Terri's Law: 
The Limit of the Florida Legislature to Decide an Individual’s Right to Die

The ambulance passed through wildly cheering crowds as the word spread that their side now had possession of the “body politic.”

On October 21, 2003, Florida state troopers stormed into a Florida hospice and carried away a helpless Terri Schiavo in response to an order given by Governor Jeb Bush. They brought Terri to a hospital where she was fed through a tube despite her husband’s wishes.

Less than two years later, on March 18, 2005, Terri’s feeding tube was removed for the last time. Thirteen days later on March 31, 2005, she died. Ironically, what began as personal decision evolved into a test of not only the Florida Constitution, but also a check on our structure of governmental powers. In the end, the fate of Terri Schiavo, a shy person who hated the spotlight, polarized a nation on deciding whether she would have wanted to die. Her husband, parents, the Florida courts, the federal courts, the Florida legislature, the Governor of Florida, the U.S. Congress, the President, and even Pope John Paul II weighed in on Terri’s fate.

The high-profile battle over Terri Schiavo’s fate, a Florida woman who spent almost fifteen years in a vegetative state, brought “[l]aw, medicine and political grandstanding” together in the most tragic and bitter end-of-

2. Id.
3. Id.
4. See Arian Campo-Flores et al., The Legacy of Terri Schiavo: One Woman’s Journey from Marital Bliss to Medical Darkness — and the Forces that Made her Story a Political and Ethical Watershed, NEWSWEEK, Apr. 4, 2005, available at 2005 WLNR 4912831.
6. Campo-Flores et al., supra note 4.
7. See id.
The question appeared simple: “When can third parties assert a right to die for patients who can’t decide for themselves?” When the patient is incapacitated but outwardly appears aware, as in Terri’s case, “[l]egal precedents and everyday moral guidelines” provide inadequate answers. Nineteen judges in six different courts toiled over the existing laws and relevant evidence, ultimately determining that Terri’s husband, Michael Schiavo, had the legal right to withdraw the nutrition and hydration tubes that had kept his wife alive for over fifteen years.

Governor Bush and the Florida legislature’s unprecedented intervention came at what seemed to be the end of a long, contentious legal battle that ultimately resulted in the removal of the feeding tube sustaining Terri’s life. When Governor Bush signed the order to reinstate Terri’s feeding tube, he disregarded a court ruling based on almost a decade of fact-finding trials and legal analysis. The Governor’s decision prolonged Terri’s life and “added a new element to the Schiavo battle: the question of whether it was constitutional for the legislature and the governor to act after the courts had already ruled.”

This article reviews the long, bitter battle between Michael Schiavo and Robert and Mary Schindler over Terri Schiavo’s — a wife and a daughter’s fate. It also presents a detailed analysis of how courts answer the question: “When can third parties assert a right to die for patients who can’t decide for themselves?” Lastly, this article illustrates how the Florida legislature and Governor Bush in assuming “responsibility for this most intimate of decisions, . . . violated several fundamental constitutional principles,” including a complete disregard for the separation of powers. (The United States Congress and President Bush took dramatic and unprecedented

10. Id.
12. See id.
13. See id.
15. Stern & Goddard, supra note 9.
actions in an attempt to get involved in the fate of Terri Schiavo. Although noteworthy, the details of what occurred go beyond the scope of this paper and will be discussed only briefly.)

I. HISTORY OF THE "RIGHT TO DIE"

The power to determine whether a person should live or die is the most omnipotent power an individual may be given. The power is supreme in a determination of ending one's own life or that of a loved one. The finality and ramifications yield an immense question as to who has the power to determine when a person's life may end. Is the power vested in an individual, a loved one, the legislature, the courts, or perhaps the governor?

Advances in medicine have made it possible to prolong life. These advances have saved lives, but in other cases, the drawn out process of dying, has made it difficult to "die[ed] with dignity." In addition to the moral dilemma, prolonging lives has "added billions of dollars to our national health-care costs." Consequently, the question of when and under what circumstances life should be prolonged has been the center of tremendous "debate within the medical, legal, governmental, academic and religious communities and in the courts of our nation."

A. A Competent Individual's "Right to Die" or Right to Refuse Medical Treatment

Over a hundred years ago, Louis Brandeis and Samuel Warren stated in a Harvard Law Review article that there is a common law right of personal privacy, "the right to be let alone." In 1928, Justice Brandeis referred to "the right to be let alone" as the "most comprehensive of rights and the right most valued by civilized men." Despite its unquestioned importance, the right of "personal privacy" is not expressly referred to in the Constitution.

The right of privacy is an "unwritten constitutional right . . . found in the penumbra of specific guaranties of the Bill of Rights." The Bill of Rights
contains a number of guarantees which create a zone of privacy.\textsuperscript{26} The First, Third, Fourth, Fifth, and Ninth Amendments all contain language creating the right of privacy.\textsuperscript{27} The strongest language is found in the Fourth Amendment which provides the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."\textsuperscript{28} This protects individuals against all governmental invasions "of the sanctity of a man's home and the privacies of life."\textsuperscript{29} Therefore, although not specifically written, the Fourth Amendment creates a "right to privacy, no less important than any other right carefully and particularly reserved to the people."\textsuperscript{30}

Given its constitutional origin, the right to privacy has evolved into a broad power, encompassing numerous areas. As a result, a person may "preserve his or her right to privacy against unwanted infringements of bodily integrity in appropriate circumstances."\textsuperscript{31} The question then becomes: What are appropriate circumstances? The answer depends on an individual's condition and the proper identification of state interests.\textsuperscript{32}

A competent individual unquestionably has the right to refuse unwanted medical treatment.\textsuperscript{33} "The right to refuse treatment or to discontinue treatment is [derived from] a person's strong interest in being free from nonconsensual invasions of... bodily integrity."\textsuperscript{34} An individual can assert their constitutional right to privacy to preserve this interest.\textsuperscript{35} However, the right of a competent individual to refuse life-sustaining treatment is not an absolute right; it must be weighed against a number of legitimate state interests.\textsuperscript{36} States have differing views on the scope and nature of a state’s interests in various medical contexts.\textsuperscript{37} However, certain interests are common, including: "(1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession."\textsuperscript{38}

\textsuperscript{26} Griswold v. Conn., 381 U.S. 479, 484 (1965).
\textsuperscript{27} See id.
\textsuperscript{28} U.S. Const. amend. IV.
\textsuperscript{29} Griswold, 381 U.S. at 484 (quoting Boyd v. United States, 116 U.S. 616, 630 (1885)).
\textsuperscript{30} Id. at 485.
\textsuperscript{32} See id.
\textsuperscript{34} Id.
\textsuperscript{35} In re Spring, 405 N.E.2d 115, 119 (Mass. 1980).
\textsuperscript{36} See Pickering, supra note 18.
\textsuperscript{37} See Saikewicz, 370 N.E.2d at 424.
\textsuperscript{38} Id. at 425.
The most important state interest is “the preservation of human life.” As previously mentioned, the right of a competent individual to refuse unwanted medical treatment is not an absolute right. Every state has a paramount interest in preserving life, particularly when the individual is suffering from a treatable condition. However, when the state is seeking to protect the life of a competent individual who has refused treatment, the state’s concern is dramatically reduced. This is because a competent person is capable of protecting him or herself. Therefore, “[i]n cases where a competent adult refuses medical treatment for him or herself, the State’s interest in preserving the particular patient’s life will not override the individual’s decision.”

A state’s interest expands beyond the life and desire of a particular individual and encompasses the “sanctity of all life.” In determining the depth of this interest, we must consider what is important about life in general. Is it the physical aspect of living and existing, or are “free choice and self-determination the fundamental constituents of life?” A state can only protect the sanctity of life if it recognizes that an “individual [has the] right to avoid circumstances in which the individual . . . would feel that efforts to sustain life demean or degrade . . . humanity.” Ultimately, this means that a competent individual’s decision to refuse medical treatment has priority over the state’s interest in preserving the sanctity of life.

