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## Pangloss

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# Pangloss

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Constitutional law can be conceived as a complex of ordinary understandings – widely held assumptions, straightforwardly framed (if not always consistent). But constitutional law might also be thought of as an intensive resource, a body of materials available for close arguments, complex formulations, ongoing criticism: recurring contests and reformulations. Constitutional law may take either demotic or esoteric forms. In some instances ordinarily understood constitutional law and intensively explored constitutional law diverge. The *Schiavo* controversy, I think, supplies one example. Around the time Congress acted to grant federal courts jurisdiction over the matter, critics claimed that this legislation obviously flouted basic constitutional norms. After federal judges seemingly refused to exercise this new authority, other critics contended that the judges not only acted impertinently, but also ignored the well-established constitutional division of responsibilities. In this Article – which will likely strike its readers as intensive and esoteric – I claim that Congress acted constitutionally and that the federal judges rightly put to use the protective jurisdiction that Congress had granted them. It turned out, though, that the constitutional problem that appeared to justify congressional intervention had already been addressed – in a surprisingly bold way – by Florida state court judges interpreting state law.

We do not live in a constitutional law equivalent of the best of all possible worlds. The arguments that I sketch here should not be attributed to Congressman Tom DeLay (if he was indeed the moving force in Congress) or any of the other participants in the *Schiavo* legislative clan-gor. Almost certainly, there was no congressional-judicial consensus in fact. This Article is an entirely academic exercise. Its value may lie in the independent worth (if any) of its assembled formulations of U.S. and Florida constitutional law. The discussion of Fourteenth Amendment “equal protection of the laws” is perhaps especially provocative.

## I. THE RETROACTIVITY PROBLEM

It is not at all surprising that the hurried congressional enactment granting federal district court jurisdiction to hear arguments raised by Terri Schiavo’s parents appeared to be constitutionally dubious. The

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legislation addressed only a single case seemingly finally adjudicated in state courts.<sup>1</sup> Thomas Cooley summarized what was already conventional wisdom in 1868:

[L]egislative action cannot be made . . . to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which the parties might appeal when dissatisfied with the rulings of the courts.<sup>2</sup>

Cooley's *Constitutional Limitations* discussed attempts of state legislators to revise the decisions of state courts.<sup>3</sup> In *Plaut v. Spendthrift Farm*,<sup>4</sup> Justice Scalia echoed Judge Cooley in holding that Congress violated basic separation of powers principles by attempting to revive cases that federal courts had previously dismissed pursuant to the then-applicable statutes of limitation. "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 . . . that the judgment was wrong . . . ."<sup>5</sup> Why should the same conclusion not follow if Congress acted to reopen state court determinations via new federal court proceedings?<sup>6</sup> Judge Birch, writing in one of the federal proceedings undertaken pursuant to the *Schiavo* jurisdictional enactment, argued as much: "Manifestly, because the Act applies only to this case it lacks

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1. See An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, § 1, 119 Stat. 15 (2005).

2. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 94 (Lawbook Exchange 1999) (1868). On Cooley and constitutional law as common understanding, see PAUL CARRINGTON, STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION 9-10, 33, 35, 56-57 (1999).

3. See also *Bush v. Schiavo*, 885 So. 2d 321, 332 (Fla. 2004) ("[I]t is without question an invasion of the authority of the judicial branch for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination in a case.").

4. 514 U.S. 211 (1995).

5. *Id.* at 228 (emphasis omitted).

6. In *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461 (2004), Justice Ginsburg wrote for a majority of the Supreme Court, upholding the EPA's power under the Clean Air Act to issue stop orders (with respect to a particular question arising under the Act) directed at ongoing state administrative hearings that the EPA concluded were proceeding in error. Justice Kennedy dissented, joined by three other Justices, arguing that the majority's analysis extended to cases involving state judicial proceedings as well as agency action.

Under the majority's holding, decisions by state courts would be subject to being overturned, not just by any agency, but by an agency established by a different sovereign. We should be reluctant to interpret a congressional statute to deny to States the judicial independence guaranteed by their own constitutions. . . . For States to have a role, . . . their own governing processes must be respected.

*Id.* at 512-13 (Kennedy, J., dissenting).

the generality and prospectivity of legislation that comports with the basic tenets of the separation of powers.”<sup>7</sup>

U.S. Supreme Court decisions, however, show that retroactive legislation reopening particular cases is not always unconstitutional. In *Miller v. French*,<sup>8</sup> for example, the Court held that a statutory automatic stay was constitutional notwithstanding its effect on a previously issued judicial injunction. “Prospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law.”<sup>9</sup> Writing subsequently, Tenth Circuit Judge McConnell explained decisions like *Miller* especially clearly:

Within the scope of its enumerated powers, Congress has authority to enact laws to govern matters of public right, . . . and authority to change those laws. Even when the Judiciary has issued a legal judgment enforcing a congressional act – for example, by a writ of injunction – it is no violation of the judicial power for Congress to change the terms of the underlying substantive law. The purpose of an injunction is to define and enforce legal obligations, not to freeze them into place. Thus, when Congress changes the laws, it is those amended laws – not the terms of past injunctions – that must be given prospective legal effect.<sup>10</sup>

The judicial order at issue in the *Schiavo* controversy was a version of an injunction. As a matter of Florida law, in cases turning on the wishes of comatose individuals, “courts are always open to adjudicate legitimate questions pertaining to the written or oral instructions.”<sup>11</sup> But Congress expressly declared that it was not changing applicable substantive law.<sup>12</sup> *Plaut* should control and not *Miller*, right? *United States v. Klein*<sup>13</sup> is often thought to hold that Congress cannot “direct[ ] decisions in pending cases without amending any law.”<sup>14</sup> *Klein* is controversial, however.<sup>15</sup> *Klein* involved a federal judicial action and not a state court

7. *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1274-75 (11th Cir. 2005) (Birch, J., concurring).

8. 530 U.S. 327 (2000).

9. *Id.* at 344.

10. *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1165 (10th Cir. 2004).

11. *In re Guardianship of Schiavo*, 780 So. 2d 176, 179 (Fla. 2d Dist. Ct. App. 2001).

12. An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, § 5, 119 Stat. 15 (2005) (“Nothing 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.”).

13. 80 U.S. 128 (1872).

14. *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 441 (1992).

15. *See, e.g., id.* (“we need not consider whether this reading of *Klein* is correct”); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 339 (5th ed. 2003) (*Klein* “raises more questions than it answers”). For close contrasting discussions of *Klein* in the *Schiavo* context, see Evan Caminker, *Schiavo and Klein*, 22 CONST. COMMENT. 529 (2005), and Edward A. Hartnett, *Congress Clears Its Throat*, 22 CONST. COMMENT. 553, 570-81 (2005).

proceeding (like the *Schiavo* case). Should this matter?<sup>16</sup>

## II. FEDERAL QUESTION JURISDICTION AFTER *CRUZAN*

These questions point to a question even more basic: which provision of the U.S. Constitution authorized Congress to enact the *Schiavo* jurisdictional grant? The list of possible grounds for exercise of federal judicial power set up in Article III, Section 2, supplies Congress with a menu.<sup>17</sup> Granting Article III courts the ability to adjudicate entirely state law controversies is an available option given, for example, diversity of state citizenship as between parties – a circumstance not present in the *Schiavo* case. The *Schiavo* grant, it appears, fits constitutionally only if it falls within the compass of Article III, Section 2's federal question jurisdiction – "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under Their Authority." Congress is not, of course, free to define whatever it wants to be a federal question. The constitutional key, Justice Frankfurter observed in *Lincoln Mills*, is "the presence of some substantial federal interest, one of greater weight and dignity than questionable doubt concerning the effectiveness of state procedure."<sup>18</sup> The *Schiavo* statute needs, therefore, some evident constitutional footing (absent, of course, a pertinent statutory right of action).<sup>19</sup>

How could any constitutional provision other than Article III, Section 2, be relevant if Congress did not change underlying substantive law in the *Schiavo* case? This question suggests another: why didn't Congress affirmatively legislate – in some obviously substantive way – pursuant to the grant of power set out in Section 5 of the Fourteenth Amendment?<sup>20</sup> The *Schiavo* controversy, after all, plainly put in conflict conceptions of life and liberty and, thus, the meaning – within the context of the decision whether to withdraw life support – of due process of law. The Supreme Court acknowledged as much years earlier in

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16. Federalism principles, it might be thought, are the equivalent of Article III in this context. "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992).

