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### INTRODUCTORY REMARKS

For this installment of the Recent Developments, we examine recent decisions of both the United States Supreme Court and the Florida Supreme Court; one piece of controversial 2005 Florida legislation; and the Florida and federal judicial and legislative involvement in the Theresa Schiavo controversy. The opening Note examines the United States Supreme Court’s decision in *Gonzales v. Raich (Raich II)*,<sup>1</sup> where the Court held that the Commerce Clause permits Congress to prohibit local cultivation and possession of marijuana for medical purposes in compliance with state law.<sup>2</sup>

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1. 125 S. Ct. 2195 (2005).  
2. Amanda Quirke contributed this Note.

Our coverage of three recent Florida Supreme Court decisions begins with *Tyne v. Time Warner Entertainment Co. (Tyne III)*,<sup>3</sup> where the court held that “commercial purpose,” as used in Florida’s commercial misappropriation statute, does not apply to a motion picture that does not directly promote a product or service.<sup>4</sup> *Patchen v. Florida Department of Agriculture and Consumer Services (Patchen II)*,<sup>5</sup> examines the Florida Supreme Court’s most recent pronouncement in the citrus canker saga.<sup>6</sup> *Allstate Indemnity Co. v. Ruiz*,<sup>7</sup> examines the Florida Supreme Court’s holding that in an action for bad faith against an insurance company, work-product privilege does not protect materials prepared through the date of the resolution of the underlying claim for coverage.<sup>8</sup>

The next Note examines the Florida Legislature’s controversial enactment of the Judiciary Committee’s Committee Substitute for Senate Bill 436 and the corresponding changes to Florida’s self-defense law.<sup>9</sup> The final Note chronicles the federal and Florida judicial and legislative involvement in the Theresa Schiavo controversy.<sup>10</sup>

CONSTITUTIONAL LAW—COMMERCE CLAUSE—UNITED STATES SUPREME COURT HOLDS COMMERCE CLAUSE PERMITS CONGRESS TO PROHIBIT LOCAL CULTIVATION AND POSSESSION OF MARIJUANA FOR MEDICAL PURPOSES IN COMPLIANCE WITH CALIFORNIA LAW—*Gonzales v. Raich (Raich II)*, 125 S. Ct. 2195 (2005)

At least nine states, including California, have authorized the use of marijuana for medical purposes.<sup>11</sup> California’s Compassionate Use Act of 1996 exempts from criminal prosecution “a patient, or . . . a patient’s primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.”<sup>12</sup>

Respondents Raich<sup>13</sup> and Monson used marijuana upon the recommendation of their board-certified family practitioners for the

3. 901 So. 2d 802 (Fla. 2005).

4. Maureen Walterbach contributed this Note.

5. 906 So. 2d 1005 (Fla. 2005).

6. Melinda Parks contributed this Note.

7. 899 So. 2d 1121 (Fla. 2005).

8. Amanda Quirke contributed this Note.

9. Jessica Slatten contributed this Note.

10. Richard Junnier contributed this Note.

11. The other states include Alaska, Colorado, Hawaii, Maine, Nevada, Oregon, Vermont, Washington. *Gonzales v. Raich (Raich II)*, 125 S. Ct. 2195, 2198 (2005). Additionally, in 1998 Arizona voters rejected repeal of a voter initiative that permits physicians to prescribe Schedule I substances for medical purposes, and in 2004 Montana voters approved an initiative authorizing use of marijuana for medical purposes. *Id.*

12. CAL. HEALTH & SAFETY CODE § 11362.5(d) (West 2005).

13. Raich received locally grown marijuana for no charge from two caregivers, litigating as “John Does.” *Raich II*, 125 S. Ct. at 2200.

treatment of serious medical conditions.<sup>14</sup> Monson, who cultivated her own marijuana, was the subject of a raid in August 2002.<sup>15</sup> County deputy sheriffs determined Monson's possession and cultivation of marijuana were in compliance with California law; however, agents from the federal Drug Enforcement Agency (DEA) seized and destroyed all six of her marijuana plants under the apparent authority of the federal Controlled Substances Act (CSA).<sup>16</sup>

Subsequently, Raich and Monson petitioned a California federal district court for injunctive relief, requesting that the court prohibit the enforcement of the CSA "to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use."<sup>17</sup> However, the petition was denied.<sup>18</sup> On appeal, the Ninth Circuit reversed the district court's denial of injunctive relief.<sup>19</sup> The Ninth Circuit found respondents had "demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' [sic] Commerce Clause authority."<sup>20</sup> The court found "that intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law" is a "separate and distinct class of activities," which is beyond the reach of federal power.<sup>21</sup>

Congress enacted the CSA to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."<sup>22</sup> The CSA makes it unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance" except in a manner authorized by the CSA.<sup>23</sup> Congress made express findings about the close relationship between local distribution and possession and the interstate traffic of controlled substances.<sup>24</sup>

Controlled substances are divided into five schedules based on "their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body."<sup>25</sup> Marijuana is a Schedule I drug, which is a category reserved for drugs with a high poten-

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14. Raich's physician provided a statement that Raich had tried "essentially" all other legal alternatives, and her cessation of marijuana use may prove fatal. *Raich v. Ashcroft* (*Raich I*), 352 F.3d 1222, 1225 (9th Cir. 2003), *vacated*, 125 S. Ct. 2195 (2005).

15. *Raich II*, 125 S. Ct. at 2200.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Raich I*, 352 F.3d at 1235.

20. *Id.* at 1227.

21. *Id.* at 1228 (emphasis omitted).

22. *Raich II*, 125 S. Ct. at 2203.

23. 21 U.S.C. § 841(a)(1) (2000).

24. *Id.* § 801(1)-(6).

25. *Raich II*, 125 S. Ct. at 2203-04.

tial for abuse, lack of any accepted medical use, and lack of accepted safety for use under medical supervision.<sup>26</sup> Schedule II substances are distinguished from Schedule I substances because the former have a currently accepted medical use.<sup>27</sup>

On appeal to the U.S. Supreme Court, respondents asserted an “as applied” challenge to the CSA, arguing that “the CSA’s categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress’ [sic] authority under the Commerce Clause.”<sup>28</sup> However, the Supreme Court expressly refuted this definition of respondents’ class of activities, which was also used by the Ninth Circuit.<sup>29</sup>

First, the majority discounted the distinction that marijuana has a medical purpose because the CSA includes many substances that are used for medicinal purposes.<sup>30</sup> Since marijuana is a Schedule I drug, the CSA prohibits its use for any purpose, including medical purposes sanctioned by a licensed physician. Therefore, the fact that respondents use marijuana for medical purposes does not distinguish the activity from the activities regulated by the CSA.<sup>31</sup>

Second, the majority disputed the assertion that since respondents’ activities are intrastate, it is beyond the scope of the Congress’s authority under the Commerce Clause. “Congress has the power to regulate activities that substantially affect interstate commerce,”<sup>32</sup> and more specifically, “the power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”<sup>33</sup>

The Court relied on its earlier decision in *Wickard v. Filburn*, where a farmer, for his personal use, cultivated wheat outside of his allotment under the Agricultural Adjustment Act of 1938.<sup>34</sup> The farmer argued Congress did not have the power to regulate the production and consumption of wheat, “since they are local in character, and their effects upon interstate commerce are at most ‘indirect.’”<sup>35</sup> The Court disagreed and found Congress can regulate purely intra-

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26. 21 U.S.C. § 812(b)(1).

27. *Id.* § 812(b)(2).

28. *Raich II*, 125 S. Ct. at 2204-05.

29. *Raich v. Ashcroft (Raich I)*, 352 F.2d 1222, 1227-29 (9th Cir. 2003) (defining the class of activities).

30. *Raich II*, 125 S. Ct. at 2211.

31. *Id.*

32. *Id.* at 2205 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

33. *Id.*; see also *Wickard v. Filburn*, 317 U.S. 111 (1942).

34. 317 U.S. at 114-15.

35. *Id.* at 119.

state activity if the class of activity has a “substantial economic effect on interstate commerce.”<sup>36</sup>

Using the same reasoning, the *Raich II* Court held that “Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.”<sup>37</sup> The CSA was not only enacted to control drug abuse but also to control the supply and demand of controlled substances. The concern was previously articulated in *Wickard* that due to high demand, the home-grown product, be it wheat or marijuana, will be drawn into the interstate market.<sup>38</sup> This would impede the federal interest in regulating, or in the case of marijuana, completely eliminating, commercial transactions of the product.<sup>39</sup>

Respondents pointed to the fact that Congress has made no specific findings about whether their class of activities would substantially affect the interstate market for marijuana.<sup>40</sup> However, specific findings are not necessary because the Court is only required to determine whether Congress had a rational basis for the legislation.<sup>41</sup> According to the Court:

Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.<sup>42</sup>

The respondents and the Ninth Circuit relied heavily on *United States v. Lopez*<sup>43</sup> and *United States v. Morrison*,<sup>44</sup> but Stevens, writ-

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36. *Id.* at 125.

37. *Raich II*, 125 S. Ct. at 2207. In contrast, the Ninth Circuit found that since the respondents’ class of activities was not commercial, *Wickard* did not apply to this case. *Raich v. Ashcroft (Raich I)*, 352 F.3d 1222, 1230 (9th Cir. 2003).

38. *Raich II*, 125 S. Ct. at 2207; see also *Wickard*, 317 U.S. at 128.

39. *Raich II*, 125 S. Ct. at 2207.

40. *Id.* at 2208. However, Congress made specific findings regarding the relationship between (1) drugs manufactured and distributed intrastate and (2) interstate drug traffic. 21 U.S.C. § 801(1)-(6) (2000). Nevertheless, O’Connor’s dissent questioned these statements as “bare declarations . . . asserted without any supporting evidence.” *Raich II*, 125 S. Ct. at 2227 (O’Connor, J., dissenting).

41. *Raich II*, 125 S. Ct. at 2208 (majority opinion).

42. *Id.* at 2209 (footnote omitted).

43. 514 U.S. 549 (1995). In *Lopez*, the Supreme Court held the Gun-Free School Zones Act of 1990, which made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone,” was beyond the scope of Congress’s Commerce Clause authority. *Id.* at 549 (quoting 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)).

44. 529 U.S. 598 (2000). In *Morrison*, the Supreme Court held section 13981 of the Violence Against Women Act of 1994, which provided a civil remedy to a victim of a gender-motivated crime, could not be upheld under the Commerce Clause. *Id.* at 616-20.

ing for the majority, made several distinctions between *Raich II* and the recent Commerce Clause precedent. First, the parties in *Lopez* and *Morrison* both challenged a statute in its entirety as unconstitutional and beyond the scope of Congress's Commerce Clause power.<sup>45</sup> "This distinction is pivotal for [the Court has] often reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'"<sup>46</sup>

Another distinction made by the majority was "the CSA is a statute that directly regulates economic, commercial activity."<sup>47</sup> In contrast, the statutes at issue in *Lopez* and *Morrison* regulated criminal, noneconomic conduct and required a chain of inferences to make a connection between the subject of the regulation and interstate commerce.<sup>48</sup> Thus, the statutes in *Lopez* and *Morrison* were beyond the reach of Congress's Commerce Clause power because they did not regulate economic activity.<sup>49</sup> Noneconomic activity can be regulated only as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."<sup>50</sup>

Finally, the Court found that the last element of the Ninth Circuit's distinction, the possession and use in accordance with state law, also fails under the Supremacy Clause.<sup>51</sup> Under the Supremacy Clause, federal law prevails where there is a conflict between state and federal law.<sup>52</sup> Even if marijuana had a legitimate medical purpose, as asserted by respondents, the CSA imposes stricter requirements on all drugs by requiring registration with the DEA, reporting and prescription requirements, and other security measures.<sup>53</sup> If marijuana were classified within a less restrictive schedule, the CSA would still impose more controls than the California law.<sup>54</sup> Therefore, the federal law, the CSA, prevails under the Supremacy Clause.

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45. *Raich II*, 125 S. Ct. at 2209.

46. *Id.* at 2209 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)).

47. *Id.* at 2211.

48. *Id.*

49. Justice Scalia clarified in his concurring opinion that *Lopez* and *Morrison* do not state that Congress never has the power to regulate noneconomic intrastate activity. *Id.* at 2218 (Scalia, J., concurring).