The state interest in preventing suicide is well established. Suicide is defined as “the voluntary and intentional killing of one’s self.” It could be argued that when an individual refuses medical treatment, that individual is expediting his or her demise, and therefore is intentionally killing him or herself. However, courts in the First Circuit have held that “declining [potentially] life-sustaining treatment may not properly be viewed as an

39. Id.
41. Id.
43. See id.
44. See id.
45. Id.
46. Id. at 1023.
47. Id.
48. Id.
49. Id.
50. Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 427 (1977); see also Norwood Hospital, 564 N.E.2d at 1023.
attempt to commit suicide.”52 The reasoning behind the ruling is that, by refusing medical intervention, an individual is simply permitting the disease to progress naturally.53 Therefore, when the person eventually dies, it would not be the result of a self-administered deadly blow, but instead, the natural consequence of the underlying medical condition.54 As a result, the right of a competent person to refuse medical treatment means that an individual, who could survive, may choose death, without legally committing suicide.

The third state interest involves maintaining the ethical integrity of the medical profession.55 Allowing a competent individual to refuse medical treatment does not have a negative impact on the integrity of the medical community.56 “[T]he doctrines of informed consent and right of privacy have as their foundations the right to bodily integrity, and control of one’s own fate, . . . th[ese] rights are superior to the institutional considerations.”57 Therefore, when an individual listens to a doctor’s advice and chooses a different path which may result in death, the consequence of the decision falls on the individual, not the doctor or the medical profession.58

Protecting innocent third parties who may be harmed by the patient’s treatment decision is the final state interest.59 This state interest restricts a competent individual’s right to refuse treatment “[w]hen the patient’s exercise of his free choice could adversely and directly affect the health, safety, or security of others.”60 Historically, this interest has been upheld in a number of circumstances.61 For example, the Supreme Court upheld a statute that forced individuals to undergo smallpox vaccinations to prevent the spread of the disease, thereby protecting public health.62 A narrower application is when a state intervenes to protect a competent individual’s minor child.63 However, the state’s interest in protecting a child is not very strong compared to an adult’s right to refuse medical treatment. In fact, “in

52. In re Conroy, 486 A.2d 1209, 1224 (N.J. 1985); see also Saikewicz, 370 N.E.2d at 426 n.11; Norwood Hospital, 564 N.E.2d at 1022.
53. In re Conroy, 486 A.2d at 1224.
54. Id.
55. Norwood Hospital, 564 N.E.2d at 1022; see also Saikewicz, 370 N.E.2d at 426.
56. See Norwood Hospital, 564 N.E.2d at 1023.
57. Saikewicz, 370 N.E.2d at 427 (citations omitted).
58. See Norwood Hospital, 564 N.E.2d at 1023 (citing In re Conroy, 486 A.2d 1209 (N.J. 1985)).
59. Saikewicz, 370 N.E.2d at 426.
60. In re Conroy, 486 A.2d at 1225.
61. See id. at 1225-26.
62. Id. at 1225 (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)).
63. Norwood Hospital, 564 N.E.2d at 1017, 1024.
the absence of any compelling evidence that the child will be abandoned, the State’s interest in protecting the well-being of children does not outweigh the right of a fully competent adult to refuse medical treatment.\textsuperscript{64}

Although courts have limited a person’s right to refuse medical treatment when such refusal created dangers to public health, courts give considerable deference to competent patients’ decisions. As previously asserted, there are specific state interests that must be addressed; however, an individual’s privacy rights typically supercede state interests. Even when a condition is curable and refusal of treatment will ultimately result in death, a competent person has the constitutional right to make that decision. Additionally, a competent person has the legal right to hasten his or her own death as long as the death is the natural result of an underlying medical condition. On the other hand, a legal line is drawn when an individual actively and intentionally terminates his or her own life by committing suicide.

B. An Incompetent Individual’s “Right to Die” or Refuse Medical Treatment

It is well established that “[e]very competent adult has a right ‘to [forgo] treatment, or even cure, if it entails what for [her] are intolerable consequences or risks however unwise [her] sense of values may be in the eyes of the medical profession.’”\textsuperscript{65} A balancing test is used to determine whether the individual’s interest outweighs the countervailing state interest.\textsuperscript{66} The right of privacy “is also extended to an incompetent person, to be exercised through a ‘substituted judgment’ on his [or her] behalf.”\textsuperscript{67}

Case law concerning the removal of life-sustaining technology for incompetent adults began in 1976 with the New Jersey case, \textit{In re Karen Ann Quinlan}.\textsuperscript{68} In 1975, Karen lapsed into a coma as caused by mixing alcohol and drugs.\textsuperscript{69} Due to two fifteen minute periods without oxygen, anoxia left Karen in a profoundly damaged state and most likely doomed to an irreversible “biologically vegetative remnant of life.”\textsuperscript{70} There was no treatment which could have cured or improved her condition; she would

\begin{itemize}
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{66} \textit{See In re Spring}, 405 N.E.2d 115, 119 (1980).
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} \textit{See Pickering, supra} note 18.
\item \textsuperscript{69} \textit{Wallis, supra} note 8, at 43.
\item \textsuperscript{70} \textit{In re Karen Quinlan}, 355 A.2d 647, 654, 662 (N.J. 1976).
\end{itemize}
never be restored to a state of awareness. As a result, Karen's father was allowed to discontinue the use of the life support apparatus. The New Jersey Supreme Court held that "Karen had a right of privacy grounded in the Federal Constitution to terminate treatment." After recognizing the right, "the court balanced it against asserted state interests. Noting that the State’s interest ‘weakens and the individual’s right to privacy grows as the degree of bodily invasion increases and the prognosis dims.’ Lastly, the Court determined ‘that the ‘only practical way’ to prevent the loss of Karen’s privacy right due to her incompetence was to allow her guardian and family to decide ‘whether she would exercise it in these circumstances.'

After In re Karen Ann Quinlan, hundreds of similar cases were brought in a number of states. However, instead of relying solely on the right of privacy, "most courts have based a right to refuse treatment either solely on the common law right to informed consent or on both the common law right and a constitutional privacy right."

In re Karen Ann Quinlan made it clear that an incompetent individual is afforded the same rights as a competent person. This rule seems simple enough; however, when a decision must be made for an incompetent person, the rule’s application may prove to be challenging. Unlike a competent individual who will endure the result of his or her own decision, an incompetent individual lives or dies because of another’s decision. As a result, the question of withdrawing treatment becomes more precarious when dealing with an incompetent individual.

In dealing with this difficult question, courts must first determine whether an individual is incompetent. Under Massachusetts General Laws, a determination of incompetence means, “the principal lacks the capacity to make or to communicate health care decisions. Such determination shall be made by the attending physician according to accepted standards of medical judgment.” The determination of an individual’s incompetence “should consist of facts showing a [person’s] inability to think or act for himself as to matters concerning his personal health, safety, and general welfare, or to make informed decisions as to his property or financial

71. See id. at 655.
72. Id. at 656.
74. Id. (citing In re Karen Quinlan, 355 A.2d at 664).
75. Id. at 271 (quoting In re Karen Quinlan, 355 A.2d at 664).
76. Pickering, supra note 18.
77. Cruzan, 497 U.S. at 271.
78. MASS. GEN. LAWS ANN. ch. 201D, § 6 (West 2004).
In the realm of medical treatment, incompetence denotes that the "patient lacks the capacity to make treatment decisions." In order for an individual to be declared incompetent, the court must determine that the person is unable to take care of him or herself "as to all the world." As a result, the court or a permanent guardian must stand in and make decisions regarding the patient’s best interests. The guardian position is not taken lightly and is held to a high standard of trustworthiness in exercising the authority to the optimal benefit of the incompetent individual.