17. See also U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1.

18. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 483-84 (1957) (Frankfurter, J., dissenting). Concerning the long lasting, if fitful debate regarding "protective jurisdiction," the foil for Justice Frankfurter's formula, see FALLON, MELTZER & SHAPIRO, *supra* note 15, at 847-55.

19. Article III, Section 2, cannot itself count as the basis of a constitutional claim (that would be too circular). See Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 190 n.42 (1953).

20. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

*Cruzan v. Director, Missouri Department of Health*.<sup>21</sup> But the Court, we all know, has frequently viewed congressional assertions of Section 5 authority with considerable skepticism. Especially since *City of Boerne v. Flores*,<sup>22</sup> Justices writing majority opinions (even if only bare majority opinions) have repeatedly declared that congressional assertions of violations of Section 1 of the Fourteenth Amendment – the due process and equal protection requirements, for example – have to be manifestly grounded in a legislative record demonstrating sufficiently widespread, sufficiently obvious transgressions.<sup>23</sup> Because of the brief period before which congressional action would become too late in the *Schiavo* matter, the time needed for proper record building may have precluded development of a substantive formula to be put to use by federal courts assessing the Florida law for Section 5 purposes. We also all know, however, that the Supreme Court is less demanding if legislation pretty much tracks the Court's own understandings of Fourteenth Amendment priorities.<sup>24</sup> Why was it not possible, if the *Cruzan* decision was an available template, to frame a workable congruent formula for federal review in the *Schiavo* case?<sup>25</sup>

*Cruzan* upheld a Missouri requirement that, before a court could approve withdrawal of life support from an unconscious individual, there must be clear and convincing evidence that the individual, if conscious, would indeed choose to refuse life support in the circumstances at hand. On the record as it then stood, Missouri courts ruled that evidence of Nancy Cruzan's wishes (as expressed before her automobile accident) did not meet the standard.<sup>26</sup> Chief Justice Rehnquist's majority opinion concluded that the clear and convincing evidence requirement did not violate the Fourteenth Amendment Due Process Clause.<sup>27</sup> The individual's potentially conflicting constitutional interests in life

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21. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277-81 (1990).

22. 521 U.S. 507 (1997) (reviewing the Religious Freedom Restoration Act).

23. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

24. See, e.g., *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

25. For arguments that the *Cruzan* and *Schiavo* cases are indistinguishable, see Edward J. Larson, *From Cruzan to Schiavo: Similar Bedfellows in Fact and at Law*, 22 CONST. COMMENT. 405 (2005).

26. Further development of the record later led Missouri courts to the opposite conclusion. See *id.* at 408.

27. Discussing congressional power in the *Schiavo* case, Michael Paulsen eloquently outlines a procedural due process right to a "beyond a reasonable doubt" standard – a right that he suggests *Cruzan* did not address because of the focus there on substantive due process. Michael Stokes Paulsen, *Killing Terry Schiavo*, 22 CONST. COMMENT. 585, 588-90 (2005); see *id.* at 586-87. It is not clear, we may think, that the "what process is due" inquiry is anything other than one version of substantive due process analysis. Professor Paulsen does not, in any case, attempt to fit his narrow reading of *Cruzan* within the parameters of the Supreme Court's Section 5 decisions.

and liberty justified the state's decision to proceed carefully – if the individuals interest in choosing for herself was therefore burdened, it was done in the service of protecting her interest in life (an interest that the state itself could properly take seriously).<sup>28</sup>

*Cruzan* was not a case in which family members disagreed about a comatose individual's wishes. But several of the Justices who wrote opinions plainly anticipated the prospect of family conflict. Chief Justice Rehnquist emphasized that the choice was the individual's and not one belonging to her or his family members, noting the possible conflicts of interest family members might confront.<sup>29</sup> The need to be sure that the choice was really the individual's rather than the family's contributed to justifying Missouri's use of the clear and convincing evidence standard.<sup>30</sup> Justice Brennan, dissenting, treated conflicts of interest as an only occasional problem, readily solved through the appointment of a guardian *ad litem*.<sup>31</sup> Brennan stressed the importance of a trial judge hearing testimony from a wide range of family and friends about what they knew of an unconscious individual's beliefs, however informally those beliefs might have been expressed. An encompassing inquiry of this sort would be the surest means of developing a sufficient sense of the individual's preferences (this inquiry, he thought, rendered a heightened standard of proof unnecessary and thus arbitrary).<sup>32</sup> Justice Stevens, also dissenting, argued that even if efforts to determine what an unconscious individual's "choice" would have been prove to be pointless,<sup>33</sup> it would nonetheless be possible to assess "[t]he best interests of the individual."<sup>34</sup> Careful judicial inquiry should be adequate to the task. "It may be that the best we can do is to ensure that these choices are made by those who will care enough about the patient to investigate his or her interests with particularity and cau-

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28. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 281-83 (1990).

29. Chief Justice Rehnquist posed this possibility:

Close family members may have a strong feeling – a feeling not at all ignoble or unworthy, but not entirely disinterested, either – that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent.

*Id.* at 286.

30. See *id.* at 280-81.

31. *Id.* at 318 (Brennan, J., dissenting); see *id.* at 328 n.23.

32. "The testimony of close friends and family members . . . may often be the best evidence available of what the patient's choice would be. It is they with whom the patient most likely will have discussed such questions and they who know the patient best." *Id.* at 325.

33. See *id.* at 352 (Stevens, J., dissenting).

34. See *id.* at 350, 352.

tion.”<sup>35</sup> Stevens, it appears, treated judges as ultimately responsible for determining the “best interests” of the comatose individual – and as entirely capable of taking on that task.<sup>36</sup>

Florida like Missouri fixed the clear and convincing evidence test as the standard pertinent for judging whether an individual now unconscious would wish to refuse life support.<sup>37</sup> The *Schiavo* controversy, it seemed, concerned the state of the record; more precisely, whether Terri Schiavo’s parents had introduced evidence, or had been denied the opportunity to introduce evidence – additional tests, biographical detail, and the like – that had or would have sufficiently complicated the question of what Terri Schiavo wanted. If the trial judge was understood as artificially restricting the range of inquiry, the approach that Justice Brennan outlined in his *Cruzan* dissent might be read as supporting the arguments and criticisms of Terri Schiavo’s parents. Brennan’s dissent, however, is plainly not – by itself – an authoritative indicator of well-established constitutional law that Congress could straightforwardly enforce via Section 5 of the Fourteenth Amendment.<sup>38</sup> The *Cruzan* majority opinion, moreover, did not declare the “clear and convincing evidence” requirement to be constitutionally necessary; rather, Chief Justice Rehnquist held only that this standard of proof was not unconstitutional.<sup>39</sup> Due process of law, as the Supreme Court understood it, acknowledged the possibility that states might adopt other, differing reconciliations of the conflicting individual interests in life and liberty.<sup>40</sup> It would be difficult for Congress, obviously, to purport to legislate in the name of due process of law if it simply substituted one entirely constitutional approach for another.

### III. THE FLORIDA STRUCTURE

*Back to basics:* If the *Schiavo* legislation finds constitutional authorization in the Fourteenth Amendment, it must be plausibly understandable as a congressional response to unconstitutional state action.

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35. *Id.* at 354.

36. *See id.* at 353-55.

37. *See In re Guardianship of Browning*, 568 So. 2d 4, 15 (Fla. 1990).

