

TERRI'S LAW AND DEMOCRACY

Michael P. Allen*

As one can tell from the articles prepared for this Symposium, the litigation concerning Terri's Law and that more broadly dealing with Theresa Marie Schiavo's "right to die" has many implications. Other participants have discussed the ways in which this epic litigation saga implicates the proper interpretation of the Florida Constitution,¹ advance directives,² and how the litigation fits into the relationship between politics and bioethics.³ For my part, I hope to make a relatively modest observation, but one that I believe has broad implications for our democratic form of government. My assertion is that the Florida Supreme Court's decision striking down Terri's Law⁴ should be seen as a significant part of the tradition by which courts serve as a bulwark of freedom. By ensuring, as the Court did here, that no governmental actor or organization obtains too much power, courts across the country and across time have been able to preserve the liberty we all possess.

* © 2005, Michael P. Allen. All rights reserved. Associate Professor of Law, Stetson University College of Law. B.A., University of Rochester, 1989; J.D., Columbia University School of Law, 1992. I wish to express my thanks to all the participants in the conference, "Reflections on and Implications of Schiavo," jointly sponsored by Stetson University College of Law and the *Stetson Law Review*, for their stimulating perspectives on the litigation surrounding Terri Schiavo. I particularly thank my colleague Becky Morgan for getting me interested in this area of the law and helping me to navigate these very muddy waters. Thanks also to the members of the Faculty Support Staff at Stetson for their work on this Article.

1. See e.g. Kenneth Connor, *Connor on Schiavo*, 35 *Stetson L. Rev.* 31 (2005); Thomas C. Marks, Jr., *A Dissenting Opinion*, *Bush v. Schiavo*, 885 *So. 2d* 321 (Fla. 2004), 35 *Stetson L. Rev.* 195 (2005).

2. See e.g. Norman Cantor, *Déjà Vu All Over Again: The False Dichotomy between Sanctity of Life and Quality of Life*, 35 *Stetson L. Rev.* 81 (2005); John Robertson, *Schiavo and Its (In)Significance*, 35 *Stetson L. Rev.* 101 (2005).

3. See e.g. George J. Annas, "I Want to Live": *Medicine Betrayed by Ideology in the Political Debate over Terri Schiavo*, 35 *Stetson L. Rev.* 49 (2005).

4. *Bush v. Schiavo*, 885 *So. 2d* 321, 325 (Fla. 2004).

This Article is in four parts. Part I lays out the basic factual background concerning Terri Schiavo and Terri's Law.⁵ Part II discusses the importance of the separation of governmental powers to the preservation of the liberty of the people.⁶ Part III explains how the Florida Supreme Court's decision fits comfortably into a tradition of preserving liberty through enforcing constitutional guarantees of the separation of powers.⁷ Finally, Part IV provides some concluding comments concerning the lasting importance for democracy of the litigation concerning Terri's Law.⁸

I. TERRI SCHIAVO AND TERRI'S LAW: THE FACTUAL BACKGROUND

The long road to this Symposium began in February 1990, when Terri Schiavo, then twenty-seven years old, suffered a cardiac arrest.⁹ The litigation that eventually resulted from this event is multifaceted and complex.¹⁰ For present purposes, it is sufficient to understand that the litigation principally concerned whether Terri Schiavo would have chosen to continue receiving nutrition and hydration if she were aware that she was in a persistent vegetative state.¹¹ Every judge who has had occasion to consider this question directly has concluded that she would not have chosen to do so.¹²

5. *Infra* nn. 9–28 and accompanying text.

6. *Infra* nn. 29–42 and accompanying text.

7. *Infra* nn. 43–63 and accompanying text.

8. *Infra* nn. 64–66 and accompanying text.

9. *In re Guardianship of Schiavo*, 780 So. 2d 176, 177 (Fla. 2d Dist. App. 2001).