The doctrine of substituted judgment provides incompetent individuals with the means to be heard and the ability to exercise their right to refuse and terminate unwanted medical treatment. Under the substituted judgment doctrine, the court must attempt to figure out what decision the incompetent person would have made if competent. "Ideally, both aspects of the patient’s right to bodily integrity, the right to consent to medical intervention and the right to refuse it, should be respected." The judge considers five factors in determining what an incompetent person would have decided: "[1.] the patient’s expressed preferences; [2.] the patient’s religious convictions and their relation to refusal of treatment; [3.] the impact on the patient’s family; [4.] the probability of adverse side effects; and [5.] the prognosis with and without treatment." As previously mentioned, a parent, spouse, or duly appointed guardian may provide effective consent for a patient to undergo whatever medical treatment the guardian believes will be in the patient’s best interest. A court’s determination that the patient is incompetent and unable to make the decision is a prerequisite to designating a guardian for surrogate decision-making. Incompetence cannot be presumed, "there must be some sort of due process, and if the patient has not been adjudicated to be

80. Id. (quoting Rogers v. Comm’r of the Dep’t of Mental Health, 458 N.E.2d 380, 314 (Mass. 1983)).
82. See id.
83. See id.
85. See id.
86. In re Conroy, 486 A.2d at 1229.
89. In re Conroy, 486 A.2d at 1240.
incompetent, he must be treated as competent.”90 Thus, if a guardian is appointed “under the ‘substituted judgment’ doctrine[,] . . . the guardian, like the court must seek to identify and effectuate the actual values and preferences of the [incompetent individual].”91

Again, an individual’s right to refuse treatment, although strong, is not absolute.92 Similarly, an incompetent individual’s “right to refuse treatment through the exercise of substituted judgment is not absolute.”93 The same important state interests protect an incompetent individual, such as: “(1) the preservation of life; (2) the protection of innocent third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession.”94 When state interests are addressed in regards to a competent individual, they become less influential because the decision maker is ultimately the party affected by the decision.

In the case of an incompetent individual, the legal standard is “a ‘preponderance of the evidence’ with an ‘extra measure of evidentiary protection’ [by reason of] specific findings of fact after a ‘careful review of the evidence.’”95 This heightened standard requires a judge to work painstakingly and give each case considerable reflection prior to entering a substituted judgment order.96 Judges cognizant of the severe consequences will only enter them after vigilantly reflecting on the evidence, entering specific findings on each factor, and balancing them against the various state interests.97

In summary, through the substituted judgment doctrine, incompetent individuals are given the right to refuse medical treatment in appropriate circumstances like competent individuals. These circumstances are determined by balancing the individual interests against opposing state interests, particularly the state’s interest in the preservation of life. However, unlike competent individuals, the treatment decision will affect persons unable to make the decision themselves. As a result, courts must look at a number of variables and satisfy a heightened standard of review to determine that the decision made is, in fact, the decision desired by the incompetent individual.

90.   Id.
91.   In re Spring, 405 N.E.2d at 121-22.
93.   Id.
94.   Id. at 1269.
95.   Guardianship of Jane Doe, 583 N.E.2d at 1271.
96.   See id.
97.   Id.
II. THE FIFTEEN-YEAR FIGHT OVER THE LIFE OF TERRI SCHIAVO

Michael Schiavo awoke on the morning of February 25, 1990 to find his wife collapsed in the hallw ay of their home.\textsuperscript{98} Theresa “Terri” Schiavo, age twenty-seven, suffered a cardiac arrest likely due to a potassium imbalance.\textsuperscript{99} Terri never regained consciousness, despite being immediately rushed to the hospital.\textsuperscript{100} Approximately one month later, Terri’s eyes opened. Although she appeared awake, she was unfortunately in “a persistent vegetative state.”\textsuperscript{101} Once she opened her eyes, she was completely dependent on a nursing home’s constant care.\textsuperscript{102} As part of her care, she was fed and hydrated by tubes, and the staff regularly tended to her most personal needs.\textsuperscript{103}

As the result of her heart stopping, Terri’s brain suffered oxygen deprivation, which resulted in a deterioration of her brain.\textsuperscript{104} In 1996, a CAT scan of Terri’s brain revealed “a severely abnormal structure” in which “much of her cerebral cortex [was] . . . gone and . . . replaced by cerebral spinal fluid.”\textsuperscript{105} Based on medical opinions the court concluded that “[m]edicine cannot cure [Terri’s] condition. Unless an act of God, a true miracle, were [sic] to recreate her brain, [she] w[ould] always remain in an unconscious, reflexive state, totally dependent upon others to feed her and care for her most private needs.”\textsuperscript{106}

The court found the evidence “overwhelming that Terri [wa]s in a permanent or persistent vegetative state . . . not simply a coma.”\textsuperscript{107} Conditions consistent with being in a coma are: (1) “Patients do not hear, see, communicate or show emotion; eyes are closed,” (2) “[t]he only movements are reflexive,” and (3) “[a] coma rarely lasts more than four weeks.”\textsuperscript{108} At the end of four weeks, patients have become conscious or have entered either a “vegetative” or a “minimally conscious” state.\textsuperscript{109} A patient in a permanent vegetative state will never recover, and may exhibit the following conditions: (1) “Patient’s eyes may open and close,” (2)
“[m]otor skills [such as] reflexive movement, withdrawal from pain,” and (3) “may show brief startle or orienting responses to visual and auditory stimuli, such as blinking at the sound of a handclap.”

Despite overwhelming and contrary evidence, Terri’s parents were not convinced and insisted that their daughter was not a vegetable. The Schindlers offered videos to support their stance that there was conscious life hidden behind Terri’s empty stare. In one video, Terri seemed to respond to her mother’s voice when she “gaze[d] in her mother’s direction from her hospital bed, and her expression bloom[ed] from slack-jawed passivity to beatific smile. She seem[ed] happy, comforted, [and] aware.” In another video, “she seem[ed] to follow the movements of a balloon with her eyes; in another, she appear[ed] to comply with a doctor’s request to open her eyes.” Terri’s doctors attempted to explain to the Schindlers that those motions were involuntary; however, they did not agree.

The Schindlers claimed to have fifteen doctors on record with the courts who suggested that Terri could and would improve. However, three of the five doctors who testified in court found her to be in a “classic vegetative state in which there [was] no chance for reversibility and no chance for treatment.” Ronald Cranford, an expert neurologist hired by Michael, denounced the videotapes offered by the Schindlers as “misleading and gimmicky.” The Director of Neuropsychology at the John F. Kennedy Medical Center, Joseph Giacino strengthened Dr. Cranford’s claim stating that there were numerous behaviors that appeared to be conscious but were simply reflexive or automatic. Dr. Bambakadis, a neurologist appointed by the court to make an independent evaluation, said “unfortunately, I know of no single treatment or combination of treatments that could result in . . . [her] meaningful improvement.”

Regardless of the renowned experts’ opinions in the medical profession that Terri would never recover, and did not and would not have function beyond involuntary reflexes, the Schindlers strongly believed that Terri had

110. Id.
111. See Dorf, supra note 16.
112. See generally Wallis, supra note 8, at 43.
113. Id.
114. Id.
115. See Dorf, supra note 16.
116. See Schiavo Suspects Bulimia, supra note 98.
117. Id.
118. Id.
119. Id.
a quality of life and could improve.

A. The Dispute Between Michael Schiavo and Terri’s Parents

Terri’s spouse, Michael, assumed decision making power over his wife’s treatment after he found her unconscious on the floor of their home.\textsuperscript{121} Michael asserted that he had done everything possible to bring his wife back, including allowing an operation to implant a brain stimulator, despite doctors’ predictions that it would not work.\textsuperscript{122} Michael proclaimed that years ago when watching a television program on terminal illness issues, Terri stated that she wanted neither to be kept alive through artificial means, nor to live in a severely compromised state.\textsuperscript{123} CNN’s Larry King Live show quoted Michael saying, “[t]his is Terri’s wish, this is Terri’s choice, and I am going to follow that wish if it is the last thing I can do for her.”\textsuperscript{124} Concerning his wife’s consciousness, Michael was convinced that “[t]here’s nothing there” and that Terri “wouldn’t have liked to have lived like this and that is all she’s doing — surviving.”\textsuperscript{125}

Terri’s parents contended that their daughter never expressed a wish to die rather than being kept alive artificially and they did not believe she would have ever said such a thing to Michael.\textsuperscript{126} Schindlers’ lawyer Patricia Anderson stated that “Terri never said, ‘If I become incapacitated, don’t help me out,’” and continued that “She never said, ‘Don’t give me a spoon.’”\textsuperscript{127} In addition, Terri’s parents adamantly believed that she was mentally cognizant and that her condition had the potential to be improved by advancements in medical technology.\textsuperscript{128}