38. For a thoughtful, extended effort to work through one version of Justice Brennan’s assumptions – in this instance, giving priority to consultation and mediation in preference to litigation, bringing to bear healthcare expertise, and (perhaps inevitably) abstracting somewhat from the Sophoclean elements of the *Schiavo* case itself, see Mary Coombs, *Schiavo: The Road Not Taken*, 61 U. MIAMI L. REV. 539 (2007).

39. *Cruzan*, 497 U.S. at 280; *see also Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1294-95 (11th Cir. 2005).

40. *See Cruzan*, 497 U.S. at 278, 284. A similar emphasis on the discretion states are constitutionally afforded is evident in *Washington v. Glucksberg*, 521 U.S. 707 (1997), for example, which addressed the states’ authority to legislate regarding life-ending procedures.



"[A]ny legislation by [C]ongress . . . must necessarily be corrective in its character, adapted to counteract and redress the operation of . . . prohibited state laws or proceedings of state officers."<sup>41</sup> The question of Terri Schiavo's wishes or Michael Schiavo's conduct cannot be the first concern. Florida law, it must seem, is the problem.

The 1990 Florida Supreme Court decision *In re Guardianship of Browning*<sup>42</sup> recognized the "right to choose or refuse medical treatment" and associated this right with the principal proposition of article I, section 23, of the Florida Constitution:<sup>43</sup> "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life . . . ."<sup>44</sup> Justice Barkett's majority opinion, however, was also plainly an exercise in common-law manufacture, judicial legislation working out implications of the constitutional starting point at considerable length.<sup>45</sup> *Browning* acknowledged that in cases in which an individual is not conscious, "a close family member or friend," or another

41. The Civil Rights Cases, 109 U.S. 3, 18 (1883), *quoted in* United States v. Morrison, 529 U.S. 598, 624 (2000).

42. 568 So. 2d 4 (Fla. 1990).

43. *Id.* at 11; *see id.* at 10; *see also In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993) ("overarching" constitutional privacy right "overlaps with the right to freely exercise one's religion to protect the right of a person to refuse a blood transfusion").

44. Art. I, § 23, FLA. CONST. The constitutional text adds "except as provided herein" and concludes: "This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." *Id. Browning* does not, however, treat the right to choose that it recognizes as limited only by the terms of the article I, section 23, itself:

The state has a duty to assure that a person's wishes regarding medical treatment are respected. That obligation serves to protect the rights of the individual from intrusion by the state unless the state has a compelling interest great enough to override this constitutional right. The means to carry out any such compelling interest must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual.

*In re Guardianship of Browning*, 568 So. 2d at 13-14. For extended discussion of possible compelling interests not relevant in the *Schiavo* case, *see In re Dubreuil*, 629 So. 2d at 824-28, and *see also In re Guardianship of Browning*, 568 So. 2d at 14, in which interests were treated as not compelling.

45. A few years earlier, in a living will case, the Florida Supreme Court had proceeded entirely in common-law terms. *See John F. Kennedy Mem'l Hosp., Inc. v. Bludworth*, 452 So. 2d 921 (Fla. 1984). But other prior decisions invoked constitutional rights of privacy. *See Satz v. Perlmutter*, 379 So. 2d 359, 360 (Fla. 1980), *adopting* *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. 4th Dist. Ct. App. 1978); *In re Guardianship of Barry*, 445 So. 2d 365, 370 (Fla. 2d Dist. Ct. App. 1984). The conjunction of constitutional interpretation and judicial rule-writing is notable – although plainly not unprecedented – in federal constitutional law. *See generally* Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). Within Florida constitutional law, however, the Florida Supreme Court's primary responsibility for judicial procedure is well established. *See, e.g., State v. Raymond*, 906 So. 2d 1045, 1048-49 (Fla. 2005). Judge-made common law is constitutionally protected, up to a point, as a second source of substantive law, alongside statutes. *See, e.g., State Farm Mut. Auto Ins. Co. v. Nichols*, 932 So. 2d 1067, 1076-77 (Fla. 2006); *Nationwide Mut. Fire Ins. Co. v. Pinnacle Med., Inc.*, 753 So. 2d 55, 57-59 (Fla. 2000).

surrogate designated by the individual, “may carry out the patients instructions.”<sup>46</sup> The court announced a series of ground rules:

A surrogate must take great care in exercising the patient’s right of privacy, and must be able to support that decision with clear and convincing evidence. Before exercising the incompetent’s right to forego treatment, the surrogate must satisfy the following conditions:

1. The surrogate must be satisfied that the patient executed any document knowingly, willingly, and without undue influence, and that the evidence of the patient’s oral declarations is reliable;
2. The surrogate must be assured that the patient does not have a reasonable probability of recovering competency so that the right could be exercised directly by the patient; and
3. The surrogate must take care to assure that any limitations or conditions expressed either orally or in the written declaration have been carefully considered and satisfied.<sup>47</sup>

In many instances, *Browning* supposed, a patient’s wishes would be clear – and thus “the surrogate need not obtain prior judicial approval to carry out those wishes.”<sup>48</sup> In the event of dispute, “courts are always open.”<sup>49</sup> “[J]udicial intervention” should be “*expedited*,” however, and to this end, at the Florida Supreme Court’s request, a specially designed probate rule was written to structure such proceedings.<sup>50</sup>

The Florida Legislature has also acted.<sup>51</sup> Section 765.401, Florida Statutes, first adopted in 1992 and subsequently amended, restates the *Browning* standard governing decisionmakers acting as surrogates for incapacitated individuals:

[A] proxy’s decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the

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46. *In re Guardianship of Browning*, 568 So. 2d at 15 n.15.

47. *Id.* at 15.

48. *Id.* The Florida Supreme Court, however, was not prepared to grant a surrogate the same freedom from challenge that it sought to accord intermediaries responding to the wishes of competent individuals acting for themselves. “When a health care provider, acting in good faith, follows *the wishes of a competent and informed patient* to refuse medical treatment, the health care provider is acting appropriately and cannot be subjected to civil or criminal liability.” *In re Dubreuil*, 629 So. 2d at 823-24 (emphasis supplied).

49. *In re Guardianship of Browning*, 568 So. 2d at 16.

50. *Id.* (emphasis in original); see FLA. PROB. R. 5.900.

51. See § 765.101 *et seq.*, FLA. STAT. (2006). The elaborate statutory scheme, notwithstanding its breadth and detail, does not claim to be legally definitive:

The provisions of this chapter are cumulative to the existing law regarding an individual’s right to consent, or refuse to consent, to medical treatment and do not impair any existing rights or responsibilities which a health care provider, a patient, including a minor, competent or incompetent person, or a patient’s family may have under the common law, Federal Constitution, State Constitution, or statutes of this state.

§ 765.106; see Alice Reiter Feld, *Life Prolonging Procedures and Related Issues*, in FLORIDA GUARDIANSHIP PRACTICE 3-10 to -11 (4th ed. 2002) (discussing safe harbor effects).

decision would have been one the patient would have chosen had the patient been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient's best interest.<sup>52</sup>

In addition, the legislature fixed priority rules identifying surrogates in cases in which unconscious individuals had made no prior designation. The first choice was "[t]he judicially appointed guardian of the patient . . . if such guardian has been previously appointed."<sup>53</sup> The list thereafter added the patient's spouse, adult child, parent, adult sibling, an "adult relative . . . who has exhibited special care and concern," concluding with "[a] close friend."<sup>54</sup> Statutory acknowledgement of – indeed, deference to – "judicially appointed guardian[s]" locates section 765 within a particular legal milieu, suggesting a variation on, or coexistence with, the larger office of guardianship, a statutory grant of agency elaborately defined and regulated in chapter 744, Florida Statutes.<sup>55</sup> Chapter 744 declares that individuals who possess requisite qualifications, who show that other individuals are incapacitated in pertinent respects, and who present adequate plans – initially and annually thereafter – may acquire broad authority via judicial order to act on behalf of identified incapacitated individuals, including power "[t]o consent to medical and mental health treatment."<sup>56</sup>

Chapters 765 and 744 overlap conceptually – albeit not entirely. Chapter 744 guardians are, by and large, legislatively depicted as exercising discretion and as ordinarily acting independently of immediate judicial oversight in the course of addressing issues that an incapacitated individual would have resolved if capable. In the moment, at least, 744 guardians are relatively autonomous, even if subject before or after the fact to plan-making obligations, to accounting requirements, and to adjudicative inquiries in cases of third-party objections.<sup>57</sup> Chapter 765 similarly characterizes proxies – judicially appointed guardians and other individuals included in the statutory list – as empowered to make "health care decisions . . . for the patient."<sup>58</sup> But proxy discretion is now

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52. § 765.401, FLA. STAT. (2006). The "patient's best interest" alternative included at the provision's end was added in 2001, after the onset of the *Schiavo* controversy; it was not invoked in the *Schiavo* case itself. See § 765.401(3); *In re Guardianship of Schiavo*, 916 So. 2d 814, 819 n.3 (Fla. 2d Dist. Ct. App. 2005).