10. I have described this litigation in depth elsewhere. See Michael P. Allen, *The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die*, 53 Am. U. L. Rev. 971, 976–977, 1009–1011 (2004) [hereinafter Allen, *Right to Die*]; Michael P. Allen, *Life, Death and Advocacy: Rules of Procedure in the Contested End-of-Life Case*, 34 Stetson L. Rev. 55, 66–80 (2004) [hereinafter Allen, *Life, Death and Advocacy*]. For a detailed description of the facts surrounding these matters with a bent towards the position of Terri Schiavo's parents, see O. Carter Snead, *Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Context*, 57 Fla. L. Rev. 53, 55–71 (2005).

11. *In re Guardianship of Schiavo*, 780 So. 2d at 180. The body of a person in a persistent vegetative state is able to maintain such basic functions as temperature regulation, respiration, and circulation, but the person is not able to experience "either self-awareness or awareness of the surroundings in a learned manner." *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 266 n. 1 (1990) (quoting *In re Jobes*, 529 A.2d 434, 438 (N.J. 1987)).

12. See e.g. *In re Guardianship of Schiavo*, 851 So. 2d 182, 183 (Fla. 2d Dist. App. 2003) ("[C]lear and convincing evidence at the time of trial supported a determination that

In conformity with her wishes and as allowed by Florida law, an order was entered directing that the equipment providing Terri Schiavo with nutrition and hydration be removed.¹³ On October 15, 2003, that order was carried out.¹⁴ Shortly thereafter, however, matters took an unprecedented turn when the Florida Legislature passed, and Governor Jeb Bush signed into law, what has become known as “Terri’s Law.”¹⁵ The law purported to grant Governor Bush the power to issue a “stay” of any court order directing the withdrawal of nutrition and hydration from a narrowly defined class of persons, so long as certain conditions were met.¹⁶ Any stay issued would remain in place until the Governor

Mrs. Schiavo would have chosen in February 2000 to withdraw the life-prolonging procedures.”); *In re Guardianship of Schiavo*, 792 So. 2d 551, 561 (Fla. 2d Dist. App. 2001) (“We are confident that the guardianship court understood [its] difficult task when it made its decision in February 2000” regarding “the decision that Theresa Marie Schiavo would have made . . .”); *In re Guardianship of Schiavo*, 780 So. 2d 176, 180 (“In the final analysis, the difficult question that faced the trial court was whether Theresa Marie Schindler Schiavo . . . would choose to continue the constant nursing care . . . or whether she would wish to permit a natural death process to take its course. . . . After due consideration, we conclude that the trial judge had clear and convincing evidence to answer this question as he did.”).

13. *In re Guardianship of Schiavo*, 851 So. 2d at 187.

14. CNN, *Woman's Feeding Tube Removed*, <http://www.cnn.com/2003/LAW/10/15/coma.woman/index.html> (Oct. 16, 2003).

15. See *Bush v. Schiavo*, 885 So. 2d at 328 (discussing enactment of Terri’s Law). I have discussed the events surrounding the enactment of Terri’s Law in more depth elsewhere. See e.g. Allen, *Right to Die*, *supra* n. 10, at 977–978, 1009–1012 (discussing the enactment of Terri’s Law and the events immediately subsequent to its enactment, and applying the “undue burden standard” to a challenge of Terri’s Law); Allen, *Life, Death and Advocacy*, *supra* n. 10, at 78–80 (discussing the enactment of Terri’s Law).

16. 2003 Fla. Laws ch. 418. Terri’s Law provides in full as follows:

Section 1.

