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Politicizing the End of Life: Lessons From the Schiavo Controversy

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In politics, an absurdity is not a handicap.
–Napoleon Bonaparte (1769-1821)

I. INTRODUCTION

Fourteen years ago, at the age of twenty-six, Theresa Marie Schiavo lapsed into a permanent vegetative state (PVS) after a cardiac arrest
deprived her brain of oxygen for an extended period. Since then, a tube providing artificial nutrition and hydration has kept her body alive.\footnote{See Abby Goodnough, Governor of Florida Orders Woman Fed in Right-to-Die Case, N.Y. TIMES, Oct. 22, 2003, at A1.} Because non-comatose PVS patients, such as Theresa, experience waking and sleeping cycles, open their eyes, move their limbs, and utter sounds,\footnote{See Multi-Soc’y Task Force on PVS, Medical Aspects of the Persistent Vegetative State (pt. 1), 330 NEW ENG. J. MED. 1509, 1500 (1994) [hereinafter PVS Report (pt. 1)] (“Patients in a vegetative state are usually not immobile. They may move the trunk or limbs in meaningless ways. They may occasionally smile, and a few may even shed tears . . . utter grunts or, on rare occasions, moan or scream. . . . These motor activities may misleadingly suggest purposeful movements . . . .”); see also id. at 1501; cf. Christopher M. Booth et al., Is this Patient Dead, Vegetative, or Severely Neurologically Impaired?, 291 JAMA 870 (2004) (evaluating data on neurological outcomes after cardiac arrest, and concluding that several clinical signs that become apparent just twenty-four hours after cardiac arrest serve as reliable predictors of poor neurological prognosis).} some people, including Theresa’s parents Robert and Mary Schindler, find it difficult to accept that she lacks any capacity for thought, emotion, or other activities associated with consciousness. With the passage of years, Theresa’s cerebral cortex has withered and liquefied, but her brainstem remains intact. Thus, she breathes without assistance, but she cannot experience or interact with her environment and requires comprehensive care, including artificial nutrition and hydration through a tube, to sustain her body.\footnote{See PVS Report (pt. 1), supra note 2, at 1501 (“The adjective ‘persistent’ refers only to a condition of past and continuing disability with an uncertain future, whereas ‘permanent’ implies irreversibility. Persistent vegetative state is a diagnosis; permanent vegetative state is a prognosis.”).} Several medical experts have concluded that Theresa will never recover any measurable brain function.\footnote{See Multi-Soc’y Task Force on PVS, Medical Aspects of the Persistent Vegetative State (pt. 2), 330 NEW ENG. J. MED. 1572, 1572-73 (1994) [hereinafter PVS Report (pt. 2)] (explaining that the “prognosis for cognitive and functional recovery depends on the cause of the underlying brain disease” and that recovery of consciousness after three months is rare in adults with nontraumatic injuries to the brain). One year after nontraumatic brain injury, only fifteen percent of adults in the study had recovered any degree of consciousness and, for those few who regained consciousness, recovery of function was “extremely poor.” See id. at 1573, 1575 tbl.5. Because Theresa’s brain injury resulted from a nontraumatic cause (a cardiac arrest) she has essentially no chance of any measurable recovery after fourteen years.} Notwithstanding these expert opinions, her parents retain the hope that Theresa will benefit from unconventional efforts at rehabilitation.\footnote{See William R. Levesque, Doctors Offer Voices for Terri Schiavo, ST. PETERSBURG TIMES, Oct. 25, 2003, at 1B (quoting various family members who believe that Theresa responds to them with smiles and eye movements).}
explaining that Theresa would have never wanted to continue to exist in a vegetative state after all hope of recovery had vanished. At the same time, her parents have continuously and vigorously objected to this request, arguing that the evidence of Theresa’s wishes is insufficient and that its source is suspect. In a series of judicial decisions, state and federal courts have repeatedly confirmed the legal propriety of acceding to Michael’s request, finding evidence of Theresa’s wishes legally sufficient to support the removal of life supportive measures.6 Last fall, after they had exhausted the available legal avenues, the Schindlers appealed to the Governor of Florida (Jeb Bush) for help, and, six days after Theresa’s feeding tube was removed, the Florida legislature enacted a special bill authorizing the Governor to intervene in the dispute.7

This is certainly not the first end-of-life dispute to pit family members against one another or to generate difficult ethical and legal dilemmas for treating physicians. In some of its ethical, medical, and political dimensions, the Theresa Schiavo case presents an eerie reprise of the now famous Baby K case.8 In October of 1992, Contrenia Harrell gave birth to a baby girl named Stephanie. The child, later designated as “Baby K” in court documents, was born with anencephaly, a congenital condition in which most of the brain, including the cerebrum, fails to develop, leaving affected infants with an absent higher brain but with an intact brainstem. In its medical manifestations, anencephaly resembles PVS. Both conditions leave affected individuals entirely devoid of cognitive abilities or awareness but with spontaneous cardiac and respiratory functions.9 Although physicians diagnosed Stephanie’s condition prenatally, Ms. Harrell chose not to terminate the pregnancy.10

Beyond the medical comparisons, these cases share other significant elements in common. Certain family members in each case refused to accept the grim prognosis, resulting in a dispute over appropriate treatment that ultimately required judicial resolution. In the Baby K case, physicians treating Stephanie explained to her mother that mechan-

9. See PVS Report (pt. 1), supra note 2, at 1501-03 (describing related conditions leading to permanent unconsciousness, including coma, whole brain death, various degenerative brain disorders, and developmental malformations such as anencephaly).
10. See George J. Annas, Asking the Courts to Set the Standard of Emergency Care—The Case of Baby K, 330 NEw ENg. J. MED. 1542, 1542 (1994) (explaining that the “mother’s position was that ‘all human life has value,’ including her anencephalic daughter’s life”).
ical ventilation and other supportive measures were medically inappropriate because they served no therapeutic or palliative purpose and instead only prolonged the dying process. While Stephanie’s father agreed to discontinue treatment, Ms. Harrell steadfastly refused to consent to the withdrawal of support.11

Furthermore, in these and other cases, religious organizations intervened in support of those family members seeking to continue treatment, despite the objections of physicians and others that such treatment was medically inappropriate. Finally, various state governmental entities have intervened in several of these treatment disputes, each time advocating in favor of continued treatment. In Baby K, the state Department for Rights of Virginians with Disabilities simply submitted an amicus brief in support of continued treatment.12 In the Schiavo case, the state’s intervention, described in detail below, represents an even more disturbing interference with fundamental principles of personal autonomy in the medical decision-making context. The dispute is more than an isolated and extraordinary case: it offers a cautionary tale about the serious hazards associated with political meddling in individual bioethical controversies.

II. EXERCISING THERESA’S RIGHT TO REFUSE LIFE-SUSTAINING TREATMENT

It is a well-settled principle under Florida law that individuals have a right to refuse life-sustaining medical treatment. In fact, the combination of Florida’s constitution,13 statutes, and case law appears more clearly protective of a right to refuse such treatment than the federal due process standard discussed in Cruzan.14 The right of refusal is grounded in the ethical principle of autonomy that allows patients to retain control over their bodies. This right of bodily integrity does not disappear when

11. See id. at 1542. For another example of a case in which parents disagreed about medical decision-making for a terminally ill child resulting in a judicial order forbidding the termination of life support, see In re Jane Doe, 418 S.E.2d 3 (Ga. 1992).

12. See In re Baby “K,” 16 F.3d at 592 (listing amici in the case).

13. The Florida Constitution, unlike the U.S. Constitution, contains an explicit provision guaranteeing citizens a right of privacy. See Fla. CONST. art. I, § 23 (“Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein.”).