50. *Id.* at 2209 (majority opinion) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

51. *Id.* at 2212-13.

52. *Id.*

53. *Id.*

54. The Supreme Court specifically discussed the lack of regulation imposed on physicians by the California law, where physicians have no limits on the dosage, duration, or purpose of the prescription, which could therefore lead to abuse by unscrupulous physicians. *Id.* at 2213.

Justice Scalia, in his concurring opinion, distinguished between Congress's power to regulate activities that "substantially affect" interstate commerce and Congress's power under the Necessary and Proper Clause. Under the Necessary and Proper Clause, "[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce."<sup>55</sup> Thus, "[t]he regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself 'substantially affect' interstate commerce."<sup>56</sup>

Justice O'Connor's strong dissent asserted there is no material distinction between *Raich II* and precedent set by *Lopez* and *Morrison*.<sup>57</sup> O'Connor rejected the distinction in the majority opinion that the statutes in *Lopez* and *Morrison* were single-subject statutes regulating noncommercial, criminal activity, while the CSA is a larger regulatory scheme controlling economic activity.<sup>58</sup> This "suggests that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute."<sup>59</sup>

O'Connor insisted the analysis must be restricted to the "personal cultivation, possession, and use of marijuana for medicinal purposes."<sup>60</sup> She also disputed the majority's interpretation of economic activity as overbroad<sup>61</sup> and reasoned that the marijuana at issue in this case was never in the stream of commerce, nor does personal cultivation and possession of marijuana in general have any commercial character.

O'Connor also found there was no evidence that medical marijuana users have a substantial impact on the drug market or are "enough to threaten the federal regime."<sup>62</sup> "[S]omething more than

55. *Id.* at 2216 (Scalia, J., concurring).

56. *Id.* at 2217.

57. *Id.* at 2221 (O'Connor, J., dissenting).

58. *Id.* at 2222-23.

59. *Id.* at 2222; *see also* *United States v. Lopez*, 514 U.S. 549, 560 (1995) (distinguishing the Gun-Free School Zones Act from commerce because it "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce").

60. *Raich II*, 125 S. Ct. at 2224 (O'Connor, J., dissenting).

61. *Id.* "[T]he Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach." *Id.*

62. *Id.* at 2228. The majority stated that it is unnecessary to "determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact." *Id.* at 2208. However, Justice O'Connor used this basis to distinguish *Wickard*, be-

mere assertion is required when Congress purports to have power over local activity whose connection to an intrastate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation.”<sup>63</sup> Thus, O’Connor concluded that “whatever the wisdom of California’s experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case.”<sup>64</sup>

Justice Thomas also dissented on similar grounds, arguing that the respondents’ activities were neither interstate nor commercial and therefore were not within Congress’s power to regulate under the Commerce Clause or the Necessary and Proper Clause.<sup>65</sup> He stressed this was an “as applied” challenge, and therefore the question was “[W]hether the intrastate ban is ‘necessary and proper’ as applied to medical marijuana users like respondents.”<sup>66</sup>

Like O’Connor, Thomas also insisted the analysis must be made in the specific context of medical marijuana users, whose conduct is distinguished in the California statute, which sets controls and guidelines for that specific class of people.<sup>67</sup> On that basis, he disputed the majority’s application of the “substantial effects” test because the conduct being evaluated by the majority is the “intrastate manufacture and possession of marijuana,” instead of limiting the class to medical marijuana users.<sup>68</sup>

Thomas, like O’Connor, argued that the government had offered no “obvious reason why banning medical marijuana use [was] necessary to stem the tide of interstate drug trafficking.”<sup>69</sup> Thomas found that the respondents’ class of activities was beyond the reach of Congress’s power under the Commerce Clause because it was purely intrastate.<sup>70</sup> Further, the Necessary and Proper Clause did not provide Congress with authority because the regulation of Respondents’ activities was purely incidental.<sup>71</sup> Therefore, Thomas concluded “Congress has encroached on States’ traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.”<sup>72</sup>

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cause the court evaluated actual evidence of the effect homegrown wheat would have on the interstate market. *Id.* at 2227.

63. *Id.* at 2226.

64. *Id.* at 2229.

65. *Id.* (Thomas, J., dissenting).

66. *Id.* at 2231.

67. *Id.* at 2232.

68. *Id.* at 2235.

69. *Id.* at 2233.

70. *Id.*

71. *Id.*

72. *Id.* at 2234.

In summary, the majority rejected the Ninth Circuit's assertion that respondents' activities were a "separate and distinct class of activities."<sup>73</sup> The two strong dissents showed that the definition of the class of activities at issue is determinative of the resulting Commerce Clause analysis. According to the majority, the fact that respondents' use was for medical purposes, or within the boundaries of California state law, was insufficient to remove respondents' activities from the reach of the CSA. The Supreme Court, relying on *Wickard*<sup>74</sup> and other recent Commerce Clause precedent, held Congress has the authority to prohibit the " 'intrastate, noncommercial cultivation, possession and use of marijuana.' "<sup>75</sup> Thus, despite efforts by California and other states to allow the use of marijuana for medical purposes in accordance with state law, medical marijuana users are still subject to federal enforcement under the CSA. In order to permit the medical use of marijuana, Congress will have to reclassify it from Schedule I to another schedule under the CSA. "But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress."<sup>76</sup>

TORTS—CONSTITUTIONAL LAW—FLORIDA SUPREME COURT HOLDS "COMMERCIAL PURPOSE," AS USED IN FLORIDA'S COMMERCIAL MISAPPROPRIATION STATUTE, DOES NOT APPLY TO A MOTION PICTURE THAT DOES NOT DIRECTLY PROMOTE A PRODUCT OR SERVICE—*Tyne v. Time Warner Entertainment Co. (Tyne III)*, 901 So. 2d 802 (Fla. 2005)

The Eleventh Circuit Court of Appeals presented a certified question to the Florida Supreme Court asking the court to determine the extent to which section 540.08, *Florida Statutes*,<sup>77</sup> applied to the facts

73. *Id.* at 2215 (majority opinion).

74. *Wickard v. Filburn*, 317 U.S. 111 (1942).

75. *Raich II*, 125 S. Ct. at 2215 (quoting *Raich v. Ashcroft (Raich I)*, 352 F.3d 1222, 1229 (9th Cir. 2003)).

76. *Id.*

77. Section 540.08, *Florida Statutes*, which is entitled "[u]nauthorized publication of name or likeness," provides:

(1) No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by:

(a) Such person; or

(b) Any other person, firm or corporation authorized in writing by such person to license the commercial use of her or his name or likeness; or

(c) If such person is deceased, any person, firm or corporation authorized in writing to license the commercial use of her or his name or likeness, or if no person, firm or corporation is so authorized, then by any one from among a class composed of her or his surviving spouse and surviving children.

(2) In the event the consent required in subsection (1) is not obtained, the person whose name, portrait, photograph, or other likeness is so used, or any person, firm, or corporation authorized by such person in writing to license the

of the case before the Eleventh Circuit.<sup>78</sup> The court used its discretionary jurisdiction under article 5, section 3, subsection (b)(6) of the Florida Constitution to review the case.<sup>79</sup> With the Eleventh Circuit's permission, the Florida Supreme Court rephrased the issue as follows: "Does the phrase 'for purposes of trade or for any commercial or advertising purpose' in section 540.08(1), Florida Statutes, include publications which do not directly promote a product or service?"<sup>80</sup> In this case of first impression, a divided<sup>81</sup> Florida Supreme Court con-

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commercial use of her or his name or likeness, or, if the person whose likeness is used is deceased, any person, firm, or corporation having the right to give such consent, as provided hereinabove, may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

(3) The provisions of this section shall not apply to:

(a) The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes;

(b) The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use of her or his name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof; or

(c) Any photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph.

(4) No action shall be brought under this section by reason of any publication, printing, display, or other public use of the name or likeness of a person occurring after the expiration of 40 years from and after the death of such person.

(5) As used in this section, a person's "surviving spouse" is the person's surviving spouse under the law of her or his domicile at the time of her or his death, whether or not the spouse has later remarried; and a person's "children" are her or his immediate offspring and any children legally adopted by the person. Any consent provided for in subsection (1) shall be given on behalf of a minor by the guardian of her or his person or by either parent.

(6) The remedies provided for in this section shall be in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of her or his privacy.

FLA. STAT. § 540.08 (2005).

78. *Tyne v. Time Warner Entm't Co. (Tyne III)*, 901 So. 2d 802, 803 (Fla. 2005) (emphasis omitted) (certifying the following question: "To what extent does section 540.08 of the *Florida Statutes* apply to the facts of the case?"). This case reached the Eleventh Circuit Court of Appeals when Tyne appealed a decision by the Florida Middle District, in which the court granted the motion for summary judgment on all claims of appellees. *Id.* at 805; see *Tyne ex rel. Tyne v. Time Warner Entm't Co. (Tyne I)*, 204 F. Supp. 2d 1338 (M.D. Fla. 2002).

79. *Tyne III*, 901 So. 2d at 803 (citing FLA. CONST. art. V, § 3(b)(6)).

80. *Id.* at 806 (emphasis omitted).

81. Justice Lewis dissented but did not issue an opinion. *Id.* at 810.

cluded the phrase does not include publications, “including motion pictures,” that do not directly promote a product or service.<sup>82</sup>

Tyne and other appellants brought the original action in the Middle District of Florida<sup>83</sup> under Florida’s commercial misappropriation law<sup>84</sup> after Warner Bros. released the film *The Perfect Storm*,<sup>85</sup> which was based upon the story of a fishing vessel caught in a storm off the coast of New England. Crewmembers, who were family members of appellants, were presumed dead after the boat went missing. Both the crewmembers and their surviving family members, who were parties to this action, were portrayed in the film. Before the movie, Sebastian Junger wrote a book<sup>86</sup> about the event based on the extensive media reports and interviews. Without seeking permission or offering compensation to the family members, Warner Bros. bought the rights from Junger to produce the movie, which was a concededly more dramatized account than the book.<sup>87</sup>

The court, like the federal district court, discussed and approved the analysis of section 540.08, *Florida Statutes*, by the Fourth District Court of Appeals in *Loft v. Fuller*.<sup>88</sup> The *Loft* court held the statute’s purpose was to prevent the “unauthorized use of a name to directly promote the product or service of the publisher.”<sup>89</sup> It added that the statute is aimed to prevent harm that occurs when an individual’s name or likeness is associated with something else.<sup>90</sup> Although making money through the sales of a movie is commercial, it “simply does not amount to the kind of commercial exploitation prohibited by the statute.”<sup>91</sup>

In another referenced case, *Lane v. MRA Holdings, LLC*, the Middle District of Florida followed the same reasoning as the *Loft* court.<sup>92</sup>

82. *Id.*

83. *See Tyne I*, 204 F. Supp. 2d at 1341 (explaining that a motion picture in and of itself is not a commercial purpose). The district court drew a distinction between using a name for trade and advertising, which is actionable, versus using a name in a publication, which is not actionable. *Id.* at 1341.

84. FLA. STAT. § 540.08 (2000).

85. *THE PERFECT STORM* (Warner Bros. 2000). The appellees in the case were Time Warner Entertainment Company, L.P., d/b/a Warner Bros. Pictures. *Tyne III*, 901 So. 2d at 803 n.1.

86. SEBASTIAN JUNGER, *THE PERFECT STORM: A TRUE STORY OF MEN AGAINST THE SEA* (1997).

87. *Tyne III*, 901 So. 2d at 804. Warner Bros. indicated at the beginning of the movie “THIS FILM IS BASED ON A TRUE STORY,” but also included a disclaimer in the closing credits: “Dialogue and certain events and characters in the film were created for the purpose of fictionalization.” *Id.* (internal quotations omitted).

88. *Id.* at 806, 810 (citing *Loft v. Fuller*, 408 So. 2d 619 (Fla. 4th DCA 1981)).

89. 408 So. 2d at 622-23.

90. *Id.* at 623.

91. *Id.*

92. 242 F. Supp. 2d 1205 (M.D. Fla. 2002) (considering whether section 540.08, *Florida Statutes*, was violated by defendant’s display of plaintiff exposing her breasts in a *Girls Gone Wild* video after plaintiff signed letter of consent).