- (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. The Governor may lift the stay authorized under this act at any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.

decided otherwise, but his power to issue any stays expired fifteen days after Terri's Law's effective date.¹⁷ The Governor exercised his authority under the statute to "stay" the court order and further directed that Terri Schiavo's feeding tube be restored.¹⁸

Almost immediately upon the entry of the Governor's "stay," more litigation ensued, now focused on the constitutionality of Terri's Law. The circuit court declared Terri's Law unconstitutional¹⁹ and the Second District Court of Appeal certified the question to the Florida Supreme Court as a matter of "great public importance."²⁰ The Florida Supreme Court accepted the appeal and in a unanimous opinion issued in September, 2004, the Court struck Terri's Law down as unconstitutional under the Florida Constitution.²¹

The Court's decision was premised on two fundamental points. First, the Court concluded that Terri's Law violated the Florida Constitution because it encroached on the judicial branch of government.²² The Court reasoned that the order directing the removal of Terri Schiavo's feeding tube was a final determination of the judicial branch of a controversy over which it had jurisdiction.²³ Thus, the Court held that the Legislature, by purporting to grant the Governor the power to stay that final judgment, had inappropriately attempted to give the Governor a portion of the judicial power.²⁴

The Court also held that Terri's Law was an unconstitutional delegation of legislative authority to the Governor.²⁵ The Court determined that Terri's Law did not provide the Governor with

(3) Upon the issuance of a stay, the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court.

Section 2. This act shall take effect upon becoming a law.

17. Fla. Stat. § 744.3215(1), (2) (2003).

18. *Bush v. Schiavo*, 885 So. 2d at 328 (citing Exec. Or. No. 03-201).

19. *Schiavo v. Bush*, 2004 WL 980028 (Fla. Cir. Ct. 6th Dist. May 5, 2004).

20. *Bush v. Schiavo*, 885 So. 2d at 324 n. 1.

21. *Id.* at 336–337.

22. *Id.* at 329–332.

23. *Id.* at 331–332.

24. *Id.* at 332. Some commentators have argued that Terri's Law was not an improper attempt to reverse a final decision of the judicial branch. *See e.g.* Snead, *supra* n. 10, at 82–84 (arguing that the court order to remove Terri Schiavo's feeding tube was an executive order, not a final judgment, and as such was subject to changes in the law, in this case, the enactment of Terri's Law).

25. *Bush v. Schiavo*, 885 So. 2d at 332–336.

sufficient standards by which he was to exercise the wide discretion given him under the law.²⁶ Rather, the law essentially gave the Governor the authority to do as he pleased, something not allowed under the Florida Constitution.²⁷

In my view, the Florida Supreme Court was correct in its decision as a matter of Florida constitutional law. This Essay, however, is not meant to provide a defense of the Court's decision or a response to its critics.²⁸ Rather, in the balance of my discussion, I seek to orient the decision in a broader constitutional framework concerning the critical role of the judiciary as a guardian against tyranny.

II. THE SEPARATION OF POWERS: "THE CORNERSTONE OF AMERICAN DEMOCRACY"²⁹

When Florida Supreme Court Chief Justice Pariente described the separation of governmental powers as "[t]he cornerstone of American democracy," she was on firm ground.³⁰ The concept of dividing governmental powers among different governmental units has deep roots.³¹ For example, decades before the concept was enshrined in the United States Constitution, French political philosopher Charles de Montesquieu extolled the virtues of separating the powers of government.³² Montesquieu explained the importance of the concept:

26. *Id.* at 334–335.

27. *Id.* at 336–337. Some commentators have argued that Terri's Law was not an unlawful delegation of legislative power. *See e.g.* Snead, *supra* n. 10, at 79–80 (arguing that the Governor's discretion was suitably limited, and that there is precedent for the kind of flexibility which was granted to him).

28. *See e.g.* Connor, *supra* n. 1; Marks, *supra* n. 1; *see also* Snead, *supra* n. 10 (arguing in favor of the constitutionality of Terri's Law).

29. *Bush v. Schiavo*, 885 So. 2d at 329.

30. *Id.*

31. *See* Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449, 457–462 (1991) (discussing the historical foundations of the separation of powers doctrine); Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. Chi. L. Rev. 385, 386–393 (1934–1935) (same).