14. See Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261 (1990). Justice Rehnquist’s opinion in Cruzan, while noting that the “principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions,” id. at 278, merely concludes that the U.S. Constitution does not forbid states like Missouri from requiring a “clear and convincing” standard of evidence to prove that an incapacitated person would wish to forego life-sustaining measures in proceedings in which a guardian seeks judicial permission to withdraw artificial nutrition and hydration from a person in PVS. See id. at 280-85.
patients become unable to express their wishes. Instead, the law in Florida, as most elsewhere, permits a proxy decision-maker to step in to articulate the desires of incapacitated patients. In a landmark decision announced the same year that Theresa suffered her attack, the Florida Supreme Court in *In re Guardianship of Browning* ordered the removal of a feeding tube from a patient in PVS based on her preferences as expressed in a living will. The decision confirmed that an incompetent person's guardian, surrogate, or proxy decision-maker may exercise this privacy-based right of refusal on the patient's behalf, whether those wishes have been expressed orally or in writing.\(^{15}\)

Florida law explicitly recognizes the validity of oral advance directives.\(^{16}\) A state statute enacted in the wake of the *Browning* decision provides that if the patient has not designated a surrogate decision-maker in writing, then a proxy decision-maker can represent her wishes. In Florida, as in many states, the statutory hierarchy of proxies grants decisional authority to the incapacitated patient's spouse ahead of her parents.\(^{17}\) Because Theresa Schiavo did not designate a surrogate decision-maker in writing, her husband Michael presumptively serves as the proxy decision-maker in accordance with Florida law.\(^{18}\) The statute further requires that, before a proxy may exercise an incapacitated patient's right to withdraw life-prolonging measures, the decision "must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent."\(^{19}\) After years of litigation, the appellate court affirmed the trial court's conclusion that the evidence presented through the testi-

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15. *See In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (reviewing the case of a woman in a persistent vegetative state and dependent on a feeding tube). It is all the more remarkable that, at the time, Florida's statute specifically excluded artificial nutrition and hydration from its definition of life-prolonging procedures. *See id.* at 9 & n.5. Thus, the Florida Supreme Court's decision to respect the patient's refusal as set out in her living will, despite the lack of explicit statutory authority on this point, constitutes a powerful endorsement of the individual right of autonomy at the end of life.


17. The Florida statutes created the following statutory hierarchy: (1) court-appointed guardian (if already appointed); (2) spouse; (3) majority of adult children; (4) parents; (5) majority of adult siblings; (6) other relative; (7) friend; and (8) clinical social worker appointed by bio-ethics committee. *See Fl. Stat.* ch. 765.401 (2004).

18. The court also appointed Michael Schiavo as Theresa's formal guardian in 1990. Although Theresa's parents have challenged the propriety of this designation and have sought the removal of Michael, they have not succeeded. At various points during the litigation, the court also appointed different individuals to serve as guardian ad litems for Theresa. *See Key Events, supra* note 6.

mony of Michael Schiavo and several of Theresa’s friends satisfied this statutory standard of proof.  

The Florida statutes also explicitly affirm that the right of refusal covers all life-prolonging procedures and treatments, including artificial nutrition and hydration. The specific inclusion of these measures in the enumerated list of life-prolonging procedures coincides with the ethical position that there is no scientific or moral basis on which to distinguish such interventions from other types of life support such as mechanical ventilation. Moreover, medical experts repeatedly have confirmed that the withdrawal of artificial nutrition and hydration from a

20. The appellate court confirmed the trial court’s conclusion that the standard of evidence had been met, and observed that, “in 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.” See In re Guardianship of Schiavo, 851 So. 2d 182, 186-87 (Fla. Dist. Ct. App. 2003). Florida’s statute requires “clear and convincing” evidence that the substituted judgment decision is the one the patient would have chosen if competent. By contrast, more conservative jurisdictions such as Michigan and New York require clear and convincing evidence that the particular patient actually wanted specific measures taken or refused. See, e.g., In re Eichner, 52 N.Y.2d 363 (N.Y. 1981); In re Westchester County Med. Ctr. (O’Connor), 531 N.E.2d 607, 613 (N.Y. 1988).

21. See Fla. Stat. ch. 765.101(10) (2004) (defining “life-prolonging procedure” as “any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function”). Other states have taken different approaches to the issues surrounding artificial nutrition and hydration. Some statutes require specific statements about individual patient preferences regarding artificial nutrition and hydration rather than considering these measures as part of the general category of life-sustaining treatments. See, e.g., Ohio Rev. Code Ann. § 2133.09 (West 2004). Other states take the opposite position, requiring the withdrawal of artificial nutrition and hydration from terminally ill patients absent an advance directive expressing a contrary preference. See, e.g., Nev. Rev. Stat. 449.624 (2004).

22. Numerous courts and commentators have affirmed this position.

[We see no reason to differentiate between the multitude of artificial devices that may be available to prolong the moment of death. . . . We are unable to distinguish on a legal, scientific, or a moral basis between those artificial measures that sustain life—whether by means of “forced” sustenance or “forced” continuance of vital functions—of the vegetative, comatose patient who would soon expire without the use of those artificial means.


Once one enters the realm of complex, high-technology medical care, it is hard to shed the “emotional symbolism” of food . . . . Analytically, artificial feeding by means of a nasogastric tube . . . can be seen as equivalent to artificial breathing by means of a respirator. Both prolong life through mechanical means when the body is no longer able to perform a vital bodily function on its own.


Common sense tells us that food and water do not treat an illness, they maintain a life . . . . [T]his is not a case in which we are asked to let someone die . . . . This is a
person in a permanent vegetative state will cause the person to die naturally from their underlying disease within ten to fourteen days, without suffering any feelings of pain, thirst, or hunger.\textsuperscript{23}

The Florida statute defines "persistent vegetative state" in a manner consistent with the definition endorsed in the reports of an expert task force on the subject.\textsuperscript{24} Chapter 765, pertaining to health care advance directives, also contains a provision expressly describing the rights and interests of individuals in PVS that implicitly recognizes the grim reality of this condition's prognosis: Even for persons in PVS who have no advance directive, for whom there is no evidence indicating their wishes under the circumstances, and for whom no one is willing to serve as a health care proxy, physicians may withdraw life support whenever a court-appointed guardian concludes, with the concurrence of a physician and a hospital ethics committee, that there is no reasonable medical probability for recovery and that withdrawing life-prolonging procedures is in the patient's best interest.\textsuperscript{25} Thus, the Florida legislature, through the enactment of this statutory provision, appeared to contemplate the possibility that providing artificial support to a person in PVS who has not expressly requested such treatment may offer no genuine benefit to the patient.

Cruzan v. Harman, 760 S.W.2d 408, 412, 423 (Mo. 1988), aff'd, 497 U.S. 261 (1990). See, e.g., In re Warren, 858 S.W.2d 263, 266 (Mo. Ct. App. 1993) (discussing the Missouri Supreme Court opinion in Cruzan with approval). A recent statement by Pope John Paul II, apparently made in response to the Theresa Schiavo case, seemingly adopts the same position. The papal statement to the conference of the World Federation of Catholic Medical Associations concludes that the removal of a feeding tube from a person in PVS is immoral and constitutes "euthanasia by omission" because providing food and water is natural, ordinary, and proportionate care and not artificial medical intervention.

I should like particularly, to underline how the administration of water and food, even when provided by artificial means, always represents a natural means of preserving life, not a medical act. Its use, furthermore, should be considered, in principle, ordinary and proportionate, and as such morally obligatory, insofar as and until it is seen to have attained its proper finality, which in the present case consists in providing nourishment to the patient and alleviation of his suffering.


24. See PVS Report (pt. 1), supra note 2, at 1500-01. In Florida, a persistent vegetative state is "a permanent and irreversible condition of unconsciousness in which there is: (a) The absence of voluntary action or cognitive behavior of any kind. (b) An inability to communicate or interact purposefully with the environment." Fla. Stat. ch. 765.101(12) (2003).

III. TURNING THE SCHIAVO CASE INTO A POLITICAL FOOTBALL

On September 17, 2003, a Florida court broke the deadlock between Michael Schiavo and Theresa’s parents, ordering Theresa’s feeding tube removed, and, four weeks later, the hospice providing her care complied with this order. Less than one week after that, the Florida legislature took the extraordinary step of intervening in the case by enacting special legislation that granted the Governor fifteen days in which to order a “stay” of the court’s decision. Governor Jeb Bush immediately acted on that authority, directing health care providers to reinsert the tube so that Theresa Schiavo could resume artificial nutrition and hydration. Of course, in this case the term “stay” is really a misnomer as it does not refer to a temporary delay to allow the courts to consider additional evidence about the merits of their decision. The special legislation did include a provision requiring the appointment of a guardian ad litem to represent Theresa’s interests and to provide advice to the Governor about how to proceed after issuing the “stay.” Because the guardian failed to persuade Governor Bush to relent, however, the “stay” will remain in effect indefinitely. At this point it is inconceivable that the Governor would order the feeding tube removed again. Thus, the legislation left the ultimate judgment about this issue with a non-judicial actor, and the gubernatorial order amounted to a permanent overruling of the court’s final order.

Michael Schiavo immediately filed a challenge to the constitutionality of the legislature’s action and the intervention of the executive branch. The Governor responded with a series of procedural maneuvers, beginning with a motion to dismiss the constitutional claims on the

26. See H. B. 35E, 2003 Leg., Spec. Sess. E (Fla. 2003); 2003 Fla. Laws ch. 418. The pertinent part of the legislation provides that:

(1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003: (a) That patient has no written advance directive; (b) The Court has found that patient to be in a persistent vegetative state; (c) That patient has had nutrition and hydration withheld; and (d) A member of that 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 . . . .

Id. The bill is popularly known as “Terri’s Law.”