Additionally, it based its conclusion upon the definition of “the purposes of trade” found in section 47 of the *Restatement (Third) of Unfair Competition*:

The names, likeness, and other indicia of a person’s identity are used “for the purposes of trade” . . . if they are used in advertising the user’s goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However, use “for the purpose of trade” does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising incidental to such uses. . . . [U]se of another’s identity in a novel, play, or motion picture is . . . not ordinarily an infringement . . . [unless] the name or likeness is used solely to attract attention to a work that is not related to the identified person . . . .<sup>93</sup>

The court in *Lane* concluded that the video at issue was an “expressive work,” which never showed the individual endorsing or promoting the product; so it was not a violation of the statute.<sup>94</sup>

Based upon the reasoning in both *Lane* and *Loft*, the Florida Supreme Court held that “the purpose of section 540.08 is to prevent the use of a person’s name or likeness to directly promote a product or service because of the way that the use associates the person’s name or personality with something else.”<sup>95</sup> Thus, *The Perfect Storm* did not violate Florida’s commercial misappropriation statute.

As it rejected the broader expansion of the statute, the court responded to the arguments proposed by appellants. It stated that, contrary to the appellants’ arguments, the exceptions in sections 540.08(3)(a) and (b), *Florida Statutes*, are not superfluous under this construction.<sup>96</sup> Regarding subsection (3)(a), “[a]pplying the statute to only those situations that ‘directly promote a product or service’ does not necessarily mean that the use is in an advertisement.”<sup>97</sup>

Furthermore, the resale exemption in subsection (3)(b) does not only apply to such limited circumstances as appellants contend.<sup>98</sup> Instead, it allows retailers to promote and advertise by using names and likenesses of artists and celebrities whose works they are sell-

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93. *Id.* at 1213 (alterations in original) (citations omitted).

94. *Id.* at 1215 (“Lane’s lawsuit arose from an expressive work that has no purpose other than to entertain a segment of the general population.”).

95. *Tyne v. Time Warner Entm’t Co. (Tyne III)*, 901 So. 2d 802, 808 (Fla. 2005).

96. *Id.* at 808.

97. The court cited *Ewing v. A-1 Management, Inc.*, 481 So. 2d 99 (Fla. 3d DCA 1986), for an example of a name falling within the scope of section 540.08, but exempted under the newsworthiness exception in subsection (3)(a). *Id.* Thus, the subsection served a practical function and was not redundant. *Id.*

98. *Id.*

ing.<sup>99</sup> “The exemption does not simply authorize the resale of the exempted works themselves.”<sup>100</sup>

In addition to agreeing with the construction of the statute in the cases previously discussed, the court also proposed two supporting arguments for its conclusion. The first was the silence of the legislature in response to cases such as *Loft*.<sup>101</sup> The failure to amend the statute in response to the decisions may be viewed as “legislative acceptance or approval of the judicial construction of the statute.”<sup>102</sup>

Second, the court addressed the constitutional issue regarding the First Amendment if motion pictures and similar works were defined within “commercial purpose.”<sup>103</sup> It quoted the Supreme Court statement, also quoted by Judge Conway in the lower court decision, that “books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.”<sup>104</sup> Similarly, a Pennsylvania court discussing the same First Amendment issue with regard to commercial misappropriation and motion pictures concluded that works of artistic expression are provided greater protection by the First Amendment than commercial speech.<sup>105</sup> Another case from the Tenth Circuit Court of Appeals “recognized that an ‘expressive work’ protected by the First Amendment was not commercial speech because commercial speech is best understood as speech that merely advertises a product or service for business purposes.”<sup>106</sup>

The Florida Supreme Court drew two conclusions based upon these cases: (1) the common usage of “commercial” in commercial misappropriation statutes is limited to promotion of a product or service, and (2) motion pictures are protected by the First Amendment.<sup>107</sup> Thus, because a court must give constitutional construction to a statute where it is possible, the court’s statutory construction, which avoided First Amendment challenges, was appropriate.<sup>108</sup>

The court ultimately answered the rephrased certified question in the negative but noted that the question presented was narrow.<sup>109</sup> It cautioned that the decision did not preclude other claims by appel-

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99. *Id.*

100. *Id.*

101. *Id.* There have been no amendments to the statute since 1967 except to rephrase it in gender-neutral terms. *Id.*

102. *Id.* (citing *Goldenberg v. Sawczak*, 791 So. 2d 1078, 1083 (Fla. 2001)).

103. *Tyne III*, 901 So. 2d at 808.

104. *Id.* at 809 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)).

105. *Id.* (citing *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996)).

106. *Id.* (citing *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996)).

107. *Id.* at 810.

108. *Id.*

109. *Id.*

lants under statutory or common law.<sup>110</sup> However, the motion picture, *The Perfect Storm*, did not violate Florida's law prohibiting commercial misappropriation.<sup>111</sup>

AGRICULTURE—FLORIDA SUPREME COURT HOLDS HOMEOWNERS MAY RECEIVE COMPENSATION FOR STATE'S DESTRUCTION OF HEALTHY, RESIDENTIAL CITRUS TREES UNDER REMEDIAL STATUTE AND AVOIDS DECIDING INVERSE CONDEMNATION CLAIM—*Patchen v. Florida Department of Agriculture & Consumer Services (Patchen II)*, 906 So. 2d 1005 (Fla. 2005)

Inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."<sup>112</sup> Since 1957,<sup>113</sup> the Florida Supreme Court has increasingly narrowed its interpretation of the law in favor of the State when it comes to compensating property owners for the destruction of citrus trees in the State's effort to eradicate crop-destroying disease.<sup>114</sup> The court's recent decision in *Patchen v. Florida Department of Agriculture & Consumer Services (Patchen II)*,<sup>115</sup> the latest in this line of takings claims, seems to divert from this trend. However, whether intentionally or not, the court may have still implicitly narrowed the options for petitioners and those similarly situated by denying a common law cause of action.<sup>116</sup>

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110. *Id.* (implying this ruling did not make a judgment on other related claims brought by plaintiffs, such as a violation of relational right to privacy as discussed by the Eleventh Circuit, *see Tyne v. Time Warner Entm't Co. (Tyne II)*, 336 F.3d 1286, 1291 (11th Cir. 2003), and false light invasion of privacy discussed by the Middle District Court of Florida, *see Tyne ex rel. Tyne v. Time Warner Entm't Co. (Tyne I)*, 204 F. Supp. 2d 1338, 1343 (M.D. Fla. 2002)).

111. *Id.*

112. *Patchen v. Fla. Dep't of Agric. & Consumer Servs. (Patchen II)*, 906 So. 2d 1005, 1012 (Fla. 2005) (Quince, J., dissenting) (quoting *Kirkpatrick v. City of Jacksonville, Dep't of Hous. & Urban Dev.*, 312 So. 2d 487, 488 (Fla. 1st DCA 1975)).

113. *Corneal v. State Plant Bd.*, 95 So. 2d 1 (Fla. 1957) (holding that while the Plant Board validly exercised its police power in destroying trees to prevent the "spreading decline" disease, the owners were entitled to compensation).

114. *See Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774 (Fla. 2004) (upholding the State's ability to deprive citizens of private property pursuant to its police power); *Dep't of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35 (Fla. 1990) (holding that the State's destruction of diseased trees and those within 125 feet of the diseased tree was not a taking but that trees outside the 125-foot radius were eligible for compensation); *Dep't of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla. 1988) (holding that while the State validly exercised its police power in destroying trees to prevent the spread of citrus canker, the State's actions constituted a taking and required just compensation for the owners).

115. 906 So. 2d 1005 (Fla. 2005).

116. *Id.* at 1009 (Lewis, J., concurring in result only). Justice Lewis disagreed with the majority's intentional avoidance of discussing common law rights and the implication that petitioners' only remedy is pursuant to section 581.1845, *Florida Statutes*, which attempts

The Patchens brought their inverse condemnation claim when, in October 2000, their healthy, residential citrus trees were destroyed by the Department of Agriculture and Consumer Services ("Department").<sup>117</sup> The trial court granted summary judgment in favor of the Department based upon evidence that the Patchens' trees were located within 1900 feet of a diseased tree and, therefore, exposed to citrus canker.<sup>118</sup> The Third District, relying on an earlier Florida Supreme Court decision in *Department of Agriculture & Consumer Services v. Polk*, affirmed and held that the Patchens were not entitled to compensation in an inverse condemnation claim because "[s]uch property is incapable of any lawful use, it is of no value, and it is a source of public danger."<sup>119</sup>

The Third District then certified a question to the Florida Supreme Court, asking whether *Polk*, which held that destroying healthy, commercial citrus trees did not compel compensation from the State, applied in this type of case, where the State destroyed healthy, residential, noncommercial citrus trees.<sup>120</sup> Answering the certified question in the negative,<sup>121</sup> the majority found the application of section 581.1845(2), *Florida Statutes*, and *Haire v. Florida Department of Agriculture & Consumer Services*<sup>122</sup> controlling.<sup>123</sup> In a concurring opinion, Chief Justice Pariente reasoned that holding the statute applicable under the circumstances of this case eliminated the need to litigate whether petitioners' trees were a nuisance or presented an imminent danger.<sup>124</sup>

The court's decision in *Patchen* is apparently grounded in the idea that remedial statutes are excepted from the general rule against retrospective application of statutes.<sup>125</sup> In 2002, the Citrus Canker Law was amended to include those trees located within 1900 feet of an infected tree as being exposed to infection and to allow the de-

to retroactively provide a statutory right of "compensation to eligible homeowners whose citrus trees have been removed under a citrus canker eradication program." *Id.*

117. *Id.* at 1006 (majority opinion). On October 31, 2000, agents of the State of Florida destroyed six healthy, mature, fruit-laden citrus trees. *Id.* Canker-infested trees were allegedly found within 1900 feet of the Patchens' property by trained pathologists. *Id.*

118. *Id.*

119. *Patchen v. Fla. Dep't of Agric. & Consumer Servs. (Patchen I)*, 817 So. 2d 854, 855 (Fla. 3d DCA 2002) (quoting *Dep't of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35, 40 n.4 (Fla. 1990)). In *Polk*, the trial court noted that the diseased trees and those trees within 125 feet of the diseased trees had no marketable value and ruled that *Polk* need not be compensated for those trees. 568 So. 2d at 37.

120. *Patchen I*, 817 So. 2d at 855-56.

121. *Patchen II*, 906 So. 2d at 1006.

122. 870 So. 2d 774 (Fla. 2004).

123. *Patchen II*, 906 So. 2d at 1008.

124. *Id.* at 1009 (Pariente, C.J., concurring). Chief Justice Pariente explained that the Patchens, as well as similarly situated homeowners, are in a better position than if the court were to hold that they have a right to an inverse condemnation claim. *Id.*

125. See *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 278 (Fla. 1978).

struction of all infected and exposed trees.<sup>126</sup> Further, section 581.1845, *Florida Statutes*, was added to provide reimbursement to certain homeowners whose citrus trees have been removed as part of the eradication program.<sup>127</sup> In a per curiam opinion, the Florida Supreme Court found that petitioners, whose cause of action arose prior to the 2002 addition of section 581.1845(2), *Florida Statutes*, were eligible to receive compensation based on the destruction of uninfected, healthy, noncommercial citrus trees located within 1900 feet of a tree infected with citrus canker.<sup>128</sup> However, by avoiding the discussion of common law rights and by failing to explicitly find the Third District Court of Appeal's summary denial of the Patchens' inverse condemnation claim erroneous, the court may have implicitly denied the Patchens a vested right to pursue such a claim.<sup>129</sup>

The court has traditionally recognized that the presumption in favor of prospective application generally does not apply to "remedial" legislation, and such legislation should be applied to pending cases only when necessary to effectuate the legislation's intended purpose.<sup>130</sup> With this recognition, the court apparently determined the 2002 legislation to be simply procedural rather than substantive. The court has refused in the past to classify a statute that accomplishes a remedial purpose by either creating substantive new rights or imposing new legal burdens as that type of "remedial" legislation that should be presumptively applied in pending cases.<sup>131</sup>

In *Polk*, a similar inverse condemnation claim, the trial court found, based on substantial competent evidence, that those trees actually diseased, as well as those within 125 feet of a diseased tree, had no marketable value.<sup>132</sup> Thus, destroying both diseased and ex-

126. Act effective July 1, 2005, ch. 02-11, § 1, 2002 Fla. Laws 310, 311 (codified at FLA. STAT. § 581.184 (2005)). The initial buffer zone was 125 feet from an infected tree, but that distance was not adequate in preventing the spread of citrus canker. *Haire*, 870 So. 2d at 778. Consequently, the Department recommended a 1900-foot removal radius. *Id.* at 779.

