2:1 TENNESSEE JOURNAL OF LAW & POLICY 115

A FIGHT 'TILL THE DEATH: CONGRESS'S USURPATION OF STATE COURT POWER IN END-OF-LIFE MATTERS

Leland C. Abraham

I. Introduction

In the spring of 2005, the United States Congress passed An Act for the Relief for the Parents of Theresa Marie Schiavo[1] ("the Act") in response to numerous requests by Michael Schiavo, Theresa's husband, to have Theresa's feeding tube removed. Michael Schiavo argued that, prior to her accident, Theresa ("Terri") made oral statements expressing her wish not to be kept alive in a persistent vegetative state.[2] The Act provided a mechanism for the parents of Terri Schiavo to institute legal proceedings to prevent the removal of Terri's feeding tube.[3]

Despite its numerous backers, many advocates of a patient's right to make end-of-life decisions perceive the Act as a step backwards. The Act negates Michael Schiavo's ability, as the surrogate decision-maker for Terri, to make the decision to withhold or withdraw food that is necessary to sustain her major life functions. While Michael Schiavo claims that he has empirical evidence that Terri did not want to be kept alive in a persistent vegetative state, the Act precludes him from fulfilling Terri's wishes

[1] An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).
[2] *In re* Schiavo, 916 So. 2d 814 (Fla. Dist. Ct. App. 2005).
[3] *See* An Act for the Relief of the Parents of Theresa Marie Schiavo § 1.

without the threat of a lawsuit by Terri's parents.[4] Furthermore, the Act prevents Michael Schiavo from complying with the holding of the court in *In re Schiavo*.[5] In that case, the Florida District Court of Appeals refused to grant Terri's parents relief from a trial court judgment holding that, based on clear and convincing evidence, Terri was in a persistent vegetative state and would have decided to forego further use of a feeding tube.[6] While the court ordered the feeding tube be removed under the Act, Michael Schiavo could not comply with the court order without the possibility of a lawsuit by Terri's parents.[7]

In this note, I will first provide a brief summary of the government's treatment of end-of-life decision-making and how that treatment assisted in the development of the Act. Then, I will examine the Act as it relates to the Fourteenth Amendment of the United States Constitution. Next, I will examine Congress's interest in this case, showing that Congress had neither a compelling interest to interfere with the state court's order nor a compelling interest in passing legislation to limit the rights of Michael Schiavo, in his capacity as surrogate decision-maker for Terri, to fulfill Terri's wishes. Finally, I will examine the separation of powers requirements and show that Congress's interference in this matter was a clear constitutional violation of the separation of powers doctrine and that, based on this violation, the Act should be overturned on appeal.

---

[4] *Id.*

[5] *In re Schiavo*, 916 So. 2d at 814.

[6] *See id.*

[7] *See* An Act for the Relief of the Parents of Theresa Schiavo § 2.

II. Development of an Act for Relief for the Parents of Terri Schiavo

A. Historical Perspective on End-of-Life Decision Making

The history of an individual's right to autonomy and self-determination is derived from several sources including the United States Constitution[8] and state constitutional provisions.[9] While these rights may seem to strike a cord in the court of public opinion, no court of law has ever held that these rights are absolute.

The patient's right to choose whether to receive medical treatment is an issue that has been debated for many years. Although some court opinions express the view that a citizen has the "right to be let alone,"[10] most early refusals of medical treatment were disregarded, and patients were forced to undergo treatment.[11]

The right to refuse treatment was debated for decades in cases concerning competent patients who sought to refuse medical treatment.[12] In most of those cases,

---

[8] *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 262 (1990) (holding that a person has a liberty interest under the Due Process Clause to refuse unwanted medical treatment).

[9] *See, e.g., id*; *In re* Quinlan, 355 A.2d 647 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976).

[10] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[11] *See, e.g.*, Jacobson v. Mass, 197 U.S. 11 (1905) (holding that the protection of the public trumped the individual's right to refuse medical treatment when a patient refuses a smallpox vaccination shot).