27. The appointed guardian assumed the unenviable task of meeting with the interested parties and with physicians providing Theresa’s care. Although he concluded that the situation was medically hopeless and that the court’s order to terminate support was “firmly grounded within Florida statutory and case law,” he was unable to sway the Governor. See Jay Wolfson, A Report to Governor Jeb Bush in the Matter of Theresa Marie Schiavo, Dec. 1, 2003, at 34, at http://www.miami.edu/ethics2/shiavo/wolfson’s report.pdf (this cite can be found through a link in Key Events, supra note 6); also at http://www.myflorida.com/myflorida/governorsoffice/review_year/docs/wolfson.pdf.
grounds that the case did not conform with the technical requirements relating to venue and service of legal documents, a move apparently designed to delay judicial resolution of the constitutional challenges.\footnote{28} Governor Bush also invited a prominent right-to-life attorney to serve as lead counsel in the defense of the special legislation,\footnote{29} prompting commentators to speculate about the not-so-hidden conservative religious and political agendas behind his decision to intervene. Meanwhile, the American Center for Law and Justice (ACLJ), a pro-life group established by Christian Coalition founder Pat Robertson, allied itself with Theresa Schiavo’s parents, offering to assist their attorney in defending the constitutionality of “Terri’s Law.”\footnote{30}

Elected officials in Florida take an oath to abide by the state constitution. Without pausing to offer any serious defense of the legislation’s constitutionality at the time of enactment, the Governor proceeded to intervene in Theresa’s case, claiming that he did what he thought was right.\footnote{31} Governor Bush even garnered praise from his brother the President.\footnote{32} Nevertheless, the legislative and executive branch meddling in

\begin{itemize}
\item \footnote{28} See Abby Goodnough, \textit{Florida Governor Seeks to Toss Out Suit on Feeding Tube}, N.Y. TIMES, Nov. 6, 2003, at A28; William R. Levesque, \textit{Terri’s Law Defender Lashes Out}, St. PETERSBURG TIMES, Nov. 6, 2003, at 1B. Attorneys for the Governor also attempted to force the judge assigned to hear the constitutional challenge to recuse himself on the grounds of “bias” because he had previously ruled that it was ethically and legally appropriate to remove the feeding tube based on the facts at trial. See \textit{Bush v. Schiavo}, 861 So. 2d 506 (Fla. Dist. Ct. App. 2003).
\item \footnote{29} See Levesque, \textit{supra} note 28 (describing the lead counsel, Ken Connor, as a “leader in Florida’s right-to-life movement” and former president of the Family Research Counsel, a Washington think tank).
\item \footnote{30} See William R. Levesque, \textit{Terri Schiavo’s Parents Seek Stake in Lawsuit}, St. PETERSBURG TIMES, Oct. 31, 2003, at 1B (quoting the ACLJ chief counsel, who has opined that the Schiavo case is “no different” from a situation in which the Governor uses his acknowledged authority to intervene to save the life of someone on death row). Although Florida’s Constitution expressly grants clemency power to the governor, see \textit{FLA. CONST.} art. IV, § 8, it contains no such provision authorizing gubernatorial intervention in end-of-life disputes.
\item \footnote{31} According to Governor Bush, “[t]his was the right thing to do and the courts will make the determination. It’s on appeal as I understand it and they’ll make the determination of the constitutionality but we did what was right and I’m proud of the legislature for responding.” \textit{CNN NewsNight with Aaron Brown} (CNN television broadcast, Oct. 23, 2003) (transcript #102300CN.V84 available on LEXIS); \textit{see also} Linda Kleindienst, \textit{Bush’s Schiavo Intervention Has Political Tinges, Analysts Say}, \textit{Sun Sentinel} (Ft. Laud.), Oct. 25, 2003, at 1A (quoting the Governor who stated, “I did what I thought was right . . . I think life is innocent. Life is precious.”).
\item \footnote{32} See David E. Sanger, \textit{Bush Backs His Brother’s Decision in Feeding Tube Case}, N.Y. TIMES, Oct. 29, 2003, at A23 (noting that the President made his supportive remarks in a speech in which he also reiterated his intention to sign a bill banning “partial-birth abortion,” sending reassurance to his conservative supporters on key issues). Occasionally, judges facing difficult medical treatment decisions have offered similar justifications for trampling on patient’s rights to refuse life-sustaining medical treatment. For instance, Judge Skelly Wright famously offered the following justification for ordering an emergency blood transfusion over the express refusal of a woman who was a member of the Jehovah’s Witness faith: “[A] life hung in the balance. There was no time for research and reflection . . . . To refuse to act, only to find later that the law
this case smacks of political expediency and hypocrisy. These events strongly suggest that the conservative religious right is seeking to impose its beliefs on Theresa Schiavo who, the courts have concluded, would prefer to die under these circumstances. Imagine instead a mirror image situation: Theresa Schiavo's parents prevail in the courts, forcing the continuation of artificial life support, notwithstanding her husband's claim that she had previously expressed wishes to refuse care under these circumstances. Not satisfied with this outcome, Theresa Schiavo's husband somehow persuades the legislature to intervene and to grant the Governor the authority to reverse the court's conclusion and order the removal of life support. The constitutional objections to such a series of events remain the same. Even so, the very groups that vocally applauded the legislative intervention in the Schiavo case would be crying foul under these circumstances.

A. Separation of Powers Objections

The legislative action and the Governor's blithe decision to overturn the court order raise significant constitutional questions and should not survive appeal. An inquiry into one structural infirmity in the legislation suffices to demonstrate its unconstitutionality. Unlike its federal

required action, was a risk I was unwilling to accept. I determined to act on the side of life." In re President & Dirs. of Georgetown Coll., Inc., 331 F.2d 1000, 1009-10 (D.C. Cir. 1964). There is much to criticize in Judge Wright's reasoning, but Governor Bush does not even have the emergency situation to justify his actions because the decision to remove Theresa Schiavo's feeding tube was the result of lengthy "research and reflection" resulting in a final determination by several courts that the removal was consistent with her wishes.

33. It is important to acknowledge that judicial fact-finding and conclusions in these sorts of cases represent an imperfect method of resolving questions of an incompetent patient's wishes. The Governor and the legislature have suggested that where there is even a scintilla of doubt about the patient's wishes regarding the refusal of life-sustaining treatment (which the Schindlers vehemently argue there is), one should "err on the side of life" and continue with treatment. See Statement By: Governor Jeb Bush Guardian Ad Litem's Report (Dec. 2, 2003), at http://sun6.dms.state.fl.us/eog_new/eog/library/releases/2003/December/litems-report_12-2-03.html (this cite can also be found through a link in Key Events, supra note 6). Adopting "err on the side of life" as the default position in the end of life context, however, penalizes the many who do not share that view; it seems probable that fewer mistakes would be made in individual cases if the system adopted no default position, but instead made the best decision possible with the facts available.

34. Randall Terry, the pro-life activist leader of Operation Rescue, was purportedly "ecstatic" in an interview on CNN, expressing delight that finally "an executive and a legislative body stood up to judicial tyranny." See Jonathan Turley, Terri Schiavo: Constitution Anticipated Such Hard Cases, MILWAUKEE J. SENTINEL, Nov. 3, 2003, at 13A (observing that, "when legislatures have passed bills on subjects such as abortion rights or same-sex unions, [Mr.] Terry has denounced them as 'godless' and led calls for court challenges").

35. It is worth remembering that the current litigation involves a challenge to the constitutionality of the legislative and executive efforts to overrule the final judicial decision, not to the merits of that decision. The Governor now is attempting to revisit judicial findings of fact in the decision to order removal of life support, but, because the Governor was not an interested party in those proceedings, the courts should resist these efforts.
counterpart, Florida’s constitution includes a provision that expressly requires maintaining the separation of powers among the three branches of government.\textsuperscript{36} Classically legislative actions are those that have general application and prospective effect,\textsuperscript{37} not those that are targeted and retroactive. In this respect, the Schiavo legislation’s format—its specificity taken together with its retroactivity—constitutes a dead giveaway that the legislature is not legislating anymore but rather engaging in an activity that is classically judicial. Generally speaking, it is the role of courts to resolve particular disputes, while legislatures are charged with creating laws of general application and prospective effect, and executive officers are charged with implementing these laws. Although these categories of authority overlap and blend in numerous ways, it would be difficult to argue in this case that the legislative intervention was constitutionally acceptable. A legislature may not grant an executive officer, such as the governor, powers that are properly viewed as judicial.

