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Federal Court Self-Preservation and Terri Schiavo

JACK M. BEERMANN†

INTRODUCTION

If the federal court in Florida had granted preliminary relief to allow itself more time to consider the constitutional claims that Terri Schiavo's parents brought on her behalf, and if, as expected, those claims were ultimately rejected, the federal court would have been placed in the unenviable position of having to be the institution that made the final decision to terminate Terri Schiavo's feeding and other treatment. Although I have no way of knowing whether this fact, which has not been noted in the commentary,¹ actually entered into the mind of any of the federal judges who considered the case, in my view it goes a long way toward explaining why the federal court did not grant preliminary relief. I suspect that the federal judges involved in the case simply did not want to be in the position of having to issue an order that would be widely seen as the order that

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1. The closest I have seen to a reference to this factor is in Adam M. Samaha, *Undue Process: Congressional Referral and Judicial Resistance in the Schiavo Controversy*, 22 CONST. COMMENT. 505, 509 (2005), in which Professor Samaha notes that "federal courts have a (part-time) tradition of hesitation in controversial cases." In his contribution to the same symposium in which Professor Samaha's paper appeared, Sam Bagenstos accused the federal courts of being unduly hasty, but the primary reason he discerned for the haste was that perhaps "the federal judges assigned to the case perceived the equities as strongly tilting in favor of ending the litigation as soon as possible." See Samuel R. Bagenstos, *Judging the Schiavo Case*, 22 CONST. COMMENT. 457, 469 (2005). Professor Bagenstos also suggests that the federal judges may have been motivated by an "impulse to stand up to the political pressure," an "impulse to defend the work of the state courts" and "the general disinclination of federal judges to hear cases that feel like 'family law.'" *Id.* at 473, 473 n.73.

resulted in the final removal of Terri Schiavo's feeding tube which, in turn, resulted in her death.

The federal court's posture in this regard is perfectly understandable. In light of the strident attacks on the federal trial and appellate court that were forthcoming after they declined to intervene, imagine the reaction had a federal court ordered preliminary relief and then later issued an order that, in effect, resulted in the removal of Terri Schiavo's feeding tube. It is the hope of this Essay that viewing the case from this perspective sheds new light on Congress's intervention into the case and on the federal judiciary's reaction to that intervention.

I. TERRI SCHIAVO, HER STATUTE, AND FEDERAL COURT PROCEEDINGS UNDER IT

The sad facts about the end of Terri Schiavo's life are well known, and I will not recount them here except in the barest detail.² In 1990, when she was twenty-six years old, Terri Schiavo suffered cardiac arrest and lapsed into what doctors described as a "persistent vegetative state." She was kept alive with a tube that supplied food and water. After seven years, Mrs. Schiavo's husband sought to have the feeding tube removed, which, under Florida law, because Mrs. Schiavo did not leave written instructions, required a judicial finding by clear and convincing evidence that Terri Schiavo would not want to be kept alive in her condition. Mrs. Schiavo's parents, the Schindlers, opposed Mr. Schiavo's request, and the litigation over whether to remove the feeding tube spanned another seven years. The Florida state courts ultimately sided with Mr. Schiavo, and after many appeals and attempted intervention by the legislature and Governor of Florida, on March 18, 2005, the feeding tube was removed pursuant to court order.

On March 21, 2005, Congress passed, and the President signed, "An Act For the Relief of the Parents of Theresa Marie Schiavo."³ This extraordinary statute gave jurisdiction to a federal court in Florida to hear any federal

2. These facts are drawn from Edward J. Larson, *From Cruzan to Schiavo: Similar Bedfellows in Fact and at Law*, 22 CONST. COMMENT. 405, 406 (2005).

