC. INQUIRY 127 (2004); *see also supra* notes 2, 13.

15. Justice Scalia is reported to have observed that "Congress is increasingly abdicating its independent responsibility to be sure that it is being faithful to the Constitution." *See* Stuart Taylor, Jr., *The Tipping Point*, 32 NAT'L J. 1810, 1811 (2000).

16. It is ironic that many critics of the judiciary seemingly have passed up many of their own opportunities for constitutional analysis and interpretation.

17. *See* Opposition Brief to Motion for Injunction, Schiavo ex. rel. Schindler v. Schiavo, 357 F. Supp. 2d 1378 (M.D. Fla. 2005) (No. 8:05-CV-530-T-27TBM), *available at* http://news.findlaw.com/hdocs/docs/schiavo/hus32105opp.pdf.

18. Schiavo ex. rel. Schindler v. Schiavo, 357 F. Supp. 2d 1378, 1382–83 (M.D. Fla. 2005).

19. Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1227 (11th Cir. 2005).

tion, hardly support their approach.[20] One was the Eleventh Circuit's decision in a case called *Benning v. Georgia*[21] (which was the sole case cited by the district court when stating it would presume the statute constitutional), and the other the Supreme Court's opinion in *United States v. Morrison*.[22] While both cases (and others) note that respect for a coordinate branch of government requires the federal courts to presume, *as a starting point*, that Congress has acted with constitutional authority, neither case involved the application of that presumption to a request for an injunction or to constitutional challenges to the court's jurisdiction, let alone mandates that the constitutionality of a statute purportedly conferring jurisdiction on the court be presumed rather than decided. In fact, in each of the two cases the court went on to resolve the constitutional issues raised by the litigants immediately after referencing this supposed "presumption," and in *Morrison*, notwithstanding the presumption, the Court found that Congress had exceeded its authority under the Constitution.[23]

Moreover, substituting a presumption of jurisdiction for evaluation of the issue is inconsistent with the Eleventh Circuit's own case law. For instance, that court has cited the Supreme Court's observation that "'[j]urisdiction is the power to declare law . . . . [I]f there is no jurisdiction there is no authority to sit in judgment of *anything else*.'"[24] It has similarly observed that: "'[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by the Constitution and statute.' . . . It follows from this principle of limited jurisdiction that a federal court has an independent obligation to review its authority to hear a case *before it proceeds to the merits*."[25] Because federal

20. *See id.*

21. 391 F.3d 1299 (11th Cir. 2004).

22. 529 U.S. 598 (2000).

23. *See Benning*, 391 F.3d at 1304 (assessing constitutionality of Religious Land Use and Institutionalized Persons Act); *Morrison*, 529 U.S. at 607–27 (finding Congress lacked power to enact 42 U.S.C. § 13981, which provided a federal civil remedy for the victims of gender-motivated violence). Given Congress's performance as a constitutional interpreter, the propriety of any such presumption may be called into question. *See* Note, *Should the Supreme Court Presume That Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 Harv. L. Rev. 1798 (2003) (questioning validity of the presumption).

24. Allapatah Servs., Inc. v. Exxon Corp., 362 F.3d 739, 754 (11th Cir. 2004) (quoting Vermont Agency of Natural Res. v. United States, 529 U.S. 765, 778 (2000)) (emphasis added).

25. Mirage Resorts, Inc. v. Quiet Nacelle Corp., 206 F.3d 1398, 1400–01 (11th Cir. 2000) (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)) (emphasis added); *see also* Riley v. Merrill Lynch, Pierce, Fenner & Smith, 292 F.3d 1334,

courts have limited jurisdiction they "are obligated to inquire into subject-matter jurisdiction *sua sponte* whenever it may be lacking,"[26] and to do so at any stage in a proceeding, at both the trial and appellate levels.[27] These principles apply to requests for preliminary injunctions,[28] just as in any other context. They are also consistent with the Supreme Court's rejection of the doctrine of "hypothetical jurisdiction," under which some courts had proceeded to address merits issues despite jurisdictional objections.[29]

Despite their obligations to consider the constitutional issues presented by Terri's Law (particularly in light of the argument raised by Mr. Schiavo's lawyers), the district court and the twelve active members of the Eleventh Circuit entirely refrained