The Florida legislature expressly provided that the judiciary must settle controversies about whether patients who lack decisional capacity would choose to decline life-sustaining treatment.\textsuperscript{38} In this case, numerous courts have confirmed the guardianship court’s initial conclusion that Theresa Schiavo would choose to refuse continued life support under these circumstances, and the matter had been litigated to its conclusion, culminating in a final order to remove her feeding tube.\textsuperscript{39} The legislature, dissatisfied with the courts’ conclusions in this particular case, intervened by handing the Governor the authority to interfere with this final judicial determination, in violation of Florida’s constitutional requirement of separation of powers. As the United States Supreme Court has ruled, Congress may not intrude upon judicial proceedings, no matter what the reason, and the same principle applies at the state level.

\textsuperscript{36} See \textit{Fla. Const.} art. II, § 3 (“The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”); see also \textit{id.} art. I, § 10 (“No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.”). Moreover, Florida’s case law interpreting this explicit separation of powers provision strongly supports a strict application of the doctrine. \textit{See, e.g.}, State v. Cotton, 769 So. 2d 345, 353 (Fla. 2000); Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1991).


\textsuperscript{38} See \textit{Fla. Stat.} ch. 765.105 (2004) (providing that the patient’s family, the health care facility, and other interested parties may seek expedited judicial intervention if the person believes that the surrogate or proxy’s decision is not in accord with the patient’s known wishes, that the surrogate or proxy has failed to discharge his/her duties or has abused powers).

Of course, the resolution of disputes with respect to end-of-life treatment hardly represents an inherently judicial function. Resolution in the courts may not represent the optimal approach to dealing with such conflicts; in fact, courts in Florida and elsewhere have acknowledged that such matters ideally should be resolved outside of the judicial system. As of now, however, the statute indisputably lodges primary decisional authority with the Florida courts, and the legislature cannot ignore this established decision-making scheme on an ad hoc basis, especially not after the judicial process has run its course. If the constitution does not regard the resolution of end-of-life disputes as an inherently judicial function, then the legislature retains the discretion to amend the statute to remove this authority from the courts. In light of this concession, could the legislature defend “Terri’s Law” on the basis that its greater power to remove all authority over end-of-life disputes from the judiciary includes the lesser power to revoke such authority in a particular dispute? Courts generally have rejected such greater-includes-the-lesser arguments in various constitutional settings, and the statute delegated full authority to the courts without reservation, so it would contravene the enacting legislature’s design to allow piecemeal revocations of that power.

40. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995) ("Having achieved finality ... a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was."). Supporters of the legislative override of the judicial determination in the Schiavo case might attempt a more sophisticated defense of its constitutionality by suggesting that the separation of powers argument in this case is excessively formalistic. Those taking a functionalist approach generally argue against bright line delineations of authority, suggesting instead that it is more appropriate to balance on an ad hoc basis the competing policy concerns in a given case by asking whether the apparent separation of powers violation genuinely threatens to unbalance the branches and whether it promotes a sufficiently weighty goal. See Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1732-44 (1996) (describing and discussing the two styles of separation of powers analysis); Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions-A Foolish Inconsistency?, 72 Cornell L. Rev. 488, 510-26 (1987) (comparing two cases representing formal and functional approaches to separation of powers analysis). Nevertheless, it seems likely that even a diehard functionalist would find this legislation difficult to defend because it involves the usurpation of another branch’s function, rather than a give-away of power to another branch, and it serves no plausible public purpose.

41. See infra note 100 and accompanying text (briefly discussing an alternative, non-judicial approach).

42. See Brooks R. Fudenberg, Unconstitutional Conditions and Greater Powers: A Separability Approach, 43 UCLA L. Rev. 371, 519 (1995) (arguing that, although the greater-includes-the-lesser argument makes some sense, heightened judicial scrutiny is appropriate in cases where the lesser power is separated from the greater power along a constitutionally protected dimension); John H. Garvey, The Powers and the Duties of Government, 26 San Diego L. Rev. 209, 215-19 (1989) (commenting on the limitations of this argument).

43. Along a similar line, could the legislature amend Chapter 765 of the Florida statutes to
Private legislation also does not invariably offend federal or state constitutional principles. No provision in the U.S. Constitution generally prohibits private bills. In fact, Congress frequently enacts special bills designed to affect individual rights retroactively, particularly in the context of immigration claims, but these bills typically provide a benefit to the individual rather than imposing a detriment. In contrast, Florida’s constitution expressly prohibits most types of “special laws,” though not surprisingly it fails to mention issues of guardianship or end-of-life decision-making.

Because the Florida courts have repeatedly concluded that Theresa would not wish to continue artificial support under these circumstances, it seems unlikely that she would perceive this legislation as providing her with a benefit. Johnnie Byrd, Jr., the Speaker of the Florida House of Representatives, took a purposefully naive position on this question in his amicus brief in support of the legislation he helped craft:

Nothing on the face of [Terri’s Law] questions the propriety or authority of the determination of how chapter 765 and the constitutional right to privacy applied to Terri Schiavo’s situation at the time of Judge Greer’s decision to withdraw and withhold nutrition and hydration. Instead, [the statute] adds new protections to the right to life of Terri Schiavo and other incompetents whose deaths by dehydration and starvation had been judicially ordered and approved

create an end-of-life dispute resolution scheme in which courts initially hear and decide these cases but the legislature expressly retains the authority to override individual judicial decisions with which it disagrees? Cf. INS v. Chadha, 462 U.S. 919, 952-55 (1983) (invalidating on bicameralism and presentment grounds a legislative veto in a statute delegating to the U.S. Attorney General the authority to waive statutory deportation requirements in certain cases while retaining for one chamber of Congress the power to override this partial delegation of authority in individual cases).

44. The U.S. Constitution does, however, forbid two particular categories of private bills. See U.S. Const. art. I, § 9, cl. 3 (bills of attainder); U.S. Const. art. I, § 8, cl. 8 (titles of nobility).

45. See Brian M. Hoffstadt, Normalizing the Federal Clemency Power, 79 Tex. L. Rev. 561, 609-10 (2001) (explaining that Congress possesses the authority to enact private bills and “has traditionally exercised that power in granting people immigration status and allowing individuals to press financial claims against the federal government”); cf. Sharona Hoffman, A Proposal for Federal Legislation to Address Health Insurance Coverage for Experimental and Investigational Treatments, 78 Ore. L. Rev. 203, 240 (1999) (describing special state legislation intervening in a health insurance contract coverage dispute to provide insurance benefits to a child with cancer over the objections of the insurer).


47. Brief of Amicus Speaker of the House on the Issue of Separation of Powers at 4, Schiavo
While apparently conceding that the courts got it right under the applicable law at the time the dispute was litigated, he wonders, in effect, "Who could possibly object to giving someone more rights than they had before?"

B. Other Constitutional Objections

In addition to its structural constitutional flaws, the legislation interferes with Theresa's individual constitutional rights. Before she lost decisional capacity, Theresa made statements that, as the courts have confirmed, met the standard at the time for an incompetent to refuse additional life sustaining treatment. The legislature's action applies retroactively, changing the rules that Theresa may have relied on, in violation of her Fourteenth Amendment right to procedural due process. This lack of notice creates an unfair surprise for the parties in the case. In another recent case examining the constitutionality of a retroactive statute, a Florida court upheld retroactive legislation forbidding the publication of autopsy photographs (including those of the already dead NASCAR legend Dale Earnhardt) despite the general right of access and publication to autopsy records under state public records laws. Unlike the Schiavo legislation, however, the statute enacted in response to the media's attempt to publish Earnhardt's autopsy photographs not only

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48. Courts generally disfavor retroactivity in legislation. See Landgraf v. USI Film Prods., 511 U.S. 244, 264-80 (1994); United States v. Carlton, 512 U.S. 26, 30-31 (1994); Fisch, supra note 37, at 1065-66 (explaining that the Supreme Court has "reaffirmed the presumption against retroactivity" and that this presumption "is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation") (quoting Landgraf, 511 U.S. at 286)). Nevertheless, retroactive legislation is permissible if its purpose is remedial—that is, if it is intended to remedy a problem or redress an injury—and if it does not interfere with a vested private right.

49. See U.S. Const. amend. XIV, § 1. What if, after Theresa had entered PVS but before the litigation to remove her life support began, the legislature had amended the statute to require a written advance directive in all cases in order to withdraw artificial nutrition and hydration from a person in PVS? Such a scenario would remove the separation of powers concerns discussed above and would instead raise a pure retroactivity question—whether application of the hypothetical statute to Theresa improperly interferes with due process in her case. Then, the court hearing the Schiavo case would have to determine whether Theresa Schiavo actually relied on the previous version of the statute (that did not require written advance directives). In the alternative, what if Theresa actually had an advance directive that was executed consistent with the statute at the time, but the legislature amended the statute to require two witness signatures and notarization in order to make the written instructions valid? In this latter scenario, the fact that she had executed an advance directive consistent with the statute at the time (before she lost capacity) would appear to indicate reliance.

