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# Killing Terri Schiavo

Michael Stokes Paulsen

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Much ink and wind was expended during the tragic last few weeks of Terri Schiavo's life, debating the facts and issues surrounding her death. But it reduces to this: The State of Florida, acting through its judiciary, ordered a severely disabled woman to be slowly dehydrated and starved to death, by removing her feeding tube.

This sort of thing, of course, happens all the time.[1] The exceptional feature of the Terri Schiavo case is not the situation it presented or the result produced, but the extraordinary attention it received, out of all proportion to anything genuinely unique about its facts. Many commentators have pointed this out, curiously implying that this fact somehow justified the state's actions or rendered illegitimate the extraordinary efforts to save her life. It does not. To be sure, there is something odd in the treatment of Terri Schiavo's case as if it were one-of-a-kind. There is a certain *Saving Private Ryan* element to *Killing Terri Schiavo*: When so many others are being killed, why should anyone care about, let alone take heroic efforts to save, this one person? But just as the Steven Spielberg's famous movie frames a compelling story, the real-world story of Terri Schiavo is paradigmatic as well as dramatic. Whether the legal system produced a defensible result in this case tells us a lot about how the legal system should act in the many, many other cases that are not so very different.

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1. For an excellent discussion of the unexceptional nature of the Schiavo fact pattern and legal result, see Professor Edward Larson's contribution to this issue. Edward J. Larson, *From* Cruzan *to* Schiavo*: Similar Bedfellows in Fact and at Law*, 23 CONST. COMM. 405 (2006). One feature of *Schiavo*, however, *is* extraordinary. The Florida court's order is, in form, not merely an authorization to another to take the victim's life, but a directive from the court specifically to do so.

Unique, unusual attention on this case affords an opportunity for focused examination of issues of general importance.

## I

The conventional legal fiction usually asserted to justify the killing of Terri Schiavo—a legal fiction that, while of recent vintage, rapidly has become familiar and deeply embedded in the law—was that *this is what she would have wanted*, and therefore the state was justified in *ordering* it. By all accounts, Terri Schiavo had extremely little or no cognitive capacity. She was not in a coma, but she likely was in a "persistent vegetative state." Terri Schiavo had left no living will or advance medical directive as to what her desires were with respect to her medical care (and food and water) under such circumstances. Florida law provided that her husband could apply to a court for an order that she be starved and dehydrated to death if he could satisfy a court by "clear and convincing evidence" that this is what she wanted. A state trial judge so found, and the appellate courts deferred to the trial judge's determination.

There is no doubt that Terri Schiavo could have continued to live indefinitely in her deeply disabled condition. Her condition was tragic but not terminal. Removal of food and water, even if characterized as a decision regarding her "medical care," affirmatively killed her. At best, then, the killing of Terri Schiavo was a state-assisted suicide. At worst, it was a state-ordered execution of a disabled person who had committed no crime and was unable to speak in her own defense. Which of the two it was—bad, or much worse—depends on the reliability of the determination of Terri Schiavo's "consent" to the slow taking of her life by order of a state judicial officer.

My modest contention here is that the Constitution's requirement that no person be deprived of his or her life without due process of law requires, at minimum, that the state not kill an individual who is not competent to express his or her wish for death and has given no advance directive, except on an evidentiary showing that this was the victim's desire satisfying a standard of proof at least as high as that required to execute a murderer—proof beyond a reasonable doubt of the proposition(s) thought to justify the state's life-depriving act. Moreover, as with the imposition of the death penalty, the greatest of procedural care and caution must be taken in guarding against a wrongful

decision, because of the terrible human finality of the state's action.

I submit that, except on the basis of proof beyond a reasonable doubt that the victim possessed and expressed a desire to be killed under the circumstances, state action to deprive the victim of her life fails to satisfy the Due Process Clause of the Constitution. The beyond-a-reasonable-doubt standard is the one long held to be required by the Constitution for ordinary criminal convictions.[2] It is difficult to see why any lesser standard should guard innocent disabled persons against wrongful or arbitrary execution on the mistaken, capricious, or malicious assertion of third persons that this is what the victim would want if she could speak for herself. (I have very serious doubts about the moral propriety of the state's granting of, and ordering the carrying out of, an individual's wish that she be killed, *even* where the victim's desire is expressed with unmistakable clarity, but that is a separate question that I leave to one side for present purposes.)