127. Act effective July 1, 2001, ch. 01-254, § 45, 2001 Fla. Laws 2699, 2699 (codified at FLA. STAT. § 581.1845 (2001)). Section 581.1845, *Florida Statutes*, states:

- To be eligible to receive compensation under this program, a homeowner must:
- (a) Be the homeowner of record on the date the trees were removed from the residential property as part of a citrus canker eradication program;
  - (b) Have had one or more citrus trees removed from the property by a tree-cutting contractor as part of a citrus canker eradication program on or after January 1, 1995; and
  - (c) Have received no commercial compensation and is not eligible to receive commercial compensation from the United States Department of Agriculture for citrus trees removed as part of a citrus canker eradication program.

FLA. STAT. § 581.1845 (2005).

128. *Patchen II*, 906 So. 2d at 1005.

129. *Id.* at 1110 (Quince, J., dissenting).

130. See *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994); *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986).

131. *Patchen II*, 906 So. 2d at 1110 (Quince, J., dissenting).

132. *Dep't of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35, 38 (Fla. 1990).

posed trees within the 125-foot radius did not constitute a taking requiring compensation.<sup>133</sup> However, in upholding the trial court's decision, the Florida Supreme Court went one step further to require compensation for those healthy trees outside the 125-foot radius.<sup>134</sup>

Analyzed under *Polk*, as the Third District did, the Patchens would have no inverse condemnation cause of action. The Department destroyed trees within the 1900-foot radius, which was allowed under the statute. However, because there was no record from which to determine whether substantial competent evidence supported the determination that the Patchens' destroyed trees were without value, the court appropriately found *Polk* inapplicable.<sup>135</sup>

By applying *Haire*, however, the court retroactively applied case law. Although *Haire* supports the conclusion that a homeowner may seek compensation in addition to that offered by the 2002 statute, neither the decision nor the statute existed until after the Patchens filed their claim.<sup>136</sup>

The 2002 statute provided for compensation to certain homeowners whose residential trees were destroyed under the Citrus Canker Law on or after January 1, 1995, and the court found that the 2002 statute clearly intended to include the Patchens' 2000 cause of action.<sup>137</sup> This seems to be at odds with the court's prior determination that "it cannot be reasoned that a statutory change that affects and changes the measure of damages is merely 'remedial' and thus, procedural, and, therefore is not a change in the substantive law giving the substantive right which is the basis for the damages."<sup>138</sup> If one reasons that the 2002 statute creates a new right to recover compensation, then the court clearly departed from its precedent by retroactively applying the 2002 statute.

Perhaps the more appropriate alternative, as suggested by Justice Quince's dissenting opinion, would have been to quash the Third District's opinion and remand for an evidentiary hearing. If such were the case, the Patchens could have proven the value of their destroyed trees, if any, and been entitled to a factual finding on damages. As it stands, the Florida Supreme Court's application of a statute and case law that were not in existence at the time the Patchens' cause of action arose leaves the residents of Florida wondering if a common law right exists and sets the legislature up to abrogate the right to compensation as easily as it granted it.

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133. *Id.* at 43.

134. *Id.*

135. *Patchen II*, 906 So. 2d, 1008-09 (majority opinion).

136. *Id.* at 1011 (Quince, J., dissenting).

137. *Id.* at 1008 (majority opinion).

138. *L. Ross, Inc. v. R.W. Roberts Constr. Co.*, 481 So. 2d 484, 485 (Fla. 1986) (quoting *L. Ross, Inc. v. R.W. Roberts Constr. Co.*, 466 So. 2d 1096, 1098 (Fla. 5th DCA 1985)).

CIVIL PROCEDURE—FLORIDA SUPREME COURT HOLDS IN AN ACTION FOR BAD FAITH AGAINST AN INSURANCE COMPANY, WORK-PRODUCT PRIVILEGE DOES NOT PROTECT MATERIALS PREPARED THROUGH THE DATE OF THE RESOLUTION OF THE UNDERLYING CLAIM FOR COVERAGE—*Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005)

The Florida Supreme Court accepted jurisdiction to resolve a conflict among the district courts of appeal on what materials are discoverable in a first-party insurance bad faith action.<sup>139</sup> The Fourth District Court of Appeal recently held “the key inquiry is whether the probability of litigation is ‘substantial and imminent.’”<sup>140</sup> This decision conflicted with the decisions of other districts, which have found that documents are protected by the work-product privilege when prepared at a time when litigation is foreseeable.<sup>141</sup> Since litigation with an insurer is arguably foreseeable from the time of an incident giving rise to a claim, the work-product privilege has effectively protected most of an insurer’s documents, including the contents of the claims file in other districts.<sup>142</sup>

In *Ruiz*, the plaintiffs, Joaquin and Paulina Ruiz, purchased automobile insurance coverage from the defendant, Allstate Indemnity Company (“Allstate”), for a Chevrolet Blazer that was mistakenly deleted from the policy one month later.<sup>143</sup> Thus, the plaintiffs were unaware the Blazer was uninsured.<sup>144</sup> Plaintiff Joaquin Ruiz was subsequently involved in an accident in the Blazer and filed a claim for collision coverage.<sup>145</sup> Initially, Allstate denied coverage because the Blazer was not included on the insurance policy.<sup>146</sup> However, Allstate extended coverage on the Blazer a month later, after plaintiffs filed a bad faith action.<sup>147</sup>

After the coverage issue was resolved, the plaintiffs moved to compel production of the claim and investigative files, internal manuals, the insurance agent’s files, and other documents.<sup>148</sup> The trial court conducted an in camera inspection and found that no at-

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139. *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1122 (Fla. 2005).

140. *Allstate Indem. Co. v. Ruiz*, 780 So. 2d 239, 241 (Fla. 4th DCA 2001) (citing *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131 (S.D. Ga. 1982), *quashed*, 899 So. 2d 1121 (Fla. 2005)).

141. *See Vesta Fire Ins. v. Figueroa*, 821 So. 2d 1233 (Fla. 5th DCA 2002); *Wal-Mart Stores, Inc. v. Ballasso*, 789 So. 2d 519 (Fla. 1st DCA 2001); *Prudential Ins. Co. of Am. v. Fla. Dep’t of Ins.*, 694 So. 2d 772 (Fla. 2d DCA 1997); *Anchor Nat’l Fin. Servs., Inc. v. Smeltz*, 546 So. 2d 760 (Fla. 2d DCA 1989).

142. *See cases supra* note 141.

143. *Ruiz*, 899 So. 2d at 1123.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

torney-client or work-product privilege applied to the requested documents.<sup>149</sup> On appeal, Allstate argued that since there was an issue with coverage immediately, litigation was an instant possibility.<sup>150</sup> Thus, according to Allstate, all documents, including the claims file, were prepared in anticipation of litigation and protected by the work-product privilege.<sup>151</sup> However, “the claim file type material presents virtually the only source of direct evidence with regard to the essential issue of the insurance company’s handling of the insured’s claim.”<sup>152</sup>

The Fourth District Court of Appeal distinguished between “material prepared during the normal course of evaluating a claim and materials actually prepared ‘in anticipation of litigation.’”<sup>153</sup> Therefore, the Fourth District Court of Appeal upheld the order to produce the statement of the insurance agent, an internal memorandum from the insurance adjuster, and some computer diaries.<sup>154</sup> However, materials in the claim file and other documents were found to be prepared “in anticipation of litigation” and protected by the work-product privilege.<sup>155</sup>

On review, the Florida Supreme Court reasoned that the conflict among the districts stemmed from an artificial distinction between first- and third-party bad faith actions.<sup>156</sup> In an action by a third party against an insured, the insurance company defends the insured and thus owes the insured a fiduciary duty to handle the claim in good faith.<sup>157</sup> However, in *Kujawa v. Manhattan National Life Insurance Co.*, the Florida Supreme Court, affirming a decision by the Fourth District Court of Appeal, previously held that in a first-party bad faith action, an adversarial, not a fiduciary, relationship exists between parties.<sup>158</sup> Therefore, pursuant to *Kujawa*, the adversarial relationship in a first-party bad faith action precluded discovery of materials protected by the attorney-client and work-product privileges.<sup>159</sup> To the contrary, in a third-party bad faith action, “all materials, including documents, memoranda and letters, contained in the

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149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Allstate Indem. Co. v. Ruiz, 780 So. 2d 239, 241 (Fla. 4th DCA 2001).

154. *Id.* at 240.

155. *Id.* at 241.

156. *Ruiz*, 899 So. 2d at 1129. The supreme court receded from its earlier decision *Kujawa v. Manhattan National Life Insurance Co.*, 541 So. 2d 1168 (Fla. 1989), which created the distinction.

157. *Ruiz*, 899 So. 2d at 1125; see also *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 58 (Fla. 1995).

158. 541 So. 2d at 1169.

159. *Id.*

insurance company's file, up to and including the date of judgment in the original litigation, should be produced."<sup>160</sup>

Another common distinction is in a third-party bad faith action, "[a]s a third party beneficiary of the insurance policy, [the injured third party] stands in the same posture as that of . . . the insured."<sup>161</sup> Since the insured and insurer were represented by the same attorneys in the original action, the insured, and therefore the injured third party, is "entitled to discovery, including deposition and production of files by the attorneys."<sup>162</sup> The last distinction analogizes the injured third party to a judgment creditor. If the insurance company fails to resolve a third-party claim for less than the policy limit, the insured is exposed to the excess liability. If the insured is judgment proof, the injured third party can bring a bad faith action directly against the insurance company because the third party is the "real party in interest in a position similar to that of a 'judgment creditor.'"<sup>163</sup>

Section 624.155, *Florida Statutes*, eliminated the distinction between first- and third-party bad faith actions. "Any person may bring a civil action" if the insurer does not attempt "in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests."<sup>164</sup>

However, in *Kujawa*, the Florida Supreme Court held the "legislature in creating the bad faith cause of action did not evince an intent to abolish the attorney-client privilege and work-product immunity."<sup>165</sup> Therefore, the Florida Supreme Court expressly receded from its decision in *Kujawa*<sup>166</sup> "because it has unnecessarily produced the application of artificial and disparate discovery rules to first- and third-party bad faith actions."<sup>167</sup>

Further, the Florida Supreme Court reiterated the distinction between actions brought by an insured based on a claim for coverage

160. *Ruiz*, 899 So. 2d at 1126 (quoting *Stone v. Travelers Ins. Co.*, 326 So. 2d 241, 243 (Fla. 3d DCA 1976)).

161. *Id.* at 1127 (quoting *Boston Old Colony Ins. Co. v. Gutierrez*, 325 So. 2d 416, 417 (Fla. 3d DCA 1976)).

162. *Id.*

163. *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 58 (Fla. 1995).

164. FLA. STAT. § 624.155(1)(b)1 (2004).

165. *Kujawa v. Manhattan Nat'l Life Ins. Co.*, 541 So. 2d 1168, 1169 (Fla. 1989).

166. Justice Wells dissented to receding from the decision in *Kujawa* because he asserted that there remains an adversarial relationship between the insured and insurer. Thus, "the insurer must have the right to defend the claim without work product of the attorney for the insurer being subject to discovery while the claim remains pending." *Ruiz*, 899 So. 2d at 1132 (Wells, J., concurring in part and dissenting in part).

167. *Id.* at 1129 (majority opinion). The court also expressly agreed with the analysis in *Fidelity & Casualty Insurance Co. of New York v. Taylor*, 525 So. 2d 908 (Fla. 3d DCA 1987).

and the bad faith action.<sup>168</sup> Some materials, including the claim file, contain information that may be protected by the attorney-client or work-product privileges in the underlying claim dispute. However, materials prepared after the initiation of the bad faith action are subject to the traditional rules of discovery and the work-product privilege.<sup>169</sup> “[L]itigants who choose to file both actions simultaneously must recognize that certain documentation relevant to the bad faith action may not be available for discovery until after resolution of the [claim dispute].”<sup>170</sup>

Through the enactment of section 624.155, *Florida Statutes*, the legislature has imposed on the insurance companies the duty of good faith in handling the claims of both their insured and third parties.<sup>171</sup> According to the court:

[I]n connection with evaluating the obligation to process claims in good faith under section 624.155, all materials, including documents, memoranda, and letters, contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and pertain in any way to coverage, benefits, liability, or damages, should also be produced in a first-party bad faith action.<sup>172</sup>

Thus, the Florida Supreme Court expressly receded from *Kujawa* and held the same discovery rules apply to first- and third-party bad faith actions, because any distinction between the two types of action is artificial and overly formalistic. By eliminating this distinction, the Florida Supreme Court resolved the conflict among the districts on whether materials are protected by the work-product privilege if litigation is “substantial and imminent” or “merely foreseeable.” In light of this decision, all materials prepared through the date of the resolution of the underlying claim for coverage are discoverable in both first- and third-party bad faith actions.

