A DISSENTING OPINION, *BUSH v. SCHIAVO*, 885 So. 2d 321 (Fla. 2004)*

Marks, J., dissenting

The majority finds that Terri's Law, Chapter 2003–418, Laws of Florida, violates the separation of powers mandated by Article II, Section 3 of the Florida Constitution in that it not only amounts to an encroachment on the judicial power by the Legislature, it also violates the rule that forbids legislation that authorizes action by the executive branch without sufficient guidance (guidelines), the so-called non-delegation rule. This prevents the executive branch from making the legislative policy of the State. I cannot deny that my colleagues' opinion is well grounded in its references to prior case law. However, that law is, in my opinion, not without exceptions. Based upon those exceptions, I respectfully dissent.

I. ENCROACHMENT

No one would contest the importance of the separation of powers to our form of government. Even though not found in so

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I must make two points about this "dissent." First, I commenced the project to see if a convincing counter-argument could be made to the Florida Supreme Court's unanimous decision. The reader will have to be the judge of my success or failure in that endeavor. As the project progressed, it became more than an academic exercise; it became a plea from the heart.

Second, except as otherwise noted, my arguments are, as far as I can determine, original. I say "as far as I can determine," because it was impossible to read all the briefs filed in all the times this case has appeared in one court or another. This is to say nothing about everything else that has been written. If there are, somewhere, similar arguments, mine were arrived at independently of them. For example, in both the *Tampa Tribune* and the *Saint Petersburg Times* of February 24, 2005 (after the "dissent" was written), there are stories about the State Department of Children and Families attempting to *intervene* in the *Schiavo* case. My intervention theory was obviously unrelated to this move by the State and I am confident that my theory did not influence the State.

It is my pleasure to thank my colleagues, Mike Allen and Becky Morgan, who put this program together, and Marge Masters who typed the manuscript. She was also supported by the rest of our magnificent Faculty Support Services.

many words in the United States Constitution, it is there by clear and strong implication in the creation by the Constitution of three branches of government. The concept was mentioned numerous times in *The Federalist Papers*. For example, James Madison in *Number 49* refers to "the constitutional charter, under which the several branches of government hold their power [being intended to prevent encroachment by one branch] on the chartered authorities of the others." James Madison (Publius), *The Federalist Papers No. 49*, (B.F. Wright ed., Barnes & Noble 2004) (originally published 1788). However, in *Number 48* and *Number 49*, we also discover that Madison finds that keeping the three branches of government "separate and distinct," as illustrated by state constitutions and state practice, is simply unworkable. To be fair, Madison's discussion of the subject does not seem to envision anything resembling the problem before this Court today, but how could general comments reach every specific situation?

That separation of powers cannot be absolute is eloquently (what else?) described by Justice Oliver Wendell Holmes, Jr. in his dissenting opinion in *Springer v. Philippine Islands*, 277 U.S. 189, 209–210 (1928) (Holmes, J., dissenting):

> The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. . . . When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on.

Article II, Section 3 of our Constitution says, "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."

Strong words, but as pointed out by the First District Court of Appeal in *State Department of Health and Rehabilitative Services v. Hollis*, 439 So. 2d 947, 948 (Fla. 1st Dist. App. 1983) (citing *Sullivan v. Askew*, 348 So. 2d 312, 315–316 (Fla. 1977)), a case admittedly vastly different from those before this Court today,

> It is true that "Article II, Section 3, Florida Constitution, divides government into three separate and distinct branches

> of government . . . ." Nevertheless as a practical matter, it is often difficult to delineate specifically between the three divisions, and some degree of overlap frequently exists. 10 [Fla. Jur. 2d] *Constitutional Law* s. 139 (1979).

As Justice Holmes also observed, in another context, "Some play must be allowed for the joints of the machine." *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904). To a large measure, what I object to more than anything else in this Court's opinion is its rigidity, the lack of "play in the joints of the machine." We have not always behaved that way. Indeed, this Court, in *Dade County Classroom Teachers Assn., Inc. v. The Legislature*, 269 So. 2d 684, 686 (1972), threatened to *enact legislation* called for by the Florida Constitution if the Legislature refused to do so. What we did there should have been instructive to this Court today. Our words, which I quote below, were in the context of the Legislature's failure to enact a procedure that would be an effective substitute for the forbidden right to strike in the process of public employees' constitutionally guaranteed right to bargain collectively. If one considers the right to go on living *at least* the equal of an effective means of collective bargaining for public employees, then Chief Justice B.K. Roberts's words could apply, and should apply, to this case, except, they would be in the context of the Court's allowing the Legislature *to* act rather than it acting as the Legislature if the Legislature did not.