[12] *See, e.g.*, *In re* Georgetown College, 331 F.2d 1000, 1002-03 (1964) (balancing the legal rights and responsibilities of the hospital and its agents on one hand and the patient and her husband on the other).

however, the courts denied the competent person's attempt to refuse treatment.[13] It was not until the question of withholding or withdrawing treatment was raised on behalf of incompetent patients that the courts began to recognize such a right in all patients.[14] Regarding incompetent patients, courts rationalized that incompetent patients should not lose their rights to autonomy and self-determination merely because they lack competency.[15] Those patients who are incompetent have the same decision-making rights as those who are competent, but they need another to assist them in making such end-of-life decisions.[16] Once the right was recognized in incompetent patients, courts became more willing to recognize the right of competent patients to refuse treatment as well. Ironically, it was not until the United States Supreme Court heard a case involving the scope of end-of-life decision-making for an incompetent person in a persistent vegetative state[17] that the Court addressed the issue as it relates to competent patients.

In 1976, the New Jersey Supreme Court decided *In re Quinlan*, which became the land-mark case addressing the rights of patients in persistent vegetative states.[18] In *In re Quinlan*, a young woman was in a persistent vegetative

---

[13] *See, e.g., Jacobson*, 197 U.S. 11.

[14] *See, e.g., In re Quinlan*, 355 A.2d 647.

[15] Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 423 (1977).

[16] *See, e.g., In re* Conroy, 486 A.2d 1209, 1221 (1985) (stating that the court has a special responsibility to place appropriate constraints on private decision making and to create guideposts that will help protect people's interests in determining the course of their own lives); Saikewicz, 370 N.E.2d 417; *In re Quinlan*, 355 A.2d 647.

[17] *Cruzan*, 497 U.S. 261.

[18] *In re Quinlan*, 355 A.2d 647.

state and her breathing was assisted by a ventilator.[19] Her father sought appointment as her guardian in order to discontinue all extraordinary medical procedures sustaining his daughter's life.[20] The New Jersey Supreme Court recognized that the incompetent patient had the right to have a guardian exercise for her the same decisions she could have made if competent and able to make them for herself.[21] According to the court, her guardian's power to do this was not unconditional.[22] Before he could request the withdrawal of life-sustaining treatment, however, his daughter's physicians had to conclude that there was no reasonable possibility that she would ever emerge from the vegetative state and regain her full cognitive abilities.[23]

The debate over withdrawal of nutrition and hydration has been far-reaching. For many individuals, artificial nutrition and hydration administered through a feeding tube is another form of medical treatment, similar to breathing through a ventilation system. However, artificial nutrition and hydration bears little resemblance to eating and drinking naturally. The procedure is invasive to the patient's body, and most foods must be liquefied before they are inserted into the feeding tube. There is also debate over whether patients in persistent vegetative states suffer pain associated with the removal of the feeding tube.[24] When it comes to the removal of a feeding tube, most courts addressing the issue have held that a competent

---

[19] *Id.* at 647.
[20] *Id.* at 651.
[21] *Id.* at 663.
[22] *Id.* at 671.
[23] *Id.* at 671-72.
[24] *See* Jeff M. Sellers, *When to Pull a Feeding Tube*, CHRISTIANITY TODAY, May 2005, *available at* *http://www.christianitytoday.com/ct/2005/005/9.48.html.*

person, or a surrogate acting for an incompetent person, can order the withholding or withdrawal of artificial nutrition and hydration.[25] Some courts, however, have held the contrary, especially in cases involving incompetent patients.[26]

The next significant case addressing a patient's right to refuse medical treatment was *Cruzan v. Director, Missouri Department of Health.*[27] In *Cruzan*, the patient was in a persistent vegetative state as a result of a car accident.[28] Before her accident, she had made statements to her roommate indicating that she "would not wish to continue her life unless she could live at least halfway normally."[29] The issue in *Cruzan* was whether the Missouri standard requiring clear and convincing evidence of a patient's wishes before withdrawal of life-sustaining treatment violated the patient's due process rights.[30] The Supreme Court held that it did not.[31] The Court indicated that the question of whether a constitutional right has been violated must be determined by balancing an individual's liberty interest against the relevant state interests.[32] The

---

[25] *See, e.g.,* Gray v. Romeo, 697 F. Supp. 580, 587 (R.I. 1988) (holding that if an incompetent patient, when competent, would have made the decision to refuse nutrition and hydration, a guardian ad litem may make the decision to refuse nutrition and hydration for that now incompetent patient).