Another way of thinking about the same issue is that the state denies a disabled or incompetent person the equal protection of the laws when it grants to any third person a license to kill the disabled or incompetent person, or assumes such a power itself, on any lower showing of the victim's desire to be killed than proof beyond a reasonable doubt. The very core of the Equal Protection Clause is that the state may not withdraw from its *protection* against the private violence of others (and certainly that should equally include the public violence of state actors) certain classes of individuals—most certainly including persons who are disabled and whose disability prevents them from protecting themselves, or speaking for themselves. Assuming (for the sake of argument) that the Equal Protection Clause does not *absolutely* forbid the state from ordering the killing of a person, not found guilty of any crime, on the application of another person asserting the victim's consent, surely the standard for granting such a request on the basis of the legal fiction of the victim's consent, should be an extraordinarily high standard of proof that might warrant the finding of such constructive consent—proof beyond a reasonable doubt, or perhaps something higher yet.[3]

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2. *In re* Winship, 397 U.S. 358, 364 (1979); *see also* Jones v. U.S., 526 U.S. 227, 243 n.6 (1999), Jackson v. Virginia, 443 U.S. 307, 324 (1979).

3. I am *not* advocating a "*substantive* due process" "right to live." The Due Process Clause, properly construed, confers no substantive legal rights, but only a right to procedural regularity and propriety. *See* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1007–16 (2003). It is ironic,

This was not the standard employed in the state judicial decision ordering the killing of Terri Schiavo. Rather, the Florida courts employed a lower, "clear and convincing evidence" standard—and employed it quite badly.[4] Much of the subsequent federal Due Process Clause legal challenge to the validity of the state's action in ordering Terri Schiavo's food and water removed focused on whether the trial judge could properly have found that the evidence presented satisfied the "clear-and-convincing" standard, or whether the trial judge was an improperly biased or otherwise poor decision-maker. Such contentions were scarcely frivolous, under the circumstances (and, as I argue below, the federal courts were surely wrong to deny interim injunctive relief to save Terri Schiavo, in order to consider those claims fully and carefully). But the fact that too low a legal standard of proof was employed in the first place is an even clearer (and more convincing) basis for concluding that the Florida courts' order deprived Terri Schiavo of her life without due process of law, and seemingly did so because of its legal treatment of her disability, denying her the equal protection of the laws because of that status or condition.

Where did this "clear and convincing" standard, seemingly so widely accepted, come from? The clear-and-convincing standard the Florida courts employed as a matter of state law, and that Schiavo's attorneys and the federal courts considering the

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though, that believers in the idea of "substantive due process" tend to champion a right to die (as against state-compelled life), but no presumptive right to live (as against state-imposed death). *See* Edward A. Hartnett, *Congress Clears Its Throat*, 22 CONST. COMM. 553, 553 n.1 (2006). My position is that *procedural* due process requires that a high standard of proof be satisfied before the state may order the killing of an innocent, disabled person on the theory that this is what (the state concludes) she would have wanted. My equal protection theory *is* substantive: The state may not deprive certain persons or classes of persons of the right to protection from the violence of others.

The U.S. Supreme Court precedent most nearly on point and supportive of the *Schiavo* result (and, of course, rejecting the due process and equal protection arguments I advance here) is *Buck v. Bell*, 274 U.S. 200, 207 (1927) (rejecting procedural due process and equal-protection-from-harm-inflicted-by-others claims, brought on behalf of a mentally disabled woman challenging non-consensual compulsory state sterilization of such persons, on the basis of Justice Holmes' eugenics-sympathetic quip that "three generations of imbeciles are enough."). More recent case law has been somewhat more sympathetic to due process and equal protection claims brought by persons with disabilities. *See, e.g.*, Cleburne v. Cleburne Living Center, 473 U.S. 432, 448, 456 (1985), Tennessee v. Lane, 541 U.S. 509, 522–23 (2004).

4. *See In re* Guardianship of Browning, 568 So.2d 4, 15–17 (Fla. 1990); *In re* Guardianship of Schiavo, 780 So.2d 176, 179–180 (Fla. Dist. Ct. App. 2001); *In re* Guardianship of Schiavo, 2000 WL 34546715, at *6–7 (Fla. Cir. Ct. 2000). Professor Carter Snead makes a powerful, seemingly overwhelming, case against the propriety of the Florida courts' application of this stated standard. O. Carter Snead, *The (Surprising) Truth about* Schiavo*: A Defeat for the Cause of Autonomy*, 22 CONST. COMM. 383 (2006).