Suspicion between Michael and the Schindlers further strained their relationship. They believed that the “other party [was] assessing Terri’s wishes, based on their own monetary self-interest.”\textsuperscript{129} Their suspicions arose out of a 1992 medical malpractice lawsuit by Michael as Terri’s guardian.\textsuperscript{130} The jury awarded $700,000 for Terri’s care and $300,000 to

\begin{itemize}
\item 121. Wallis, supra note 8, at 44.
\item 122. Schiavo Suspects Bulimia, supra note 98.
\item 123. Id; Wallis, supra note 8, at 44.
\item 124. Schiavo Suspects Bulimia, supra note 98.
\item 125. Phillips, supra note 120.
\item 127. Wallis, supra note 8, at 43.
\item 130. Id.
\end{itemize}
Michael for loss of companionship.\textsuperscript{131} The fund was to provide sufficient care for Terri; however, on her death, the remainder vested with Michael.\textsuperscript{132} Conversely, if divorce, the remainder would have gone to her parents.\textsuperscript{133}

The battle between Michael and "his in-laws began shortly after the $1 million award."\textsuperscript{134} The trial court found nothing in the record to suggest that either Michael or the Schindlers sought financial gain from their actions.\textsuperscript{135} Despite this finding, the animosity became increasingly bitter as the case progressed.\textsuperscript{136} Terri's parents asserted that Michael, after winning the lawsuit, "remembered that Terri had made some vague remarks about not wanting to be sustained on anything 'artificial' if she suddenly became incapacitated."\textsuperscript{137} They have suggested that Michael chose to spend the money on legal fees rather than providing Terri with the proper therapy that could have potentially improved her condition.\textsuperscript{138} In return, Michael accused the Schindlers of only being concerned with how much of their daughter's money he would give to them.\textsuperscript{139} The fact that Michael has a child with his live-in girlfriend fueled the negativity between the parties.\textsuperscript{140}

Despite the deep-seated animosity between Michael and his in-laws, the Florida Court of Appeals found that Terri had been "blessed with loving parents and a loving husband."\textsuperscript{141} The court pointed out that in similar circumstances, "[m]any patients in this condition would have been abandoned by their family and friends within the first year."\textsuperscript{142} As Terri's guardian, Michael had always tried to provide his wife the best possible care.\textsuperscript{143} Terri's parents also continued to "love her and visit her," and held on to hope for a "divine miracle" that could have led their daughter to recovery.\textsuperscript{144}

\begin{footnotes}
\footnote{131}{Wallis, \textit{supra} note 8, at 43.}
\footnote{132}{Schindler, 780 So. 2d at 178.}
\footnote{133}{\textit{Id}.}
\footnote{134}{Wallis, \textit{supra} note 8, at 44.}
\footnote{135}{Schindler, 780 So. 2d at 178.}
\footnote{136}{Wallis, \textit{supra} note 8, at 44.}
\footnote{137}{Stern & Goddard, \textit{supra} note 9.}
\footnote{138}{Wallis, \textit{supra} note 8, at 44; Schiavo Suspects Bulimia, \textit{supra} note 98.}
\footnote{139}{Schiavo Suspects Bulimia, \textit{supra} note 98.}
\footnote{140}{See Wallis, \textit{supra} note 8, at 44.}
\footnote{141}{Schindler v. Schiavo, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001).}
\footnote{142}{\textit{Id}.}
\footnote{143}{\textit{Id}.}
\footnote{144}{\textit{Id}. at 178.}
\end{footnotes}
B. The Legal Battle of Schiavo v. Schindler

In June of 1990, the same year that Terri was found unconscious, the United States Supreme Court held in *Cruzan v. Missouri Department of Health,* "a State must apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state." In other words, a patient in a persistent vegetative state could not be removed from life support unless there was clear and convincing evidence that the patient would wish to discontinue living in such a state.

Thirteen years later, in June of 2003, the Florida Court of Appeals addressed the same question addressed in *Cruzan,* in the case of Terri Schiavo. It would be the fourth time that the appeals court reviewed an order from the guardianship court in this ongoing controversial case. In total, nineteen judges in six different courts weighed the evidence and heard the arguments.

Typically, when a living will does not exist, the important decision is placed on a surrogate decision-maker, usually a spouse or close relative. In this case, however, because of opposing opinions, neither Terri’s husband nor her parents were able to make the final decision. The Schindlers claimed that Michael should not be allowed to make the decision because of the potential inheritance. The court found that the claim was invalid because most surrogate decision-makers would be in a position to inherit. However, recognizing the appearance of a conflict, Michael, as Terri’s guardian, invoked the trial court’s jurisdiction giving them the power to act as a surrogate decision-maker.

The trial court as a surrogate decision-maker essentially served as Terri’s guardian. “In circumstances such as these, when families cannot agree, the law has opened the doors of the circuit courts to permit trial judges to

151. *See* id.
152. *See* id.
153. *Id.*
154. *Id.*
155. *See* id. at 179. The court has the power to appoint a guardian ad litem, however in these types of cases, “a guardian ad litem would tend to duplicate the function of the judge, would add little of value to this process and might cause the process to be influenced by hearsay or matters outside the record.” *Id.*
serve as surrogates or proxies to make decisions about life-prolonging procedures." The trial court was obligated to exercise Terri’s right of privacy for her. "It is the trial judge’s duty not to make the decision that the judge would make for himself or herself or for a loved one." As a substitute, the trial judge must determine by clear and convincing evidence what decision Terri would have made for herself. As a result, the trial court was compelled to exercise the decision that Terri would have personally chosen. It was paramount that Terri’s wishes were upheld and that the court did not substitute its own personal preference. The decision had to be made with the utmost care and supported with clear and convincing evidence that the patient would have wanted to forego treatment. Clear and convincing is an extremely high standard of proof. However, it allows a decision despite inconsistent or conflicting evidence. When making the difficult determination, the court “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.”

Before exercising Terri’s right to privacy, the court had to answer an extremely difficult question. The court had to determine whether Terri, “not after a few weeks in a coma, but after ten years in a persistent vegetative state that has robbed her of most of her cerebrum and all but the most instinctive of neurological functions, with no hope of a medical cure . . . would wish to permit the natural death process.” In answering this question, the trial court concluded:

- Mrs. Schiavo’s medical condition was the type of end-stage condition that permits the withdrawal of life-prolonging procedures,
- she did not have a reasonable medical probability of recovering capacity so that she could make her own decision to maintain or withdraw life-prolonging procedures,
- the trial court had the authority to make such a decision when a conflict within the family prevented a qualified person from effectively exercising the responsibilities of a proxy, and

157. See Browning v. Herbert, 568 So. 2d 4, 13 (Fla. 1990).
158. Schindler, 851 So. 2d at 187.
159. Id.
160. Browning, 568 So. 2d at 13.
161. See id.
162. See id. at 15.
164. See id.
165. Id. at 179 (quoting In re Guardianship of Browning, 543 So. 2d 258, 273 (Fla. Dist. Ct. App. 1989)).
166. See id. at 180.
167. Id.
clear and convincing evidence at the time of trial supported a determination that Mrs. Schiavo would have chosen in February 2000 to withdraw the life-prolonging procedures.\textsuperscript{168}

In January 2001, the Florida Court of Appeals for the Second District affirmed the trial court’s decision and ordered the removal of life sustaining procedures from Terri Schiavo.\textsuperscript{169} The court found clear and convincing evidence that Terri would not have wanted to live in such a condition.\textsuperscript{170} The court concluded that when tragedy struck, “Theresa was very young, . . . very healthy, . . . [and] she had not prepared a will.”\textsuperscript{171} Case testimony established that the statements she had made “to her friends and family about the dying process were few and they were oral. Nevertheless, those statements, along with other evidence about Theresa, gave the trial court a sufficient basis to make this decision for her.”\textsuperscript{172} Therefore, the trial judge had clear and convincing evidence to support his ruling.\textsuperscript{173}

In June of 2003, the Florida Court of Appeals reviewed the decision to remove Terri’s nutrition and hydration tubes.\textsuperscript{174} The review was limited to an order denying a motion for relief from judgment.\textsuperscript{175} “The final judgment was entered several years ago and ha[d] already been affirmed by [the Florida Court of Appeals].”\textsuperscript{176} The fact that the Florida Supreme Court declined to review the case enhanced the decision’s finality.\textsuperscript{177} The Schindlers requested that the court conduct a \textit{de novo} review of the evidence because of the irrevocability of the decision.\textsuperscript{178} However, the court determined that abuse of discretion was the appropriate standard of review.\textsuperscript{179}