[26] *See, e.g.,* Cruzan v. Harmon, 760 S.W.2d 408, 417 (Mo. 1988), *aff'd*, 497 U.S. 261 (1990) (holding that the decision to refuse medical treatment must be an informed decision and in order to be informed, the patient must have capacity).

[27] *Cruzan*, 497 U.S. 261.

[28] *Id.* at 265.

[29] *Id.* at 268.

[30] *Id.* at 262.

[31] *Id.* at 285.

[32] *Id.* at 279 (quoting Youngbanks v. Romeo, 457 U.S. 307, 321 (1982)).

Court assumed that competent patients possess a liberty interest in ordering that medical treatment be withheld or withdrawn.[33] The Court stated that it does not, however, violate equal protection principles to deny substitute decision-making to incompetent patients because, unlike competent patients, they are not able to make end-of-life decisions.[34] The Court further stated that it is a patient's ability to hear and understand information and make decisions knowingly and voluntarily that distinguishes the competent patient from the incompetent patient.[35]

While many believed that the *Cruzan* decision would hinder the right of incompetent patients to have others make treatment decisions for them, it does not seem to have had this effect. Although the Court held that the standard of clear and convincing evidence did not violate the constitutional rights of the patient, the Court did not mandate that all states adopt that burden of proof when allowing a surrogate to make decisions for an incompetent patient. State legislators are free to enact legislation that protects incompetent patients' rights to have others make end-of-life decisions for them. As a result of *Cruzan* and its predecessors, most states have enacted statutes governing the end-of-life decision making process for incompetent patients.[36] These statutes may specify the types of medical treatment that may be refused and may separate and draw distinctions between artificial ventilation, artificial nutrition, artificial hydration, surgery, kidney dialysis, and medication.[37] Some statutes may

---

[33] *Cruzan*, 497 U.S. at 279.
[34] *Id.* at 287.
[35] *Id.* at 279-80, 287.
[36] *See, e.g.*, TENN. CODE ANN. § 32-11-103(5) (West 2005); FLA. STAT. ANN. §§ 765.201-765.205, 765.301-765.305 (West 2005).
[37] *See, e.g.*, TENN. CODE ANN. § 32-11-103(5).

permit nutrition and hydration to be withheld, but only when certain standards are met.[38]

Florida, the state where Michael and Terri Schiavo resided, deals with the subject of end-of-life decision making for incompetent patients in its statutory law. For example, § 765.305 of the Florida Statutes Annotated states that, in the absence of a living will, a health care surrogate, i.e. a person appointed to make the decisions for another,[39] is charged with deciding to withdraw or withhold life-prolonging procedures unless the designation limits the surrogate's authority.[40] Absent any limitation from the patient pertaining to the surrogate's authority to make decisions for the patient, the only statutory limitations on the surrogate's authority to withdraw life-prolonging procedures are: (1) that the surrogate be satisfied that the patient is in a persistent vegetative state, and (2) that the patient lacks a reasonable medical probability of recovering so that the right to decide may be exercised by the patient.

Legislators and courts are rarely faced with scenarios where family members disagree on whether life-prolonging procedures should be withdrawn. The parents of Terri Schiavo had engaged in a legal battle to prevent the removal of Terri's feeding tube. That legal battle ended on March 16, 2005 when the Florida District Court of Appeals upheld the Florida statute concerning a surrogate's decision-making power to remove an incompetent person's feeding tube.[41] Five days later, on March 21, 2005, the United States Congress passed An Act for the Relief of the Parents of Theresa Marie Schiavo.[42]

---

[38] *See id.*

[39] BLACK'S LAW DICTIONARY 1458 (7th ed. 1999).

[40] FLA. STAT. ANN. § 765.305 (West 2005).

[41] *In re Schiavo*, 916 So. 2d 814.

[42] An Act for the Relief of the Parents of Theresa Marie Schiavo.