3. Pub. L. No. 109-3, 119 Stat. 15 (2005) [hereinafter "the Act" or "Terri's Law"].

constitutional or statutory claims Terri Schiavo might have, and granted her parents standing to bring those claims. The Act instructed the federal district court to decide Terri Schiavo's claims "de novo . . . notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings."⁴ Congress was also adamant that the federal court decide the case without regard to any prudential grounds for deference to ongoing state court proceedings, providing that "[t]he District Court shall entertain and determine the suit without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted."⁵

The Act was also clear about remedies. Section 3 provided that:

After a determination of the merits of a suit brought under this Act, the District Court shall issue such declaratory and injunctive relief as may be necessary to protect the rights of Theresa Marie Schiavo under the Constitution and laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.⁶

On the matter of rights, Congress was clear that it was not creating any. In section 5 of the Act, Congress specified that "[n]othing in this Act shall be construed to create substantive rights not otherwise secured by the Constitution and laws of the United States or of the several States."⁷

Shortly (within hours) after the Act became law, the Schindlers filed suit on Terri's behalf in the United States District Court for the Middle District of Florida, alleging numerous constitutional and statutory violations and seeking preliminary and permanent injunctive relief. On March 22, 2005, one day after the Act became law, the district court denied all relief, including a temporary order which would have required the reinsertion of the feeding

4. *Id.* § 2.

5. *Id.*

6. *Id.* § 3.

7. *Id.* § 5.

tube while the court considered the merits of the case. In a key legal conclusion, the district court found that nothing in the Act altered the traditional requirements for granting preliminary relief. The court stated:

A district court may grant a preliminary injunction only if the moving party shows that:

- (1) it has a substantial likelihood of success on the merits;
- (2) irreparable injury will be suffered unless the injunction issues;
- (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and
- (4) if issued, the injunction would not be adverse to the public interest.⁸

Although the federal court found that factors two, three, and four weighed in favor of granting preliminary relief—especially factor two, that Terri would suffer irreparable harm (death) if preliminary relief were denied—it found that the Schindlers did not establish a sufficient likelihood of success on the merits to warrant preliminary relief.⁹

To decide whether a preliminary injunction was warranted, in its opinion issued the day after the case began, the district court analyzed numerous constitutional claims raised on Terri's behalf, and found them all wanting.¹⁰ The next day, one day after the district court denied preliminary relief, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision¹¹ and denied rehearing en banc,¹² finding no abuse of discretion in the district court's determination that the Schindlers had not demonstrated a sufficient likelihood

8. *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1383 (M.D. Fla. 2005), *aff'd* 403 F.3d 1223, *reh'g denied*, 403 F.3d 1261, *stay denied*, 544 U.S. 945 (2005).

9. *Id.*

10. *Id.* at 1384-88.

11. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005), *reh'g denied*, 403 F.3d 1261, *stay denied*, 544 U.S. 945 (2005).

12. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1261 (11th Cir. 2005) (denying rehearing en banc), *stay denied*, 544 U.S. 945 (2005).

of success on the merits to justify preliminary relief.¹³ Again, the key ruling by the court of appeals, which was made after an examination of the legislative history of the Act which discussed the precise issue, was that the Act had not modified the standard for granting preliminary relief.¹⁴ The day after that the Supreme Court of the United States denied a stay of the lower court's order pending the submission of a petition for certiorari.¹⁵ In the meanwhile, the Schindlers had filed an amended complaint and request for preliminary relief, raising additional constitutional and statutory claims. Preliminary relief under this complaint was denied by both the district court¹⁶ and court of appeals¹⁷ on March 25, 2005. Rehearing and rehearing en banc were denied on March 30, 2005,¹⁸ and that same day the Supreme Court once again denied a stay of the lower court's order pending certiorari.¹⁹ Thus, all litigation under Terri's Law was completed in nine short days. Terri Schiavo died on March 31, 2005.

II. CRITICISM OF THE FEDERAL COURT'S ACTIONS UNDER TERRI'S LAW

The federal courts were swiftly and strongly condemned for their handling of the litigation brought by the Schindlers on behalf of Terri.²⁰ The principal criticism, made in the media and in a dissenting opinion in the court of appeals, was that the federal courts rushed to judgment for no reason, since Terri Schiavo was not in immediate

13. 403 F.3d at 1226.

14. *Id.* at 1227-28.

15. Schiavo *ex rel.* Schindler v. Schiavo, 544 U.S. 945 (2005).

16. Schiavo *ex rel.* Schindler v. Schiavo, 358 F. Supp. 2d 1161 (M.D. Fla.), *aff'd*, 403 F.3d 1289 (11th Cir.) (per curiam), *reh'g denied*, 404 F.3d 1282 (11th Cir.), *reh'g en banc denied*, 404 F.3d 1270 (11th Cir.), *stay denied*, 544 U.S. 957 (2005).

17. Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1289 (11th Cir.) (per curiam), *reh'g denied*, 404 F.3d 1282 (11th Cir.), *reh'g en banc denied*, 404 F.3d 1270 (11th Cir.), *stay denied*, 544 U.S. 957 (2005).

18. Schiavo *ex rel.* Schindler v. Schiavo, 404 F.3d 1282 (11th Cir.), *reh'g en banc denied*, 404 F.3d 1270 (11th Cir.), *stay denied*, 544 U.S. 957 (2005).

19. Schiavo *ex rel.* Schindler v. Schiavo, 544 U.S. 957 (2005).

20. See, e.g., William Yardley, *On the Day After, Attending to the Details of Death*, N.Y. TIMES, April 2, 2005, at A8.

danger at the time treatment and feeding were halted and certainly would have lived long enough to allow for more careful deliberation—if only the federal courts had ordered preliminary relief that would have resulted in the temporary reinsertion of the feeding tube.

This criticism was accompanied by a charge that the courts had, in effect, thumbed their noses at Congress. As Judge Wilson stated in dissent at the Court of Appeals:

The entire purpose for the statute was to give the federal courts an opportunity to consider the merits of Plaintiffs' constitutional claims with a fresh set of eyes. Denial of Plaintiffs' petition cuts sharply against that intent, which is evident to me from the language of the statute, as well as the swift and unprecedented manner of its enactment. Theresa Schiavo's death, which is imminent, effectively ends the litigation without a fair opportunity to fully consider the merits of Plaintiffs' constitutional claims

. . . . [R]efusing to grant the equitable relief would, through Theresa Schiavo's death, moot the case and eliminate federal jurisdiction. This deprivation would directly contravene Congress's recent enactment granting jurisdiction in this case.²¹

The reaction to the federal courts' inaction was extreme. Then-House Majority Leader Tom Delay threatened the federal judges involved in the case with impeachment, declaring "[t]his loss happened because our legal system did not protect the people who need protection most, and that will change. The time will come for the men responsible for this to answer for their behavior, but not today."²² Calls for impeachment of the federal judges involved were widespread. The director of the Christian Defense Coalition was quoted as saying "[i]mpeachment of federal judges needs to be put on the table and needs to be discussed."²³ A web commentator stated that "every federal judge involved in the execution of Terri Schiavo has violated his/her office as judge and has committed the high crime of being an accessory to murder. Therefore every

21. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1237-39 (11th Cir.) (Wilson, J., dissenting); see also Bagenstos, *supra* note 1, at 466-73.

22. Bill Sammon, *Pro-Lifers Hear Call to Overhaul "Arrogant" Judiciary*, WASH. TIMES, Apr. 1, 2005, at A1.

23. Yardley, *supra* note 20.

judge so tainted *must* be impeached by Congress and removed from the bench.”²⁴ The author of these words posted a paper on the internet linking the *Schiavo* decision to the *Dred Scott* case.²⁵ Ironically, the federal courts that declined to intervene were charged with “judicial activism” on the ground that Congress intended for them to get involved by deciding the merits, and acting contrary to Congress’s clearly expressed intent was activist.

A premise of this criticism appears to be that it would have been relatively costless for the federal court to issue a temporary restraining order or preliminary injunction staying the effectiveness of the state court decision ordering the removal of the feeding tube. The main purpose of this Essay is to dispute that point. There are several important factors to keep in mind in this regard. First, this was not a situation in which preliminary relief would have merely maintained the status quo. By the time the case reached the federal court, the status quo had been altered by the state court that ordered the removal of Terri Schiavo’s feeding tube. At this point, a federal court order suspending the effectiveness of the state court order would have altered the status quo by requiring the reinsertion of the tube.²⁶

Second, and obviously related, the federal judges who heard Terri Schiavo’s case must have known full well that if they granted preliminary relief, it would be they, and not the state judge, who would appear to have ordered the final removal of the feeding tube. Although technically the federal judge would be merely allowing the state court’s order to take effect, that technicality would not conceal the fact that the removal of the reinserted tube would be the direct result of an order by a federal court, either the district court or court of appeals, when it rejected Terri Schiavo’s claims on the merits.

24. Gary Amos, *Impeach all Judges in the Terri Schiavo Case* (2005), <http://www.freerepublic.com/focus/f-news/1380607/posts> (emphasis in original).