Even though the court made a determination with the proper standard of review, the court stated,

\begin{quote}
[w]e have repeatedly examined the videotapes . . . carefully observing the tapes in their entirety. We have examined the brain scans . . . considered the explanations provided by the doctors. . . . [and] if we were called upon to review the guardianship court’s decision \textit{de novo},
\end{quote}

\begin{footnotes}
\footnotetext{168.}{\textit{Id.} at 180.}
\footnotetext{169.}{Schindler v. Schiavo, 851 So. 2d 182, 183 (Fla. Dist. Ct. App. 2003).}
\footnotetext{170.}{\textit{Schindler}, 780 So. 2d at 180.}
\footnotetext{171.}{\textit{Id.} at 179-80.}
\footnotetext{172.}{\textit{Id.} at 180.}
\footnotetext{173.}{\textit{See id.}.}
\footnotetext{174.}{\textit{Schindler}, 851 So. 2d at 186.}
\footnotetext{175.}{\textit{Id.}}
\footnotetext{176.}{\textit{Id.} at 185-86}
\footnotetext{177.}{\textit{Id.} at 186.}
\footnotetext{178.}{\textit{Id.}}
\footnotetext{179.}{\textit{Id.}}
\end{footnotes}
we would still affirm it.\textsuperscript{180}

After due consideration, the Florida Court of Appeals ruled once more that the trial judge had “clear and convincing evidence to answer the question the way he did.”\textsuperscript{181} As a result, on June 6, 2003, the court remanded the case to the guardian court for a hearing to enter a new order that would effectuate Terri’s wishes by removing her nutrition and hydration tubes.\textsuperscript{182}

On Wednesday, October 15, 2003, the doctors removed Terri’s feeding and hydration tubes.\textsuperscript{183} Doctors estimated that Terri would survive a week to ten days without the tubes.\textsuperscript{184}

On Tuesday, October 21, 2003, Terri’s fate took a dramatic twist when troopers stormed into the “hospice and whisked away a helpless Terri Schiavo, taking her to a hospital where she again would be fed through a tube.”\textsuperscript{185} A crowd cheered wildly as the ambulance carried Terri to the hospital.\textsuperscript{186} Earlier that day, Florida lawmakers had rushed through a bill designed to keep her alive.\textsuperscript{187} House Bill 35E (HB-35E) authorized the Governor to issue a one-time stay to prevent the withholding of nutrition and hydration under specific circumstances; providing for expiration of the stay; authorizing the Governor to lift the stay at any time; providing that a person is not civilly liable and is not subject to regulatory or disciplinary sanctions for taking an action in compliance with any such stay; providing for the chief judge of the circuit court to appoint a guardian ad litem; providing an effective date.\textsuperscript{188}

The House voted seventy-three to twenty-four and the Senate voted twenty-three to fifteen in favor of the bill.\textsuperscript{189} The votes broke primarily along party lines as follows:

in the House, 67 Republicans and 6 Democrats voted for the law, while one Republican and 23 Democrats voted against it and 22 members did not vote. In the Senate, 20 Republicans and 3 Democrats voted yes,

\textsuperscript{180.} Id.
\textsuperscript{181.} Id.
\textsuperscript{182.} Id.
\textsuperscript{185.} Turley, supra note 1, at B1.
\textsuperscript{186.} Debate Grows in Right-To-Die Case, supra note 126.
\textsuperscript{187.} Associated Press, supra note 17.
\textsuperscript{189.} Debate Grows in Right-To-Die Case, supra note 126.
Governor Bush wasted no time and within an hour, he issued the order to have the feeding tube immediately reinserted. 191

The bill was designed to save Terri’s life, however medical ethicist, Dr. Joseph Fins, stated that “[a]fter six days, six and a half days of not being fed, not receiving hydration, there’s going to have been inevitab[le] damage and it’s just going to prolong the dying process.” 192 In addition, a number of legal experts and politicians questioned the constitutionality of a legislature giving the governor power to overrule the courts. 193

III. THE CONSTITUTIONALITY OF “TERRI’S LAW”

A. Is “Terri’s Law” Bold, Lifesaving Legislation or the Result of a “Tyranny of the Majority” which Violates the Constitution?

The immediate effect of HB 35-E led to the reinsertion of Terri’s feeding tube. 194 The lasting legal issue is whether the Florida Legislature has the power to create a law that empowers the governor to get involved in legal matters previously adjudicated by the courts. 195 In addition, it raises the question of whether Governor Bush violated Terri’s constitutional right to privacy when he ordered the reinsertion of her feeding tube. 196

HB 35-E is more commonly known as “Terri’s Bill” because it was strictly tailored to affect only Terri Schiavo. 197 The specific factors of HB 35-E are as follows:

Section 1. (1) The Governor may issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:

(a) The patient has no written advance directive;

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191. See Associated Press, supra note 17.
192. Debate Grows in Right-To-Die Case, supra note 126.
193. See Halifax, supra note 184.
195. See id.
196. See id.
197. Steve Geller, Why I Had To Vote No, SUN-SENTINEL, SATURDAY BROWARD METRO EDITION, Nov. 1, 2003, at 19A.
(b) The court has found the patient to be in a persistent vegetative state;

(c) That patient has had nutrition and hydration withheld; and

(d) A member of the patient’s family has challenged the withholding of nutrition and hydration.

(2) The Governor’s authority to issue the stay expires 15 days after the effective date of this act, and the expiration of that authority does not impact the validity or the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.198

Constitutional scholars believe that the law violated the Separation of Powers Doctrine and disregarded Terry’s right to refuse unwanted medical treatment.199 Conversely, proponents of the law like the American Center for Law and Justice, feel that when there is a life and death issue, there should be a heightened sense of caution.200 More specifically, the group feels that if the Governor has a right to supercede the court by staying executions, then the Governor has an analogous right to become involved “when family members disagree about life-ending decisions for loved ones who cannot speak for themselves.”201


The American Civil Liberties Union (ACLU) of Florida joined Michael Schiavo to challenge the constitutionality of HB 35-E, which overrode a number of judicial rulings and disregarded Terri’s right to make medical decisions regarding her health.202 Their position was that if HB 35-E was held constitutional, the “abuse of power” by Governor Jeb Bush and the Florida Legislature would create a dangerous precedent wherein politicians could set aside any judicial decisions that were unpopular.203

200. See id.
201. Id.
203. See id.
In their brief to the Pinellas Circuit Court, the ACLU and Michael Schiavo outlined a number of arguments, which sought to prove that the legislature does not have the constitutional power to pass laws that override court orders.\textsuperscript{204} The arguments included: (1) "The Legislature's unprecedented invasion of Terri Schiavo's right to control her health care treatment violates her constitutional rights."\textsuperscript{205} (2) "HB 35-E violates Florida's strict separation of powers and impermissibly usurps the judicial power."\textsuperscript{206} (3) "HB 35-E violates a host of other constitutional provisions."\textsuperscript{207}

2. The Florida Legislature and Governor Bush Violated Terri Schiavo's Constitutional "Right to Privacy"

Article I, section 23 of the Florida Constitution provides "an explicit textual foundation for those privacy interests inherent in the concept of liberty."\textsuperscript{208} As a result of this "fundamental right," every person in Florida has the right to determine what should be done with his or her own body.\textsuperscript{209} This right is extended to incompetent individuals through the use of a proxy or surrogate decision maker who is obligated to carry out the expressed wishes of the person.\textsuperscript{210}

When a legislative act interferes with an individual's right of privacy, it is presumed unconstitutional, unless the state has a valid reason.\textsuperscript{211} In addition, because "[t]he right of privacy is a fundamental right," the valid reason must serve a compelling state interest.\textsuperscript{212} If the state has a compelling interest then it must achieve its objective through the use of the "least intrusive means."\textsuperscript{213} The privacy right set fourth in the Florida Constitution "offers more protection from governmental intrusion" and "is much broader in scope than the privacy right afforded by the Federal

\textsuperscript{204} See id.
\textsuperscript{206} Brief for Petitioner at 22, Schiavo (No. 03-008212-CI-20).
\textsuperscript{207} Id. at 35.
\textsuperscript{208} Browning v. Herbert, 568 So. 2d 4, 10 (Fla. 1990) (quoting Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 536 (Fla. 1987)).
\textsuperscript{209} Id.
\textsuperscript{211} Id. at 508.
\textsuperscript{212} Brief for Petitioner at 8, Schiavo (No. 03-008212-CI-20) (quoting Browning, 568 So. 2d at 13-14).
\textsuperscript{213} Id. (quoting N. Fla. Women's Health & Counseling Servs., 866 So. 2d 612 (Fla. 2003)).
House Bill 35-E failed to provide a compelling state interest because its narrow focus strips one person of her right to privacy based on a governor’s standardless discretion. It did not show a compelling state interest, but instead showed the legislature and the governor’s desire to keep Terri on life-support despite her wishes. In addition, the legislation failed to provide safeguards against over-intrusiveness. Schiavo’s lawyers argued that:

No standards govern the family member’s challenge to the withholding of artificial nutrition and hydration – it can be for any reason, or no reason. The Governor’s power to override the individual patient’s judicially-affirmed choice is utterly standardless and unreviewable. . . . and no procedures exist for contesting it. Nor are there any criteria for lifting a stay.