32. *See e.g.* Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws*, bk. XI, ch. 1–6 (Thomas Nugent trans., revised by J.V. Prichard) reprinted in 35 Great Books of the Western World 68–75 (Philip W. Goetz ed., 2d ed., Ency. Britannica, Inc. 1990). Montesquieu himself derived at least a portion of his inspiration from John Locke. *See* Sharp, *supra* n. 31, at 389 (discussing influence of Locke on Montesquieu).

[C]onstant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits? To prevent this abuse, it is necessary from the very nature of things that power should be a check to power.³³

Thus, as a matter of its political/philosophical tradition, the doctrine of separation of powers was based on the belief that separating power was not an end in itself; rather, it was a means by which to secure the liberty of the people.

The Framers relied on these concepts concerning the diffusion of power when crafting the United States Constitution.³⁴ As with Montesquieu, the Framers' division of governmental power was, at least in part, a means of protecting individual liberty.³⁵ James Madison wrote the following as Publius, urging the ratification of the Constitution:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.³⁶

33. Montesquieu, *supra* n. 32, at bk. XI, ch. 4, p. 69.

34. See e.g. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219–223 (1995) (discussing the Framers' implementation of the separation of powers concept); Sharp, *supra* n. 31, at 394–415 (discussing the implementation and revision of the classical separation of powers doctrine in connection with the framing of the United States Constitution); see also *The Federalist No. 47* (Madison) 249, 250 (George W. Carey & James McClellan eds., Liberty Fund 2001) (referring to Montesquieu as “[t]he oracle who is always consulted and cited” concerning separation of powers).

35. Other commentators have taken this view as well. See e.g. Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 *Am. U. L. Rev.* 1, 12 (2003) (explaining that in the scholarly community “the dominant view holds that these institutional divisions [separating government power] were intended to serve the ‘negative’ purpose of creating multiple and mutual checks to avoid the tyrannical accumulation of power”); Redish & Cisar, *supra* n. 31, at 451 (“By simultaneously dividing power among the three branches and institutionalizing methods that allow each branch to check the others, the Constitution reduces the likelihood that one faction or interest group that has managed to obtain control of one branch will be able to implement its political agenda in contravention of the wishes of the people.”).

36. *The Federalist No. 47* (Madison), *supra* n. 34, at 249; see also *Clinton v. N.Y.*, 524 U.S. 417, 449–450 (1998) (Kennedy, J., concurring) (discussing the impact of the separation of governmental power on liberty); *Myers v. U.S.*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose

The Framers implemented the separation of powers by creating three coordinate branches: the legislative under Article I, the executive under Article II, and the judicial under Article III.³⁷ The powers of the branches are both separated and yet intertwined.³⁸ Interestingly, the United States Constitution does not expressly state that there will be a separation of powers among the organs of the federal government. Instead, separation of powers principles at the federal level are implied from the structure of the Constitution itself.³⁹

This separation of powers principle is also prevalent in state constitutional law. Indeed, every state constitution provides for a division of its own governmental powers among separate branches.⁴⁰ And, once again, the reason for this separation is the

was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”); Redish & Cisar, *supra* n. 31, at 451 (“By simultaneously dividing power among the three branches and institutionalizing methods that allow each branch to check the others, the Constitution reduces the likelihood that one faction or interest group that has managed to obtain control of one branch will be able to implement its political agenda in contravention of the wishes of the people.”).

37. U.S. Const. arts. I–III.

38. See e.g. Erwin Chemerinsky, *Constitutional Law Principles and Policies* 1 (2d ed., Aspen Publishers 2002) (“The division of powers among the branches was designed to create a system of checks and balances and lessen the possibility of tyrannical rule. In general, in order for the government to act, at least two branches must agree.”).

39. See e.g. Donald E. Lively et al., *Constitutional Law Cases, History and Dialogues* 369 (2d ed., Anderson Publg. Co. 2000) (“There is no ‘Separation of Powers’ clause in the Constitution. Rather we draw the meaning of separation of powers from the structure of the national government and our understanding of what the Framers contemplated in the establishment of the three separate branches of national government and a system of checks and balances.”); Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 Alb. L. Rev. 1417, 1417 (1998) (“While the text of the national Constitution of 1787 did not provide specific authorization for a separation of powers, categorical references to separate departments of government conveyed implicit recognition of the doctrine.”).