#### FLORIDA LEGISLATION—THE CONTROVERSY OVER FLORIDA’S NEW “STAND YOUR GROUND” LAW—FLA. STAT. § 776.013 (2005)

While several bills taken up for discussion during the 2005 Florida legislative session were controversial, the Judiciary Committee’s

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168. Justice Wells, with whom Justice Bell concurred, would draw a clear line and “not allow discovery in a bad faith lawsuit of the insurer’s file until the claim on the policy is completed. Once it is completed, then the entire file of the insurer is discoverable over the objection of work product.” *Ruiz*, 899 So. 2d at 1132 (Wells, J., concurring in part and dissenting in part).

169. *Id.*

170. *Id.* at 1130 (majority opinion) (citing *Old Republic Nat’l Title Ins. Co. v. HomeAmerican Credit, Inc.*, 844 So. 2d 818 (Fla. 5th DCA 2003) and *Allstate Ins. Co. v. Shupack*, 335 So.2d 620 (Fla. 3d DCA 1976)).

171. *Id.* at 1128.

172. *Id.* at 1129-30.

Committee Substitute for Senate Bill 436<sup>173</sup> is, perhaps, at the top of the list. Inspiring newspaper articles such as those entitled *Legisla-*

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173. The Judiciary Committee's Committee Substitute for Senate Bill 436 creates sections 776.013 and 776.032, *Florida Statutes*. Section 776.013, *Florida Statutes*, entitled "Home protection; use of deadly force; presumption of fear of death or great bodily harm," provides:

(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:

(a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and

(b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible act was occurring or had occurred.

(2) The presumption set forth in subsection (1) does not apply if:

(a) The person against whom the defensive force is used had the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person; or

(b) The person or persons sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used; or

(c) The person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or

(d) The person against whom the defensive force is used is a law enforcement officer, as defined in s. 943.10(14), who enters or attempts to enter a dwelling, residence, or vehicle in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer.

(3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or another or to prevent the commission of a forcible felony.

(4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

(5) As used in this section, the term:

(a) "Dwelling" means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.

(b) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.

(c) "Vehicle" means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

FLA. STAT. § 776.013 (2005).

Section 776.032, *Florida Statutes*, entitled "Immunity from criminal prosecution and civil action for justifiable use of force," provides:

ture Says *Let the Force Be with You*<sup>174</sup> and drawing national attention,<sup>175</sup> the battle over what is commonly referred to as Florida's "stand your ground" bill,<sup>176</sup> figuratively speaking, had many Floridians up in arms, debating the changes the proposed law would bring.

For many, the debate rages on. The new law took effect on October 1, 2005,<sup>177</sup> and, in the words of the Senate Judiciary Committee, redefines justifiable use of force (self-defense):

permits a person to use force, including deadly force, without fear of criminal prosecution or civil action for damages, against a person who unlawfully and forcibly enters the person's dwelling, resi-

(1) A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.032 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

*Id.* § 776.032.

Additionally, the measure amends section 776.031, *Florida Statutes*, entitled "Use of force in defense of others," in pertinent part to provide that "[a] person does not have a duty to retreat if the person is in a place where he or she has a right to be." *Id.* § 776.031. Further, the measure amends section 776.012, *Florida Statutes*, entitled "use of force in defense person," in pertinent part to provide that a person is justified in the use of deadly force "and does not have a duty to retreat if . . . [h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony; or . . . [u]nder those circumstances permitted pursuant to s. 776.013." *Id.* § 776.012.

174. Steve Bousquet, *Legislature Says Let the Force Be With You*, ST. PETE. TIMES, Apr. 6, 2005, available at [http://www.sptimes.com/2005/04/06/news\\_pf/State/Legislature\\_says\\_let\\_.shtml](http://www.sptimes.com/2005/04/06/news_pf/State/Legislature_says_let_.shtml).

175. See, e.g., Abby Goodnough, *Florida Expands Right to Use Deadly Force in Self-Defense*, N.Y. TIMES, Apr. 27, 2005, at A18 (noting a comment by Wayne LaPierre, Executive Vice President of the National Rifle Association (NRA), that the NRA will push for similar measures elsewhere); *Talk of the Nation: Florida's New Gun Law Loosens Curbs* (NPR radio broadcast May 2, 2005) (featuring a discussion panel comprised of Leslie Clark, a political reporter from *The Miami Herald*; George Fletcher, a professor from Columbia Law School; Florida State Representative Dennis Baxley, a sponsor of the bill; and Florida State Representative Dan Gelber, an opponent of the bill).

176. See, e.g., Goodnough, *supra* note 175 (referencing the measure as the "stand your ground" bill).

177. Fla. S. Judiciary Comm., CS for SB 436 (2005) Staff Analysis 7 (Feb. 25, 2005) (on file with comm.) [hereinafter Judiciary Comm. SB 436 Staff Analysis] ("The bill takes effect on October 1, 2005.").

dence, or occupied vehicle [and] abrogates the common law duty to retreat when attacked before using force, including deadly force in self-defense or defense of others.<sup>178</sup>

Before Florida's stand your ground law, both Florida statutes and common law governed the instances in which a person could use force, including deadly force, in self-defense, or in the defense of others.<sup>179</sup> Pursuant to section 776.012, *Florida Statutes*, a person was justified in using force, other than deadly force, against another where the person reasonably believed force was necessary to defend himself or herself against another person's imminent use of unlawful force.<sup>180</sup> However, deadly force was not justified unless the person reasonably believed deadly force was necessary to prevent "imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony."<sup>181</sup> Additionally, section 776.031, *Florida Statutes*, governed the instances in which a person was justified in using force, and in some instances deadly force, to protect property.<sup>182</sup> Further, Florida common law recognized a "duty to retreat," which required "a person acting in self-defense outside his or her home or workplace" to employ "every reasonable means to avoid the danger, including retreat, prior to using deadly force."<sup>183</sup> The "castle doctrine," however, provided an exception from the duty to retreat before using deadly force where a person was attacked in his or her home or workplace and reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself or herself or another or the commission of a forcible felony.<sup>184</sup>

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178. *Id.* at 1.

179. *Id.*

180. *Id.* at 1-2 (citing FLA. STAT. § 776.012 (2004)).

181. *Id.* at 2 (citing FLA. STAT. § 776.012 (2004)). Further, section 776.085, *Florida Statutes* (2004), protected a person acting in self-defense from damages for personal injury or death of a person who sustained injuries while attempting a "forcible felony."

182. Section 776.031, *Florida Statutes*, provides:

A person is justified in the use of force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to prevent or terminate such other's trespass on, or other tortious or criminal interference with, either real property other than a dwelling or personal property, lawfully in his or her possession or in the possession of another who is a member of his or her immediate family or household or of a person whose property he or she has a legal duty to protect. However, the person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent the imminent commission of a forcible felony.

FLA. STAT. § 776.031 (2004).

183. Judiciary Comm. SB 436 Staff Analysis, *supra* note 173, at 2 (citing *Florida v. James*, 867 So. 2d 414, 416 (Fla. 3d DCA 2003)). "The duty to retreat appears to stem from policy that '[h]uman life is precious, and deadly combat should be avoided if at all possible when imminent danger to oneself can be avoided.'" *Id.*

184. *Id.* at 3. However, an exception to the castle doctrine applies where a resident uses deadly force in his or her home against a fellow resident or guest, requiring a person

The stand your ground law creates a presumption that the defender, in his or her home, a temporary place of lodging, or in a vehicle, "has a reasonable fear of imminent death or great bodily harm" when the intruder unlawfully or forcibly enters.<sup>185</sup> It additionally "presumes that the intruder intends to commit an unlawful act involving force of violence."<sup>186</sup> The above "conclusive"<sup>187</sup> presumptions "protect the defender from civil and criminal prosecution for unlawful use of force or deadly force in self-defense."<sup>188</sup> However, the presumption concerning the intent of the intruder does not apply where the intruder (1) has a right to be in the home, place of temporary lodging, or vehicle;<sup>189</sup> (2) seeks to lawfully remove a person under his or her care from a home, place of temporary lodging, or vehicle; or (3) is a law enforcement officer, acting lawfully, and the defender knew or had reason to know that the intruder was a law enforcement officer.<sup>190</sup> Thus, Florida's stand your ground law effectively:

expands the castle doctrine by expanding the concept of what is a "castle" and by expanding the group of persons entitled to the castle's protection. Under the castle doctrine, a person has no duty to retreat from his or her "castle," a person's home or workplace, before resorting to deadly force necessary for self-defense. [Florida's Stand Your Ground Law] expand[s] the concept of the castle to include attached porches, any type of vehicle, and place of temporary lodging, including tents. Under the castle doctrine, only persons lawfully residing in a dwelling have no duty to retreat before resorting to deadly force necessary for self-defense. [Florida's Stand Your Ground Law gives] invited guests in another person's "castle" . . . the same rights to self-defense as a resident of the expanded castle.<sup>191</sup>

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to "retreat within the residence to the extent reasonably possible, but not from the residence, before resorting to deadly force against a co-occupant or invitee necessary to prevent death or great bodily harm." *Id.* at 4.

185. *Id.* at 5.

186. *Id.*

187. *Id.* at 6 ("Legal presumptions are typically rebuttable. The presumptions created by the committee substitute, however, appear to be conclusive."); *see also id.* (stating that Florida's stand your ground law "does not require proof that the intruder was attempting to engage in a forcible felony[, as] the intruder's actual intent is irrelevant").

188. *Id.* at 5. Florida's stand your ground law "prevent[s] a jury from determining whether a person had a reasonable fear," but likely permits juries to decide "whether an entry was unlawful and forcible, and whether the defender knew or had reason to know that the entry was unlawful and forcible." *Id.* at 6.

189. *Id.* at 5 (adding "unless there is a domestic violence injunction or written pretrial supervision order of no contact against that person").

190. *Id.* However, the presumptions will not benefit the defender "if the defender was engaged in unlawful activity at the time of the unlawful and forcible entry or if the defender was using his or her home, place of temporary lodging, place of temporary lodging of another, or vehicle to further unlawful activity." *Id.* Additionally, the "unlawful activity" and the "unlawful forcible entry" do not have to be related to defeat the presumption. *Id.*

191. *Id.* at 6.

Further, the law abrogates the common law duty to retreat where the defender is in a place where he or she is lawfully entitled to be.<sup>192</sup> However, even under the new law, a person who defends himself or herself outside of his or her “expanded castle” must reasonably believe deadly force is necessary to prevent imminent death or great bodily harm.<sup>193</sup>

Reactions to the changes discussed above vary from supporters touting the new law as a “reasonable, self-protection bill [that] defends innocent life,”<sup>194</sup> to those in opposition observing that the law “will encourage a ‘Wild West’ atmosphere in Florida, where people are emboldened to use deadly force without fear of prosecution.”<sup>195</sup> Only time will tell which, if either, side is correct.<sup>196</sup>

HEALTH CARE LAW—TREATMENT—PRIVACY RIGHTS—DUE PROCESS—  
WITHDRAWAL OF LIFE SUPPORT—THE THERESA SCHIAVO DECISIONS

Even compared to the most controversial legal issues of the past several years, the jurisprudence regarding Theresa Schiavo (hereinafter collectively referred to as the “Terri Schiavo case”) distinguishes itself as particularly polarizing. With the utmost sincerity, very intelligent people—even foremost experts in law and medi-

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192. *Id.* The Staff Analysis further explained:

Under Florida common law, a person has a duty to retreat, if outside his or her home or place of business before resorting to deadly force reasonably believed necessary to prevent imminent death or great bodily harm. A person attacked within his or her home by a co-occupant or invitee must also retreat, if possible, within the home, but not from the home, before resorting to deadly force. Under [Florida’s stand your ground law], a person will no longer have any duty to retreat, unless the person is not in a place where he or she is lawfully entitled to be.