House Bill 35-E gave more weight to the “standardless discretion of the Governor,” over the wishes of the patient. This staunchly contrasts Florida Statutes, Chapter 765, which offers a process where family members may plead their case to an unbiased court without arbitrarily depriving the patient of the right to refuse medical treatment.

Chapter 765.401 of the Florida Statutes recognizes that incapacitated individuals have the right to express their wishes through another person. When disputes erupt between family members over the wishes of the incompetent person, the courts have the power to adjudicate the matter. When this occurs, the judge acts like a proxy or surrogate, and based on the evidence, makes the decision on what the ward would have wanted. Chapter 765.401 and the court proceedings that followed resulted in identifying and protecting the wishes of Terri Schiavo.

This case was repeatedly heard by the trial court and was before the appellate court on numerous occasions. The courts heard “hundreds or thousands of hours of testimony from several doctors, scientists, family

214. Id. at 7 n.4 (quoting In re T.W., 551 So. 2d 1186, 1191-92 (Fla. 1989)).
215. Id. at 14-17.
216. Id. at 17.
217. Id. at 18.
218. Id. at 19.
219. Id. at 16.
220. Id.
221. Id. at 16 (citing FLA. STAT. § 765.401).
222. See id. at 12.
224. Brief for Petitioner at 12, Schiavo (No. 03-008212-CI-20).
225. Geller, supra note 197.
members and friends” before they ruled that there was clear and convincing evidence of Terri’s wishes.\textsuperscript{226} Despite these facts, Florida Senator Steve Geller believed that “[t]he Florida Legislature, without having heard one witness, without having reviewed one medical record, determined that we would overrule all of the judges, all of the testimony and the wishes of the next of kin, the husband.”\textsuperscript{227}

Until the passage of HB 35-E, Chapter 765.401 of the Florida Constitution protected the privacy rights of all Floridians.\textsuperscript{228} The legislation passed in Florida did not alter Florida Statute 765.401.\textsuperscript{229} Instead, “[i]t [g]rant[ed] the governor, in limited circumstances only, the ability to order feeding and hydration tubes reconnected.”\textsuperscript{230} In the long term, this law would take away the power of Florida judges to order the removal of feeding and hydration tubes.\textsuperscript{231} For Terri Schiavo, it meant that she was treated differently than all other Floridians, and as a result, was deprived of her fundamental right of privacy.\textsuperscript{232}

When the feeding tube was forced back into Terri’s body, she was deprived of her “right to refuse unwanted artificial life support,” in violation of both state and federal constitutions.\textsuperscript{233} “That right is reasonably well established as a matter of federal constitutional law under \textit{Cruzan} and very well established as a matter of Florida constitutional law under \textit{Browning}.”\textsuperscript{234} If the fact that HB 35-E was an intrusion on Terri’s right to refuse medical treatment was not enough to have a court strike it down, then the fact that HB 35-E violated both the Federal and Florida Constitution’s Separation of Powers should justify ruling the law unconstitutional.\textsuperscript{235}

3. “Terri’s Law” Violates the Separation of Powers of Both the Federal and Florida Constitutions

In 1788, Alexander Hamilton wrote in Federalist Paper No. 81, “[a] legislature without exceeding its province, cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for

\begin{itemize}
  \item \textsuperscript{226} \textit{Id.}
  \item \textsuperscript{227} \textit{Id.}
  \item \textsuperscript{228} \textit{See} Brief for Petitioner at 7-15, \textit{Schiavo} (No. 03-008212-CI-20).
  \item \textsuperscript{229} \textit{See} Geller, \textit{supra} note 197.
  \item \textsuperscript{230} \textit{Id.}
  \item \textsuperscript{231} \textit{Id.}
  \item \textsuperscript{232} \textit{Brief for Petitioner at 16, Schiavo} (No. 03-008212-CI-20).
  \item \textsuperscript{233} \textit{Id.} at 5-6.
  \item \textsuperscript{234} Dorf, \textit{supra} note 16.
  \item \textsuperscript{235} \textit{See} Geller, \textit{supra} note 197.
\end{itemize}
future cases.” Hamilton wrote these words because, like the other framers of the Constitution, he was aware of the irresistible propensity of politicians to intervene in individual cases. The framers of the Constitution understood that the test of any democratic system was its ability to restrain, not satisfy, the majority. As a result they drafted a Constitution that was designed to protect from “the tyranny of the majority over those who are unpopular or underrepresented.” The Federal Constitution protects from this type of tyranny by distributing power to three separate, independent branches of government.

Article III of the Constitution creates a “judicial department’ with the ‘province and duty . . . to say what the law is’ in particular cases and controversies.” “[T]he framers crafted this charter with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy.” In other words, if legislation “nullifies, suspends, or ‘reverses a determination, once made, in a particular case,’ it violates the separation of powers.” In Plaut v. Spendthrift, the United States Supreme Court recognized that the separation of powers applies in all cases regardless of the legislature’s reasoning. This point was emphasized by the opinion of Justice Antonin Scalia when he stated: “The prohibition is violated when an individual final judgment is legislatively rescinded for even the very best of reasons, such as the legislature’s genuine conviction (supported by all the law professors in the land) that the judgment was wrong . . . .”

The Separation of Powers Doctrine is an essential tool in structuring an organized, efficient government, and for providing citizens with the safeguards of liberty. These identical reasons prompted the drafters of the Florida Constitution to incorporate a three-branch system of government. However, as in the case with the right to refuse unwanted

236. Turley, supra note 1 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).
237. Id.
238. Id.
239. Id.
240. Brief for Petitioner at 23, Schiavo (No. 03-008212-CI-20).
242. Id.
243. Brief for Petitioner at 26, Schiavo (No. 03-008212-CI-20) (quoting Plaut, 514 U.S. at 219).
244. See Plaut, 514 U.S. at 228.
245. Id.
246. Brief for Petitioner at 23, Schiavo (No. 03-008212-CI-20).
247. See id.
medical treatment, the Florida Constitution "embodies a far stricter and more categorical approach to the separation of powers than does the U.S. Constitution."248

The Florida Constitution Article II, Section 3 states, "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers pertaining to either of the other branches unless expressly provided herein."249 Article II, Section 3 clearly lays out three separate, distinct branches of government, each with its own delineated powers and a decree that no branch may exercise their power over one of the other branches, nor may one branch be impeded by the appropriate use of power by another branch.250

The Florida Supreme Court has consistently protected the power of the judicial branch from infringements by the executive and legislative branches.251 In an advisory opinion to the Governor, the court stated, "[t]he executive branch has no authority nor can be given such authority by the legislature to review or oversee judicial decisions."252 If, as in Terri's case, "a statute purports to give one branch powers textually assigned to another by the Constitution,' then that statute is unconstitutional and it must be struck down."253 If parties to the litigation disagree with the decision handed down by the court, then "appeal is the exclusive remedy."254 When the Florida Legislature passed "Terri's Law," they disregarded the separation of powers doctrine and essentially gave the Governor the authority to act as a court of appeals.255

4. HB 35-E May Be an Unlawful Bill of Attainder

In addition to violating Terri's right to refuse medical treatment and the separation of powers, HB 35-E may have been an unlawful bill of attainder prohibited by Article I, Section Ten of the Florida Constitution.256 "A bill of attainder is a legislative act which inflicts punishment without a judicial

248. Id.
249. FLA. CONST. art. II, § 3.
250. Brief for Petitioner at 27, Schiavo (No. 03-008212-CI-20).
251. See id. at 26-27.
252. Id. (citing In re Advisory Opinion to the Governor, 213 So. 2d 716, 720 (Fla. 1968)).
253. Id. at 27 (quoting B.H. v. State of Florida, 645 So. 2d 987, 992 (Fla. 1994)).
254. Id. (citing In re Advisory Opinion to the Governor, 213 So. 2d 716, 720 (Fla. 1968)).
255. Dorf, supra note 16.
256. FLA. CONST. art. I, § 10.
In order for a law to be struck down as a bill of attainder it must: "(1) 'single[] out' a particular party, and (2) impose[] a 'punishment' on that party without a judicial trial." A bill of attainder violates the due process right to trial and separation of powers, because the legislative act takes the place of the courts' designated power to determine the outcome of a particular case. House Bill 35-E undisputedly "single[d] out" Terri Schiavo. The fact that she was not named specifically is inconsequential because "[t]he singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms... which... operate[] only as a designation of [a] particular person[]."