40. See e.g. John Devlin, *Toward A State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 Temp. L. Rev. 1205, 1236–1237 (1993) (collecting state constitutional provisions concerning separation of powers); G. Alan Tarr, *Understanding State Constitutions* 14–15 (Princeton U. Press 1998) (discussing separation of powers principles across state constitutions). There are, of course, differences in the way the states express their commitment to separation of powers. For example, the provision of the Florida Constitution on which the Florida Supreme Court relied when striking down Terri's Law states,

Branches of Government—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.

Bush v. Schiavo, 885 So. 2d at 329 (quoting Fla. Const. art. II, § 3). Professor Devlin re-

protection of individual liberty through the prevention of tyranny.⁴¹ Moreover, there is debate about the manner in which state constitutions should be interpreted when compared with the structural provisions of the United States Constitution.⁴² The point is, however, that the political tradition of Montesquieu is deeply ingrained in American political life at both the national and state level.

III. THE DECISION STRIKING DOWN TERRI'S LAW: PRESERVING LIBERTY BY ENFORCING THE SEPARATION OF POWERS

Not surprisingly, there are many difficult questions implicated when considering separation of powers disputes.⁴³ After all, the American incarnation of separation of powers was designed with the explicit understanding that there were certainly gray

ports that twenty-six states other than Florida have such a specific constitutional guarantee of separate powers. Devlin, *supra* n. 40, at 1237 n. 113. Other states have even stricter separations requirements. *Id.* at 1236–1237 nn. 111–112. Thus, the separation of powers provided under state constitutions is often more explicit than that under the United States Constitution. See Lively & Friedelbaum, *supra* n. 39 (discussing the implicit nature of separation of powers under the federal Constitution).

41. See e.g. *Kasler v. Lockyer*, 2 P.3d 581, 595 (Cal. 2000) (discussing the California Constitution); *Bush v. Schiavo*, 885 So. 2d at 329–330 (discussing the Florida Constitution); *Auditor v. Jt. Comm. on Legis. Research*, 956 S.W.2d 228, 231 (Mo. 1997) (discussing the Missouri Constitution); see also Thomas C. Marks, Jr. & John F. Cooper, *State Constitutional Law in a Nutshell* 186–187 (2d ed., West Group 2003) (noting that the separation of powers doctrine “is based on the belief that the concentration of power in one branch of government risks despotism,” and collecting citations to state cases).

42. See e.g. Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 Roger Williams U. L. Rev. 79, 99–107 (1998) (arguing that different interests at the state level suggest that modes of interpreting state structural constitutional provisions should be different from those used at the federal level to interpret similar constitutional provisions); Tarr, *supra* n. 40, at 14–15 (discussing different views of interpreting state separation of powers principles).

43. See generally Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 Ohio St. L.J. 175 (1990) (discussing the appropriate role of judicial review in the context of separation of powers); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. Pa. L. Rev. 603 (2001) (arguing that current approaches to the separation of powers focusing on distinct branches of government are defective and in need of revision); Peabody & Nugent, *supra* n. 35 (discussing a proposed re-conceptualization of separation of powers principles to better develop a “unified” theory in the area); Redish & Cisar, *supra* n. 31 (discussing the debate between the formalistic and functional approaches to separation of powers doctrine and proposing an alternative method); Symposium, *The American Constitutional Tradition of Shared and Separated Powers*, 30 Wm. & Mary L. Rev. 209 (1989) (discussing numerous theoretical and practical issues concerning the separation of powers doctrine).

areas in which the allocation of a certain power to a specific branch of government was not at all clear.⁴⁴ The constitutionality of Terri's Law was not one of these gray areas.