*Id.*

193. *Id.* at 5.

194. Kelley Beaucar Vlahos, *Floridians’ Self-Defense Rights Expanded*, FOXNEWS.COM, May 3, 2005, available at [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,155303,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,155303,00.html) (quoting Florida State Representative Dennis Baxley).

195. *Id.* (quoting Florida State Senator Steven Geller as saying “I hate this bill and I voted for it . . . Here’s the problem—the first two parts of the bill are mom and apple pie and American flags and Chevrolet, so you can’t vote against it . . . the third part is terrible”). As indicated by the quote from Senator Geller, much of the controversy with the new law stems from the “third part” of the bill’s abrogation of the duty to retreat before using deadly force where the defender is in a place he or she is lawfully entitled to be. Many critics of the new law fear that doing away with the duty to retreat will result in situations such as “men, liquored-up at a sporting event [getting] into a deadly confrontation and then claim[ing] self-defense.” *Id.* (referencing a comment by Senator Geller).

196. Perhaps neither side’s view of the changes that the new law will bring is correct. See Shannon Colavecchio-Van Sickler, *Will Deadly Force Law Open Door to Abuses?*, ST. PETE. TIMES, Apr. 8, 2005, at 1A (quoting Florida State University criminology professor Gary Kleck, “I don’t think criminals really have any idea about the intricacies of the law on self-defense . . . . And the same folks who weren’t likely to retreat before, will continue to not retreat”).

cine<sup>197</sup>—decisively disagree as to whether the flurry of published court holdings (in excess of fifty) were decided “correctly.”<sup>198</sup> Popular opinion seems to range from calling the actions of the Florida court system “judicial murder,” to calling the seeming endless parade of judicial appeals and impromptu legislation, at both the state and federal levels, religious-political conservatism run amok, with comparatively few opinions falling moderately between.<sup>199</sup> Independent of public perception of the propriety of events, however, the law, both judicial and statutory, has changed dramatically since the well-known, tragic events of February 25, 1990, when Schiavo abruptly lost consciousness due to a potassium imbalance caused by overaggressive dieting behavior.<sup>200</sup> What follows below is a summary of the law that was applied in the many decisions regarding the Terri Schiavo case; how that law interacted with the peculiar facts of this case; how that law interacted with the subsequent and arguably unprecedented actions of the Florida Legislature and the United States Congress; how the statutory law has been changed subsequent to, and independent of, the onset of this case; and finally, what the decisions of the Terri Schiavo case did not decide. Many important legal issues, from obscure rules of Florida civil procedure to the separation of powers under the United States Constitution, were affected, discussed, and often held to be dispositive. However, this Note will focus on issues relating to Florida and federal due process and privacy rights as they relate to end-of-life decisionmaking, the Florida Constitution’s requirement of separation of powers as it relates to the statute popularly referred to as “Terri’s law,”<sup>201</sup> and federal subject matter jurisdiction as it relates to Public Law 109-3, entitled “An Act For the Relief of the Parents of Theresa Marie Schiavo.”<sup>202</sup> Due to the unusual volume and nature of the events relevant to the Terri Schiavo case, this Note will begin with a chronology.

#### A. *Chronology of Events Relevant to the Terri Schiavo Case*

February 25, 1990—After six years of marriage, Terri Schiavo, 27, suffered cardiac arrest and lost consciousness due to a potassium imbalance caused by an overaggressive diet.<sup>203</sup>

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197. See, e.g., John Leo, *The End of Argument*, USNEWS.COM, Apr. 25, 2005, <http://www.usnews.com/usnews/opinion/articles/050425/25john.htm>.

198. A list of the most significant opinions can be found at *In re Guardianship of Schiavo*, 916 So. 2d 814, 814 n.1 (Fla. 2d DCA 2005).

199. See, e.g., Leo, *supra* note 197.

200. *In re Guardianship of Schiavo*, 916 So. 2d at 815 n.2.

201. See Act effective Oct. 21, 2003, ch. 2003-418, 2004 Fla. Laws 1.

202. 119 Stat. 15 (2005).

203. *In re Guardianship of Schiavo*, 916 So. 2d at 815 n.2.

From 1990 to 2005—“Theresa . . . lived in nursing homes with constant care. She [was] fed and hydrated by tubes. The staff change[d] her diapers regularly. She . . . had numerous health problems, but none [were] life threatening.”<sup>204</sup>

1992—As a result of a settlement agreement and a jury award, Michael Schiavo (Terri’s husband) received a significant sum of money from a medical malpractice suit, charging that doctors failed to diagnose an eating disorder, which likely caused the events of February 25.<sup>205</sup> The award, while sufficient to care for Terri for several years,<sup>206</sup> was likely inadequate to cover long-term caregiving expenses.

1993—Michael Schiavo and Robert and Mary Schindler (Terri’s parents), who “enjoyed an amicable relationship”<sup>207</sup> for the first three years subsequent to the tragedy, had an argument purportedly concerning the expenditure of the malpractice-recovery money, which resulted in cessation of communication.<sup>208</sup>

Mid 1996—CAT scans reflected nearly all of Schiavo’s cerebral cortex (the portion of the brain used for cognitive processes) had been replaced by cerebral spinal fluid.<sup>209</sup> According to the court, “medicine cannot cure this condition. Unless an act of God, a true miracle, were to recreate her brain, Theresa [would] always remain in an unconscious, reflexive state, totally dependent upon others to feed her and care for her most private needs.”<sup>210</sup>

May 1998—Apparently due to a dispute between her husband and parents concerning pecuniary motives, Michael Schiavo, acting in his capacity as his wife’s legal guardian, asked the court to determine whether Terri Schiavo would want to discontinue life-prolonging treatment, if she were then presently competent to make that decision.<sup>211</sup> The court noted that there was “no evidence” that either Terri Schiavo’s husband or parents had financial motives in holding their respective positions.<sup>212</sup>

February 2000—In the original guardianship case, Michael Schiavo petitioned the guardianship court, pursuant to the 1997 version of chapter 765, *Florida Statutes*, to decide two questions.<sup>213</sup> First,

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204. *In re Guardianship of Schiavo*, 780 So. 2d 176, 177 (Fla. 2d DCA 2001) (finding that there was clear and convincing evidence that Schiavo would want the withdrawal of life-support measures).

205. *Id.* at 178.

206. *Id.*

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

208. *In re Guardianship of Schiavo*, 780 So. 2d at 179.

209. *Id.* at 177.

210. *Id.*

211. *Id.* at 178.

212. *Id.*

213. *Id.*

was his wife and ward, Terri Schiavo, in a persistent vegetative state, and if so, would she want to discontinue life-prolonging procedures that kept her alive while in that state?<sup>214</sup> The guardianship court determined that there was overwhelmingly conclusive evidence that Schiavo was in a persistent vegetative state and that there was clear and convincing evidence that Schiavo would want to discontinue life-prolonging procedures that were keeping her alive,<sup>215</sup> allowing “her family members and loved ones to be free to continue their lives.”<sup>216</sup> As a result of these findings, the guardianship court ordered the removal of all life-sustaining equipment.<sup>217</sup>

January 2001—The case was appealed to the Second District Court of Appeal, where the court was asked to resolve a number of issues, the most pertinent of which was whether there was sufficient evidence for the guardianship court judge to decide that there was clear and convincing evidence that Schiavo would want to discontinue life-prolonging procedures when the evidence considered was in the form of contradicted testimony.<sup>218</sup> While the appellate court noted there was contradictory testimonial evidence (though the guardianship judge was free to assess which of the testimonial evidence was more credible), and that when in doubt the guardianship court was to “err on the side of life,” the appellate court nevertheless held there was sufficient evidence from which the guardianship judge could base his decision.<sup>219</sup> The Florida Supreme Court declined review of the case.<sup>220</sup>

October 2003 to October 2004—After two failed motions for relief, an ordered rehearing in the guardianship court that redetermined Schiavo was really in a persistent vegetative state, which was affirmed on direct appeal,<sup>221</sup> and a variety of other several other failed motions filed in both state and federal courts, the Florida Legislature intervened with the passage of Terri’s law.<sup>222</sup> As a part of the enforcement of that law, while its constitutionality was being argued by both parties, a third independent guardian was appointed at the re-

214. *Id.* at 178-79.

215. *See id.* at 177 (noting “[t]he trial court made a difficult decision after considering all of the evidence and the applicable law” and concluding “that the trial court’s decision is supported by competent, substantial evidence and that it correctly applies the law”).

216. *Id.* at 180.

217. *See id.* at 177 (noting that the trial court’s order authorized the discontinuance of artificial life support).

218. *Id.* at 179.

219. *Id.* at 179-80.

220. *Schindler v. Schiavo ex rel. Schiavo*, 789 So. 2d 348 (Fla. 2001) (unpublished table decision).

221. *In re Guardianship of Schiavo*, 851 So. 2d 182, 183 (Fla. 2d DCA 2003).

222. Act effective Oct. 21, 2003, ch. 2003-418, 2004 Fla. Laws 1.

quest of Governor Bush.<sup>223</sup> The guardian later determined there was no reasonable medical hope that Schiavo would improve.<sup>224</sup> Ultimately, the Florida Supreme Court struck down the statute as unconstitutional, both on its face and as applied to Schiavo.<sup>225</sup>

March 2005—After several more failed motions, the United States Congress intervened with the passage of Public Law Number 109-3.<sup>226</sup> Accepting the jurisdiction given to the federal courts through Public Law 109-3 with extreme reluctance,<sup>227</sup> the district court determined that there were not sufficient grounds to grant a temporary restraining order against the removal of Schiavo's life-prolonging equipment.<sup>228</sup> The district court's determination was upheld on direct appeal.<sup>229</sup>

March 31, 2005—Subsequent to a denial of certiorari by the U.S. Supreme<sup>230</sup> and several other failed motions in both the state and federal courts, more than five years after the initial order requiring the removal of Schiavo from life-prolonging treatment, Schiavo died.<sup>231</sup>

*B. An Incapacitated Individual's Right to Refuse Life Support: A Summary and Analysis of In re Guardianship of Schiavo (Schiavo I), 780 So. 2d 176 (Fla. 2d DCA 2001)*

The statutory and common law guidance used in the guardianship court's order of February 11, 2000—requiring that Schiavo be removed from life-support mechanisms—changed considerably during the five-year course of litigation.<sup>232</sup> The applicable statute, guided by constitutional considerations discussed in dicta from *In re Guardianship of Browning*,<sup>233</sup> allows for a surrogate (Michael Schiavo, in this case) to ask the court to decide whether the ward, if presently compe-

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223. *In re Guardianship of Schiavo*, 30 Fla. L. Weekly D743, D744 (Fla. 2d DCA Mar. 16, 2005).

224. *Id.*

225. *Bush v. Schiavo*, 885 So. 2d 321, 324 (Fla. 2004).

226. 119 Stat. 15 (2005).

227. Dicta from the Eleventh Circuit strongly suggests that the law giving the federal courts jurisdiction was unconstitutional, and that the Rooker-Feldman doctrine, which prohibits the federal courts from reexamining the final judgments of state courts under certain relevant circumstances, required the federal courts to refuse jurisdiction. *See generally* *Schiavo v. Schiavo*, 404 F.3d 1270, 1272-79 (11th Cir. 2005) (Birch, J., concurring). *But see id.* at 1279-82 (Tjoflat, J., dissenting).

228. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225 (11th Cir. 2005).

229. *Id.* at 1226.

230. *Schiavo ex rel. Schindler v. Schiavo*, 125 S. Ct. 1692 (2005).

231. Carl Hulse & David D. Kirkpatrick, *The Schiavo Case: Political Strategy; Even Death Does Not Quiet Harsh Political Fight*, N.Y. TIMES, Apr. 1, 2005, at A1, available at 2005 WL 5085920.

232. *See, e.g., In re Guardianship of Schiavo*, 780 So. 2d 176, 178 n.2 (Fla. 2d DCA 2001).