25. See Gary Amos, *Dred Scott and Terri Schiavo: The Long and Tortured Death of the 14th Amendment At the Hands of the Federal Judiciary* (2005), http://www.thecheck.org/GuestColumnist/dredscott_terrischiavo-4.pdf.

26. The court of appeals understood that preliminary relief would have altered rather than preserved the status quo because it would have required the reinsertion of the feeding tube. See 403 F.3d at 1225 n.1.

Viewed in this light, the stress the federal courts placed on the “probability of success on the merits” prong of the requirements for ordering preliminary relief makes sense. Had the federal court been acting before the tube had been removed, an order preserving the status quo would have had a relatively minor impact. Given that Terri Schiavo had been on life support for fifteen years, allegedly against what she would have wanted, a few more weeks or months while the federal courts heard and decided the merits of the constitutional claims raised by her parents would not have been such a great intrusion on her autonomy. Once the tube was removed, the stakes were much higher, because the federal court would have been, in effect, ordering the reinsertion of the tube.²⁷ Any such order would have placed the federal court in the awkward position of being the last actor before the feeding tube was removed once and for all.

In light of these consequences, it would be understandable if the federal court, without explicitly changing the standard, required a higher probability of success on the merits than usual. This, of course, opened the court’s decision to criticism from the supporters of Terri’s Law who had expected, or at least hoped, that Terri Schiavo would be kept alive while the court considered the constitutional claims brought on her behalf. But the court may have anticipated even greater criticism if, after granting preliminary relief, its dissolution of a preliminary injunction or temporary restraining order had been the immediate cause of Terri Schiavo’s death.

III. SHOULD THE FEDERAL JUDGES HAVE REACTED AS THEY DID?

Suppose I am correct that the federal judges hearing Terri Schiavo’s case refused to grant preliminary relief to allow for a fuller, calmer consideration of the merits of the constitutional claims brought on Terri Schiavo’s behalf to avoid having to issue the final order that would result in

27. Even though reinsertion would have been more intrusive than an order that resulted in simply maintaining preexisting treatment, the district court explicitly found that reinsertion was not so intrusive as to preclude preliminary relief. See *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1383 (M.D. Fla. 2005) (“To the extent Defendants urge that Theresa Schiavo would be harmed by the invasive procedure reinserting the feeding tube, this court finds that death outweighs any such harm.”).

the removal of Terri Schiavo's feeding tube. Suppose further that one reason for this reluctance was fear of the reaction to such an order, perhaps combined with a feeling that it was improper for Congress to drop the matter in the lap of the federal courts without providing any substantive guidance at all. The question then becomes whether this is legitimate behavior for a federal court. Should a federal court take into account the public reaction to its rulings? Stated this way, it seems that the answer is an easy "no." It is contrary to the ideal of justice for a court to take into account the reaction to its rulings, and the constitutional guarantees of independence enjoyed by federal judges are designed to immunize them from these types of considerations. The ideal is for judges to decide based only on the merits of the case before them. *Fiat justitia, ruat coelum*, even if, when the heavens descend, the wrath of the world is visited upon the deciding judges.

As is so often true, things are not so simple. Do we really want or expect judges to decide all cases without regard to the popular reaction to their decisions? I think not, and there are prudential doctrines of judicial self-governance that can be explained, at least in part, by fear of damage to the status of the judicial system that can result from a perception that the judiciary has made decisions that overstep the bounds of what is viewed as appropriate judicial behavior.

One argument against the propriety of the federal court avoiding a complete consideration of Terri Schiavo's case is that Congress clearly instructed it to reach the merits of the claims. Congress declared: "The District Court shall entertain and determine the suit without any delay or abstention in favor of State court proceedings."²⁸ This is the provision that the federal court is most clearly charged with violating—if not in letter, at least in spirit. Congress also wrote its remedial provision on the assumption that the federal court would reach the merits of Mrs. Schiavo's claims: "After a determination of the merits of a suit brought under this Act, the District Court shall issue such declaratory and injunctive relief as may be necessary to protect the rights of Theresa Marie Schiavo"²⁹ These

28. Pub. L. No. 109-3, § 2, 119 Stat. 15, 15 (2005).

29. *Id.* § 3 (emphasis supplied).

provisions counsel strongly against any attempt by the court to avoid reaching the merits for prudential or other reasons.