The element of punishment may be more challenging to prove given the fact that the objective of HB 35-E was to preserve Terri's life. However, Michael's lawyers point out, "the deprivation of any rights, civil or political, previously enjoyed, may be punishment." As previously discussed, Terri was deprived of her constitutional right to refuse medical treatment and furthermore was "forced to undergo an invasive medical procedure" to reinsert her feeding tube. If a court found that to be a punishment then HB 35-E would be an unlawful bill of attainder in violation of both the Florida and Federal Constitutions.

5. The Motivation Behind "Terri's Law"

One cannot help but ponder the question of why Governor Bush and the Florida Legislature would go to such extremes to overrule the court and reinsert Terri Schiavo's feeding tube. Some political analysts believe that Governor Bush's impetus was his Roman Catholic background, his anti-abortion stance, and his alleged passion for the "sanctity of life." Others like Mary Parker Lewis, Chief of Staff for Alan Keyes, felt that the vote was based on many people feeling that courts have too much power.

John Starkle, the member of the Florida House of Representatives who

259. Dorf, supra note 16.
261. Id. (quoting Cummings v. Missouri, 71 U.S. 277, 320 (1866)).
262. Id. at 37.
263. See id.
265. Id. (Alan Keyes is a conservative Republican who ran for president in 2000).
introduced HB35-E to the House, said he filed the legislation because he

questioned whether the laws as previously written provided the judiciary sufficient direction to address potential conflicts on the part of an incompetent patient’s guardian and contrary testimony on the part of the patient’s family. As an additional layer of protection for such vulnerable citizens, we have now authorized the Governor to consider such critical issues in appropriate cases.266

Lastly, religious conservatives feel that the prayer vigils, radio broadcasts, and thousands of email messages they sent to Florida lawmakers were a major factor in the passing of HB 35-E.267 The unrelenting pressure on the Florida legislature and Governor Bush consisted of daily talk shows which blamed Bush and the legislature for letting Terri Schiavo die, and picketers accused “Mr. Bush of murder.”268 In addition, innumerable emails threatened lawmakers that “they would be sorry if they did not stop the court-ordered removal of Mrs. Schiavo’s feeding tube.”269

The result of this unremitting pressure was perhaps accurately stated by Randall Terry who said, “[f]inally a governor and legislature had the courage to stand up to judicial despots because of an overwhelming call by the public.”270 Mr. Terry proclaimed, that “[t]he Republican Party wants to present itself as the pro-life, pro-family party . . . [t]his pro-life, pro-family Governor could not afford to not intervene in some way.”271 The fact that the vote on “Terri’s Law” in both Houses essentially broke along party lines272 suggests that there may be at least some truth to Mr. Terry’s claim.

Despite Mr. Terry’s reasoning, not all of the legislators voted because of religious reasons, said political science professor Susan MacManus; most seemed to be voting their conscience.273 This was evident in Senator Tom Lee’s statement, where after he reluctantly voted for the bill he stated, “I have never had a worse day as a senator, . . . [y]ou could feel how rotten people felt having to vote on this.”274

Regardless of the exact reasoning behind each legislator’s vote or the

266. Affidavit of John Starkle ¶ 8, Schiavo (No. 03-008212-CI-20).
268. See id.
269. Id.
270. Id. (Randall Terry is the founder of the anti-abortion group Operation Rescue).
271. Id.
272. See id. The combined vote for passing “Terri’s Law” was eighty-seven Republicans and nine Democrats, while seven Republicans and thirty-two Democrats voted against the law. Id.
273. Id.
274. Id.
motivation behind Governor Bush’s action, proponents of the law appeared delighted with the actions of the lawmakers. Mr. Terry referred to the law as a “crack in the wall” and expressed his intent to use the victory to “chip away at court rulings allowing abortion and banning organized prayer in schools and the posting of the Ten Commandments in public schools.”

In addition to the joy experienced by the conservative right, many people were thrilled that Terri’s life had been saved. However, without question, the person happiest with the law was Terri’s father, who said “[i]t’s restored my belief in God.”

IV. TERRI’S FATE WAS DETERMINED BY THE COURTS

A. “Terri’s Law”: An Invaluable Tool for Attacking Court Rulings or Unconstitutional Legislation?

State Senator Steve Geller expressed fear that “Terri’s Law” could lead to a “precedent where anytime the legislature and governor get inundated with letters about one person, we will pass legislation to affect that person.” The Senator was not alone; many legal experts felt that Governor Bush and the Florida legislature went too far. Lars Noah, a University of Florida law professor said that the law is “unprecedented and it’s dangerous.”

Professor Noah feels that the integrity of judicial authority is dependent on people accepting court judgments as final.

Former Supreme Court Justice Gerald Kogan stated that “[t]his particular administration has not yet understood why we have a separation of powers . . . . They seem to believe that the governor and the Legislature can do whatever they want and the courts should not interfere and that’s not right.”

This point was further articulated by Harvard Law Professor Laurence Tribe, who said, “I’ve never seen a case in which the state legislature treats someone’s life as a political football in quite the way this is being done.”

Ironically, the decision of whether the legislature can pass a law that essentially overrules a judicial decision and deprives a person of her right to privacy was decided by the court. On May 6, 2004, Judge Baird entered

275. Id.
277. Geller, supra note 197.
278. See Stern & Goddard, supra note 9.
279. Id.
281. Id.
282. Id.
a final summary judgment in favor of Michael Schiavo. Judge Baird found that chapter 418 of the Florida Laws "was unconstitutional on its face as an unlawful delegation of legislative authority and as a violation of the right to privacy, and unconstitutional as applied because it allowed the Governor to encroach upon the judicial power and to retroactively abolish Theresa's vested right to privacy." 

B. "Terri's Law" goes to the Florida Supreme Court

As expected, Governor Bush appealed and "[t]he Second District Court of Appeals certified [the] case as one of great public importance and requiring immediate resolution by [the Florida Supreme Court]." In September 2004, the Florida Supreme Court addressed Bush v. Schiavo, and 2003 Fla. Laws ch. 418. In their written opinion, the court made extremely clear that they were not going to address previous decisions by the guardianship court or the multiple decisions delivered by the Second District pertaining to the removal of Terri's nutrition and hydration tubes. Instead, the primary focus of the court's decision was on whether chapter 2003-418 violated the express separation of powers provision in the Florida state constitution.

The Florida Constitution, like the U.S. Constitution, divides the balance of power among the three co-equal branches of government. The three branches are guided by two fundamental prohibitions that have been strictly upheld by the Florida courts. "The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power."