III. Due Process: A Fourteenth Amendment Analysis

The Fourteenth Amendment of the U.S. Constitution forbids the government from depriving an individual of life or liberty without due process of the law.[43] In the more than two hundred years since the ratification of the U.S. Constitution, the government has taken an interest in ensuring that every citizen is provided due process of law when engaged in legal proceedings. The Fourteenth Amendment further provides citizens with protection from any law which abridges the privileges or immunities of the several states. The Fourteenth Amendment also affords all citizens equal protection of the laws.[44] If a patient's interest in self-determination and autonomy are founded on fundamental constitutional principles, the government must demonstrate that it has a compelling interest in overriding the patient's right to refuse treatment, and that the means of enforcing its interest is the least restrictive of the available alternatives.[45] The Supreme Court has held that, even if a patient's decision-making interest is not based on a fundamental right guaranteed by the U.S. Constitution, the government's restriction of that interest must satisfy a rational basis test.[46]

---

[43] U.S. CONST. amend. XIV.

[44] *Id.*

[45] In some cases, the Supreme Court has departed from the application of a specific standard and has employed a test that balances the interests of the state with those of the individual and evaluates the weight of the obstacle the state has imposed upon the citizen's exercise of the right at issue. *See, e.g.,* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[46] *See* Reno v. Flores, 507 U.S. 292, 301-03 (1993).

IV. The Government's Compelling Interest

Courts have traditionally recognized four interests sufficient to override a patient's right to self-determination: (1) preserving life; (2) protecting the interests of innocent third persons; (3) preventing suicide; and (4) protecting the integrity of the medical profession.[47]

A. Preserving Life

The government's interest in preserving life focuses not on the life of any one individual, but rather on the value of every person's life to society as a whole. It is an interest based on the sanctity of life and on every individual's dignity and worth.[48] If the government's interest in preserving life were found to override Terri's right to self-determination, the right to self-determination would be rendered meaningless. If Congress's interest in preserving the life of an incompetent patient is based on that individual's dignity, then Congress cannot, in good faith, deny Terri her right to autonomy. Moreover, if there is clear and convincing evidence that Terri did not want to live in a persistent vegetative state, as the court in *In re Schiavo* found,[49] the state should carry out her wishes. Thus, if the government's interest is in the sanctity of life and the individual's dignity, that interest must be honored

[47] *See* Satz v. Perlmutter, 362 So. 2d 160, 162 (1978); Saikewicz, 370 N.E.2d at 425.

[48] *See, e.g., In re Conroy*, 486 A.2d at 1220 (stating that all persons have a fundamental right to expect that their lives will not be foreshortened against their will).

[49] *In re Schiavo*, 916 So. 2d at 814.

when the individual, facing a prolonged, painful death or the indignity of having to be cared for by others, decides to refuse further medical care.

The assertion that the government has a fundamental interest in the sanctity of life may be attacked on the ground that many states have a death penalty designed to end the lives of those persons deemed culpable of egregious crimes. Likewise, for those who are sick or have various other injuries, the government's interest in preserving their lives is hardly absolute because the government does not guarantee health care for its citizens. In Terri's case, the state kept her alive, against clear and convincing evidence that she did not want to live in a persistent vegetative state. Terri was neither honored nor afforded dignity by the government's decision to keep her alive against clear evidence that she would have objected to such treatment.

In the 1970s, courts began to allow an individual's right to self-determination to override the government's interest in preserving life.[50] The individual's right to have life-prolonging treatment removed or withheld was initially recognized in cases where the invasion of the patient's body by the treatment was great and the patient's prognosis, even with treatment, was not favorable.[51] Today, however, it is unlikely that a court would deny a patient's request to refuse treatment on the basis of the government's interest in preserving life, even if the

[50] *See, e.g.*, Rasmussen v. Fleming, 741 P.2d 674, 683 (1987) (holding that an individual's right to chart his or her own plan of medical treatment deserves as much, if not more, constitutionally protected privacy than does an individual's home or automobile).