Despite the strength of the implications of the foregoing statutory provisions, Terri Schiavo's case presented problems that counseled in favor of judicial restraint. The first problem is that, while Congress ordered the federal court to decide the case, it explicitly disavowed any intent to create substantive law. In section 5 of the Act, in somewhat illogical fashion, Congress declared: "Nothing in this Act shall be construed to created substantive rights not otherwise secured by the Constitution and laws of the United States or of the several States."³⁰ (Illogical because the language implies that the Act does create rights that are otherwise secured, a logical impossibility since, if they are otherwise secured, Congress obviously did not create them in the Act.) This placed the federal court under compulsion to decide a case in a very unsettled area of the law. While some people might confidently assert that Terri Schiavo's federal rights were violated,³¹ I daresay that for

30. *Id.* § 5.

31. *See, e.g.*, Michael Stokes Paulsen, *Killing Terri Schiavo*, 22 CONST. COMMENT. 585 (2005). Professor Paulsen argues that because the structure of Florida law places the state court in the position of, in effect, ordering the killing of a patient, the Constitution requires that the court employ the criminal law's "beyond a reasonable doubt" standard. While Professor Paulsen presents a compelling case for extreme judicial care in dealing with the lives of people like Terri Schiavo, I am not so confident that he correctly states an established principle of constitutional law. I also note that, although the Florida court in Mrs. Schiavo's case appears to have relied on relatively flimsy evidence to conclude that, by clear and convincing evidence, she would have been against continued treatment, Florida's definition of "clear and convincing evidence" appears to be close to, but not quite, a civil equivalent of "beyond a reasonable doubt." *See* O. Carter Snead, *The (Surprising) Truth about Schiavo: A Defeat for the Cause of Autonomy*, 22 CONST. COMMENT. 383, 391, 394-404 (2005); *see also In re Davey*, 645 So. 2d 398 (Fla. 1994):

There must be more than a "preponderance of the evidence," but the proof need not be "beyond and to the exclusion of a reasonable doubt." This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. "[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the

most of us there is a great deal of uncertainty over whether Florida's scheme or its application to Terri Schiavo's situation violated, or even came close to violating, any recognized constitutional right.

Congress's failure to create substantive rights coupled with the lack of clarity of any preexisting constitutional rights³² amounted to an instruction to the federal court to engage in the sort of judicial activism for which federal courts are so often condemned. It should not be surprising that the federal judges' reactions to this were decidedly negative. Here is the conservative legal community, they might think, usually against judicial activism, egging us on to create new rights on behalf of a dying adult when they condemn us if we create new rights for other groups that suffer from discrimination or government overreaching. If for no other reason than the ability to think, if not say, "gotcha," a federal judge might be extremely reluctant to create new rights in this area in light of the decades of criticism federal courts have endured for creating rights in other areas. Congress was inviting the federal court to stick its neck out and create a new right when members of Congress are often among the federal courts' most vocal critics when they do just that.

The reaction might have been different had Congress specified a legal standard for the federal court to use in deciding the case. Congress might have adopted Michael Paulsen's standard and stated, as enforcement of the due

facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."

Id. at 404 (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. Dist. Ct. App. 1983)) (internal citation omitted).

In the *Schiavo* case itself, while the Florida appellate court did not define "clear and convincing evidence," it characterized the standard as very high and stated that in such cases there should be a preference for maintaining life. See *Schindler v. Schiavo (In re Schiavo)*, 780 So. 2d 176, 179 (Fla. Dist. Ct. App. 2001) ("In making this difficult decision, a surrogate decision-maker should err on the side of life. . . . In cases of doubt, we must assume that a patient would choose to defend life in exercising his or her right of privacy." (quoting *In re Browning*, 543 So. 2d 258, 273 (Fla. Dist. Ct. App. 1989))).

32. See, e.g., Samaha, *supra* note 1, at 509.

process clause,³³ that “the federal court shall order the reinstatement and continuation of life-saving treatment, including feeding and hydration, unless it appears beyond a reasonable doubt that cessation of such treatment would have been Terri Schiavo’s wishes in this situation.” Under that standard the federal court might have ordered that treatment be maintained, but if the federal court had still decided against relief, at least blame would have been shared with Congress, since the court’s opinion presumably would have concluded that under the legal standard specified by Congress, the Schindlers were not entitled to relief.