The Dade County Classroom Teachers had petitioned this Court to issue a writ of mandamus to the Legislature requiring it to act as indicated above. This Court responded as follows:

> The petition for the writ must, of course, be denied. Florida's Constitution, like those of most other states, divides the state's sovereign powers into three coordinate branches—legislative, executive and judicial—and prohibits a person belonging to one of such branches from exercising any powers "appertaining to either of the other branches unless expressly provided herein." Section 3, Article II, 1968 Constitution. And it is too well settled to need any citation of authority that the judiciary cannot compel the Legislature to exercise a purely legislative prerogative. This Court has been diligent in maintaining and preserving the doctrine of separation of powers mandated by our Constitution.
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> . . .

> We think it is appropriate to observe here that one of the exceptions to the separation-of-powers doctrine is in the area of constitutionally guaranteed or protected rights. The judiciary is in a lofty sense the guardian of the law of the land and the Constitution is the highest law. A constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it. As Chief Justice Charles Evans Hughes once stated,
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> > "We are under a [C]onstitution, but the [C]onstitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the [C]onstitution."
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> When the people have spoken through their organic law concerning their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights; however, in the absence of appropriate legislative action, it is the responsibility of the courts to do so.
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> . . .
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> We take judicial notice that the 1972 Legislature had many problems to deal with and we must assume that the weight of their labors in other matters precluded the establishing of guidelines for public employees other than fire fighters.
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> . . .
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> The Legislature, having thus entered the field, we have confidence that within a reasonable time it will extend its time and study into this field and, therefore, *judicial implementation* of the rights in question would be premature at this time. If not, this Court will, in an appropriate case, have no choice but to fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the [C]onstitution, and comply with our responsibility.

Dade County Classroom Teachers, 269 So. 2d at 686–688 (emphasis added).

The Legislature did what it should have done. The 1974 Session enacted what is now Florida Statutes, Section 447.201 (2004). But it cannot be assumed that this Court was bluffing. And if it wasn't, today's decision is inconsistent with the spirit, if not the letter, of Chief Justice Roberts' words quoted just above.

In the first place, "What's sauce for the goose should be sauce for the gander." If this Court was willing in an extraordinary case to actually legislate, and call it what you will, that's what it would have amounted to, then in another extraordinary case involving a point even more important than public employee collective bargaining, life itself, it should have been willing to allow the Legislature to act. That is to say, this Court should give the Governor a chance, in turn, to give Terri a chance at life if the judiciary erred on the issue of persistent vegetative state and/or in its privacy determination about what Terri's wishes would have been. After all, these issues have been and still are the subject of great differences of opinion of which we can, I believe, take judicial notice. Indeed, as Chief Justice Roberts pointed out above, "it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights." *Dade County Classroom Teachers*, 269 So. 2d at 686. Surely life is the greatest right of all. In this extraordinary case, we should have allowed the Governor, as authorized by the Legislature, to act to ensure that Terri's life was not wrongfully allowed to expire.

Chief Justice Roberts quoted Charles Evan Hughes, whose words in another context are apropos here. In *Home Building & Loan Assn. v. Blaisdell*, the Minnesota Mortgage Moratorium case, 290 U.S. 398, 425–426 (1934) (citing *Wilson v. New*, 243 U.S. 332, 348 (1917)), Chief Justice Hughes said the following in referring to "the relation of emergency to constitutional power":

> While emergency does not create power, emergency may furnish the occasion for the exercise of power. Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.

Precisely. There was an emergency—Terri's feeding and hydration tube had already been removed and her life was on the line. And the brushing aside of separation of powers had, in *Dade County Classroom Teachers*, already been "enjoyed" or at least there was a very credible threat that it would be "enjoyed." The majority's reliance on run-of-the-mill cases involving legislative encroachment on the judiciary should not have carried the day in this case.

Beyond that, we have recently departed from what I consider to be our misguided rule on taxpayer standing[1] to allow a taxpayer to have standing in a single case because of "unique circumstances." This is what we said in refusing to extend the rule beyond the facts of the case it was created for:

> We found [in *Clayton v. Board of Regents*, 635 So. 2d 937, 938 (Fla. 1994)] that Clayton did have standing to bring the petition because of the *unique* circumstances present there. . . . (citation omitted). Accordingly, we will not extend that decision beyond the unique circumstances present in that case. Further, we make it clear that our finding that unique circumstances existed in that case should not be interpreted as having created our exception to [the taxpayer standing rule].

Sch. Bd. of Volusia County v. Clayton, 691 So. 2d 1066, 1068 (Fla. 1997) (emphasis in original). We did depart from our taxpayer standing rule because of "unique circumstances" in a single case.

So, once again, we found a way to create a special rule for a special case. Very simply put, we have followed ordinary law in an extraordinary case when extraordinary law was there to be used. We were prepared to write law, but we are unwilling to let the Legislature act when a human life is at stake. As Chief Justice William H. Rehnquist explained in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 281 (1990), "The choice between life and death is a deeply personal decision of obvious and overwhelming finality."