233. 568 So. 2d 4 (Fla. 1990).

tent to decide for herself, would decide to refuse continued use of life support.<sup>234</sup> The statute also provides a mechanism for an interested person to challenge the decision of a surrogate in his decision to withhold or continue life support for the ward.<sup>235</sup> Michael Schiavo availed himself of the first legal possibility.<sup>236</sup> At that time, the court was required to determine what Schiavo herself would have wanted to be done, had she herself been competent to make that determination.<sup>237</sup>

This determination was to be made utilizing a standard of proof requiring clear and convincing evidence.<sup>238</sup> The applicable standard of review required the appellate court to find that the guardianship court based its decision on competent, substantial evidence.<sup>239</sup>

The court noted that the evidence regarding Schiavo's wishes was testimonial and was contradicted by other testimony.<sup>240</sup> Nevertheless, presumably because judges are permitted to comparatively weigh the credibility of witnesses,<sup>241</sup> the court determined that "[t]he clear and convincing standard of proof, while very high, permits a decision in the face of inconsistent or conflicting evidence."<sup>242</sup> Similarly, while the court required any ambiguity as to the projected desires of the patient to be determined in favor of assuming a desire to live, the court found that the level of evidence in the case was such that there was no ambiguity.<sup>243</sup> The court concluded:

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234. *In re Guardianship of Schiavo*, 780 So. 2d at 179.

235. *Id.*

236. *Id.*

237. *Id.* at 178. It is worth noting that today, however, the court would instead make a determination as to what would be in the "best interests" of the ward. *Id.* at 178 n.2 (citing FLA. STAT. § 765.404 (2005)). The statute itself creates an elaborate procedure for a guardian assessing the best interests of the patient and does not discuss what to do when the guardian is unable to reach a decision or his decision is subsequently challenged by an interested party. In these instances, *In re Guardianship of Browning* applies. There is, of course, no way of knowing whether this different frame of question would lead to a different result.

238. *Id.* at 179.

239. *Id.* at 177.

240. *Id.* at 179.

241. *Id.* In Judge Greer's decision of February 11, 2000, he explicitly delineated all the testimony suggesting Schiavo would have desired to continue life-prolonging treatment, and item by item, explained why each piece of testimony was irrelevant to determining Schiavo's desires. *In re Guardianship of Schiavo*, 2000 WL 34546718 *passim* (Fla. Cir. Ct. Feb. 11, 2000). Specifically, the judge determined that the impromptu objections made by Schiavo as a child while watching a movie about an incapacitated person taken off life support were only enlightening in that they suggested how Schiavo felt as a child about other people utilizing life support. *Id.* at \*6. Meanwhile, statements to her husband and her friend regarding her own desires as an adult, specifically statements regarding her desire not to be a burden, were revealing about what she would want presently. *Id.*

242. *In re Guardianship of Schiavo*, 780 So. 2d at 179.

243. *Id.* at 179-80.

The testimony in this case establishes that Theresa was very young and very healthy when this tragedy struck. Like many young people without children, she had not prepared a will, much less a living will. She had been raised in the Catholic faith, but did not regularly attend mass or have a religious advisor who could assist the court in weighing her religious attitudes about life-support methods. Her statements to her friends and family about the dying process were few and they were oral. Nevertheless, those statements, along with other evidence about Theresa, gave the trial court a sufficient basis to make this decision for her.

In the final analysis, the difficult question that faced the trial court was whether Theresa Marie Schindler Schiavo, not after a few weeks in a coma, but after ten years in a persistent vegetative state that has robbed her of most of her cerebrum and all but the most instinctive of neurological functions, with no hope of a medical cure but with sufficient money and strength of body to live indefinitely, would choose to continue the constant nursing care and the supporting tubes in hopes that a miracle would somehow recreate her missing brain tissue, or whether she would wish to permit a natural death process to take its course and for her family members and loved ones to be free to continue their lives. After due consideration, we conclude that the trial judge had clear and convincing evidence to answer this question as he did.<sup>244</sup>

Naturally, for any analysis of Schiavo's projected desires to be relevant, an initial decision had to be made regarding her being in a persistent vegetative state. The court described Schiavo's condition as follows: "She is not asleep. She has cycles of apparent wakefulness and apparent sleep without any cognition or awareness. As she breathes, she often makes moaning sounds. Theresa has severe contractures of her hands, elbows, knees, and feet."<sup>245</sup> Regarding any chance of recovery, the court opined that "[m]edicine cannot cure this condition. Unless an act of God, a true miracle, were to recreate her brain, Theresa will always remain in an unconscious, reflexive state, totally dependent upon others to feed her and care for her most private needs."<sup>246</sup> The court concluded that "[t]he evidence is overwhelming that Theresa is in a permanent or persistent vegetative state."<sup>247</sup>

There were two other issues the Schindlers brought to the court's attention. First, they contended that the court needed to appoint a guardian ad litem to replace Michael Schiavo, as he stood to inherit a large sum of money upon Schiavo's death.<sup>248</sup> After noting that the guardians contemplated by section 765.404, *Florida Statutes*, would very often be the relatives of the ward and therefore likely to inherit

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244. *Id.*

245. *Id.* at 177.

246. *Id.*

247. *Id.*

248. *Id.* at 178.

money, the court discussed that Michael Schiavo was not the one responsible for the decision but instead that the court was, and that therefore any potential bias in the guardian was irrelevant.<sup>249</sup> Independent of this analysis, the court also expressed its strong belief that the motives of both parties, while either stood to gain monetarily depending upon a particular resolution of events, were entirely pure and devoid of pecuniary desires.<sup>250</sup> The second issue involved the permissibility of hearing evidence from an expert on attitudes toward discontinuation of life support.<sup>251</sup> While the court suggested that such evidence might be inappropriate in making a “best interests” assessment (which would suggest that similar expert testimony would be inadmissible today, since the relevant statute now requires a best interests assessment), the court found the judge did not give it “undue” weight in this case.<sup>252</sup>

In summary, the court affirmed that there was clear and convincing evidence that Schiavo was in a persistent vegetative state and that she would elect to discontinue life support if she were competent to do so.

### C. Schiavo I *Vested Terri Schiavo with a Privacy Right to Discontinue Life Support*

Both competent and incompetent people have the right to refuse or discontinue life-prolonging procedures.<sup>253</sup> Incompetent people maintain this right even if they lacked the foresight or means to prepare a living will or any other authoritative writing prior to their incapacitation.<sup>254</sup> Once a court has made the decision that the ward would have desired to discontinue life-prolonging procedures, a privacy right vests in the ward to have those life-prolonging procedures discontinued.<sup>255</sup>

249. *Id.*

250. *Id.* (“[W]e see no evidence in this record that either Michael or the Schindlers seek monetary gain from their actions. Michael and the Schindlers simply cannot agree on what decision Theresa would make today if she were able to assess her own condition and make her own decision.”).

251. *Id.* at 179.

252. *Id.*

253. *In re Guardianship of Schiavo*, 916 So. 2d 814, 815 (Fla. 2d DCA 2005) (citing *John F. Kennedy Mem’l Hosp., Inc. v. Bludworth*, 452 So. 2d 921 (Fla. 1984) (relying on the explicit privacy right given by article I, section 23 of the Florida Constitution, which gives more protection than the implied privacy right given by the United States Constitution).

254. *Id.* at 815-16 (citing *Corbett v. D’Alessandro*, 487 So. 2d 368 (Fla. 2d DCA 1986), and *In re Guardianship of Barry*, 445 So. 2d 365 (Fla. 2d DCA 1984)).

255. *Id.* at 815 (“Mrs. Schiavo’s legal guardian [does not have] the option of leaving the life-prolonging procedures in place. No matter who her guardian is, the guardian is required to obey the court order because the court, and not the guardian, has determined the decision that Mrs. Schiavo herself would make.”).

When asked to rule on the validity of the original decision, the Second District Court of Appeal enunciated its belief that “[n]ot only has Mrs. Schiavo’s case been given due process, but few, if any, similar cases have ever been afforded this heightened level of process.”<sup>256</sup> To support this unusual declaration, the court cited the numerous formal proceedings, many rendered out of judicial sympathy for the Schindlers even when the proceedings were legally inappropriate.<sup>257</sup> While noting the court’s extreme sympathy for the Schindlers,<sup>258</sup> “that many people around the world disagree with the trial court’s decision,”<sup>259</sup> and that the images of Schiavo’s face were “haunting,”<sup>260</sup> the court, utilizing past precedent regarding Florida privacy rights, framed the main issue as Schiavo’s constitutional right to discontinue her life support.<sup>261</sup> Several years prior the guardianship court had, by clear and convincing evidence, determined that Schiavo would want to discontinue life-prolonging procedures, and it was now the job of the court to ensure that Schiavo’s decision, as determined through the court system, be honored.<sup>262</sup>

*D. Although Terri’s Law Was Potentially a Violation of Schiavo’s Florida Privacy Rights, the Florida Supreme Court Instead Declared the Law Unconstitutional as a Violation of the Florida Constitution’s Requirement of Separation of Powers*

At the onset, the Florida Supreme Court made clear that its role was limited to determining the constitutionality of Terri’s law and did not include a reexamination of lower court decisions relating to the withdrawal of Schiavo from life support.<sup>263</sup> With the issue thus framed, the Florida Supreme Court found that Terri’s law<sup>264</sup> “violates

256. *Id.*

257. *Id.* at 817-18 (“Because of the nature of this case, neither the trial court nor this court has enforced these general rules [barring many of the Schindler’s ultimately failed motions from consideration].”).

258. *Id.* at 818.

259. *Id.*

260. *Id.*

261. *Id.* (“But in the end, this case is not about the aspirations that loving parents have for their children. It is about Theresa Schiavo’s right to make her own decision, independent of her parents and independent of her husband.”) (quoting *In re Guardianship of Schiavo*, 851 So. 2d 182, 186-87 (Fla. 2d DCA 2003)).

262. *Id.*

263. *Bush v. Schiavo*, 885 So. 2d 321, 324 (Fla. 2004). The court nevertheless immediately followed this admonishment with a very thorough discussion of the proceedings to date and quoted frequently from the records of many of the various, related proceedings. *Id.* at 324-28.

264. Terri’s law states in full:

Section 1. (1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:

(a) That patient has no written advance directive;  
(b) The court has found that patient to be in a persistent vegetative state;

the fundamental constitutional tenet of separation of powers and is therefore unconstitutional both on its face and as applied to Theresa Schiavo.<sup>265</sup> Specifically, the court held that the statute was unconstitutional as applied to Schiavo because it violated article II, section 3 of the Florida Constitution, which prohibits one branch of government from exercising the powers of another branch,<sup>266</sup> and that the statute was unconstitutional on its face because the same constitutional provision prohibits the legislature from delegating any of its powers in such a way as to give the executive unfettered discretion in exercising the delegation.<sup>267</sup>

*E. Terri's Law Was Unconstitutional as Applied Because It Impermissibly Reallocated Judicial Power to the Executive*

"[T]he judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power, and the legislature cannot . . . reallocate the balance of power . . . among the three coequal branches."<sup>268</sup> Judicial power is not limited to ruling on a particular case, but to decide them with finality, reviewable only by

(c) That patient has had nutrition and hydration withheld; and

(d) A member of that patient's family has challenged the withholding of nutrition and hydration.

(2) The Governor's authority to issue the stay expires 15 days after the effective date of this act, and the expiration of that authority does not impact the validity or the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.

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

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

Act effective Oct. 21, 2003, ch. 2003-418, 2004 Fla. Laws 1.

265. *Bush*, 885 So. 2d at 324. The circuit court found that Terri's law was facially unconstitutional as an unlawful delegation of legislative authority, as a violation of privacy rights, and as applied because it permitted "the Governor to encroach upon the judicial power and to retroactively abolish Theresa's vested right to privacy." *Id.* at 328. Because the Florida Supreme Court found the separation of powers issue to be dispositive, however, the court only held Terri's law to be unconstitutional on that issue. *Id.* at 328 n.2.

266. Article II, section 3 of the Florida Constitution reads in pertinent part: "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." FLA. CONST., art. II, § 3.

267. *Bush*, 885 So. 2d at 332. "The Legislature 'may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law.'" *Id.* (quoting *Sims v. Florida*, 754 So. 2d 657, 668 (Fla. 2000)).