issue appear to have assumed was sufficient to satisfy the Due Process Clause of the Fourteenth Amendment, appears to have been borrowed from the U.S. Supreme Court's opinion in the 1990 case of *Cruzan v. Director, Missouri Department of Health*.[5] The Supreme Court's decision in *Cruzan*, however, did not decide that "clear and convincing" was a *sufficient* standard of proof to satisfy the Due Process Clause, in terms of the procedural protections necessary to assure that a disabled person is not deprived of his or her life without notice and a fair opportunity to be heard on the question of "consent" to the killing. Rather, the Court in *Cruzan* held that a "clear and convincing" standard did not violate any asserted *substantive* due process constitutional right that the disabled person might be thought to have with respect to the "right to die" by refusing food and water. The Court in *Cruzan* held, sensibly, that even if one assumed the existence of a substantive due process liberty interest right to refuse medical treatment (as the Court was prepared to assume),[6] and even if one further assumed (for the sake of argument), that that interest extended to the right to die by self-deprivation of food and water,[7] Missouri's state law requirement that the victim's (silent) assertion of such a right be proved by "clear and convincing" evidence did not violate the (substantive) Due Process Clause, because of the state's interest in assuring that this was indeed the victim's position, and not erroneously, arbitrarily, or capriciously advanced by others.[8] The Court no-

5. 497 U.S. 261 (1990).

6. *Id.* at 278 ("[The] principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

7. *Id.* at 279 ("[F]or purposes of this case, we assume that the [Constitution] would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.").

8. *Id.* at 281. The Court framed the question as "simply and starkly whether the Constitution prohibits Missouri from choosing the rule of decision which it did." *Id.* at 277. Here is the crux of the Court's analysis:

> We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death. But in the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, '[t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient.' A State is entitled to guard against potential abuses in such situations. * * * [W]e conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discon-

where said that such an evidentiary standard was *sufficient*, as against a claim made on behalf of the would-be victim *not* to have food or water removed, as a matter of procedural due process. And that was the issue presented by the facts of the *Schiavo* case.

If I am correct that the Due Process Clause requires *more* than "clear and convincing" evidence of constructive consent where the victim is asserting (through a representative) a claimed constitutional right *not* to be killed by virtue of state action (a state court order), then the killing of Terri Schiavo—and many others like her in similar such circumstances—was an egregious and horrible violation of the United States Constitution, committed by a state government. In short, if my hypothesis about the meaning and application of the Due Process Clause in this context is correct, Florida killed a disabled person, who had committed no crime, on the basis of an unproved—under the proper constitutional standard—assertion that she wished to be killed.

## II

Viewed in this light, the decision of Congress to provide for federal judicial review of potential federal constitutional objections to the state-ordered killing of Terri Schiavo pursuant to Florida statute and judicial order was eminently appropriate. There is substantial merit to the federal constitutional claim that a state deprives incompetent, disabled persons of life, without due process of law, when it orders such persons starved to death, on the application of another person, absent the strictest evidentiary proof that this was the victim's considered and expressed desire when competent.[9] Thus, it would have been appropriate (and still would be) for Congress to pass a general statute providing for federal jurisdiction to review such state court determinations in any case where the issue is presented.

The press of time, and politics, prevented Congress from enacting such a generally applicable law and so it passed "Terri's Law," governing her situation alone. There is nothing all that

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tinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.

*Id.* at 280–81, 284 (quoting *In re* Jobes, 108 N.J. 394, 419 (N.J. 1987)).

9. For a persuasive argument that there was substantial merit to Terri Schiavo's constitutional claims as they were actually framed, see Snead, *supra* note 4. For further support for this position, see Clarke D. Forsythe, *Protecting Unconscious, Medically-Dependent Persons After* Wendland *and* Schiavo, 22 CONST. COMM. 475 (2006).

unusual, and nothing at all unlawful, about such "private bill" legislation. That happens all the time. Terri's Law was a rare instance of a grant of federal jurisdiction (as opposed to particular substantive relief) for one individual case, but it is difficult to see why that should make any difference to the constitutional propriety of such an enactment (unless the substance of the jurisdictional enactment is unconstitutional for some reason suggested by its particular provisions, a set of issues I take up presently). To be sure, there is something, well, singular about singling out this individual case from among many. But this is simply the *Saving Private Ryan* aspect of the whole episode, not a true legal objection. Saving Terri Schiavo is a case of devoting extraordinary resources and attention to a single individual. There is something exceptional about that. But there is nothing unconstitutional about that.[10]