[51] See, e.g., *In re Quinlan*, 355 A.2d 647 (relying on the fact that experts did not think the patient would survive with treatment and that the patient would certainly die without the treatment).

treatment in question was commonplace.[52]

In Terri's case, the court held that Terri's wishes should be honored.[53] Congress then attempted to circumvent the court's ruling through the Act, which granted Terri's parents standing to bring suit against Michael Schiavo, Terri's surrogate decision-maker, if he complied with the court order.[54] Here, Congress did not show a compelling interest in the sanctity of life. Congress simply attempted to wield its authority in this area by overriding the state's authority. The Act did not address all residents similarly situated to Terri's condition; it only focused on Terri Schiavo.[55] For this reason, the Act does not show a compelling state interest in the sanctity of life.

B. Protecting Interests of Third Parties

Courts have traditionally recognized that governmental interest in protecting the interests of innocent third persons is sufficient to override an individual's right to self-determination. In *In re Georgetown College*, the court allowed the state's interest in protecting innocent third parties to override the decision of a Jehovah's Witness patient to refuse to undergo a blood transfusion because she was the mother of a minor child.[56] Recently, however, courts have allowed adults to refuse life-saving or

---

[52] The results could be different if the patient wanted to take active steps, or have another person take active steps, to end the patient's life. In the case of assisted-suicide or active euthanasia, however, the state's interest in preserving life could prevail over the patient's interest in autonomous decision-making.

[53] *See In re Schiavo*, 916 So. 2d 814.

[54] *See* An Act for the Relief of the Parents of Theresa Marie Schiavo.

[55] *See id.*

[56] *In re Georgetown College*, 331 F.2d at 1009-10.

life-sustaining treatment even if the refusal would mean death, and would result in the dying patient leaving behind minor children.[57] These cases mainly have pertained to competent adult patients. For example, in *St. Mary's Hospital v. Ramsey*, the court upheld the right of a 27-year old Jehovah's Witness patient with one minor child to refuse the administration of blood products. [58]

If an innocent third party exists in Terri's case, that party would be her parents. However, her parents were not dependents and did not rely on her financially, as a minor child would rely on a parent. Instead, Terri's parents were seeking guardianship of Terri.[59] If her parents had gained custody of her, then Terri would have been dependent upon them. Thus, Terri's parents would not have a claim of abandonment as would a child whose parent chooses not to accept life-prolonging treatment. Additionally, the court rulings pertaining to this governmental interest have involved competent patients. Because Terri was in a persistent vegetative state, she was an incompetent patient. For these reasons, the government's interest in protecting an innocent third party fails in the case of Terri Schiavo.

C. Preventing Suicide

The government has historically recognized an interest in preventing its citizens from committing suicide.[60] This interest coincides with the state's interest in the preservation of life for all its citizens, both collectively

---

[57] *See, e.g.*, St. Mary's Hospital v. Ramsey, 465 So.2d 666, 668 (Fla. Dist. Ct. App. 1985) (observing that although there is a minor daughter, this case is difficult to categorize as abandonment).
[58] *See id.*
[59] *In re Schiavo*, 916 So. 2d 814.
[60] *In re Conroy*, 486 A.2d 1209.

and individually. The government's interest is relevant here because a patient's decision to withdraw or withhold life-prolonging treatment will lead to the patient's death, which will occur earlier in time than if the treatment had been continued.

For many years, courts have allowed the refusal or withdrawal of life-sustaining treatment, despite the government's interest in preventing suicide. These courts have asserted that the patient's death was not caused by the refusal or withdrawal of treatment, but rather by the patient's underlying medical condition.[61] Courts have distinguished the withdrawal of treatment from suicide on the grounds that the patient's condition leading to the treatment was not self-inflicted and the patient's intent in refusing treatment was not to die. Rather, the intent was not to continue to live under the present conditions.[62] Some courts have also expressed the opinion that withdrawal of treatment was not an action, but an omission and, therefore, could not be characterized as suicide.[63]

Terri's expressed wish to refuse treatment cannot be characterized as suicide. The removal of nutrition here is not a self-inflicted procedure aimed at ending her life. It is, rather, the omission of measures that would prolong Terri's life in a state in which she expressly did not want to live. This case, as courts have previously held,[64] is

---

[61] *See, e.g., In re Conroy*, 486 A.2d at 1219 (holding that patient would have died within one year even with the treatment); *Saikewicz*, 370 N.E.2d at 417.

[62] *See, e.g., Perlmutter,* 362 So.2d. at 163 (holding that because the patient did not self-inflict his condition, the refusal of treatment cannot be characterized as suicide).