Accepted doctrines of judicial self-restraint reveal other areas in which federal judges are sensitive to the reactions others might have to their rulings. For example, in an article I published almost twenty years ago, I argued that abstention doctrines can be understood, against the charge that abstention intrudes on Congress’s power to regulate the jurisdiction of the federal courts, at least in part as matters of judicial self-preservation.³⁴ The argument is similar to the primary reason attributed to the veto power. The President’s veto power is primarily designed to provide him with the ability to resist laws that intrude on his powers. It is only secondarily about adding a national perspective designed to improve the quality of laws.³⁵

Federal courts may need an effective mechanism to prevent Congress from dropping every controversial matter in their laps. This is especially true when, as with Terri’s Law, Congress hands the courts the hot potato without substantive guidance, making any decision on the merits a responsibility of the federal courts alone. If the federal courts are overloaded with controversial cases, they may not have the political capital necessary when a strong independent court is most needed, i.e., when a federal court

33. Whether such a statute is within Congress’s power to enforce the fourteenth amendment is unclear. *See generally* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

34. *See generally* Jack M. Beermann, “Bad” Judicial Activism and Liberal Federal-Courts Doctrine: A Comment on Professor Doernberg and Professor Redish, 40 CASE W. RES. L. REV. 1053 (1990).

35. *See* THE FEDERALIST No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS. 91, 102-03 (2005).

is called upon to protect federal rights against the clearly expressed will of Congress, the President, or both in areas such as civil rights enforcement or constitutional voting rights. Abstention and related doctrines such as the preference against deciding constitutional cases provide the courts with mechanisms for regulating their agenda to preserve the political capital of the federal courts.³⁶ The underlying idea is that the reaction of the political community to controversial decisions may reduce the federal courts' ability to act in the future.

Similarly, doctrines aimed at avoiding friction with states, state courts, and state policies³⁷ are concerned, at least in part, with the reactions of others (such as judges on those state courts) to federal court decisions.³⁸ Friction with state courts arises most strongly when federal courts intervene into ongoing state proceedings, but it is also a concern anytime federal courts evaluate the constitutionality of state practices, construe unclear state law, or reexamine matters that have been previously litigated in the state courts. The Supreme Court has shaped abstention and related doctrines to avoid federal-state friction by minimizing confrontations between the federal courts and state governments, including the state courts.³⁹ The Supreme Court itself is so concerned that, when it reverses a state court, its instructions on remand are

36. As Hart & Wechsler's Federal Courts casebook explains, in recounting the discussion of constitutional avoidance in Alexander Bickel's *The Least Dangerous Branch*, "[a]ccording to Bickel, this technique of constitutional avoidance is necessary to accommodate the Court's role as the ultimate enforcer of constitutional 'principle' with competing demands of 'prudence' and expediency that counsel the Court sometimes to avoid constitutional decisions that aroused political constituencies would be unwilling to accept." Richard H. Fallon, Jr., et al, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 87 (5th ed. 2003) (citing ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 127 (1962)). Fallon also notes that judicial exercise of this power is not without its critics, including Gerald Gunther, who termed it "the neo-Brandeisian fallacy." *Id.*

37. See *Younger v. Harris*, 401 U.S. 37, 41 (1971); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500-01 (1941).

38. See *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973) (discussing habeas corpus exhaustion requirement as avoiding potential friction arising from federal court scrutiny of state court procedures).

39. See *Rizzo v. Goode*, 423 U.S. 362, 379-81 (1976) (discussing federal court restraint when called upon to issue injunctions affecting the administration of state criminal justice).

gentler than when it reverses a federal court, telling the state court that further proceedings should be "not inconsistent" with its opinion in the case, rather than ordering further proceedings "consistent" with its opinion as it does with federal courts.

In another context, members of the Supreme Court have expressed the view that the very legitimacy of the Supreme Court depends on how its decisions are received by the public at large. In their joint opinion declining to overrule decisions protecting the right to abortion, three Justices explained: "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."⁴⁰ While this may seem to some a shockingly low standard of legitimacy, if failure to adhere to precedent is perceived by federal judges as a potential threat to the public's acceptance of court decisions as authoritative, so might a decision to terminate Terri Schiavo's life support given the highly charged climate that surrounded Congress's action on her behalf.