As the Florida Supreme Court in my view convincingly demonstrated in its opinion, Terri's Law was both an unabashed legislative intrusion on the judicial branch and a simultaneous transfer of legislative authority to the executive branch.⁴⁵ As the Court explained, its decision was well supported by both precedent and reason.⁴⁶ There should never have been any doubt about Terri's Law's fate given its gross deficiencies under even the most basic separation of powers analysis. Quite frankly, it is difficult to find any action taken by a legislature or executive in the United States that can be classified as such a fundamental breach of the constitutional separation of powers. Indeed, if one returns to Montesquieu, from whom the Framers took such inspiration, it almost appears that he was describing the defects identified in Terri's Law by the Florida Supreme Court when he wrote over 250 years ago:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be

44. See e.g. The Federalist No. 37 (Madison), *supra* n. 34, at 182–183 (“Experience has instructed us, that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, the executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.”); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) (“A constitutional democracy like ours is perhaps the most difficult of man’s social arrangements to manage successfully.”); *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting) (“The great ordinances of the Constitution do not establish and divide fields of black and white.”).

45. See *supra* nn. 22–27 and accompanying text (describing the basis for the Florida Supreme Court’s decision).

46. See *Bush v. Schiavo*, 885 So. 2d at 329–337; but see Connor, *supra* n. 1; Snead, *supra* n. 10.

exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.⁴⁷

Thus, the decision to strike down Terri's Law was an easy one. It is, nonetheless, an important part of the tradition of courts enforcing separation of powers principles in order to preserve liberty. It should be appreciated in that light, in addition to its more direct application to Terri Schiavo and the "right to die."

Throughout our history, courts have stood up to encroachments by one branch of government on the powers of another branch.⁴⁸ It is in this tradition that *Bush v. Schiavo* belongs.⁴⁹ And here I am not referring to what one might call "technical" or "legalistic" violations of the principle.⁵⁰ Rather, I am referring to

47. Montesquieu, *supra* n. 32, at bk. XI, ch. 6, p. 70. Madison recognized the same point in language equally applicable to Terri's Law:

It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.

The Federalist No. 48 (Madison), *supra* n. 34, at 256; *see cf.* The Federalist No. 81 (Hamilton), *supra* n. 34, at 419 ("A legislature, without exceeding its province, cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases.").

48. In my view, courts have stood up to this encroachment for the best of reasons, including a commitment to basic democratic values. However, an alternative explanation can be found in Madison's argument that a human desire to retain power explains how separating government power will prevent tyranny in the long run. The Federalist No. 51 (Madison), *supra* n. 34, at 268–269.

49. I do not mean to suggest that the courts have always lived up to what I see as their duty to stop such encroachments. *See e.g.* Redish & Cisar, *supra* n. 31, at 473–474 (discussing the Court's relative lack of courage in resisting the arguably unconstitutional actions of President Abraham Lincoln during the American Civil War).

50. *See e.g.* *Clinton v. N.Y.*, 524 U.S. 417 (1998) (considering the constitutionality of the line item veto); *Commodity Futures Trading Commn. v. Schor*, 478 U.S. 833 (1986) (discussing vesting of jurisdiction of common law counterclaim in the Commission); *Bowsher v. Synar*, 478 U.S. 714 (1986) (considering constitutionality of delegation of certain authority by Congress to the Comptroller General); *INS v. Chada*, 462 U.S. 919 (1983) (considering constitutionality of the legislative veto). My point here is not that the issues dealt with by these and similar cases are not important. They certainly are. My assertion,

those relatively rare situations in which the executive or legislative branches have gone so far as to make the fear of tyranny quite real through a gross transgression of constitutional values. Two examples of other monumental decisions in this vein, decided approximately fifty years apart, make the point.⁵¹

In 1952, the United States was engaged in an armed conflict on the Korean peninsula. At home, the country was also facing a significant labor dispute in the steel industry. These two events came together in the landmark Supreme Court case *Youngstown Sheet & Tube Co. v. Sawyer*.⁵² Faced with an impending strike at the steel plants, President Truman ordered his Secretary of Commerce to seize the steel plants and keep them running.⁵³ The steel companies obeyed the Secretary's orders under protest and sought redress in the courts for what they considered to be the executive department's unconstitutional actions.⁵⁴ The Supreme Court eventually reversed the seizure orders based on separation of powers principles.⁵⁵