Nor is there anything unconstitutional about the grant of federal jurisdiction on any other ground. The congressional statute scrupulously skirted the relevant doctrinal land mines, as if answering quite competently a short exam question covering a good chunk of ground in a standard Federal Jurisdiction law school course.[11]

There is no "*Klein* problem" with the statute: Terri's Law does not legislatively direct the judicial outcome to be reached in the case. The statute merely creates jurisdiction for federal district courts to review these issues and removes certain potential procedural hurdles to a court's determination of the merits. It does not tell the court how to come out.[12]

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10. *See, e.g.*, Plaut v. Spendthrift Farm, 514 U.S. 211, 239 n.9 (1995) (noting that legislatures need not act through laws of general applicability and noting widespread practice of private bills); Paramino Lumber Co. v. Marshall, 309 U.S. 370, 380 (1940) ("Private acts, as such, are not forbidden by the Constitution."). *See generally* Hartnett, *supra* note 3, at 566–68 (2006) (making the same point with regard to the act granting federal jurisdiction in the Schiavo matter).

11. Professor Hartnett's contribution to this symposium persuasively shows that Judge Birch's lone, late-hit opinion concurring in the denial of en banc rehearing (*see* Schiavo v. Schiavo, 404 F.3d 1270, 1271 (11th Cir. 2005)), completely fails this short federal jurisdiction exam. Hartnett, *supra* note 3, *passim*.

12. United States v. Klein, 80 U.S. 123 (1871). *Klein* holds (as near anyone can make sense of it) that Congress may not direct the courts to decide a specific case or class of cases a particular way. That is all *Klein* sensibly can be understood to mean, and Terri's Law does not come within the neighborhood of violating such a principle. In *Klein* itself, the Court struck down an act of Congress directing that the courts treat receipt of a presidential pardon by former civil war rebels as defeating certain legal claims by such persons, and requiring dismissal of such claims—exactly the opposite outcome the Court previously had held to be the legal effect of a presidential pardon. The case delights federal courts mavens/nerds—about six of whom purport to understand it—and justifiably perplexes everybody else. *Klein* is probably best understood as holding only

Nor is there any *Klein* problem (or any other kind of problem) with Congress abrogating prudential standing barriers to entertaining a particular case or class of cases, or with its abrogation of any other purely prudential, non-statutory, judge-made doctrine for refraining to exercise otherwise proper statutory jurisdiction, such as "abstention." If the Constitution does not require a particular limitation on federal court jurisdiction, and Congress provides for jurisdiction by statute and sweeps away any non-constitutional judicial doctrine that might otherwise limit it, the court must exercise the jurisdiction conferred.[13]

The infamously obscure *Rooker-Feldman* doctrine is no problem here, for exactly the same reason. *Rooker* and *Feldman* are cases of statutory interpretation, adopting a principle of leaning against a reading of a statutory grant of jurisdiction that would permit, in effect, federal district court "appellate" review of state court judgments.[14] But Terri's Law is clear in granting such statutory jurisdiction, leaving nothing to *Rooker* or *Feldman*-ize. Since the *Rooker-Feldman* doctrine is not of constitutional dimension, the grant of such district court jurisdiction is plainly constitutional.[15] It is also totally familiar: habeas corpus jurisdiction grants such review all the time.

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that Congress may not, by statute, alter the legal effect of a previous presidential pardon and direct the courts to enforce such alteration. If it stands for anything more than that, it does not stand for much, since the Court has subsequently recognized that Congress may always alter the governing law and require courts to apply the new legal rule in pending cases. Miller v. French, 530 U.S. 327, 344 (2000); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995); Robertson v. Seattle Audobon Society, 503 U.S. 429 (1992).

For a clash of titans over *Klein*'s meaning and possible application to *Schiavo*, *compare* Hartnett, *supra* note 3, at 569–79 (discussing and demythologizing "The Cult of Klein") *with* Evan Caminker, Schiavo *and* Klein, 22 CONST. COMM. 529 (2005) (discussing, and taking seriously, *Klein*'s many possible meanings). Dean Caminker thinks there *might* be a *Klein* problem with statutory abrogation of judicial doctrines of discretionary abstention, prudential standing, and the like—because that directs how courts should "decide" those possible issues, by removing them. But this cannot possibly be the case. Even were such statutes somehow not viewed as changing the applicable law governing the case on these issues (rather than directing a result), to extend *Klein* in such a way would mean that Congress could not abrogate prudential standing (for example), contradicting everything the Court has ever said about such judge-made prudential barriers to the exercise of statutory jurisdiction. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1585–87 (2000).