I. Terri's Law was a Clear Encroachment on the Authority of the Judicial Branch

The Florida Supreme Court held that the judicial determination made in Schiavo v. Schindler was properly rendered, based on undisputed facts and full access to the judicial system. Based on these facts, the Governor was

284. Id. at 324 n.1.
285. Id. at 328.
286. Id.
287. FLA. CONST. art. II, § 3.
288. See Bush, 885 So. 2d at 329.
289. Id.
290. Id. at 331.
not entitled to review the judicial accuracy of the decision.\textsuperscript{292} When the Governor issued the executive order, which led to the reinsertion of the hydration and nutrition tubes, he did more than review a judicial decision. Instead, Governor Bush's executive order "effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary."\textsuperscript{293} As in this case, any act passed by a legislature, which gives the executive branch this unconstitutional power is per se unconstitutional.\textsuperscript{294} The court found that chapter 2003-418 granted this exact type of authority to the Governor and was therefore, unconstitutional.\textsuperscript{295}

2. Terri's Law was an Unconstitutional Delegation of Judicial Authority

In addition, the court held that chapter 2003-418 was an unconstitutional act "because it delegates legislative power to the Governor."\textsuperscript{296} Article II, Section 3 prohibits the legislature from "delegat[ing] the power to enact a law or the right to exercise unrestricted discretion in applying the law."\textsuperscript{297} Chapter 2003-418 provides that the governor has the

"authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient"... but, he is not required to do so. Likewise, the act provides that the Governor "may lift the stay... at any time. The Governor may revoke the stay upon a finding that a change in the condition of the patient warrants revocation."\textsuperscript{298}

The significant problem with this part of the Act is that there are no "directions or guidelines" provided, which the Governor must follow when exercising this "delegated authority."\textsuperscript{299} Instead, the Governor is granted "unfettered discretion to determine what the terms of the Act mean and when, or if, he may act under it."\textsuperscript{300} Terri's Law "allows the governor to act 'through whim, show [] favoritism, or exercise unbridled discretion,' and is therefore an unconstitutional delegation of authority."\textsuperscript{301}
alternative would be that "Terri’s Law" would provide the Governor with the power to act as he wished and in a manner essentially unreviewable by the courts. 302

3. Terri’s Law was Unconstitutional

In determining the constitutionality of "Terri’s Law," the Florida Supreme Court did not take lightly the tragic set of events of the case. 303 Like the many judges before them who had made similar difficult decisions in the case of Terri Schiavo, they too were forced to disregard their hearts and emotions and let the laws of the nation drive them to their determination. 304 In doing so, the court held that the "trial court’s decision . . . was made in accordance with procedures and protections set forth by the judicial branch in accordance with the statutes passed by the Legislature in effect at the time. That decision is final and the Legislature’s attempt to alter that final adjudication is unconstitutional." 305 The Court added that if such Acts were allowed,

[n]o court judgment could ever be considered truly final and no constitutional right truly secure, . . . [v]ested rights could be stripped away based on popular clamor. The essential core of what the Founding Fathers sought to change from their experience with English rule would be lost, especially their belief that our courts exist precisely to preserve the rights of individuals, even when doing so is contrary to popular will. 306

Despite the decision by the Florida Supreme Court, Governor Bush did not concede. On December 4, 2004, Bush’s lawyers appealed to the United States Supreme Court. 307 The Governor’s attorneys argued that the Florida Supreme Court had misapplied the separation of powers principle and by doing so they had violated the Governor’s and his ward’s Due Process and Equal Protection rights under the 14th Amendment. 308 On January 24, 2005, the United States Supreme Court denied Governor Bush’s petition. 309

Even after the Florida Supreme Court found "Terri’s Law" unconstitutional, the Schindlers found a ray of hope in a “substantial new
development,” that had occurred in the teachings of the Roman Catholic Church.\textsuperscript{310} Unfortunately for the Schindlers, the promise brought forth by the Papal declaration from Pope John Paul II was snuffed out on December 29, 2004, when the Florida Second District Court of Appeals affirmed a circuit court decision refusing to order a new trial based on the “substantial new evidence.”\textsuperscript{311}

The Schindlers appeared to be out of legal options when the Florida Appeals court on March 17, 2005, affirmed the trial court’s “order requiring the removal of life-sustaining procedures effective Friday, March 18, 2005.”\textsuperscript{312} Absent a miracle or perhaps an act from Congress, Terri’s feeding tube would be removed for the third time.\textsuperscript{313}

C. Terri’s Feeding Tube was Removed for the Last Time

On March 18, 2005, Terri’s feeding tube was removed for the last time.\textsuperscript{314} Although it appeared to be the beginning of the end, the next thirteen days would prove to be the most unbelievable. “On [Monday] March 21, 2005 ... the House and Senate agreed on a bill that let[] the case be heard in federal court.”\textsuperscript{315} President Bush, “flew to Washington from his Crawford, Texas, ranch, expressly to sign the Schiavo bill, which he did just after 1 a.m. Monday.”\textsuperscript{316} The last minute legislation proved to be ineffective. Although remarkable and unprecedented it led to immediate rejections from federal judges all the way up to the U.S. Supreme Court.\textsuperscript{317}

The defendants believed that the legislation passed in the U.S. Congress and signed by the President was unconstitutional in several respects, much like its predecessor, “Terri’s Law.”\textsuperscript{318} The federal courts did not address the issue of constitutionality; instead, it applied the “pre-existing and well-established federal law governing injunctions as well as Pub. L. No. 109-3.”\textsuperscript{319} In doing so, the United States District Court ruled that “Plaintiffs

\textsuperscript{310} Appellants’ Initial Brief at 12, Schindler v. Schiavo, No. 90-9208-GD-003, 12 (Nov. 22, 2004) (“Pope John Paul II declared that the ‘administration of food and water, even when provided by artificial means ... [is] not a medical act.””).


\textsuperscript{313} Campo-Flores et al., supra note 4.

\textsuperscript{314} Mitch Frank, The Legal Struggle, TIME, Apr. 4, 2005, at 24.

\textsuperscript{315} Id. Pub. L. No. 109-3, which Congress enacted to enable them to bring this lawsuit, mandates that injunctive relief be granted to enable them to have a full trial on the merits of their claims. Schiavo ex rel. Schindler v. Schiavo, No. 05-11556, 2005 WL 648897, *2 (11th Cir. 2005).

\textsuperscript{316} Campo-Flores et al., supra note 4.

\textsuperscript{317} See id.

\textsuperscript{318} Schiavo ex rel. Schindler, 2005 WL 648897, at *2.

\textsuperscript{319} Id. at *5.
ha[d] not established a substantial likelihood of success on the merits," therefore, the Motion for a Temporary Restraining Order was denied. 320

The U.S. Supreme Court refused to hear an emergency petition by the Schindlers late Wednesday night, March 30. 321 Thursday morning, March 31, 2005, Terri died. 322

V. CONCLUSION

On February 25, 1990, Terri Schiavo, tragically left the conscious world and lingered for the next fifteen years in an unimaginable existence. Terri’s husband and parents, both of kind heart and well intentioned, also lingered in a different, but equally, unimaginable existence. For Michael it was fifteen years of fighting for what he said Terri would have wanted — to die and be released from her vegetative state. For Terri’s parents, it was fifteen years of hanging on to a shred of hope that someday, a miracle would occur and release Terri from her dire condition. That shred of hope was strengthened by their vehement belief that Terri was not in a vegetative state, but was responsive and knew what was going on around her.

For both Michael and the Schindler’s the years were filled with more courtroom drama and heartbreak than most could endure. What began in guardianship court matriculated through the Florida and federal court systems, up to the United States Supreme Court. For Michael, each legal victory was marred by an appeal, a court order, or even emergency legislative acts designed specifically for Terri. Conversely, the Schindlers, despite loss after loss, never gave up hope. Even when their daughter lay on the edge of death, six days without nutrition or hydration, and the Governor intervened preventing her certain death.

On March 31, 2005, Terri Schiavo, age forty-one, died thirteen days after her feeding tube was removed. 323 The bitter battle over keeping Terri alive had ended. In the end, there will always be doubt about what Terri would have truly wanted. "But one thing is certain: [Terri] would never have wanted her loved ones to rip each other apart, as they have for more than a decade. And she surely would have shuddered at the sight of the ghoulish spectacle that her ordeal became." 324

It is difficult to answer the emotional and moral questions that this case has highlighted; in all likelihood it is an individual determination that we must make for ourselves. However, from a legal perspective the United

320.  Id. at *19.
321.  See Sosa, supra note 5. The Supreme Court refused to hear the case of Terri Schiavo six times since 2001. Id.
322.  See id.
323.  Id.
324.  Campo-Flores et al., supra note 4.
States Appeals Court answered the question definitively when it stated:

There is no denying the absolute tragedy that has befallen Mrs. Schiavo. We all have our own family, our own loved ones, and our own children. However, we are called upon to make a collective, objective decision concerning a question of law. In the end, and no matter how much we wish Mrs. Schiavo had never suffered such a horrible accident, we are a nation of laws.325

Ultimately, this heartrending case, although based on emotion, was decided by law. Thankfully, the integrity of both the Florida and U.S. Constitutions has been maintained, at least for now.

William Thompson