[63] *See, e.g.,* Vacco v. Quill, 521 U.S. 793, 801 (1997) (distinguishing the refusal of life-sustaining treatment and demanding life-ending treatment).

[64] *See id.*

distinguishable from suicide because Terri did not express a will to refuse treatment in order to end her life. She expressed a desire to refuse treatment when she could not live in a normal state. This is fundamentally different from suicide because Terri's intent was not to end her life per se, but to end prolonged survival in a persistent vegetative state.

The government's interest in preventing suicide has resurfaced in the assisted-suicide debate. The supporters of assisted-suicide argue that, in many respects, those cases are indistinguishable from withdrawal of treatment cases. According to assisted-suicide proponents, there is no difference between withdrawing treatment that results in one's death and providing a means for one to die earlier than would be expected from a terminal or chronic condition. Assisted-suicide supporters do not necessarily argue that withdrawal of treatment is not suicide, but rather that, if a patient is allowed to hasten death through withdrawal, the patient should be allowed to achieve the same end through other means.[65] If the government's interest in preventing suicide is not compelling enough to override a patient's interest in refusing treatment, it also should not be compelling enough to override the patient's interest in shortening his or her life by other means. Patients should not be forced to die from infection or from lack of ventilation, nutrition, or hydration, rather than from a quicker, more effective method. Additionally, proponents of assisted-suicide argue that withdrawal of treatment is also an act rather than an omission. Even if withdrawal of treatment is an omission, the law imposes culpability for negative omissions as well as for positive

[65] *See, e.g., Quill,* 521 U.S. at 807 (overruling the lower court's assumption that individuals have a right to hasten death).

acts.[66] Those opposed to assisted-suicide fail to recognize a patient's constitutional right to autonomy.[67] Terri's decision to refuse life-prolonging treatment is not a fight that she should have to win in the court of public opinion, because one goal of the Fourteenth Amendment of the United States Constitution is to provide every citizen with autonomy.[68] For these reasons, the government cannot sustain an interest in preventing Terri's husband from removing her feeding tube because his goal was not to help her commit suicide, but simply to ensure that she would not be forced to live in a permanent vegetative state.

D. Maintaining Integrity in the Medical Profession

Another governmental interest offered in opposition to the withdrawal of life-sustaining treatment is the need to maintain integrity in the medical profession. Although this interest is frequently cited, it is rarely persuasive.[69] Members of the medical profession would argue that it is the role of health care providers to save lives, not take them, and that providers must have the freedom to treat patients according to their reasonable professional judgment.[70] Health care providers would further argue that withholding or withdrawing treatment that results in the

---

[66] *See, e.g., In re Quinlan*, 355 A.2d. at 647 (stating that although there are medical advances, justice will have to keep up with them).

[67] U.S. CONST. amend. XIV.

[68] *Id.*

[69] *See, e.g., Perlmutter*, 362 So.2d at 163-64 (quoting *Saikewicz*, 370 N.E. 2d at 426-27).

[70] *See, e.g., In re Quinlan*, 355 A.2d. at 668 (speaking of the need not to inhibit the "independent medical judgments" of physicians "in the pursuit of their healing vocation").

death of a patient may well violate their ethical code, as well as the code of the medical profession in general.[71]

In this case, the medical professional's ethical obligation is to consent to the wishes of the patient. To deny Terri her right to self-determination would be an egregious error on the part of the medical community. To override clear and convincing evidence that the patient would want to abstain from life-prolonging treatment in the event that the patient is in a persistent vegetative state is an authority not granted to medical professionals by any ethical code.

Likewise, courts have rejected the argument that the integrity of the medical profession is an interest compelling enough to override a patient's interest in self-determination and autonomy.[72] The courts have taken the view that the medical profession's mission to save lives does not mandate life-sustaining treatment in all cases, especially those where the patient's prognosis is very poor or those in which the patient is in great pain or is permanently unconscious.[73] In Terri's case, she was in a persistent vegetative state, and she did not have a prognosis of recovery. Before her accident, Terri alluded to the fact that, if she were ever in such a state, she would want the life-sustaining measures halted so that she would not have to continue to live in an abnormal manner.[74] Courts have held that there are circumstances where appropriate medical care is comfort care, rather than life preserving

---

[71] *See id.* at 664-69.