53. § 765.401(1)(a).

54. § 765.401(1)(b)-(g).

55. See generally Nicola Jaye Boone, *Establishing the Guardianship*, in FLORIDA GUARDIANSHIP PRACTICE, *supra* note 51, at 12-1 to -27; Robert P. Scheb, *Guardian of the Person: Duties, Responsibilities, and Liabilities*, in FLORIDA GUARDIANSHIP PRACTICE, *supra* note 51, at 14-1 to -18 (4th ed. 2002).

56. § 744.3215(3)(f), FLA. STAT. (2006).

57. For a detailed discussion of statutory mechanics, see Scheb, *supra* note 55, at 14-10 to -17.

58. § 765.401(1).

considerably more statutorily structured. Proxies are obligated to “[c]onsult expeditiously with appropriate health care providers” in giving consent and to obtain “access to the appropriate medical records.”<sup>59</sup> Especially pointedly:

In determining whether the patient has a terminal condition, has an end-stage condition, or is in a persistent vegetative state or may recover capacity, . . . the patient’s attending or treating physician and at least one other consulting physician must separately examine the patient. The findings of each such examination must be documented in the patient’s medical record and signed by each examining physician before life-prolonging procedures may be withheld or withdrawn.<sup>60</sup>

It is against this closely structured backdrop that a chapter 765 proxy proceeds for purposes of deciding whether “to withhold or withdraw life-prolonging procedures” is “supported by clear and convincing evidence that the decision would have been one the patient would have chosen had the patient been competent.”<sup>61</sup>

Chapter 765, it would seem, provides points of departure sufficient to enable close judicial scrutiny of decisions by guardians or other proxies. Moreover, Florida Probate Rule 5.900 facilitates inquiry, defining a “proceeding for expedited judicial intervention concerning medical treatment procedures” that might “be brought by any interested adult person,” resulting in a preliminary hearing within seventy-two hours.<sup>62</sup> At this hearing a court may either “rule on the relief requested immediately” or “[i]n its discretion . . . conduct an evidentiary hearing not later than 4 days after the preliminary hearing and rule on the relief requested immediately.”<sup>63</sup> Neither rule 5.900 nor chapter 765 defines a standard of review for judges to use in assessing a proxy’s resolution of pertinent questions of fact. In the chapter 744 guardian setting, with respect to questions of incompetency judicially declared to require clear and convincing evidence,<sup>64</sup> appellate review of trial court findings turns on

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59. § 765.205(b), (d), FLA. STAT. (2005); see § 765.401(3).

60. § 765.306, FLA. STAT. (2006). The requirements that the individual a guardian represents have a terminal, end-state, or vegetative state condition – procedurally addressed by § 765.306 – are fixed in § 765.305(2)(b) with respect to patient-designated surrogates’ decisionmaking. § 765.401(3) incorporates § 765.305 and thus implicitly incorporates § 765.306 as well.

61. § 765.401(3).

62. FLA. PROB. R. 5.900(a), (d).

63. FLA. PROB. R. 5.900(d)(2).

64. See *In re Bryan*, 550 So. 2d 447, 448 (Fla. 1989) (“It is clear the statute provides no guidance regarding the proper standard for adjudication of incompetency under section 744.331. It is equally clear, as both parties recognize, that no case in Florida effectively settles the point. The district court cited one case, from Ohio, which held that clear and convincing evidence was the proper standard of proof in competency proceedings. . . . We find this reasoning compelling and adopt with approval the above-cited language.”).

whether “competent substantial evidence” supports a trial court’s conclusion that proof of incompetency was clear and convincing.<sup>65</sup> *In pari materia*: chapter 765 translation would not be difficult – easily understood as part and parcel of the statutory scheme itself. The section 765.401 proxy – a guardian or other listed individual – proceeds very much after the fashion of a judge ruling on the question of competency. The proxy is the primary fact finder.

*The statutory gap*: In at least some cases the substantial evidence test could effectively allow the proxy considerable discretion. It would be “the purview” of the proxy “to determine the credibility and weight of the evidence.”<sup>66</sup> A judicial inquiry invoked via rule 5.900 could not “reweigh the testimony and evidence, or substitute its judgment for that of the trier of fact.”<sup>67</sup> Chapter 765 in fact works to protect the discretion of guardians or other proxies precisely through the limits it sets. Section 765.306, on this reading, functions as an important safe harbor. If two physicians document and confirm a conclusion that an individual lives in a persistent vegetative state, substantial evidence review should pose no threat to a proxy who proceeds accordingly. The question of the incapacitated individual’s wishes per se remains open, of course, if now likely dramatically shaded by the diagnosis. But disagreements about how to resolve conflicts in testimony or how to weigh the implications of testimony about the substance or seriousness of the individual’s views do not fall within the scope of the substantial evidence assessment. This statutory bias might be reinforced in cases in which incapacitated individuals received extensive medical care with the consent of a chapter 744 guardian in advance of the judgment – by the 744 guardian who has now become the 765 guardian – that life support should be withdrawn. The attending or treating physician – whose report is obligatory for purposes of section 765.306 – will likely have communicated with the guardian repeatedly concerning the course of treatment, will not likely have doubted the correctness of the choices made concerning the course followed, and may often ratify, if not initially suggest (more or less explicitly), the conclusion reached by the guardian that nothing more

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65. *Manassa v. Manassa*, 738 So. 2d 997, 997-98 (Fla. 1st Dist. Ct. App. 1999).

66. *Id.* at 997.

67. *Id.* at 997-98; see *In re Bryan*, 550 So. 2d at 448-49 (Grimes, J., dissenting) (the record revealed substantial evidence supporting findings of both competency and incompetency). Subsequent additional appellate supervision would likely work to mark judicial limits, perhaps more often than it would reconsider proxy discretion. Cf. *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 198-99 (Fla. 2003); *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1192-94 (Fla. 2000) (limiting district court of appeal review of circuit court certiorari review of local administrative action to exclude district court reconsideration of application of substantial evidence requirement).

can or should be done. The decisionmaking process would thus reflect an unsurprising, potentially biasing path dependency.

#### IV. "THE EQUAL PROTECTION OF THE LAWS"

Is there Fourteenth Amendment trouble in any of this? There would need to be, of course, if Florida law were to suggest reason for congressional enforcement of the Fourteenth Amendment in the *Schiavo* case.