50. See Campus Communications, Inc. v. Earnhardt, 821 So. 2d 388, 401 (Fla. Dist. Ct. App. 2002) (concluding that retroactive legislation forbidding the publication of autopsy photographs did not impair a vested individual right of a media outlet to inspect, copy, and publish public autopsy records under Florida public records laws).
applied retroactively but also prospectively to all similar future situations, and it interfered with a public rather than a private right. In contrast, "Terri's Law" was drafted to apply only in Theresa's case, the authority it handed to the Governor expired after fifteen days rather than applying to all future cases, and it impaired her private right to due process, all characteristics that should raise red flags in retroactivity analysis.

Governor Bush is not the first state official to intervene in a family dispute over the withdrawal of artificial nutrition and hydration from a patient in a permanent vegetative state, and he probably will not be the last. Although the special legislation designed to address the Theresa Schiavo dispute appears to be the first of its kind in the end-of-life setting, the Virginia legislature flirted with a similar intervention in the mid-1990s. In this remarkably similar case, Hugh Finn, a forty-four-year-old former television newscaster languished in a permanent vegetative state after an automobile accident severely injured his brain. Three years after the accident, his wife, Michele Finn, concluded that he would not wish to be kept alive by artificial means under the circumstances. When she notified Mr. Finn's family that she intended to ask the nursing facility caring for her husband to withdraw artificial nutrition and hydration, the family objected and filed suit. The trial court confirmed that the medical testimony presented clear and convincing evidence of Mr. Finn's vegetative state, that Michele Finn and others had presented credible testimony that withdrawal of support would be Mr. Finn's wish, and that Virginia law permitted the withdrawal of support in the

52. See Earnhardt, 821 So. 2d at 400.
53. In another case of this sort, a state attorney general intervened to prevent a mother from withdrawing artificial nutrition and hydration from her adult son who had been permanently unconscious for over twenty years. See Dale L. Moore, Afterword: The Case of Daniel Joseph Fiori, 57 Alb. L. Rev. 811 (1994) (criticizing the Attorney General's persistent opposition to the mother's decision). The state supreme court ultimately agreed that the patient's mother retained the right to request treatment withdrawal based on her understanding of what her son would have wanted under the circumstances. See In re Fiori, 673 A.2d 905 (Pa. 1996). For another startling example of well-intentioned meddling in an end-of-life dispute, though by a private citizen rather than a government official, see In re Lawrance, 579 N.E.2d 32 (Ind. 1991) (concluding that the probate court erred in appointing a temporary guardian for Ms. Lawrance because her family retained the legal authority to decide whether to remove her feeding tube). See also In re Mullins, 649 N.E.2d 1024 (Ind. 1995) (reprimanding the lawyer who intervened in the Sue Ann Lawrance case because she was not an "interested party," and for unprofessional conduct in attempting to interfere with the guardianship by forming the "Christian Fellowship for the Disabled" that sought emergency guardianship in order to prevent the removal of her feeding tube). Earlier cases also generated strong emotions among members of the public. When the Missouri probate court ultimately issued the order permitting the removal of Nancy Cruzan's feeding tube, pro-life protesters attempted to storm her hospital room to reconnect the tube. See Associated Press, Protesters Fail in Bid to Feed Dying Woman, N.Y. Times, Dec. 19, 1990, at D20.
While the litigation was pending, representatives from various Virginia state agencies and a member of the General Assembly made "investigative visits" to the nursing home to "examine" Mr. Finn, apparently at the behest of dissenting family members. Shortly after the trial court entered its order, twenty members of the Virginia General Assembly announced an "informal declaration" regarding the Finn case in which they stated that "the provision of comfort care as well as food and water should not be denied patients where such removal will be the underlying cause of death." A few days later, the Governor of Virginia filed a separate lawsuit against the nursing home, Mr. Finn's physician, and Michele Finn, seeking a permanent injunction forbidding removal of the feeding tube. Boiled down to its essence, the Governor's complaint contended that withdrawal of artificial support would be the cause of Hugh Finn's death, rather than his underlying condition, and that because Virginia law forbids euthanasia, the court should issue the injunction. The trial court denied the Governor's request and awarded attorneys' fees and court costs to Michele Finn.

Other legislatures, including Congress, have happily meddled in similar sorts of family disputes, with equally disturbing results. A recent federal decision in a child custody case offers some instructive parallels to the Schiavo dispute. Dr. Eric Foretich and his wife Dr. Jean Morgan separated while Jean was pregnant with their daughter Hilary, and they divorced shortly after her birth. The D.C. Superior Court awarded custody to Dr. Morgan and generous visitation to Dr. Foretich, but Dr. Morgan repeatedly refused to comply with the visitation orders, claiming that Dr. Foretich and his parents had sexually abused Hilary. The courts never found any evidence of abuse and continued to reaffirm the visita-

55. See id. at 456-57 (explaining that these visits occurred without the knowledge or consent of Michele Finn).
56. See id.
57. See id. at 457-58 (explaining that the Governor's complaint asserted that he was acting "pursuant to his duty to protect or preserve the general welfare of the citizens of the Commonwealth . . . where he shall determine that existing legal procedures fail to adequately protect existing legal rights and interests of such citizens").
58. See id. As explained above, this position directly contradicts the view of numerous physicians, medical ethicists, courts and legislatures that artificial nutrition and hydration provided through a tube is no different than other types of technological life-supportive measures. See supra note 22 and accompanying text.
59. The Supreme Court of Virginia affirmed the trial court's decision including its determination to decline Michele Finn's request for punitive sanctions against the Governor, concluding that the Governor had acted in good faith and that his assertions were not totally without merit. See Gilmore, 527 S.E.2d at 462, 467.
60. See Foretich v. United States, 351 F.3d 1198 (D.C. Cir. 2003).
tion orders on Dr. Foretich’s behalf. Ultimately, Dr. Morgan served time in jail for contempt of court (for keeping Hilary from her father), after which she then fled with Hilary to New Zealand. At Dr. Morgan’s request, Congress intervened in the dispute and passed the Elizabeth Morgan Act, which enabled Dr. Morgan and her daughter to return to the United States without being subject to orders from the D.C. Superior Court, and which prevented Dr. Foretich from visitation with his daughter unless the daughter consented. Like the Florida legislature’s intervention in the Theresa Schiavo case, the Elizabeth Morgan Act pretended to be neutral, referring to “any pending case involving custody over a minor child,” but its other provisions, taken together, can refer only to the Morgan/Foretich custody dispute.61

Dr. Foretich challenged the Act as an unconstitutional bill of attainder and a violation of due process and separation of powers.62 The United States Court of Appeals for the D.C. Circuit concluded that the Act was a bill of attainder, explaining that the constitutional prohibition on such bills was intended to serve as “a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.”63 Thus, the court understood the Bill of Attainder clause as reinforcing separation of powers principles in the United States Constitution.

The Supreme Court has interpreted the Bill of Attainder clause as prohibiting laws that (1) apply with specificity and (2) impose punishment.64 Because the Elizabeth Morgan Act was drafted to cover an exceedingly narrow set of circumstances that could only apply to the Morgan/Foretich custody dispute, the D.C. Circuit readily concluded that there was “no serious dispute that the . . . Act satisfies the specificity prong of [the Bill of Attainder] analysis.”65 With respect to the question of whether the Act imposes punishment, the court concluded that

61. Id. at 1207. The Elizabeth Morgan Act did not apply except under the following circumstances: (1) the minor child in a pending custody dispute has attained 13 years of age; (2) the child has resided outside the United States for not less than 24 consecutive months; (3) any party to the case has denied custody or visitation to another party in violation of a court order for not less than 24 consecutive months; (4) any party to the case has lived outside of the District of Columbia during that period of denial of custody or visitation; and (5) the child has asserted that a party to the case has been sexually abusive with him or her. Id.

62. Id. at 1208-09. The United States Constitution provides that “[n]o Bill of Attainder . . . shall be passed.” U.S. Const. art. I, § 9, cl. 3.

63. Foretich, 351 F.3d at 1216 (quoting United States v. Brown, 381 U.S. 437, 442 (1965)).

64. See id. at 1217 (citing BellSouth v. FCC, 162 F.3d 678, 683 (D.C. Cir. 1998)). Although the bill of attainder clause initially was understood to refer to legislative acts that sentenced particular defendants to death without a judicial trial, the Supreme Court quickly expanded the scope of the clause to include “[t]he deprivation of any rights, civil or political, previously enjoyed.” See id. (citing Cummings v. Missouri, 71 U.S. 277, 320 (1866)).

65. Foretich, 351 F.3d at 1217.
the legislation evinced no legitimate non-punitive purpose and that it instead “inflict[ed] significant and costly injury to Dr. Foretich’s reputation, while... [taking]... a significant step toward permanently severing Dr. Foretich’s relationship with his own daughter.”