[72] *See, e.g., Perlmutter,* 362 So.2d at 163-64 (stating that if the doctrine of informed consent and privacy have as their foundations bodily integrity, then those rights are superior to institutional considerations).

[73] *See, e.g., In re Quinlan,* 355 A.2d. at 667.

[74] *See In re Schiavo,* 916 So. 2d at 814.

care.[75] For Terri, the most appropriate care would have been comfort care, in accordance with her wishes.

Generally, if health care professionals or institutions object to the withdrawal of treatment on individual ethical grounds, they will not be forced to act on the patient's wishes, so long as the patient can be transferred to another health care provider or institution that will help effectuate those wishes.[76] In order to comply with Terri's wishes, someone in the medical profession would not be forced to do something to which he or she was ethically opposed. Thus, there was no breach of any medical code of ethics by removing Terri's feeding tube. For these reasons, the government's interest in maintaining the integrity of the medical profession is irrelevant because Terri did not commit suicide, and the professional who ended this ordeal for her was not forced to do so.

V. The Act Versus Separation of Powers

While the ultimate decision concerning whether Terri's feeding tube should have been removed will be debated for many years to come, the effect of Congress's attempt to circumvent the order of a Florida Court of Appeals[77] is immediate. There is public sentiment that this piece of legislation was an attempt on the part of the U.S. Congress to usurp the authority of state law[78] and wield its

---

[75] *See, e.g., In re Quinlan*, 355 A.2d. at 667 (noting that some physicians have chosen not to prolong the process of dying for the patient when it is clear that the patient is in an irreversible condition and therapy offers neither human nor humane benefit).

[76] *But see In re* Requena, 517 A.2d 886 (N.J. Super. Ct. Ch. Div. 1986), *aff'd*, 517 A.2d 869 (N.J. Super. Ct. App. Div. 1986).

[77] *In re Schiavo*, 916 So. 2d 814.

[78] FLA. STAT. ANN. § 765.305 (West 2005).

own authority.[79]

The Act raises many constitutional inquiries and should not survive an appeal. Generally, legislative actions are those that have general application and prospective effect, not those which are targeted and retroactive.[80] The Act, however, is not merely legislation, but an attempt to accomplish something judicial and strictly outside the role of the legislature. Florida's Constitution clearly mandates a separation of powers.[81] While these distinctions of power may overlap at times, it is difficult to find a constitutional basis for Congress's overruling a court order. The legislature, dissatisfied with the court order, granted Terri's parents standing to sue Michael Schiavo, even though the United States Supreme Court had already ruled that Congress may not interfere with judicial proceedings.[82] Thus, the legislature should not have granted relief to Terri's parents because such relief was strictly judicial in nature. Congress should have adhered to the separation of powers principle as mandated by the nation's highest court.

It can hardly be argued that the courts are the best mechanism for determining end-of-life decisions. Because there is no universal statute to govern such decisions, states have devised their own statutes regarding who should make

---

[79] Barbara A. Noah, *Politicizing the End of Life: Lessons From the Schiavo Controversy*, 59 U. MIAMI L. REV. 107, 115-16 (2004).

[80] *Id.* at 117 (quoting Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach,* 110 HARV. L. REV. 1055, 1057 (1997) (explaining that the "general principle that statutes operate prospectively and judicial decisions apply retroactively is a matter of black letter law")).

[81] *See* 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.").

[82] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995).

end-of-life decisions. If the legislature was diametrically opposed to the language of a statute, it has the authority to amend such a statute. This, however, is a matter that Congress should not have decided by judicial means. The legislature cannot usurp the power of the courts, especially after a particular matter has been decided. The courts are committed to upholding the legislature's authority by rendering opinions consistent with the statutes, which is exactly what the court did in Terri's case.[83] The legislature, in turn, should remain true to the constraints of the statute, which requires that these matters be decided in a court of law.