13. Professor Hartnett makes this point wonderfully clear. Hartnett, *supra* note 3, at 562–64. On the power of Congress to abrogate non-statutory, judge-made "prudential" limitations on the exercise of jurisdiction, see generally Paulsen, *Abrogating Stare Decisis by Statute*, *supra* note 12 at 1585–87.

14. Again, Hartnett is spot-on. Hartnett, *supra* note 3, at 558–59.

15. *See* THE FEDERALIST NO. 81, at 454–58 (Alexander Hamilton), (I. Kramnick ed. 1987) (explicitly contemplating federal lower court review of state court decisions on federal questions), Hartnett, *supra* note 3, at 558–60.

There is no "*Plaut* problem" with the grant of jurisdiction. Terri's Law did not direct the reopening of a final federal court judgment, which is what *Plaut v. United States* had held to be a violation of the Constitution's separation of powers.[16] Terri's Law provided for federal review of a final state court judgment, but that is not unconstitutional under *Plaut*'s reasoning. The preclusive effect to be accorded a prior state court judgment in a subsequent federal court proceeding is a function of federal statutory law, not the Full Faith and Credit Clause (which concerns states' obligations to abide the judgments of other states). The federal full faith and credit statute governs the preclusive effect of state court judgments in federal courts.[17] But Congress can simply change the statute when it wants to, and that is what it did with Terri's Law.

Again, this is very similar to what the federal habeas statute does for a great many cases. The fact that Terri's Law designated a *de novo* standard of review for the prior state court decision is no big deal. A gazillion federal statutes designate standards of review for federal court consideration or reconsideration of factual or legal determinations made by others. There is nothing unconstitutional about such provisions.[18]

Finally, there is no *Hayburn's Case* problem with the grant of jurisdiction.[19] Congress did not itself "decide" the merits of the *Schiavo* case on an appeal to the legislature from the final decision of the judiciary. It merely granted jurisdiction to federal courts and swept away non-constitutional barriers to the federal judiciary's resolution of the issue on its merits. It did not tell the courts what decision to reach, nor reverse a judicial decree with a legislative one.

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16. Plaut v. United States, 514 U.S. 211 (1995). There really was no "*Plaut* problem" in *Plaut*, either, but that personal quibble I will leave to develop on another occasion, if at all. (Short version: The act at issue in *Plaut* sensibly could have been understood as simply creating a new federal cause of action exactly congruent to the cause of action some parties lost by virtue of a new judicial interpretation of the applicable statutory of limitations, waiving new filing fees, and providing for expedited consideration and use of an existing record in courts that had previously heard the earlier, but now unexpectedly time-barred, cases.)

17. 28 U.S.C. § 1738 (2000) ("The Acts of the legislature of any State, Territory, or Possession of the United States ... [and] [t]he records and judicial proceedings of any court of any such State, Territory or Possession ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.")

18. *See* Paulsen, *Abrogating Stare Decisis by Statute*, *supra* note 12, at 1582-90.

19. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

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There is one more important procedural issue presented by the *Schiavo* case, and it is perhaps the issue that the federal courts got most badly wrong: the application of the legal standard for granting a preliminary injunction or temporary restraining order. Congress did not tell the federal courts what decision to reach in the Schiavo matter *in any respect, even preliminarily*. Congress did not attempt to direct the federal district court to grant a temporary restraining order or a preliminary injunction pending plenary consideration of the merits—even though it probably had power to do so as an incident of its power to prescribe rules of procedure.[20]

Congress's inaction on this procedural point left prior law in place with respect to the standard for granting preliminary injunctions. The formulation of that standard has differed somewhat from circuit to circuit, but always with some form of weighing the likelihood of success on the merits together with consideration of the degree and significance of the "irreparable injury" that would result if interim injunctive relief is wrongfully withheld or wrongfully granted during the pendency of the proceeding prior to full decision of the merits. Typically, the stronger the showing on one of these prongs, the less strong the showing required on the other.

In the case of Terri Schiavo, the federal courts found little likelihood of success on the merits. As noted above, however, there are strong reasons to believe that Florida deprived Terri Schiavo of her life, without due process of law. At the very least, the claims should have been regarded as colorable and worthy of full, careful consideration. But the real atrocity in the denial of preliminary injunctive relief was the failure of the courts to grant interim relief so as to be able to take the careful look at the merits that they should have taken. As irreparable injuries go, death is a pretty absolute and irrevocable one. The courts have, on this ground, taken extreme care to consider potential claims and defenses by death row inmates. The terrible finality of execution by lethal action of the state requires that all reasonable considerations in favor of restraint be taken.