The preceding discussion suggests the following:

First, the Florida legislative scheme sometimes affords substantial discretion to proxies representing unconscious individuals in connection with decisions whether to terminate life-sustaining treatment. In part, this discretion is a side effect of deploying the substantial evidence standard to regulate judicial review. To be sure, use of this standard is not explicitly dictated by statute. Given the overall organization of the legislative regime, however, Florida judge-made administrative law clearly points to substantial evidence as the pertinent benchmark structuring adjudicative oversight of a proxy's determination that clear and convincing evidence establishes a represented individual's wishes. Sufficient substantive evidence may, in some circumstances, be marshaled on behalf of apparently clear and convincing preferences for both life and death given the tunnel vision the standard imposes upon reviewing judges. The proxy's opportunity for choice – we can see – thus emerges. Exercises of discretion may well ramify especially elaborately in cases like *Schiavo* in which the guardian who concludes that the represented individual would want termination was also the guardian who, again in the exercise of discretion, previously consented to preceding treatment efforts.<sup>68</sup>

Second, discretion, to the extent that it is therefore present, introduces an irresolvable uncertainty or "wobble." In some circumstances at least, it will be impossible (within the terms of the statutory setup) to declare unequivocally after the fact that termination or maintenance of life support was not to some important degree a product of the choices or views of the representative rather than the represented individual.<sup>69</sup> Obviously no legal apparatus eliminates all play in its joints. The proxy's opportunity to exercise discretion, however, is not simply

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68. See *In re Guardianship of Theresa Schiavo*, No. 90-2908-GD, 1996 WL 33496839 (Fla. Pinellas County Ct. June 18, 1996).

69. Dramatically underscoring the significance of the statutory grant of discretion, Lois Shepherd provocatively explores how matters might have worked out if Bob and Mary Schindler – Terri Schiavo's parents – had been named proxies. See Lois Shepherd, *Terri Schiavo: Unsettling the Settled*, 37 LOYOLA UNIV. CHI. L.J. 297, 313-16 (2006).

an accident of particular circumstances. It is also a straightforward corollary or concomitant of the conjoined elements of the scheme, easily read off the face of the legislative arrangement. In *Browning*, however, the Florida Supreme Court started from the premise that – as a matter of Florida constitutional law – the choice to end or continue life support was precisely the individual's. The applicable Florida constitutional text – article I, section 23 – declares “the right to be let alone and free from government intrusion into the person's private life” to be not only an *individual* right, but also an *equal* right: a right of “[e]very natural person.” Thus the statutory wobble, even if only occasionally manifest, is troubling – especially anomalous not only in view of constitutional starting points but also, it appears, the rooting of the anomalies in statutory design itself.

This is, it may seem, a state law problem. There is no basis presented warranting classification of the *Schiavo* statute as congressional intervention enforcing the Fourteenth Amendment. In fact, the U.S. Supreme Court has sometimes treated rooted variance, when it coexists with a clear legal commitment to equal treatment, as inconsistent with the state obligation to assure “the equal protection of the laws.” The Court's work reveals a few basic themes, cutting across a wide range of cases, which define a second context – however much removed from the immediate issues – within which the *Schiavo* legislation needs to be set.<sup>70</sup>

The point of departure is plainly far afield. In *Allegheny Pittsburgh Coal Co. v. Webster County Commission*,<sup>71</sup> Chief Justice Rehnquist, writing for a unanimous Supreme Court, invalidated the “systematic”

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70. The quick sketch that follows departs in some respects from formulas often – but not always – put to use by courts and commentators. These departures, I think, make clearer underlying affinities in cases that sometimes seem to be quite different from each other. I mean to restate rather than revise – this is, of course, not always a significant difference – the overall content of the U.S. Supreme Court's equal protection work. The principal departures are these: The so-called “suspect class” cases are described in terms that emphasize the similarities linking decisions dealing with troubling socially widely used categories like race or gender and decisions involving categories that are deemed to be problematic in important part because of the immediate context of their use. The so-called “fundamental interest” cases are recast in terms that expand the size of this set precisely by taking seriously the limits the Supreme Court fixed in 1973. The “rational basis” test essentially disappears – it becomes simply the explanatory form for describing cases in which, it turns out, there is no actual equal protection problem. Finally, and perhaps most importantly, the overall effort is tied more closely than usual to the language of the Fourteenth Amendment, the long history of some of its terms, and the Reconstruction crises its drafters confronted. None of these attempts, of course, are fully worked out in the short space of their presentation here. For present purposes, I mostly omit references to the huge body of thoughtful commentary addressing equal protection topics.

71. 488 U.S. 336 (1989).

policy<sup>72</sup> of a West Virginia county tax assessor quantifying property's worth on the basis of purchase price, a practice "that resulted in gross disparities in the assessed value of generally comparable property"<sup>73</sup> given increases in market prices over time and transactional history. Not all – only some – property was recently purchased and thus priced in light of increased land values. The West Virginia Constitution, Rehnquist noted at the outset, "guarantees to its citizens that, with certain exceptions, 'taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value.'"<sup>74</sup> As a result, West Virginia could not invoke the general rule that "a State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable."<sup>75</sup> For example, it appeared, no "statute or practice . . . authorizes individual counties of the State to fashion their own substantive assessment policies."<sup>76</sup> Rather, West Virginia's "Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value."<sup>77</sup>

*Allegheny Pittsburgh* is not easy to defend, some readers argue. "[I]t is . . . hard [ ] to believe that the Court has established a general principle that all systematic violations of state law by state officials can be vindicated as a violation of the equal protection clause."<sup>78</sup> In *Nordlinger v. Hahn*,<sup>79</sup> the Supreme Court subsequently upheld a California scheme originating in a state constitutional provision – California's famous Proposition 13, which precisely authorized use of purchase price, plainly contemplating the differences in tax assessments that in fact resulted. Justice Blackmun's majority opinion, however, did not

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72. *Id.* at 345. Chief Justice Rehnquist explains at some length why the gross disparities in assessed value were not simply artifacts of a policy of "seasonable attainment." *See id.* at 343-44.

73. *Id.* at 338.

74. *Id.*

75. *Id.* at 344.

76. *Id.* at 345.

77. *Id.*

78. William C. Cohen, *State Law in Equality Clothing: A Comment on Allegheny Pittsburgh Coal Company v. County Commission*, 38 UCLA L. REV. 87, 104 (1990). John Ely disagreed with Professor Cohen: "In theory, . . . there is no reason why certain possible justifying goals should not be disabled from consideration on the ground that they violate state law." John Hart Ely, *Another Spin on Allegheny Pittsburgh*, 38 UCLA L. REV. 107, 108 (1990). Ely did not think that the possibility that "all violations of state law . . . are . . . convertible into violations of the Equal Protection Clause" mattered much "operationally" because "state courts remain the final authorities on what is or is not a violation of state law" and "[w]here . . . the fact of a federal violation flows entirely from the fact that state law has been violated, . . . state law should be able to set the remedy too." *Id.* at 109-10. The Supreme Court's error lay only in its failure to appreciate this last proposition. *Id.* at 110-11.

79. 505 U.S. 1 (1992).



make much of the difference in state constitutional backdrops, even though *Allegheny Pittsburgh* itself forecasted the distinction.<sup>80</sup> Indeed, Blackmun's discussion of *Allegheny Pittsburgh* itself is notable mostly for its crabbed narrowness.<sup>81</sup> Justice Thomas, concurring, would have rejected *Allegheny Pittsburgh* outright: "A violation of state law does not by itself constitute a violation of the Federal Constitution."<sup>82</sup> Chief Justice Stone's formula propounded in *Snowden v. Hughes*,<sup>83</sup> it appears, remains canonical: "[S]tate action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state . . . ."<sup>84</sup>

The hedges are obvious. Justice Thomas inserts the qualifier "by itself";<sup>85</sup> in passages in *Snowden*, Chief Justice Stone adds "without more" and "for that reason alone" in asserting the Fourteenth Amendment unimportance of "unlawful denial" under state law.<sup>86</sup> The Equal Protection Clause is not without its own preoccupations – for example, reverberations of the constitutional language itself, the circumstances of the Fourteenth Amendment's adoption, and subsequent enforcement history. Analysis of variance – sensitivity to changes in the degree to which announced legal commitments and official practice conform – might matter because, in some circumstances, the Equal Protection Clause (more precisely, its set of associated preoccupations) marks the results of such analysis as constitutionally pertinent.