II. THE NON-DELEGATION RULE

As to the delegation problem, the current state of the law would, I believe, have allowed us to reach any result that we desired. We reached the wrong one. Our cases on this topic are nothing if not inconsistent. The majority quotes from *State, Department of Citrus v. Griffin*, 239 So. 2d 577, 581 (Fla. 1970), to the effect that "[e]ven where a general approach would be more prac-

1. I so thoroughly disagree with our taxpayer standing cases that I felt compelled to write an article about it. Stetson University kindly consented to publish it. *See* Thomas C. Marks, Jr., *Adhere Resolutely to a Mistake: The Florida Taxpayer Standing Cases*, 33 Stetson L. Rev. 401 (2004).

tical than a detailed scheme of legislation, enactments may not be drafted in terms so general and unrestrictive that administrators are left without standards for the guidance of their official acts." In the very next sentence, however, we went on to say that "it should be remembered that our Constitution does not deny to the Legislature necessary resources of flexibility and practicality, and when a general approach is required, judicial scrutiny ought to be accompanied by recognition and appreciation of the need for flexibility." *Id.* The Legislature authorized the Governor to keep Terri alive. This could be described as "the general approach." Beyond that, it would have been difficult to give the Governor guidance because of the uncertainty of what he would discover with regard to Terri's wishes or indeed as to the existence vel non of her persistent vegetative state. But, of course, any such inquiry would have been moot if Terri died. Thus, the Legislature provided the ingredient crucial to the Governor's intended course of inquiry.

To look at the non-delegation rule more generally merely reinforces my belief that we should not have found here a separation of powers problem. That doctrine is, in practice, so vague as to approach being meaningless in its application in some cases.

It is true that this Court has struck down a number of laws as being invalid delegations of power. However, our requirement of guidelines is, it seems to me, really no different from the Federal "intelligible principle" standard applied by the U.S. Supreme Court in a relatively recent case: "In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 474 (2001).

As an example of our inconsistency, compare *Delta Truck Brokers, Inc. v. King*, 142 So. 2d 273 (Fla. 1962) with *Astral Liquors v. Department of Business Regulation*, 463 So. 2d 1130 (Fla. 1985). In the former, we struck down as an invalid delegation of legislative power a statute regulating the transfer of truck brokerage licenses that allowed the agency to "'impose restrictions on such transfer where the public interest may be best served thereby.'" *Delta*, 142 So. 2d at 274 (quoting Fla. Stat. § 323.31(6)

(1961)). The former Railroad and Public Utilities Commission had relied on the "public interest" language to deny the transfer of a truck brokerage license.

In the latter case, this Court upheld the use of similar language in Florida Statutes, Section 561.32(2) (1981). *Astral*, 463 So. 2d at 1131. In doing so, we commented that,

> as a general rule, the legislature should provide certain legislative standards and guidelines when delegating discretion to an agency. The [district] court recognized, however, that there are two exceptions to the strict application of the general rule: when the subject of the statute concerns licensing and determination of fitness of license applicants and when the statute deals with the regulation of businesses which are operated as a privilege rather than as a right. *Id.* (citing *Astral Liquors, Inc. v. State, Dept. of Bus. Reg.*, 432 So. 2d 93, 95–96 (Fla. 3d Dist. App. 1983)).

The simple question must be asked: why didn't the first exception apply to *Delta*, which also involved licensing? Indeed, an absolute discretion standard when administrative charges are pending against the owner of the license (*Astral*) hardly seems different from the "public interest" standard in *Delta.* Perhaps the difference was between truck brokerage licenses and liquor licenses, but that situation should do no more than strengthen the licensing exception. We further stated that "[this] does not mean the discretion exercised by the agency is unchecked. We emphasize that discretionary agency action must be subject to judicial review to determine whether it meets the standard of reasonableness." *Id.* at 1132 (citing *N. Broward Hosp. Dist. v. Mizell*, 148 So. 2d 1, 4 n. 11 (Fla. 1962) (quoting 1 Am. Jur. 2d *Administrative Law* § 116 (1962)).

In *Straughn v. O'Riordan*, we upheld against a delegation challenge a statute that, in pertinent part, "directs the Department [of Revenue] to require a bond from sales tax registrants in 'all cases where it is necessary to insure compliance with the provision of this chapter . . . .'" 338 So. 2d 832, 833 (Fla. 1976) (quoting Fla. Stat. § 212.14(4) (1973)).

The above discussion of the non-delegation doctrine in Florida should establish that Terri's Law, brigaded with an understanding of the Governor's intention to prolong Terri's life in order to

satisfy himself that Terri's intent and persistent vegetative state were clearly established, pushes against the edge of the envelope of the non-delegation rule. It does not, in my opinion, pierce that edge. This case is certainly more important and extraordinary than licenses and sales tax bonds.