Owing to the provision in Terri's Law purporting to require the federal court to decide the case without regard to abstention in deference to state court proceedings, abstention in name may not have been the appropriate response. However, given the long history of federal court-created doctrines that manifest concern for how federal court decisions are likely to be received, it should have come as no surprise that the district court and court of appeals found a way to avoid putting themselves in a position to be the court that issued the order that removed Terri Schiavo's life support. That the decision was based doctrinally on the requirements for preliminary injunctive relief rather than on an abstention doctrine is not important. What is important is that the federal courts, trial and appellate, avoided taking action that would have ultimately subjected them to even more disdain than they must have known they would provoke by quickly denying preliminary relief.

In a sense, the standard for granting preliminary relief functioned in Terry Schiavo's case as a sort of abstention doctrine. In many cases, the denial of preliminary relief is simply a strong signal to the applicant that his or her

40. *Planned Parenthood v. Casey*, 505 U.S. 833, 836 (1992).

resources might be put to better use than pursuing the litigation, especially when the denial is based on the court's conclusion that the plaintiff has not demonstrated sufficient likelihood of success on the merits. Terri Schiavo's case may be an extreme example of a different basis for denying preliminary relief, to protect the federal court from entanglement in a messy situation. If Terri Schiavo's claims were destined to be rejected anyway, there was no good reason for the federal court to get all tangled up in such a controversial matter by ordering the reinsertion of her feeding tube, just so the federal court would have to dissolve the order and have the tube removed in a week, a month, or a year.

In sum, in my view, the federal trial and appellate courts' quick action and denial of preliminary relief can be explained by the realization that granting preliminary relief would have put the federal courts in the position of being the institution that would have been perceived to have ordered, once and for all, the removal of Terri Schiavo's feeding tube and other life-sustaining treatment. It should be no surprise that the federal courts were anxious to avoid the great controversy that would have arisen in that event. As a final pass at considering whether federal courts should be concerned with the reaction to their decisions, I offer a few reasons for a modest conclusion in the courts' favor. First and foremost, as the famous statement attributed to President Andrew Jackson illuminates,⁴¹ the federal courts depend on the Executive Branch to enforce their judgments. More generally, the courts need the cooperation of the other branches to function, whether it involves adequate funding from Congress, adequate protection from the U.S. Marshalls, or cooperation from the Department of Justice and its U.S. Attorneys. It would not be a positive development if the federal courts were under constant attack and isolation within the government. Finally, while there is no question that the insulation of the federal courts is in many respects important to the maintenance of the federal courts as a

41. In speaking about the decision of the Supreme Court in *Worcester v. Georgia*, 31 U.S. 515 (1832), which held that states have no power to regulate within the territory of Indian tribes, President Jackson is reputed to have stated: "John Marshall has made his decision: now let him enforce it!" See 1 HORACE GREELEY, *THE AMERICAN CONFLICT* 106 (1864) (emphasis omitted).

check on the activities of the other branches, complete insulation from public concern over the effect of court decisions would probably not be a good thing. Courts ought to be concerned, at least to some extent, that their decisions have, and are perceived as having, positive social effects.

CONCLUSION

Terri Schiavo's possible suffering and the certainty of her impending death created compelling reasons to err on the side of caution when adjudicating her fate. Had the state court order to remove her feeding tube not been carried out by the time Congress passed Terri's law, and her parents had brought the case to federal court, the federal court may have been much more willing to freeze matters until it could hear and decide Terri's claims in a calm, sober manner. However, that was not the case, and Congress's actions caused significant difficulty for the federal district court in Florida and the court of appeals. By "ordering" those courts to hear and decide any federal claims Terri might have, without specifying the substance under which those claims should be evaluated, Congress's actions presented a potential public relations disaster for those courts. At the time Congress acted, and even now, there was great uncertainty over the substance of any potential constitutional claims Terri might have had concerning the Florida courts' decision to allow her husband to cease all life-sustaining measures. The federal courts found an "out" in Congress's failure to specify a more lenient standard for the granting of preliminary relief, and by denying preliminary relief, they guaranteed that Terri Schiavo would die before her claims could be fully adjudicated. Given the reaction to what little the federal courts did, who could blame them?