Youngstown is important in constitutional doctrine for many reasons. For present purposes, however, the fundamental significance of the decision is the Court's willingness to prevent the executive from overstepping basic, almost common sense constitutional bounds, even in times of "war." One can debate the proper yardstick by which to judge separation of powers matters.⁵⁶ But in my view, one need not engage in such an "academic" exercise to

however, is that these types of decisions are of primary interest to players such as lawyers, judges, policy-makers, and academicians. The decisions I discuss in the text, and others like them, are the kinds of cases that the body politic itself appreciates as implicating the fabric of our constitutional republic.

51. Needless to say, one could have selected other examples to make the comparative point I wish to highlight. For example, *U.S. v. Nixon* easily fits in this group. See 418 U.S. 683 (1974) (holding that President Nixon's unilateral refusal to comply with a subpoena issued in a criminal case was unlawful). I selected the cases I discuss merely as examples of the tradition I have identified.

52. *Youngstown*, 343 U.S. at 579; see Paul G. Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 Mich. L. Rev. 141 (1952) (discussing *Youngstown* further); Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (Columbia U. Press 1977) (same).

53. *Youngstown*, 343 U.S. at 583.

54. *Id.* at 583–584.

55. *Id.* at 585, 587–589.

56. See e.g. *supra* n. 43 (collecting commentary about issues such as whether it is proper to adopt a functional or formalistic test to evaluate claims of a violation of separation of powers).

reach the conclusion that what President Truman sought to do in 1952 did not fit within the fundamental structure of government that we have in this country. The same is fundamentally true in regard to what Governor Jeb Bush did with respect to Terri Schiavo, even though the factual situations are so different between the two cases.

Fast forward slightly over fifty years and one finds the United States again in conflict, this time with international terrorism. And once again, the executive—this time from a different political party—has had his attempt to overstep constitutional boundaries rejected by the Court. In *Hamdi v. Rumsfeld*,⁵⁷ the Supreme Court was called upon to address a number of important constitutional issues. Some of those issues were decided in favor of the government while others went the way of the individual.⁵⁸ For present purposes, what is critical is that the Court rejected the President's argument that he and he alone was empowered to determine Mr. Hamdi's fate.⁵⁹ Instead, the Court made clear that the judicial branch was to serve as an important check on the president's authority.⁶⁰ And this was the case even though the country was in a time of international crisis. Justice O'Connor explained,

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's com-

57. 542 U.S. 507, 124 S. Ct. 2633 (2004).

58. *See id.* at 2639 ("We agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF."); *id.* at 2644–2645 (rejecting the government's contention that no fact-finding was required as a matter of law because Hamdi was captured in a combat zone).

59. As Justice O'Connor described it, "Under the Government's most extreme rendition of [its] argument, '[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict' ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme." *Id.* at 2546 (quoting Br. for Respts. [the Government] at 26).

60. *See id.* at 2648 ("We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.").

mitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.⁶¹

Of course, the “challenging and uncertain” moment the Florida Supreme Court dealt with in *Bush v. Schiavo* was not related to national security.⁶² Yet, the implication of separation of powers for a human being’s approach to death—an approach we all will make—qualify just as well for the real world impact of the decision as did terrorism in *Hamdi*⁶³ or the Korean War in *Youngstown*.⁶⁴ As Florida Supreme Court Chief Justice Pariente recognized in the concluding portion of her opinion, *Bush v. Schiavo* (much like *Hamdi* and *Youngstown* in my view) “is about maintaining the integrity of a constitutional system of government with three independent and co-equal branches.”⁶⁵ It is that fundamental point that marks the critical and lasting importance of the decision at the heart of this Symposium.⁶⁶

IV. SOME CONCLUDING THOUGHTS

There is no question that the Florida Supreme Court’s decision is important for preserving the rights of Floridians in end-of-life matters. I suspect it will also be used to support end-of-life rights for people around the country by short-circuiting attempts at politically based interference in decisions about the time and manner of one’s death.⁶⁷ But its impact goes far beyond the end of life.