268. *Id.* at 330 (quoting *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 268-69 (Fla. 1991)).

higher courts within the judiciary,<sup>269</sup> and “purely judicial acts . . . are not subject to review as to their accuracy by the Governor.”<sup>270</sup>

After articulating the law as set forth above, the court summarized the procession of judicial proceedings before emphatically characterizing the decision of the guardianship court of February 11, 2000, to be “final.”<sup>271</sup> The court rejected arguments from the Governor and amici that the guardianship court’s decision was not final as it was subject to revocation until the death of the ward because Florida Rule of Civil Procedure 1.540(b), which permits the potentiality of revocation, also explicitly declares that its potential revocation does not affect the judgment’s otherwise “final” disposition.<sup>272</sup>

Because the legislature had previously established the judicial mechanism to be used in determining the exercise of an incompetent’s right to refuse life support and because the judicial system fully complied with and concluded the course of that established mechanism, the judiciary alone had the power to determine Schiavo’s decision to terminate life support.<sup>273</sup> The legislature, even though it had created the mechanism used by the judiciary, was not free to change the mechanism after the judiciary had rendered a final decision utilizing the legislature’s predetermined method.<sup>274</sup> In other words, after the court had rendered its decision pursuant to then existing judicial and statutory guidance, the legislature cannot then pass a law allowing “the executive branch to interfere with the final judicial determination of a case.”<sup>275</sup>

In summary, it appears that whenever a court has made a final decision on a particular case, utilizing a properly proscribed process, the legislature cannot change that process with the effect of upsetting a particular case’s finality. As a result, Terri’s law was facially unconstitutional because it impermissibly delegated unfettered discretion to the executive in exercising legislative power.

After concluding that the law was unconstitutional as applied to Schiavo, the court continued its analysis by also finding the act unconstitutional on its face.<sup>276</sup> Although the legislature may “transfer

269. *Id.* (citing *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)).

270. *Id.* (quoting *In re Advisory Opinion to the Governor*, 213 So. 2d 716, 720 (Fla. 1968) (alteration in original)).

271. *Id.* at 331.

272. *Id.* (stating that even if “a final judgment may be subject to recall under a rule of procedure . . . [that] does not negate its finality”).

273. *Id.*

274. *Id.* at 332.

275. *Id.* “[I]t is without question an invasion of the authority of the judicial branch for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination in a case. That is precisely what occurred here and for that reason the Act is unconstitutional . . .” *Id.*

276. *Id.*

subordinate functions ‘to permit administration of legislative policy by an agency,’<sup>277</sup> it “ ‘may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law.’ ”<sup>278</sup> That is the essence of Florida’s nondelegation doctrine.<sup>279</sup> Fundamental policy choices must be made by the legislature, and the executive’s administration of legislative programs must be objectively and tangibly guided by standards within the enactment of the program.<sup>280</sup> Those standards “must so clearly define the power delegated that the [executive] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion.”<sup>281</sup> One reason the court demands such standards is to allow for “meaningful judicial review.”<sup>282</sup>

The specificity required from the standards enunciated in the enactment depends on its subject matter.<sup>283</sup> Relevant factors include the complexity of the enactment’s subject matter and the difficulty involved in fully delineating objective standards.<sup>284</sup> Even when dealing with the most complex subject matter, however, where pragmatics dictate having very relaxed standards, the court requires that the terms of the enactment cannot be “so general and unrestrictive that administrators are left without standards for the guidance of their official acts.”<sup>285</sup>

After explaining the above applicable law, the court examined two examples of statutes that it had declared unconstitutional in the past due to their vague standards.<sup>286</sup> Although both the statutes had subjective standards—such as requiring that an area be “significantly affected by . . . an existing or proposed major public facility” as a part of permitting the Division of State Planning to declare that area one of critical state concern<sup>287</sup>—the court found them to be too vague because they “did not contain sufficient standards to allow a reviewing court to ascertain whether the priorities recognized by the [executive] comport with the intent of the legislature.”<sup>288</sup> In other words, the act did not explain what threshold the legislature had in mind for differentiating merely affected from “significantly affected,” or public facil-

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277. *Id.* (quoting *Microtel, Inc. v. Fla. Pub. Serv. Comm’n*, 464 So. 2d 1189, 1191 (Fla. 1985)).

278. *Id.* (interpreting article II, section 3 of the Florida Constitution and quoting *Sims v. Florida*, 754 So. 2d 657, 668 (Fla. 2000)).

279. *Id.*

280. *Id.*

281. *Id.* (quoting *Lewis v. Bank of Pasco County*, 346 So. 2d 53, 55-56 (Fla. 1976)).

282. *Id.*

283. *Id.* at 332-33.

284. *Id.* at 333.

285. *Id.* (quoting *Fla. Dep’t of Citrus v. Griffin*, 239 So. 2d 577, 581 (Fla. 1970)).

286. *Id.* at 333-34.

287. *Id.* at 333 (quoting FLA. STAT. § 380.05(2)(b) (1975)).

288. *Id.* (internal quotation marks omitted).

ity from “major public facility.”<sup>289</sup> The court determined that the overall net effect of such vagueness was to attempt to grant to the executive “the power to say *what the law shall be*.”<sup>290</sup>

The court then compared those statutes with Terri’s law, which “contains no guidelines or standards that would serve to limit the Governor from exercising completely unrestricted discretion in applying the law.”<sup>291</sup> As examples of the unfettered discretion the law tendered the Governor, the court discussed the lack of any guidance given on whether the Governor should issue a stay of withdrawal of life support, how long the stay should last, and under what circumstances the stay should be lifted.<sup>292</sup>

The court rejected the idea that the unique specificity of the law, including it only being applicable for fifteen days and having application to one person, constituted a sufficient objective limitation. The duration and specificity of the law were irrelevant toward guiding the Governor’s power where permitted by the law.<sup>293</sup> The court also rejected the Governor’s argument that the legislation merely created an extra layer of due process, because while the rest of chapter 765, *Florida Statutes*, required the determination of the incapacitated individual’s desires as to withdrawal of life support, Terri’s law did not provide for the Governor to take those desires into account.<sup>294</sup> Since the due process afforded by chapter 765, *Florida Statutes*, was clearly targeted at reviewing the potential desires of the incapacitated individual and Terri’s law did not expressly require such a review, the court determined that it was essentially an act to upset the finality of a result of due process with which the legislature and the Governor disagreed.<sup>295</sup> Finally, the court tersely rejected the Governor’s argument that Terri’s law was just a valid expression of the State’s police power—“[a]lthough unquestionably the Legislature may enact laws to protect those citizens who are incapable of protecting their own interests such laws must comply with the constitution. Chapter 2003-418 fails to do so.”<sup>296</sup> The court further pointedly criticized the argument by saying that the law did not even aim to protect people incapable of protecting their own interests but was so

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289. *See id.*

290. *Id.* at 334 (quoting *Lewis v. Bank of Pasco County*, 346 So. 2d 53, 56 (Fla. 1976)).

291. *Id.* (quoting with approval the decision of the circuit court which had declared Terri’s law unconstitutional, for violation of the nondelegation doctrine, among other reasons).

292. *Id.*

293. *Id.* at 334.

294. *Id.* at 336.

295. *See id.*

296. *Id.* (citations omitted).

specific that it only protected one person—Schiavo—to the exclusion of all others similarly situated.<sup>297</sup>

Although the court chose to nullify Terri's law as a violation of separation of powers and the nondelegation doctrine, the lower court had declared the law unconstitutional, in addition to other reasons, as a violation of Schiavo's right to privacy.<sup>298</sup> The grandly rhetorical nature of the court's conclusion, however, seems to strongly suggest that the court believes the law implicated many related privacy right concerns. For example, according to the court:

The continuing vitality of our system of separation of powers precludes the other two branches from nullifying the judicial branch's final orders. If the Legislature with the assent of the Governor can do what was attempted here, the judicial branch would be subordinated to the final directive of the other branches. Also subordinated would be the rights of individuals, including the well established privacy right to self determination. No court judgment could ever be considered truly final and no constitutional right truly secure, because the precedent of this case would hold to the contrary. Vested rights could be stripped away based on popular clamor.<sup>299</sup>

In essence, the court had perceived the previous five years of near continuous, contentious litigation as having concluded with a final decision as to the desires of how Schiavo would want to exercise her right to discontinue life-prolonging procedures. Terri's law, though surely drafted with the most sincere intentions, appeared to be a direct attack on Schiavo's fully adjudicated vested right of privacy. Simply put, the legislature and the Governor cannot do that.

#### F. Other Legislative and Judicial Proceedings

A few days after the Florida Supreme Court declared Terri's law unconstitutional, the United States Congress passed Public Law 109-3, entitled "An Act for the Relief of the Parents of Theresa Maria Schiavo."<sup>300</sup> Almost immediately the federal courts balked at the Act's questionable constitutionality, although neither the trial court nor the federal court explicitly declared it unconstitutional. Instead, utilizing the discretion permitted by the Act, the trial court declined to issue a temporary restraining order preventing Schiavo's continued withdrawal from life support,<sup>301</sup> thereby eventually mooting the other

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297. *Id.*

298. *Id.* at 324 n.1 (citation omitted).

299. *Id.* at 337 (citation omitted).

300. *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1382 (M.D. Fla. 2005).

301. *Id.* at 1382-83. Nevertheless, a later sharp concurring opinion by Judge Birch of the Eleventh Circuit Court of Appeals detailed the argument for the Act's unconstitutionality and subsequently urged the federal court system to decline all jurisdiction over the case

issues by reason of Schiavo's death. The Middle District of Florida, upheld on direct appeal to the Eleventh Circuit Court of Appeals, denied a temporary injunction on behalf of the Schindlers because the court determined that the Schindlers had very little chance of winning their case upon the merits.<sup>302</sup> Even after discussing the potentiality of irreparable injury to be suffered by Schiavo, the threat of the injury outweighing the harm to be inflicted by the temporary injunction, and the potential public utility of the issuance of the temporary injunction—which are three of the four factors examined when a court is asked to issue an injunction—the court upheld the propriety in refusing the injunction due to the minimal likelihood of the Schindlers eventually winning on the merits.<sup>303</sup>

After the Schindlers' failure to obtain federal review through the aid of Public Law 109-3, they alleged nine different and independent claims in an attempt to otherwise obtain federal review.<sup>304</sup> Again, after a lengthy and detailed analysis of each claim, where the claims ranged from a violation of Schiavo's rights under the Americans with Disabilities Act<sup>305</sup> to a breach of procedural due process,<sup>306</sup> the court flatly refused to reverse the trial court's decision not to enter an injunction.<sup>307</sup>

After a final failed flurry of appeals, on March 31, 2005, Schiavo died, quite publicly, pursuant to her adjudicated right of privacy to withdraw herself from life support.<sup>308</sup>

### G. Conclusion

After a lengthy trial, a guardianship court determined by clear and convincing evidence that Schiavo was in a persistent vegetative state and that she would invoke her privacy right to discontinue life support if she were competent to make that decision. In furtherance of Schiavo's judicially determined wishes and pursuant to applicable statutory and constitutional law, the court ordered her withdrawal from life support. After the guardianship court's determination was reviewed and reaffirmed in an unprecedented number of judicial proceedings, the Florida legislature passed a law aimed at preventing

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as one decided with finality by the state courts of Florida. *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1271-78 (11th Cir. 2005) (Birch, J., concurring). *But see id.* at 1279-81 (Tjoflat, J., dissenting).

302. *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1383-84 (M.D. Fla. 2005).

303. *Id.* There was, of course, a lengthy analysis on this issue rendered by the court, but that analysis goes beyond the scope of this Note.

304. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1291 (11th Cir. 2005).

305. *Id.* at 1291-94 (11th Cir. 2005).

306. *Schiavo v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005).

307. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d at 1296.

308. Hulse & Kirkpatrick, *supra* note 231.

the enforcement of the judicial order rendered pursuant to the court's determinations, and the Supreme Court of Florida, perceiving the law as a direct threat to Schiavo's adjudicated privacy rights, nullified the law as violating the Florida Constitution's separation of powers. Soon after that nullification, the United States Congress passed a law permitting federal review of the guardianship court's determination. Suspicious of that law's constitutionality and because of the very small likelihood of success on the merits, the federal court refused to order a temporary injunction that would have reconnected Schiavo to life support, while the court offered federal review of the merits of the Schindlers' claims. As a result, before the Schindlers' claims could be reviewed by the federal judiciary, they were mooted by the death of their daughter.