The court also relied on the legislative history of the Act, which included numerous statements regarding the congressional intent to “correct an injustice” in the custody dispute.

Although the Florida legislation dealing with Theresa Schiavo’s case also would appear to satisfy the specificity requirement for an unconstitutional bill of attainder, it is less obvious whether “Terri’s Law” imposes the same degree of “punishment” on Michael Schiavo in the form of injury to reputation that the Elizabeth Morgan Act accomplished. At the very least, “Terri’s Law” appears to question Michael Schiavo’s motivations, implicitly endorsing the Schindlers’ claims that Michael Schiavo has sought permission to withdraw artificial support for his own convenience. In other respects, however, the two cases share remarkable similarities and trigger comparable constitutional misgivings.

* * * * *

The constitutional challenge to Terri’s Law is now winding its way through the courts. On May 6, 2004, the Florida Sixth Judicial Circuit issued an order granting summary judgment to Michael Schiavo, concluding that “there is ample undisputed record evidence... to conclusively demonstrate the unconstitutionality of [the legislation]... both on its face and as applied to Mrs. Schiavo.” The opinion adopted a “kitchen sink” approach to its constitutional analysis of the legislation and in several instances appeared to overstate or mischaracterize the facts of the case. Nevertheless, the reviewing court correctly con-

66. Id. at 1223.
67. See id. at 1225-26. In fact, the government conceded during the litigation over the Act’s constitutionality that the Act was directed solely at Dr. Foretich. See id. at 1204.
68. For an analysis of these and other objections to proposed federal legislation withdrawing the license of an abortifacient, see Lars Noah, A Miscarriage in the Drug Approval Process?: Mifepristone Embroils the FDA in Abortion Politics, 36 Wake Forest L. Rev. 571, 594-99 (2001). The state constitution tracks the federal constitution in this regard. See Fla. Const. art. I, § 10 (“No bill of attainder... shall be passed.”).
70. For example, the opinion describes the special legislation as containing “nothing to provide the Governor with any direction or guidelines for the exercise of this delegated authority,” which ignores the requirement in the statute that the Governor consult with an independent guardian. See id. at *3. Of course, the guardian’s recommendations, in reality, would be unlikely to influence the Governor unless they happened to coincide with Mr. Bush’s own views. Similarly, the court appears to overstate the claim that deciding disputes of this sort represents a
cluded that the legislation is unconstitutional. With respect to the separation of powers analysis, the court noted that "a final judgment of a court case cannot be undone by legislation as to parties before the court" and that "the prohibition against intrusion into judicial functions by legislation also applies to executive branch encroachment." The reviewing court also concluded that the legislation violates Theresa's substantive rights under the state constitution's explicit privacy provision.

The Florida Supreme Court granted a request for expedited review, over the vocal objections of the Governor. On September 23, 2004, this court confirmed the trial court's conclusion that the special legislation is unconstitutional, focusing exclusively on state separation of powers analysis. The court's opinion begins with the observation that the legislation and the ensuing gubernatorial stay interfere with a final judicial order, in violation of the Florida Constitution's separation of powers provision. In addition, the court observed that the legislation inappropriately delegates legislative authority to the Governor. Noting that "Terri's Law" provides no criteria to guide the Governor, either in issuing the stay or in deciding to lift it, the court roundly rejected the Governor's contention that his decision-making discretion is in fact limited by the provisions of Chapter 765. Unfortunately, although the court core judicial function. See id. at *7 (the "executive order . . . constituted a forbidden encroachment upon the power that has been reserved for the independent judiciary" and "the Governor interfered with the court's prior final adjudication of Mrs. Schiavo's rights through the exercise of powers textually assigned by the Constitution to the judiciary"); see also infra notes 41-43 and accompanying text (discussing the question of whether resolving such disputes represents an essential judicial function).

71. See Schiavo, 2004 WL 980028 at *7. Curiously, the court characterizes the separation of powers violation as an "as applied" rather than a "facial" constitutional flaw. Nothing about the separation of powers analysis appears to depend on the facts of this particular case, however, and it is difficult to imagine circumstances in which this legislation would not be unconstitutional on these grounds.

72. See id. at *3-5.

73. See Abby Goodnough, Top State Court to Hear Feeding-Tube Case, N.Y. TIMES, June 17, 2004, at A24 (reporting that the Florida Supreme Court voted 4-3 to hear the case and has scheduled oral argument for August 31, 2004). Attorneys for Governor Bush continued in their attempts to delay resolution of the constitutional question, requesting that the court delay additional action pending a resolution of its challenge to Michael Schiavo's guardianship authority. See Documents in the Schiavo Cases, at http://www.flcourts.org/pubinfo/schiavo/index.html (last visited Aug. 27, 2004) (providing additional examples of briefs filed in an apparent attempt to delay the oral argument).

74. See Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004). On January 24, 2005, in response to a petition by the Florida Governor, the United States Supreme Court declined to grant certiorari.

75. See id. at 331 ("[T]he Act, as applied in this case, resulted in an executive order that effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary.").

76. See id. at 334.
rectly concludes that the legislation violates Florida’s separation of powers provisions, it leaves a number of important questions unanswered. For example, the opinion does not address the more complex questions of whether the resolution of end-of-life disputes constitutes an inherently judicial function, or whether the legislature could withdraw this function from the courts by amending Chapter 765 with respect to future cases.77

C. Ethical Implications

The special legislation in the Schiavo case represents an unwarranted and irresponsible interference with an individual citizen’s right to make autonomous medical decisions. Apart from its constitutional failings, the Governor’s intervention flies in the face of the now well-settled right of individuals to refuse life-sustaining treatment. The Florida courts, after careful consideration of testimony from Theresa Schiavo’s friends and family, concluded that continued treatment would be inconsistent with her preferences and, therefore, ethically inappropriate. On the other side, Theresa’s parents and those groups which have adopted their cause hold equally vehement, emotional views about the ethical propriety of continuing to provide Theresa with artificial nutrition and hydration, disputing the court’s conclusions about her wishes and asserting that withdrawal of support constitutes a form of euthanasia. Rather than respecting the court’s confirmation of Theresa Schiavo’s wishes in this situation, the state government has opted instead to substitute its own judgment about what is right as an ethical matter, as well as choosing to contest important findings of fact regarding Theresa’s diagnosis and prognosis.78

One might also question the legislature’s true motivations79 in light

77. See supra notes 41-43 and accompanying text (discussing these questions).
78. Her husband’s attorney likens the state’s actions to a kidnapping in the midst of the dying process—a monstrous meddling with her right of bodily integrity. See Hugo Kugiya, After Fight, Tube’s Back; Comatose Woman Rehydrating, NEWSDAY, Oct. 23, 2003, at A6 (reporting that Michael Schiavo’s attorney, George Felos, “[c]haracterized the governor’s order as a sanctioned kidnapping”).
79. On the relevance of such motivations in resolving constitutional challenges, see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977) (“The legislative or administrative history may be highly relevant [in determining whether discriminatory intent existed], especially where there are contemporary statements by members of the decisionmaking body.”); Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 CAL. L. REV. 297,
of the numerous pronouncements made during the pre-enactment debate about the sanctity of life and the will of Floridians. More than a few commentators have observed that the decision to intervene in the Schiavo case appeases vocal and politically powerful religious groups who wielded tremendous clout in this election year. The Governor earned high praise from Theresa’s parents and various pro-life groups for his actions, but others view his decision as one of political expedi-ence cloaked in a mantle of concern for Theresa’s welfare. Again, interference by individuals or groups with a pro-life agenda into end-of-life decision-making does not represent a new phenomenon, but it is deeply troubling when such attempts succeed in overruling the apparent wishes of the patient in question. Many individuals would find a “majority-rule” approach to end-of-life decision-making repugnant, especially if their preferences happen to differ from that of the current majority.

If allowed to stand, this model of legislative intervention in individual medical decisions will have grave consequences for patients and health care providers in Florida. Although this particular law was carefully tailored to address only Theresa Schiavo’s circumstances, nothing would prevent the Florida legislature from opting to use a similar mechanism to intervene in other sorts of cases, such as disputes about abortion rights, decisions about organ and tissue donation, or disputes among family members over appropriate medical treatment for a gravely ill child. Imagine, for example, a scenario in which a pregnant woman wishes to obtain a legal second-trimester abortion over the objection of her husband. Can the aggrieved husband now seek legislative intervention in the form of a special bill to prevent the abortion? Such a bill would surely fail to survive constitutional scrutiny, but, while the courts review the legislation, the woman’s pregnancy likely would progress beyond the point of viability, effectively removing the abortion option. Recent events have placed the old assumptions about autonomous medical decision-making seriously in doubt.

Why has the Theresa Schiavo case caused such consternation? Although the court’s conclusion that Theresa herself, through the exer-

368-69 (1977) (concluding that the Court has increasingly and appropriately focused on the legislature’s motivations in resolving constitutional challenges).