61. *Id.* at 2648; *see also id.* at 2650 (“We necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government.”) (emphasis in original).

62. *Bush v. Schiavo*, 885 So. 2d at 324.

63. 124 S. Ct. at 2635.

64. 343 U.S. at 579.

65. *Bush v. Schiavo*, 885 So. 2d at 337.

66. It is for this reason that I believe the Florida Supreme Court was correct to base its decision *solely* on separation of powers principles. While I would usually favor a court defining with more precision the rights of individuals in terms of end-of-life decision-making, the overriding need to curb excessive legislative and executive power with respect to Terri’s Law justified leaving those issues for another day.

67. We may have further information on this general issue when the United States Supreme Court considers the federal government’s appeal in *Gonzales v. Oregon*, 125 S.

If the Florida courts had allowed the Legislature and the Governor to do what was attempted through Terri's Law, it is difficult to see why they could not have done a similar thing in any number of areas. Imagine, for example, that the Legislature did not believe it appropriate that a doctor found liable for malpractice should pay the judgment awarded against her in a civil action. Could the Legislature pass a law granting the Governor the power to issue a one-time "stay" of that judgment? While there are certainly significant differences between the Terri Schiavo situation and my hypothetical, there are also important similarities. And the fact that the parallels between the situations make it possible to cite Terri's Law as precedent for such other actions is what makes the actions of the Legislature and the Governor so profoundly disturbing.

In the final analysis, it is easy to understand Terri's Law from an emotional perspective. We may assume that the legislators who voted for it, and Governor Bush, who acted under the law, had good intentions. And the same can be said of Terri Schiavo's parents. No matter what one's views on the matter, it is clear that Mr. and Mrs. Schindler loved their child and could not bear to let her go. Yet, if liberty is to be guarded, the courts do not have the luxury of focusing on personal drama and feelings. As the Second District Court of Appeal noted in one of its many opinions in the saga, "Each of us . . . has our own family, our own loved ones, our own children. . . . But in the end, this case is not about the aspirations that loving parents have for their children."⁶⁸

What *Bush v. Schiavo* was about—and what it should be remembered for—is a protection of liberty and a rejection of tyranny. This statement may sound extreme.⁶⁹ The fact is, however,

Ct. 1299, 2005 U.S. LEXIS 1453 (Feb. 22, 2005). In that case, the United States Court of Appeals for the Ninth Circuit struck down an interpretive rule promulgated by then Attorney General John Ashcroft criminalizing conduct allowed under Oregon's Death with Dignity Act. See *Or. v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004), cert. granted sub nom. *Gonzales v. Or.*, 125 S. Ct. 1299, 2005 U.S. LEXIS 1453 (Feb. 22, 2005). While the Ninth Circuit's decision was based on principles of administrative law, I suspect there will be great pressure on the Court to discuss broader end-of-life issues.

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

69. Other commentators displayed a similar concept in another context:

[W]e believe that the separation of powers provisions of the Constitution are tremendously important, not merely because the Framers imposed them, but

2005]

Terri's Law and Democracy

193

that oppression does not spring forth as a fully formed entity.⁷⁰ Rather, it develops one innocent step at a time until there is no freedom of the people left to protect.⁷¹ The Florida Supreme Court served all of us well by stopping the drift to oppression before it was able to wash away our liberties.

because the fears of creeping tyranny that underlie them are at least as justified today as they were at the time the Framers established them. For as the old adage goes, "even paranoids have enemies."

Redish & Cisar, *supra* n. 31, at 453.

70. *Id.* at 463–464.

71. *Id.* at 464.