So too with Terri Schiavo. There surely was precious little harm in continuing to give food and water to Terri Schiavo.

20. Paulsen, *Abrogating Stare Decisis by Statute, supra* note 12 at 1585 (discussing the Anti-Injunction Act); *see* Hartnett, *supra* note 3 at 579. If Congress can enact an Anti-Injunction Act, why could it not enact a Pro-Injunction Act?

There was no evidence that doing so was painful to her, or that continuing to live was painful or harmful to her. If indeed it were her wish to die (which was the precise point of uncertainty being litigated), that would not be permanently thwarted by delay and careful consideration of the opposite possibility, and by careful thought about the applicable standard for determining which position should prevail. If there was an injury at all by granting interim relief, it was not an irreparable one but a temporary one. In contrast, if preliminary injunctive relief was wrongfully withheld, the result was permanent: death.

In light of this relative weighing of potential error costs, the failure of the federal courts to provide preliminary injunctive relief of any kind, for any period of time, seems absolutely inexcusable. It was, with all respect, as plain a case of "abuse of discretion"—abuse of the concededly discretionary power of equity—as one can imagine. If there was any flaw in Terri's Law, it was certainly not that Congress went too far, telling courts how to rule in the specific case; it was that Congress did not go far enough, requiring interim relief upon a sufficiently low threshold standard and mandating that consideration of the merits take place without a rush to death. Terri Schiavo's case deserved at least the same time for reflective consideration as a multiple murderer on death row. Neither the courts, which bear primary responsibility, nor Congress, awarded her that degree of consideration.

## III

What of the third branch of government—the executive? What should a president, or a governor, do when it appears that the federal judiciary is about to order, or authorize, the killing of an innocent person, in apparent violation of the basic requirements of due process of law?

My position here is one I have defended in the abstract elsewhere: The executive branch is not bound by the faithless departures from the law promulgated by the courts, in any matter also requiring (or permitting) executive branch action or acquiescence.[21] If ever there were a case for executive branch interven-

21. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); *see also* Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706 (2003); Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency after Twenty-five Years*, 83 MINN. L. REV. 1337 (1999); Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of*

tion to prevent the carrying out of a judicial order, in violation of the rights of a private person, this was the case. If the premise of this essay is correct—that Florida judicially ordered the killing of Terri Schiavo, in violation of the U.S. Constitution's procedural requirements before depriving an individual of her life—then the President, and the Governor of Florida, were constitutionally required, by virtue of their oaths to support the U.S. Constitution, to intervene to prevent the killing, if it was within their respective executive powers to do so.

It has become, sadly, our constitutional tradition for political actors to defer, unblinkingly and almost unthinkingly, to the final decisions of courts, no matter the consequences. This is not a result required by the Constitution.[22] But it is our practice. *Schiavo* shows just how far that practice has gone. Almost no legal commentators (at least none of which I am aware) decried the failure of President George W. Bush or of Governor Jeb Bush to intervene, at the crucial last stages of Terri Schiavo's imminent demise, to rescue her from the killing work of the American judicial system, state and federal. We accept the judiciary as the final authority over life and death.

## CODA

*Saving Private Ryan* ends with Ryan, now an old man, visiting a World War II cemetery, seeing the grave of the Captain who gave his life, and remembering the Captain's cryptic dying words exhorting Ryan to live a life worthy of the gift he had been given. Ryan was gripped with grief, and uncertainty, over whether he really had earned that gift. *Killing Terri Schiavo* ended less inspiringly, with Terri Schiavo's slow death by starvation and dehydration. A nation that had been gripped in the media frenzy of the nationwide attention to her case, watched her die, commented, grieved, cheered.

There is much to be learned from the case of the one, for the lives of many. Terri Schiavo's story does not have a happy ending, or even a bittersweet one. It is the story of slippery slopes, legal fictions, and the now commonplace legal inattention to the value of individual lives or the legal standards that should protect those lives. It is the story of a judicially ordered killing of an innocent, disabled woman. It is the story of a failure of all

*Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993).

22. See the arguments made in sources cited in note 21.

branches of government, legislative, executive and especially judicial, adequately to protect that particular life. It is an end-of-life story that is likely to be repeated, without high legal drama, in the lives of many of us. It is, and will continue to be, the untold story of many legally sanctioned killings. *Schiavo* is a paradigm case for our age.