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1336 (11th Cir. 2002) ("As always, jurisdiction is a threshold inquiry that we are required to consider before addressing the merits of any claim."); Taylor v. Appleton, 30 F.3d 1365, 1366 (11th Cir. 1994) ("[A] court must first determine whether it has proper subject matter jurisdiction before addressing the substantive issues."). This precept has governed the Eleventh Circuit since its inception in 1981, when the former Fifth Circuit was subdivided into a "new Fifth" Circuit and the Eleventh Circuit, at which time the Eleventh Circuit adopted then-existing Fifth Circuit law as its own established precedent. *See* Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (adopting Fifth Circuit decisions as precedent); Duplantier v. United States, 606 F.2d 654, 663 n.9 (5th Cir. 1979) ("Federal courts must have both subject matter and [personal] jurisdiction before they may act."); Opelika Nursing Home, Inc. v. Richardson, 448 F.2d 658, 667 (5th Cir. 1971) ("In the federal tandem jurisdiction takes precedence over the merits. Unless and until jurisdiction is found, both appellate and trial courts should eschew substantive adjudication.").

26. Galindo-Del Valle v. Att'y Gen., 213 F.3d 594, 599 n.2 (11th Cir. 2000); *see also Mirage Resorts*, 206 F.3d at 1401. The only presumption regarding federal jurisdiction is one *against* it. *See* McNutt v. General Motors Acceptance Corp. of Ind., 298 U.S. 178 (1936).

27. *See* FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (raising objection to federal court jurisdiction).

28. *See, e.g.*, Labat-Anderson, Inc. v. United States, 346 F. Supp. 2d 145, 149 (D.D.C. 2004) ("the Court must address the jurisdictional issues first, and may reach the merits of the motion for preliminary injunction only once, and only if, jurisdiction is established"). Here, the existence of jurisdiction turned entirely on the constitutionality of the statute, and did not depend on any facts related to the claims of the parties. Yet even in cases where the existence of jurisdiction depends on facts yet-to-be-adjudicated in the litigation, courts are required when confronted with a preliminary injunction motion to assess the existence of jurisdiction before deciding the merits of the motion. *See, e.g.*, Majd-Pour v. Georgiana Community Hosp., Inc., 724 F.2d 901, 902 (11th Cir. 1984); *see also* KVOS, Inc. v. Associated Press, 299 U.S. 269, 278 (1936) (motion to dismiss based in part on the contention that the trial court lacked jurisdiction, filed after request for preliminary injunction, "required the trial court to inquire as to its jurisdiction before considering the merits of the prayer for preliminary injunction").

29. *See* Steel Co. v. Citizens For A Better Environment, 523 U.S. 83, 94 (1998) (noting rejection of the doctrine "should come as no surprise, since it is reflected in a long and venerable line of [] cases" and quoting Ex Parte McCardle, 7 Wall. 506, 514 (1868), as stating "'[w]ithout jurisdiction the court cannot proceed at all in any cause'").

from addressing any aspect of the statute's constitutionality until the final denial of en banc review by the court of appeals on March 30, 2005.[30] Concurring in that denial, Judge Birch wrote separately to express his view that the statute was unconstitutional because it violated separation of powers principles.[31] He also observed that "[s]ince the passage of [the Act] its constitutionality has been presumed" and seemingly questioned that approach, contending that jurisdiction "is a prerequisite to the legitimate exercise of judicial power," and that the court "may not hypothetically assume jurisdiction to avoid resolving hard jurisdictional questions."[32] Judge Birch was exactly right in asserting (albeit belatedly)[33] that jurisdiction cannot be presumed while courts address merits issues. In this case, avoidance of the jurisdictional question was, at its core, avoidance of a serious constitutional question, already largely sidestepped by the legislative and executive branches when enacting the law.[34]

30. *See* 357 F. Supp. 2d 1378 (M.D. Fla. 2005) (denying motion for temporary restraining order); 358 F. Supp. 2d 1161 (M.D. Fla. 2005) (denying amended motion for temporary restraining order); 403 F.3d 1223 (11th Cir. 2005) (denying petition for injunctive relief); 403 F.3d 1261 (11th Cir. 2005) (denying request for rehearing en banc); 403 F.3d 1289 (11th Cir. 2005) (affirming denial of amended motion for temporary restraining order); 404 F.3d 1270 (11th Cir. 2005) (denying request for rehearing en banc).