In *Snowden*, tellingly, Chief Justice Stone thought it important to emphasize: "On the argument before us petitioner disclaimed any contention that class or racial discrimination is involved."<sup>87</sup> It is quite clear, even if Supreme Court formulations differ in detail from case to case, that criteria put to use by individuals acting under color of law raise substantial equal protection concerns insofar as they evoke and thereby reinforce antipathies threatening American political community. Stone himself famously framed one version of this point.<sup>88</sup> State action becomes constitutionally problematic insofar as it deepens risks of civil war in all its variants, whether relatively general or quite specific to particular circumstances – for example, Reconstruction racial terrorism and its long-term metastatic byproducts, chronic misogyny and associ-

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80. See *Allegheny Pittsburgh*, 488 U.S. at 344 n.4.

81. See *Nordlinger v. Hahn*, 505 U.S. 1, 15 & n.8 (1992).

82. *Id.* at 26 (Thomas, J., concurring).

83. 321 U.S. 1 (1944).

84. *Id.* at 11.

85. See *Nordlinger*, 505 U.S. at 26 (Thomas, J., concurring).

86. *Snowden*, 321 U.S. at 12.

87. *Id.* at 7-8.

88. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

ated violent commitment to gender conventions, or any number of other expressions of fear or loathing.<sup>89</sup>

There is also a second central equal protection worry. Section 1 of the Fourteenth Amendment, in its first sentence, dictates definitions of both federal and state citizenship, definitions insistently premised on the principle of equal citizenship: “*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.*”<sup>90</sup> The mandates that Section 1 thereafter imposes upon the states – initially drafted as a grant of congressional power “to make all laws necessary and proper to secure all persons in every state . . . equal protection in their rights of life, liberty, and property”<sup>91</sup> – follow, as if matters of course, straightforward applications of the old and widely asserted formula, “the reciprocal obligation of allegiance . . . and protection.”<sup>92</sup> The Fourteenth Amendment *imposes* the duty to protect, a forceful exercise entirely in train with its specification of the individuals to whom the duty is owed and a forceful exercise not simply as a matter of form, but rather precisely a substantive undertaking given the circumstances prompting the Amendment and the peculiar politics of its institution. Constitutional adherence – whether individuals acting under color of state law indeed accept their responsibility to “secure all persons” legal protections – is assumed *ex ante* to be a matter in question, a form of fidelity that the Fourteenth Amendment itself marks as doubtful.<sup>93</sup>

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89. The point of departure, of course, is Justice Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537, 560-61 (1896) (Harlan, J., dissenting). For extensions and elaborations, see, for example, *Romer v. Evans*, 517 U.S. 620, 632, 634-35 (1996), *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985), *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-25 (1982), and *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), and see also *Village of Willowbrook v. Olech*, 528 U.S. 562, 565-66 (Breyer, J., concurring) (2000), noting that allegations of ill will undercut an assertion of rational basis.

90. U.S. CONST. amend. XIV, § 1 (emphasis supplied).

91. BENJAMIN B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 46 (1914).

92. Citizenship, 10 Op. Att’y. Gen. 382, 388 (1862); see also, e.g., Calvin’s Case, 7 Co. Rep. 1a, 77 Eng. Rep. 377, 382 (K.B. 1608); THOMAS HOBBES, *LEVIATHAN* 560 (Barnes & Noble 2004) (1651); LEGES EDWARDI CONFESSORIS (1070), reprinted in BRUCE R. O’BRIEN, *GOD’S PEACE AND KING’S PEACE: THE LAWS OF EDWARD THE CONFESSOR* 158-203 (1999); PROOEMIUM, *THE LIBER AUGUSTALIS* 5 (James M. Powell, trans., Syracuse Univ. Press 1971) (1231).

93. This is not the proper occasion for full development of the propositions asserted above in the text. Put too crudely, the key to appreciating the logic of the Fourteenth Amendment may well be Section 3, initially excluding from federal or state office all Confederate participants who had previously sworn state or federal oaths of office to support the U.S. Constitution. “After the civil war practical policies required that the fundamental divergence between the sections, and the effect four years of war had had on attitudes and interests within them, be fully comprehended.” MICHAEL PERLMAN, *REUNION WITHOUT COMPROMISE: THE SOUTH AND RECONSTRUCTION* 347 (1973). “The Fourteenth Amendment can only be understood as a whole, for while respecting federalism, it intervened directly in Southern politics, seeking to conjure into being a new political

U.S. Supreme Court decisions have elaborately drawn out implications of this suspicion. In all cases, it appears, the Equal Protection Clause figures as pertinent because the proposition that individuals are to be treated as equals, in the particular context, is independently attested as a matter of either federal or state law. It is for precisely this reason, after all, that the question arises regarding official "loyalty" – official adherence to the equal protection obligation.<sup>94</sup> Otherwise, differences in treatment would be readily defensible as responses to differences in circumstances, however large or small. For example, state legislative refusals to employ the rule of "one person, one vote" in drawing election districts, exhibiting at best indifference to whether the votes of individuals will vary in significance from district to district, disregard the Fourteenth Amendment declaration of state citizens as equals (individuals voting in state elections act in their capacity as state citizens) and, therefore, also disregard the Equal Protection Clause.<sup>95</sup> Restrictive state definitions of residency, denying newcomers access to government services or benefits, may or may not disparage equal state citizenship (residence is, after all, a prerequisite for state citizenship<sup>96</sup>). The burden of such restrictions, however, falls on individuals who exercise the opportunity to move from state to state (presupposed in the federal constitutional arrangement<sup>97</sup>), an opportunity therefore counting as a privilege of national citizenship<sup>98</sup> and, thus, as an "equal privilege" for

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leadership that would respect the principle of equality before the law." ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* 259 (1988). Section 1 obligations were imposed – and ought to be read – as a response to the assumptions about the persistence of civil division and uncertain official adherence that the Fourteenth Amendment as a whole reflects.

94. For a time, these cases were thought of as "fundamental interests" cases. Equal protection concerns, the argument ran, derived from the importance as such of the interests differentially treated. The idea of "importance" turned out – not surprisingly – to be a too capacious portmanteau. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 43-72 (1980). Since *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Supreme Court has – for the most part – restricted its references to fundamental interests to interests somehow independently legally marked as carrying equality concomitants.

95. "With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

96. Absent proper justification, a state would violate the equal citizenship requirement if it acknowledged residence but nonetheless treated newcomers differently. See *Saenz v. Roe*, 526 U.S. 489 (1999); Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future – Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 127-31 (1999). Professor Tribe argues that equal citizenship is "a structural principle." *Id.* at 154. Remarkably, it is just as much a proposition evident from Section 1 of the Fourteenth Amendment's plain text.

97. See, e.g., *Crandall v. Nevada*, 73 U.S. 35, 48-49 (1867); *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 84 (1824).

98. See *The Slaughter-House Cases*, 83 U.S. 36, 79 (1872).

Fourteenth Amendment purposes. Exclusion of new arrivals denies the equal protection of state law, absent peculiar characteristics of particular services or benefits explaining the restriction.<sup>99</sup>

Other propositions part of U.S. constitutional law also carry equality concomitants and therefore set the stage for equal protection inquiries – for example, free speech guarantees, the due process rights of privacy, and (more obliquely) the Supremacy Clause.<sup>100</sup> For present purposes, however, state law predicates are especially noteworthy.<sup>101</sup> If states violate the Equal Protection Clause because, for example, they deny indigent criminal defendants access to free trial transcripts<sup>102</sup> or appointed counsel for purposes of appeal,<sup>103</sup> it is because the significance of appeal (or counsel), judged within the parameters of the criminal procedure that state law itself depicts as uniform, is so sufficiently central that the regime's professed objectives – error correction, for example – become irrelevant (or nearly so) for disadvantaged defendants.<sup>104</sup> If state civil procedure authorizes a particular state court to entertain actions of a certain sort, the court cannot refuse to hear federal claims of the “same

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99. Compare *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (one year denial of access to free non-emergency medical care struck down), with *Sosna v. Iowa*, 419 U.S. 393 (1975) (one year bar to bringing divorce action upheld).

100. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Eisenstadt v. Baird*, 405 U.S. 438, 446-60 (1972); *Plyler v. Doe*, 457 U.S. 202, 208 (1982).

101. State equal treatment commitments trigger equal protection concerns not because state officials themselves take those predicates seriously as a matter of their own understanding of state law, but because federal constitutional law – here, concerns giving shape to Fourteenth Amendment equal protection obligations – provides a reason within federal law to take state commitments at face value, to characterize state law as incorporating federally constitutionally relevant commitments occasioning equal protection scrutiny. For the point of departure for this formulation, see Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1935-47 (2003).

102. *Griffin v. Illinois*, 351 U.S. 12, 18-20 (1956).

103. *Douglas v. California*, 372 U.S. 353, 356-58 (1963).

104. See, e.g., *Halbert v. Michigan*, 545 U.S. 605, 619-22 (2005). Justice Ginsburg, writing for the *Halbert* majority, described the constitutional concerns as originating in both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. See *id.* at 610-11. Her opinion, however, emphasized the distinctive (unequal) difficulties a pro se defendant would face seeking appellate review after a plea bargain that a defendant represented by counsel would not face. See *id.* at 619-20. Not surprisingly from the equal protection perspective, the constitutional challenge fails if, given the terms of state law, “indigents have an adequate opportunity to present their claims fairly within the adversary system.” *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (holding that the Fourteenth Amendment does not require states to provide indigent defendants appointed counsel regarding second-tier discretionary review following counsel-assisted first-tier review).

type.”<sup>105</sup> But if “a neutral state rule” bars the federal claim,<sup>106</sup> or if the state court proceeded case-by-case in agreeing to hear or decline certain sorts of suits, failure to hear the federal case would not be problematic – the state would not have acted “in a systematic fashion to discriminate against federal causes of action.”<sup>107</sup> Some state law complexes, in contrast, suggest no Fourteenth Amendment benchmark – no provocation for equal protection scrutiny. The Texas public school finance scheme tying expenditure choices to local property tax resources upheld in *San Antonio Independent School District v. Rodriguez*<sup>108</sup> plainly “provide[d] less freedom of choice . . . for some districts than for others.”<sup>109</sup> But that result was not a divergence from state policy, rather an artifact of the state commitment to local control, and thus a constitutionally inconsequential inequality: “[A]ny scheme of local taxation – indeed the

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105. *Testa v. Katt*, 330 U.S. 386, 394 (1947). Justice Black invoked what he took to be the Supremacy Clause’s “purpose and effect”: “the States of the Union constitute a nation.” *Id.* at 389. But the “same type” inquiry is plainly a test tied to a nondiscrimination worry – the Supremacy Clause, keyed to conflict between state and federal law, presumably would be pertinent in any instance in which federal statutory aims were frustrated. See Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Developments in Judicial Federalism*, 60 HARV. L. REV. 966, 970 (1947). Justice Black’s reading of the Supremacy Clause, moreover, might be thought to be anachronistic given antebellum understandings of the status of the states vis-à-vis the United States. See, e.g., *Prigg v. Pennsylvania*, 41 U.S. 539, 608-26 (1842) (plurality opinion); Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39 (describing the early understanding that Congress could not compel state courts to hear federal question cases). For a recent, notably thoughtful reappraisal, see Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949 (2006). *Testa*, however, also relied heavily on *Claflin v. Houseman*, 93 U.S. 130 (1876). This is the central passage in Justice Bradley’s opinion there:

The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. . . . Legal or equitable rights, acquired under either system of law, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. . . . The fact that a State court claims its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the States as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.

*Claflin*, 93 U.S. at 136-37. Justice Bradley’s phrases blast like Civil War cannon. The Fourteenth Amendment overtones are hard to miss. Indeed, it is easy to read the entire passage as simply a gloss on the phrase “the equal protection of the laws.” See also Note, *supra*, at 970-71 (distinguishing nondiscrimination rule from Supremacy Clause analysis per se).

106. *Howlett v. Rose*, 496 U.S. 356, 372 (1990).

107. *Alden v. Maine*, 527 U.S. 706, 758 (1999).

108. 411 U.S. 1 (1973).

109. *Id.* at 50.

very existence of identifiable local governmental units – requires the establishment of jurisdictional boundaries that are inevitably arbitrary.”<sup>110</sup>

*The conclusions to be drawn:* It is not at all surprising within this larger context to read Chief Justice Rehnquist’s opinion in *Allegheny Pittsburgh* – the point of departure for this excursus – treating the *state* constitutional demand that property tax assessment be uniform as reason for judging a county assessor’s two-track approach to be a matter of *federal* constitutional concern. The sometime discretion generated by the Florida statutory scheme empowering and regulating proxies making end-of-life decisions on behalf of unconscious individuals – the possibility, both intermittent and systematic, that in cases like *Schiavo* the representative’s preferences will govern as much or more than the unconscious individual’s own views – defines what should now appear to be a cognate equal protection problem. Article I, section 23, of the Florida Constitution, recognizing the right of privacy that the Florida Supreme Court understood in *Browning* as the foundation of the individual’s right to refuse life support, explicitly declares an “equal right,” a power to choose afforded “[e]very natural person.”<sup>111</sup> *Browning* itself emphasized the particular equality commitment pertinent in Terri Schiavo’s case: “[O]ur cases have recognized no basis for drawing a constitutional line between the protections afforded to competent persons and incompetent persons. Indeed, the right of privacy would be an empty right were it not to extend to competent and incompetent persons alike.”<sup>112</sup> Florida’s complex guardianship structure, it should be apparent, in some circumstances plainly qualifies this declaration.

*The question of congressional power:* Congress could have plausibly concluded, therefore, that in the setting of the *Schiavo* controversy Florida statutory arrangements warranted an equal protection inquiry. Its grounds for acting would have been entirely in accord with the U.S. Supreme Court’s own understandings. Congress possessed a defensible basis for enacting the *Schiavo* jurisdictional grant pursuant to Section 5 of the Fourteenth Amendment.

#### IV. A SECOND DISTRICT COUP?

Public Law 109-3, the law that Congress enacted on March 21, 2005, directly addresses – remarkably clearly, really – the constitutional

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110. *Id.* at 53-54.

111. Art. I, § 23, FLA. CONST.; see *In re Guardianship of Browning*, 568 So. 2d 4, 10 (Fla. 1990).

112. *In re Guardianship of Browning*, 568 So. 2d at 12.

problem posed by statutorily-afforded proxy discretion seemingly shielded from state judicial review:

The United States District Court for the Middle District of Florida shall have jurisdiction to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right . . . under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain life. . . . In such a suit, the District Court shall determine *de novo* any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act, notwithstanding any prior State court determination . . . . [T]he District Court shall issue such declaratory and injunctive relief as may be necessary to protect the rights of Theresa Marie Schiavo. . . . Nothing 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.<sup>113</sup>

If the substantial evidence standard blocked state court review, federal *de novo* scrutiny of Michael Schiavo's choices as guardian, in the exercise of the powers Florida Statutes chapters 744 and 765 granted to him, afforded the opportunity for a fully searching judicial look, an entirely apt occasion for determining whether the truly decisive element had been Terri Schiavo's wishes and not the vagaries of path dependency or Michael Schiavo's own judgments. If Terri Schiavo's wishes had not governed – *contra Browning* and therefore *contra* the Equal Protection Clause – the federal district court could exercise its statutory power to halt withdrawal of sustenance.