80. Even if the Governor’s decision to issue the “stay” was driven by genuine concern for Theresa’s welfare, good intentions fail to excuse such intrusions into the private, personal rights of individuals. As Justice Louis Brandeis once wrote, “[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.” Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

cise of her autonomous right to refuse unwanted medical care, would have chosen to refuse the care, the dispute between Theresa’s family members at its root centers around an underlying confusion about the concept of futility in medicine. In cases of scientific futility (also known as physiologic futility), patients or their families demand treatments that simply will not achieve the desired medical goal. Because physicians readily can identify instances of scientific futility and generally can explain to patients and families why a particular intervention is not appropriate, discontinuing care based on scientific futility tends not to pose difficult ethical problems. In contrast, in a case of ethical futility (also known as qualitative futility), where treating physicians (or dissenting family members) believe that the quality of that life is so diminished that its continuation appears futile, patients or their families (or pro-life legislators) continue to demand treatments that will accomplish the medical goal of sustaining this qualitatively diminished life.

Despite its judicial resolution on individual autonomy grounds, the dispute over Theresa Schiavo’s care rages on partly because the case raises a question of ethical rather than scientific futility. No one can argue, as a scientific matter, that the artificial nutrition and hydration constitute an ineffective treatment; it “works” in the sense that it keeps Theresa’s body alive. Unfortunately, this vitalist view of life directly conflicts with the uncomfortable perception that the quality of Theresa’s life renders continued treatment ethically inappropriate. As with anencephalic infants, physicians caring for patients in a permanent vegetative state frequently reach the conclusion that continuing with tube feeding and other measures is ethically futile, despite the fact that these interventions “work” to keep the patient alive.

Because judgments about ethical futility require inherently subjective assessments regarding “benefit” to the patient, it is important to tread carefully when considering a conclusion that a particular interven-

82. The law does not require physicians to provide scientifically futile care. See Jerry Menikoff, Demanded Medical Care, 30 Ariz. St. L.J. 1091, 1095 (1998) (discussing the classic example of a patient demanding antibiotics to treat a viral infection).

83. See id. at 1097 (explaining that “[e]fforts to keep alive people who will not ever rise above that minimum level [of permanent unconsciousness] are deemed to be futile,” but noting that “[t]he response to this argument is that no one ever empowered the medical profession to decide what constitutes an adequate quality of life: that would constitute a pure value judgment”). Professor Menikoff also describes a third futility category—quantitative futility—which he defines as involving “situations where the benefits of the treatment, should it succeed, would clearly be worthwhile, but the probability of the treatment succeeding is very low.” Id. at 1098.

84. In the case of Baby K, much of the ethical debate centered on the question of whether physicians must provide medical care that they view as ethically inappropriate. See Annas, supra note 10, at 1543-44; Elizabeth A. Larson, Did Congress Intend to Give Patients the Right to Demand and Receive Inappropriate Medical Treatments?: EMTALA Reexamined in Light of Baby K, 1995 Wis. L. Rev. 1425.
tion for a particular patient is ethically futile. The touchstone principle of autonomy reminds us that, whenever possible, the conclusion that continued treatment represents an ethically futile choice should rest on the individual patient’s values, preferences, and beliefs. Can a best interests analysis help to make these decisions in cases where evidence of individual preference does not exist, or is equivocal? As the Baby K case illustrated, debates about ethical futility raise vexing questions about the appropriate limits of family authority to demand treatments that physicians believe provide no genuine benefit to the patient. In the case of an anencephalic infant like Stephanie, the decision-maker obviously cannot inquire into individual preferences that never existed. For that reason, most physicians and family members turn instead to a benefits versus burdens calculus and conclude that continued treatment is not in the baby’s best interests given the prognosis.

But what exactly is the nature of the burden of continued treatment

85. For an insightful discussion on these complex ethical concepts in theory and application, see generally Alan Meisel & Kathy L. Cerminara, The Right to Die: The Law of End-of-Life Decisionmaking (2004).

86. Taking an extreme position on this question, the federal district court in the Baby K litigation opined that the hospital could not override Ms. Harrell’s demands for treatment because “[a] parent has a constitutionally protected right to ‘bring up children’ grounded in the Fourteenth Amendment’s due process clause.” In re Baby “K,” 832 F. Supp. 1022, 1030 (E.D. Va. 1993) (citations omitted). Several other courts have refused to permit health care providers to discontinue treatments over the objections of family members. See, e.g., In re Wanglie, No. PX-91-283 (Minn., Hennepin Cty. Prob. Ct., 1991). As one commentator has observed, “[t]hose who believe the family’s wishes should be decisive see the issue as one of autonomy. To them, a family’s right to discontinue treatment implies an analogous right to have it continued. Decision-making authority means nothing unless the decision can go either way.” Marcia Angell, After Quinlan: The Dilemma of the Persistent Vegetative State, 330 New Eng. J. Med. 1524, 1525 (1994).

87. The dissenting judge in the Baby K decision argued that, given her medical condition, “whatever treatment appropriate for her unspeakably tragic illness should be regarded as a continuum, not as a series of discrete emergency medical conditions to be considered in isolation.” In re Baby “K,” 16 F.3d 590, 599 (4th Cir. 1994) (Sprouse, J., dissenting). In effect, the judge suggested that the court permit Baby K’s treating physicians to make decisions about appropriate medical care by taking into account the reality of her condition and its terminal prognosis. The dissenting judge went on to suggest that the court evaluate the propriety of these treatment decisions against the legal vehicle of state malpractice law. See id. at 599. Commentators also have suggested that ethical futility arguments permit the cessation of supportive measures, sometimes even over the objections of family members. See Annas, supra note 10, at 1544 (“It is true that parents have . . . wide discretion in choosing among treatment options for their children . . . . But it does not follow that physicians must do whatever parents . . . order them to do regardless of standards of medical practice. Parents can choose among medically reasonable treatment alternatives . . . .”). Many physicians appear willing to make a unilateral decision when to continue treatment appears ethically futile. See David A. Asch et al., Decisions to Limit or Continue Life-Sustaining Treatment by Critical Care Physicians in the United States: Conflicts Between Physicians’ Practices and Patients’ Wishes, 151 Am. J. Respir. Critical Care Med. 288 (1995) (finding that 83% of physicians surveyed agreed that they would make a unilateral decision to stop treatments that would provide no significant chance of survival or “meaningful” survival).
for anencephalic infants (or adults in PVS), given that both conditions prevent affected individuals from experiencing pain or suffering of any kind? Commentators have suggested that continued treatment of Baby K—based on symbolic purposes or on her mother's beliefs—was degrading to her "because to do so is to treat her as an object—as a means to someone else's ends."88 One might make the same argument concerning the continued treatment of Theresa Schiavo, particularly now that her life has become a symbolic cause for the political and religious right.89 Continued treatment with no hope of improvement imposes what many would view as an intolerable burden on her dignity.

With respect to permanently unconscious adult patients, Professor Norman Cantor has argued that, in the absence of specific evidence to the contrary, physicians and family members frequently presume that the patient would not wish continued life support once the permanence of the patient's vegetative state is confirmed.90 According to this pragmatic approach, the application of a best interests standard permits the withdrawal of support from permanently unconscious patients because most people would not choose to continue with life support in these circumstances.91 Of course, as Professor Cantor acknowledges, this presumption risks error in "the small percentage" of cases where there is no evidence of an individual's wishes and that person actually would, if asked, choose to continue care.92 Even more problematic, the argument

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88. See Annas, supra note 10, at 1543-44. Ms. Harrell expressed a firm religious conviction that God would work a miracle in her child's case if that was his will. At the same time, in addition to continued ventilator and respiratory support for the baby, Ms. Harrell sought an orthopedic surgeon to build a skull to cover the child's head. See Karen R. Long, Whose Life Is It, Anyway? Debate Rages on Baby K, CLEVE. PLAIN DEALER, Oct. 9, 1994, at 1A. Such requests are subject to differing interpretation, but commentators such as Professor Annas would probably view them as inappropriately objectifying the child.


90. See Cantor, supra note 22, at 415-17 (explaining that concerns about preserving human dignity justify this presumption).

91. See id. at 410 (explaining that many courts have concurred with the Quinlan court's "instinctive understanding" that "most people would prefer not to be held comatose 'prisoner[s] of medical technology'"); see also In re Quinlan, 355 A.2d 647 (N.J. 1976):

In this case, the doctors say that removing Karen from the respirator will conflict with their professional judgment. The plaintiff answers that Karen's present treatment serves only a maintenance function; that the respirator cannot cure or improve her condition but at best can only prolong her inevitable slow deterioration and death; and that the interests of the patient, as seen by her surrogate, the guardian, must be evaluated by the court as predominant . . . .