31. 404 F.3d at 1271–76. Judge Birch concluded that certain of the Act's provisions "constitute legislative dictation of how a federal court should exercise its judicial functions" thereby invading the province of the judiciary and violating separation of powers, and that the offending provisions were not severable from the rest of the Act, rendering the "entire Act a nullity." *Id.* at 1274–75. The two dissenting judges—Tjoflat and Wilson—disputed Judge Birch's separation of powers analysis, but did not address other potential arguments that the statute is unconstitutional. *Id.* at 1279–82.

32. 404 F.3d at 1272.

33. Regarding the timing of his statements about jurisdiction and the constitutionality of the statute, Judge Birch wrote: "[g]iven the rapid developments and sensitivities in this case, the need for deliberate study necessitated the delay in my questioning our jurisdiction." 404 F.3d at 1271 n.1.

34. The district court and Eleventh Circuit conceivably could have tried to rely on United States v. United Mine Workers of America, 330 U.S. 258 (1947), as a basis for their having reached the merits of the request for a temporary restraining order and injunction before having addressing the question of their own jurisdiction. United Mine Workers is sometimes cited for the proposition that "a trial court can issue a temporary restraining order to maintain the status quo while it is determining its authority to act further in the case." Wright & Miller: Federal Practice and Procedure § 3537 at 543; *see also* United Mine Workers, 330 U.S. at 293 ("In the case before us, the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief"). It is not obvious, however, that the decision still stands as authority for that categorical proposition, if it ever did. The case involved an appeal from a finding of criminal contempt, where the defendant violated a temporary restraining order it claimed the trial court lacked jurisdiction to issue. In an opinion without a majority, the Supreme Court found the trial court had jurisdiction to issue the restraining order, and affirmed the contempt determination on that and other grounds. In subsequent cases, the Court has described the power of courts to act prior to determining their jurisdiction in narrower terms. *See, e.g.*, United States Catholic Conf. v. Abortion Rights Mobilization,

The federal courts addressing the claims of Ms. Schiavo's parents brought under Terri's Law commendably acted with dispatch, despite being placed under immense political and temporal pressure. Yet the understandable desire to operate with speed cannot trump the court's obligation to ensure it has authority to act. The statute's constitutionality should have been addressed by the courts in the first instance, even if that caused minor delays in rendering rulings compared with the speed with which they acted when assuming the law was constitutional.[35] Both the district court and the court of appeals punted the dicey constitutional issue created by this extraordinary law. And they continued to avert the issue entirely, until almost the very end of this legal drama. Without necessarily endorsing Judge Birch's specific separation of powers analysis or his conclusion about the law's constitutionality, we should all applaud his having addressed the issue, even if a little late.

The issues regarding the constitutionality of Terri's Law certainly are not easy or clear cut. But that is precisely why all of those who had the opportunity—and the obligation—to address those questions should have tackled them directly rather than looking past them.[36]

Inc., 487 U.S. 72, 79 (1988) (noting "inherent and legitimate authority of the court to issue process and other binding orders . . . as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter"). Here, the courts' orders were not necessary or related to a determination of jurisdiction, and also were not issued to preserve the status quo (since they denied the requests for a temporary restraining order and injunctive relief), even if such actions were authorized under United Mine Workers. Moreover, nothing in United Mine Workers or its progeny authorizes lower courts simply to presume they have jurisdiction while proceeding to address merits issues.

35. The Supreme Court has developed doctrines calling on the federal courts, in some circumstances, to avoid deciding constitutional issues when they can be avoided. *See, e.g.*, Clark v. Martinez, 543 U.S. 371 (2005); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); *see also* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847 (2005); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. Rev. 1003 (1994). Whatever might be said about the virtues and vices of these doctrines (one of which is sometimes described as "constitutional avoidance"), none appears to apply when the threshold issue of the court's jurisdiction depends on a related constitutional question since in that circumstance the latter cannot be avoided. My use of that term in the title of this article refers to the general practice of sidestepping an obligation to grapple with constitutional issues, and is not meant to imply criticism of these doctrines.

36. It would have been proper (and prudent) for the courts to address the substance of the request for an injunction as an alternative holding, even if the court found it lacked jurisdiction because the statute was unconstitutional, in the event that a higher court reversed the determination regarding jurisdiction.