The dog did not bark, however. In the end, the U.S. District Court for the Middle District of Florida, sustained by the U.S. Court of Appeals for the Eleventh Circuit, undertook no direct and independent review of Michael Schiavo's guardianship – and indeed counsel did not press for such review *per se*.<sup>114</sup> At the threshold, considering the requested preliminary injunction that would have continued life support pending further inquiry, the federal courts concluded that there was no "substantial case on the merits" to be made, and thus usual equitable principles – left unmodified by Congress – did not warrant granting provisional relief.<sup>115</sup> The federal courts ruled against the backdrop of arguments of counsel that did not challenge the discretion that Michael Schiavo exercised as guardian. Instead, counsel emphasized the role of

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113. An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, § 1-3, 5, 119 Stat. 15, 15-16 (2005) (internal divisions omitted).

114. See *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005). The Eleventh Circuit opinion reproduces the district court's opinion.

115. See *id.*

Judge Greer – the Florida circuit court judge reviewing the guardian’s determination – who (it was asserted) “‘became Terri’s health care surrogate’” and thus could not, counsel claimed, “‘maintain his role as an impartial judge in order to review his own decision that Terri would want to die.’”<sup>116</sup> Judge Whittemore – the federal district judge – rejected this argument:

Pursuant to Florida law . . . Judge Greer . . . had a statutory obligation to resolve the competing contentions between Michael Schiavo and [the Schindlers]. . . . By fulfilling his statutory judicial responsibilities, the judge was not transformed into an advocate merely because his rulings are unfavorable to a litigant. . . . [Michael Schiavo] is correct that no federal constitutional right is implicated when a judge merely grants relief to a litigant in accordance with the law he is sworn to uphold and follow.<sup>117</sup>

Judge Whittemore’s discussion, though, appears to be utterly question-begging. If Judge Greer’s “statutory judicial responsibilities” were delimited by the substantial evidence standard, Greer would have stepped outside his state judicial role if he took over the task of surrogate and determined for himself what Terri Schiavo would have wanted. There is nothing in the federal district court opinion, however, that suggests that either Judge Whittemore or counsel considered the matter within these terms. Why not? The key may lie in a curious contention summarized and rejected in the Eleventh Circuit opinion: “Nor do we find convincing plaintiffs’ argument that in reaching its decision to deny the motion for a temporary restraining order the district court violated Pub. L. No. 109-3 by considering the procedural history of extensive state court litigation.”<sup>118</sup> What was it that counsel did not want Judge Whittemore to read?

The principal appellate review of Judge Greer’s work, written by Chief Judge Altimbernd on behalf of a three-judge panel of the Florida Second District Court of Appeal, included this remarkable passage:

[I]n the end, this case is not about the aspirations that loving parents have for their children. It is about Theresa Schiavo’s right to make her own decision, independent of her parents and independent of her husband. In circumstances such as these, when families cannot agree, the law has opened the doors of the circuit courts to permit trial judges to serve as surrogates or proxies to make decisions about life-prolonging procedures. . . . 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. Instead, the trial judge must make a decision that the clear

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116. *Id.* at 1233 (district court opinion).

117. *Id.* at 1233-34. For the Eleventh Circuit’s terse affirmation, see *id.* at 1226.

118. *Id.* at 1228.



and convincing evidence shows the ward would have made for herself. . . . It is a thankless task, and one to be undertaken with care, objectivity, and a cautious legal standard designed to promote the value of life. But it is also a necessary function if all people are to be entitled to a personalized decision about life-prolonging procedures independent of the subjective and conflicting assessments of their friends and relatives. It may be unfortunate that . . . the best forum we can offer for this private, personal decision is a public courtroom and the best decision-maker we can provide is a judge with no prior knowledge of the ward, but the law currently provides no better solution . . . .<sup>119</sup>

At an earlier point in the opinion, Alternbernd makes it clear that – at least in *Schiavo* – the Second District panel itself took up the trial judge’s “thankless task”:

In this case, the guardianship court followed the instructions of our last decision. It conducted a thorough hearing and prepared an extensive order. We cannot conclude that the guardianship court abused its discretion. . . . The Schindlers have urged this court to conduct a *de novo* review. . . . The guardianship court heard live testimony from many physicians. When it reviewed the videotapes of Mrs. Schiavo and the diagnostic tests and brain scans, it did so with the assistance and expertise of those physicians. This court can review the evidence in the record with only its training in law and its lay experience. It is simply not proper for this court to review such a fact-intensive determination using a *de novo* standard. Despite our decision that the appropriate standard of review is abuse of discretion, this court has closely examined all the evidence in this record. We have repeatedly examined the videotapes, not merely watching short segments but carefully observing the tapes in their entirety. We have examined the brain scans with the eyes of educated laypersons and considered the explanations provided by the doctors in the transcripts. We have concluded that, if we were called upon to review the guardianship court’s decision *de novo*, we would still affirm it.<sup>120</sup>

There is nothing in the Florida Supreme Court opinion in *Browning* remotely equivalent to these passages. Justice Barkett noted that “the surrogate would bear the burden of proof if a decision based on purely

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119. *In re Guardianship of Schiavo*, 851 So. 2d 182, 186-87 (Fla. 2d Dist. Ct. App. 2003) (citations omitted). For an appreciative, but also critical, discussion of this passage, see Robert A. Burt, *Family Conflict and Family Privacy: The Constitutional Violation in Terri Schiavo’s Death*, 22 CONST. COMMENT. 427, 432-33 (2005). At an earlier stage in the case, Judge Alternbernd wrote: “The trial court determines whether the evidence is sufficient to allow it to make the decision for the ward to discontinue life support. In this context, the trial court essentially serves as the ward’s guardian.” *In re Guardianship of Schiavo*, 780 So. 2d 176, 179 (Fla. 2d Dist. Ct. App. 2001).

120. *In re Guardianship of Schiavo*, 851 So. 2d at 186.

oral evidence was challenged.”<sup>121</sup> But her opinion also concluded, considering the facts of the *Browning* case itself, that “[w]e are satisfied that clear and convincing evidence existed to support a finding that Mrs. Browning suffered from a terminal condition. Under these circumstances, the surrogate was correct.”<sup>122</sup> The exercise, plainly, was one of judicial review of a surrogate’s decision – not judicial exercise of the surrogacy role itself. Section 765.401(3), Florida Statutes, declares that “a proxy’s decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence” – an instruction plainly directed first to a guardian or other representative and thus a basis for judicial review, not judicial substitution (judges are not included in the list of section 765.401(1) proxy candidates).

A Second District coup? Hardly. It is enough to recall the common law foundations of the Florida constitutional right of privacy. It is enough as well to recall the notable legislative modesty chapter 765 avows.<sup>123</sup> Judicial assertion of primary jurisdiction, as against legislative efforts especially, is not so extraordinary a phenomenon within the working assumptions of Florida constitutional law (if not necessarily noncontroversial) as it might appear to be within the terms of other constitutional points of view.<sup>124</sup>

Judge Greer, at the trial level, and the Second District Court of Appeal, at the intermediate appellate level, mooted the Fourteenth Amendment equal protection concern. Adjudication of a motion for a preliminary injunction provided an altogether sufficient context within which federal district Judge Whittemore could educate himself in this regard. It is perhaps not surprising, therefore, that in the end counsel presented Judge Whittemore with seemingly marginal, grab-bag claims and that Judge Whittemore and the Eleventh Circuit dismissed the claims so brusquely.<sup>125</sup> The central problem which would have – it seems – constitutionally justified congressional action had been addressed already by state judicial improvisation. Congress did not act unconstitutionally. The federal judges did not act impertinently.

It was all – only – excruciatingly – unnecessary.

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121. *In re Guardianship of Browning*, 568 So. 2d 4, 16 (Fla. 1990).

122. *Id.* at 17.

123. See *supra* note 51 and accompanying text.

124. For the classic study, see Alan C. Swan, *Administrative Adjudication of Constitutional Questions: Confusion in Florida Law and a Dying Misconception in Federal Law*, 33 U. MIAMI L. REV. 527 (1979).

125. See *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005).