It is important to note that there were alternative routes the legislature could have followed. For example, a private bill would not have offended the Constitution on the scale that Congress's usurpation of judicial power has. There is no provision in the U.S. Constitution that prohibits private bills. Because Terri made it clear that she did not want to live in a persistent vegetative state, as determined by the Florida courts,[84] it is unlikely that she would have perceived such a bill as favorable to her cause.

State elected officials take an oath to abide by their state constitutions. When Congress is allowed to override the authority of a state constitution, an extreme limitation is placed on the states' authority—one the Framers of the U.S. Constitution may not have envisioned.[85] It can be argued that the separation of powers discussed in the Florida Constitution[86] is to be respected by the U.S. Congress. Just as the states are not allowed to infringe on the decisions of the U.S. Congress, the U.S. Congress

[83] *See In re Schiavo*, 916 So. 2d 814.
[84] *See id.*
[85] *See* U.S. CONST. amend. X.
[86] *See* FLA. CONST. ART. II, § 3.

should not be allowed to overrule decisions made by the state and wield its own authority.

The other instances in which legislatures have interfered in family matters have also led to similar results. The Schiavo case bears some semblance to a recent federal decision regarding child custody.[87] Dr. Eric Foretich and his wife, Dr. Elizabeth Morgan, separated while Dr. Morgan was pregnant with their daughter, and they divorced shortly after their daughter's birth.[88] The D.C Superior Court gave custody to Dr. Morgan, while Dr. Foretich retained visitation rights.[89] Dr. Morgan did not allow Dr. Foretich to visit his daughter, however, claiming he had sexually molested the girl.[90] The courts never found evidence of inappropriate behavior on the part of Dr. Foretich and jailed Dr. Morgan on contempt of court charges.[91] Afterward, she fled with her daughter to New Zealand.[92] At Dr. Morgan's request, Congress passed the Elizabeth Morgan Act,[93] which allowed Dr. Morgan to return to the United States without being subjected to the jurisdiction of the D.C. Superior Court. The Elizabeth Morgan Act also prevented Dr. Foretich from visiting his daughter unless his daughter consented.[94] Similar to the legislature's intervention in the Schiavo case, the Elizabeth Morgan Act referred specifically to the Morgan-Foretich dispute. Dr. Foretich contested the legislation arguing it

---

[87] *See* Foretich v. United States, 351 F.3d 1198 (D.C. Cir. 2003).
[88] *See id.* at 1204-05.
[89] *Id.* at 1205.
[90] *Id.*
[91] *Id.* at 1205-06.
[92] *Id.* at 1207.
[93] *Id.* at 1207.
[94] *Id.* at 1208.

was a violation of the separation of powers doctrine,[95] an argument the U.S. Court of Appeals accepted.[96] The U.S. Court of Appeals concluded that the Act was a punitive measure that was designed to separate Dr. Foretich from his daughter.[97] In reaching its conclusion, the court relied on the legislative history which spoke to the effect of the Act's aim to "correct an injustice" in the custody dispute.[98]

The Act granting Terri's parent's relief has little distinction from the Elizabeth Morgan Act. While the Act passed by Congress on behalf of Terri's parents does not do the same damage to Michael Schiavo's reputation as the Elizabeth Morgan Act did to Dr. Foretich's reputation, the two acts are nonetheless similarly detrimental to the separation of powers doctrine. The cases are remarkably similar in that both involve the same questions and constitutional misgivings. On this basis, the Act violates the separation of powers doctrine and is therefore void.

VI. Conclusion

Congress's attempt to circumvent the Florida court's decision regarding the removal of Terri Schiavo's feeding tube violated her fundamental constitutional rights. She is guaranteed a right to autonomy[99] and she has a right to self-determination based on that right. Congress's attempt to usurp the state court's power not only violated Terri's constitutional rights, but it also offended the Framers' intent to afford states autonomy. Furthermore,

---

[95] *Id.* at 1208-09.
[96] *Id.* at 1226.
[97] *Id.* at 1223.
[98] *See id.* at 1225-26.
[99] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (stating that the right to autonomy is a fundamental constitutional right).

Congress has failed to show a compelling governmental interest by which to override the personal choice of Terri Schiavo. As a result, the Act is not constitutionally sound and should be overturned on appeal.

2:1 TENNESSEE JOURNAL OF LAW & POLICY 139