Id. at 663-64. As explained above, the Florida statute permitting the removal of supportive measures from a patient in a permanent vegetative state, even in the absence of any indication that this would be the patient's preference, would appear to permit such a presumption by the guardian and the reviewing court. See supra note 22 and accompanying text.

92. See Cantor, supra note 22, at 416.
is entirely contingent on the continuing validity of the foundational presumption. If the majority view described by Professor Cantor drives the presumption against continued treatment of persons in PVS, should we invert the presumption if a shift occurs over time and the majority of persons polled would prefer to continue treatment in a vegetative state? The Florida legislature may well believe that it has acted on just such a change in public attitude. Those individuals who would choose to refuse treatment would express outrage over such a majority rule, just as those who feel continued treatment is ethically mandatory express outrage over the proposed withdrawal of treatment from Theresa Schiavo. Thus, the best we can do is to strive to exercise an individual’s choice based on the evidence available.

D. Other Means to Manage These Sorts of Conflicts

How else might we manage these sorts of intra-familial conflicts about the appropriate treatment for an incapacitated individual who is terminally ill or in PVS? None of the arguments regarding the unconstitutionality of “Terri’s Law” are meant to suggest that the legislature lacks the authority to rectify the more general problem of how to settle disputes about end-of-life medical decisions. The legislature could, for instance, attempt to codify its preference for erring on the side of continued treatment when family members disagree about an incapacitated patient's wishes by enacting a non-retroactive statute that applies to all Floridians and requires a written advance directive in these cases. Such a requirement might be challenged as creating too substantial an obstacle to the exercise of a patient’s right of self-determination, but that debate undoubtedly would occur with more deliberation and openness than this recent series of events has permitted.

Because the actual preference of the patient is unknowable, some deviation from what would have been the patient’s actual preference is inevitable. A small percentage of vegetative persons might die who would have preferred to live. On the other hand, if the prevailing policy were to preserve all vegetative persons, a high percentage would be sustained indefinitely in a technological limbo when they would have preferred to die.

Id. at 416 (“Of course, the assertion that a clear majority of persons would prefer a particular path, such as cessation of artificial nutrition, is always subject to challenge.”).

Legislatures frequently enact laws inspired by high profile incidents or judicial decisions. Indeed, legislation may seek to overturn unwise extensions of the common law (e.g., overly generous tort doctrine) or misinterpretations of existing statutes, see John Copeland Nagle, Corrections Day, 43 UCLA L. Rev. 1267 (1996), but such acts normally have general and only prospective effect.

Somewhat more moderate amendments to procedural protections might include requiring
Late in 2003, a Republican legislator proposed a bill in the Florida Senate, evocatively titled the "Starvation and Dehydration of Persons with Disabilities Prevention Act,"\(^6\) that sought to establish a legislative presumption that patients in PVS would want to continue artificial nutrition and hydration in the absence of an explicit, written refusal in an advance directive, and that the artificial nutrition and hydration must be provided unless it would be medically futile to do so. The sponsoring senator has acknowledged that he drafted the bill with input from Florida Right to Life and the Florida Catholic Conference.\(^7\) Remarkably, the bill also contains the following provision: "This act shall apply prospectively in litigation pending on the effective date of this act and shall supersede any court order issued under the law in effect before the effective date of this act."\(^8\) In effect, the language would guarantee that if the Theresa Schiavo litigation is still pending, all of the judicial orders up to that point would be rendered void to the extent that they conflict with the act. In addition to its retroactivity problems, it appears likely that the bill would face substantial obstacles because it would interfere with the recognition of patient rights by the federal and state courts.\(^9\)

In the alternative, if the legislature wished to consider a non-judicial option for the resolution of end-of-life disputes, it could amend the statute to establish an interdisciplinary panel or standing committee of appointed experts, somewhat like a hospital ethics committee, comprised of physicians, clergy, social workers, and maybe even a lawyer or two with expertise in medical ethics and law to decide these disputes.\(^0\) To preserve the independence of the panel, the enacting legislation could require partisan balance, staggered terms, dismissal only for cause, and a heightened standard of proof of the patient's intentions, giving spouses lower priority in the decisional hierarchy, or requiring the use of a court-appointed guardian whenever an incapacitated patient has no advance directive.


\(^7\) See Jerome R. Stockfisch, Changes in Proposed Right-To-Die Laws, Tampa Bay Online, at http://news.tbo.com/news/mgan946wqnd.html (Dec. 3, 2003). Interestingly, the bill contains language that would appear to allow verbal refusals of treatment. As currently drafted, the presumption of treatment would not apply when there is "clear and convincing evidence that the incompetent person, when competent, gave express and informed consent to withdrawing or withholding nutrition or hydration in the applicable circumstances." The sponsor of the bill stated, however, that language was included in error and that he intended to strike the language from the proposed legislation. See id.


\(^9\) The bill was withdrawn from consideration on April 16, 2004, after many members of the Florida legislature protested that it inappropriately restricted privacy rights. See id.

other types of safeguards, much like those designed to insulate federal commissions. This approach would, however, create a new set of questions and problems. For example, after one party to the dispute has received the “wrong” answer from the panel, could they pursue an appeal in the Florida courts? That might work well if the new system adopts a very deferential standard of judicial review, beginning with a presumption that the panel’s determination was correct and permitting reversal of the panel’s decisions only in cases of abuse of discretion. Of course, at this point, if judicial review confirmed the panel’s “wrong” decision, there would be little to prevent the dissenting party from using the same strategy that the Schindlers did in the Schiavo case.

It is unlikely that this independent panel would function more efficiently or equitably than the current judicial resolution approach. Although judges in Florida and many other states are elected and may worry that reaching conclusions in these cases that conflict with the right-to-life agenda will harm their re-election chances, it seems likely that members of an independent panel would be even more susceptible to partisan politics and other external pressures. Certain aspects of end-of-life disputes require professional expertise, but the key to resolving these differences lies in efficient, careful fact-finding: the judiciary’s forte. At a less theoretical level, it is not clear that this hypothetical executive agency would have the legal authority to direct a long-term care facility or a hospital to withdraw life-support, whereas the courts clearly do. In the end, courts remain the best forum for resolving these sorts of disputes, although it might make sense to reconsider certain aspects of this type of litigation, such as burdens of proof, procedures, fact-finding processes, or a requirement of neutral experts.

IV. Conclusion: Where Do We Go From Here?

In this case, it is unfortunate, though unsurprising, that Theresa never formalized her preferences in a written advance directive. Few people in their mid-twenties prepare for the possibility of sudden physical and mental incapacity. Frankly, however, even had she done so, these events suggest that Theresa’s parents might very well refuse to believe that she could have signed such a document and allege in court that it was forged, or verbally withdrawn, even without any extrinsic evidence to support the charge.101 If the courts were to reject this contention, the parents could march to the Governor, the legislature, and the media, reiterating their allegations. If successful in pursuing this extralegal appeal, it would amount to a de facto amendment of state law,

creating a situation where any patient's relative would have the power to veto a living will that directs the withdrawal of life-sustaining treatment. Nevertheless, the controversy over Theresa Schiavo provides a jarring reminder of the importance of advance directives for all adults, including the young and healthy.

Using legal mechanisms to decide end-of-life disputes does nothing to resolve the underlying moral and ethical conflicts. Because this country consists of individuals with diverse and strongly held religious and ethical convictions, achieving consensus on these sorts of questions seems unrealistic. A lack of consensus on these issues starkly illustrates why we need legal mechanisms that preserve the individual's right to make decisions without interference from the government. These cases must be decided on a principled basis, not in a result-oriented fashion.

Through their meddling in a single difficult end-of-life decision, arrived at after careful consideration during years of grueling litigation, the Florida legislature and the Governor have succeeded in unsettling, at least temporarily, the basic presumptions under which the state's citizens make choices (or postpone making choices) about end-of-life care. Theresa Schiavo's slow death has and will continue to highlight the dynamic tension between the disciplines of medicine, ethics, religion and law. Her very private tragedy and the difficult decision that followed it have become sensational fodder for the media, politicians, and religious organizations. These developments raise troubling concerns about interference in Theresa Schiavo's autonomous rights and the rights of others who may find themselves in similar circumstances in the future. Everyone wants to retain the freedom to make choices about end-of-life care based on their own values and beliefs, rather than allowing these decisions to be made according to the will of the majority or the wishes of those in political power. Unfortunately, as the examples above demonstrate, there are those who, while retaining freedom of choice for themselves, hypocritically seek to impose their will on others who do not share their views. In view of this reality, it is essential that individual choice remain the touchstone in end-of-life decision-making, and that courts, legislatures, and individuals do everything possible to prevent this very precious choice from being held hostage to the vicissitudes of political or moral change.