III. AN ALTERNATIVE DELEGATION ARGUMENT

Indeed, there is another way to look at the delegation problem. In *Gilmore v. Finn*, 527 S.E.2d 426 (Va. 2000), Governor James S. Gilmore III sued to restrain the termination of life support of a patient. The facts need not detain us because the case is mentioned to call attention to the Governor's statutory duty "to protect or preserve the general welfare of the citizens of the Commonwealth . . . acting in its capacity as *parens patriae*, where he shall determine that existing legal procedures fail to adequately protect existing legal rights and interests of such citizens." *Id.* at 430. As far as I can determine, the Florida Statutes contain no equivalent language. However, the Florida Statutes provide the governor with vast powers. (See e.g. Index to the 2004 Florida Statutes under "Governor"). And, we should need no reminding that the Florida Constitution is a limit on inherent power, not a grant of power. *Peters v. Meeks*, 163 So. 2d 753, 755 (Fla. 1964). Once the inherent executive power is allocated to the Governor in Article IV, it would be difficult to argue that the powers explicitly described there are exclusive, unless one were to apply the maxim *expressio unius est exclusio alterius*, which should be done with great care. *Nichols v. State ex rel. Bolon*, 177 So. 2d 467, 468–469 (Fla. 1963) (citing *State ex rel. Moodie v. Bryan*, 39 So. 929, 955–956 (Fla. 1905)). Thus there is an argument to be made that although the Governor of Florida is not the subject of a statutory provision such as that in Virginia, he has that power inherently as governor. As John Marshall pointed out in *McCulloch v. Maryland*, 17 U.S. 316, 324 (1819), as to implied power, a *grant* of vast power should include the implied power to go with it. This should be even more true of the inherent executive power of the Governor.

If this is indeed true, as I believe it to be, then the Governor perhaps could have acted without the aid of Terri's Law, but the inherent power argument certainly suggests that once Terri's

Law empowered the Governor to return things to the *status quo ante* and allowed him to proceed, there was nothing for the Legislature to delegate because from that point on the inherent executive power of the Governor was the source, not a delegation from the Legislature. If there was no need to delegate anything, then there is no case for invalid delegation. In other words, if the Governor could act without the delegation, then the question is moot. Therefore, it seems to me that our decision predicated, as it was, solely on the delegation of power issue, is wrong.

Since the majority limited itself to the separation of powers issue in this way, I have done the same. I am confident that Terri's Law could withstand the other challenges as well.

IV. A TOTALLY DIFFERENT APPROACH

Even if I am wrong in my separation of powers arguments, this Court *ex mero motu* should have taken note of the admonition found in the Florida Constitution, Article V, Section 2(a), that "no cause shall be dismissed because an improper remedy has been sought." I will concede that my proposed use of this very salutary provision is unique but hardly therefore wrong. Put very simply, the Governor should have been provided with the opportunity to intervene under Florida Rule of Civil Procedure 1.230. The fact that such an intervention would be post-judgment is not necessarily fatal. In *Schiller v. Schiller*, 625 So. 2d 856, 860 (Fla. 5th Dist. App. 1993), the district court held that such intervention is *rarely* permitted for purposes of taking part in an appeal, but it is permitted "if the interests of justice so require and the intervenor stands to lose or gain valuable rights, dependent upon the outcome of the case." It seems to me that this describes the Governor's position vis-à-vis Terri Schiavo.

To be sure, if we had given the Governor the right to intervene that would take the case back to the circuit court once again. And the Governor would have to argue to that court the merits of his intervention. We could have and should have allowed this and strengthened his argument by recognizing that Terri Schiavo is not Estelle Browning. *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (upholding an appellate court ruling that the guardian of an elderly stroke victim in a vegetative state could exercise the woman's previously expressed wishes to discontinue life-sustaining treatment because her wishes had been expressed in

writing prior to her suffering the stroke). As the Governor pointed out, Terri Schiavo, unlike Mrs. Browning, had potentially many more years to live,[2] but more importantly, the distinction between the two cases is the vigor with which both sides have contested this case. Given these differences, especially the latter, we should have created an exception to the law established by our *Browning* decision regarding the standard of clear and convincing evidence. Under the circumstances of a case like this, proof beyond a reasonable doubt as to both Terri's condition and wishes should be the standard. It's the standard used in criminal cases even when "life" is not involved. Why not here?

In concluding this opinion, I wish to reiterate my difference with the majority. The majority opinion would be beyond quibble in an *ordinary case*. This is an extraordinary case and should have been treated as such. "Play [should have been] allowed in the joints of the machine."

2. Br. of Appellant at 30, *Bush v. Schiavo*, Case No. S.C. 04925.