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Terri Schiavo–Enduring Questions, Part Two

The feminist movement championed the motto, “The personal is the political.” This is certainly true in the tragic case of Terri Schiavo, whose personal reality—having her life terminated by a judicial decree—has become one of the nation’s hottest political issues. The issues swirling about this debate are both urgent and enduring. How society answers these questions will frame, not only this nation’s approach to matters of life and death, but the moral character of this civilization. Yesterday, we considered the questions, “What does this mean for the culture?” and “What does this mean for the future?” Today, we turn to consider even more enduring questions brought to light by Terri Schiavo’s case.

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Third, what does this mean for the courts? Without doubt, the courts have failed Terri Schiavo. Charged with upholding due process rights and equal protection for all citizens, a succession of courts—both state and federal—failed Terri Schiavo by accepting debatable assertions presented by compromised agents, and by refusing to consider the more fundamental issues at stake.

Columnist Charles Krauthammer of The Washington Post—trained as both an attorney and a physician—argues that the courts failed Terri Schiavo by blind and uncritical adherence to “the generally sensible rules of Florida custody laws.” As Krauthammer argues, “The general rule of spousal supremacy leads you here to a thoroughly repulsive conclusion.” Krauthammer is referring to Michael Schiavo, Terri Schiavo’s husband, who has been pressing for her death in recent years. Acting as her court-recognized legal agent, Schiavo has claimed that Terri had expressed a desire not to be kept alive by artificial means. Nevertheless, Michael Schiavo, many would argue, is no longer qualified to serve as Terri’s legal agent with the presumption that he is acting in her best interests. As Krauthammer frames the issue: “The problem is that although your spouse likely knows you best, there is no guarantee he will not confuse his wishes with yours. Terri’s spouse presents complications. He has a girlfriend, and has two kids with her. He clearly wants to marry again. And a living Terri stands in the way.”

The courts have, following established precedent, simply accepted Michael’s claim that Terri would prefer to be dead. Terri’s parents, Robert and Mary Schindler, want to keep Terri alive and believe that this would have been her wish. Since Terri left no written record of her intentions, the courts have simply sided with Michael. As Krauthammer recognizes, “One’s natural human sympathies suggest giving custody to the party committed to her staying alive and pledging to carry the burden themselves.”

As for Terri Schiavo’s medical condition, Krauthammer is unconvinced. Michael Schiavo has not allowed any extensive medical tests in recent years, so Terri’s condition is endlessly debated. As Krauthammer argues, the medical evidence “is sketchy, old and conflicting.” Beyond all this, Krauthammer simply corrects the assumption that even if Terri Schiavo is in a persistent vegetative state, she should simply be considered unworthy of life. In Krauthammer’s words, “we do not go around euthanizing the minimally conscious in the back wards of the mental hospitals on the grounds that their lives are not worth living.”

Looking at the larger legal context, Krauthammer sensibly argues for the passage of legislation that would allow courts far greater discretion in resolving conflicts among the loved ones of patients who cannot speak for themselves. But, as sensible as Krauthammer's proposal is, it likely would not fare well in the courts.

If the sad case of Terri Schiavo has demonstrated anything, it has pointed to a horrible set of legal precedents and court decisions. The courts have increasingly identified a "right to die" as a matter of legal protection and, in some cases, of constitutional right. In so doing, the courts have put themselves into inevitable conflict with larger moral questions.

When the U.S. Supreme Court handed down its infamous *Roe v. Wade* ruling on abortion in 1973, it based its decision on a medical structure of pregnancy trimesters that is now thoroughly out of date and should have been discredited from the start. Similarly, in its 1990 decision, *Cruzan v. Director*, the Court determined that hydration and food were forms of medical treatment that could be denied, either by the patient or by the patient's legal agent. These precedents set the stage for the tragedy experienced by Terri Schiavo.

Amazingly enough, those pushing for Terri Schiavo's death now champion her case as a triumph of "judicial supremacy." A myriad of commentators, political analysts, and editorialists have suggested that, in Terri Schiavo's case, the courts were a bulwark of sanity, process, and the avoidance of political considerations. Nothing could be further from the truth. As a matter of fact, the courts were deeply imbedded in a political process, and the refusal of a U.S. federal judge to follow the clear will of Congress and the President constitutes a threat to the separation of powers.

In an astounding article published in the March 24, 2005 edition of *The New York Times*, reporter Adam Liptak makes this startling opening comment: "The United States Congress and the governor of Florida have devoted extraordinary and all but single-minded energy to keeping Terri Schiavo alive. But all they have achieved so far is a bitter lesson in judicial supremacy."

Liptak congratulates Florida Circuit Court Judge George W. Greer and a succession of federal judges for being the "teachers" who have humbled the executive and legislative branches of government. Liptak continues: "If nothing else, this series of decisions vindicated the one conception of American judicial power." He cites Eric M. Freedman, a law professor at Hofstra University as saying, "It has been the basic premise of the three-branch system set up by the Constitution that judgments in individual cases are to be made by judges and not legislative bodies or executive officials. That division, which originated from unhappy experience in England, has been a valuable protection of liberty in this country over many centuries." Likewise, Mark Tushnet, a law professor at Georgetown University warned, "Judges don't like to be fooled around with. If executive officials or legislators do something that judges think look as if they're being fooled around with, it will be extremely resistant." Evidently, Professor Tushnet believes that judges are a force of nature. "You can mess with Mother Nature," he asserted, "but it's really hard to do effectively. Mother Nature has a lot of tools at her disposal. So do judges."

Liptak seems to be completely oblivious to the internal contradictions found within his article. One cannot argue that the three branches of government are equal and then champion "judicial supremacy."

Some observers and advocates have condescendingly chastised those seeking to protect Terri's life for attempting recourse through the federal courts. Some have asserted repeatedly that this is a matter of state court jurisdiction and that federal courts should neither review nor correct. Of course, this logic would mean an absolute end to all death penalty appeals to federal courts. Why do we not hear the same arguments presented in favor of state court supremacy when a prisoner on death row appeals for a federal review of his death sentence?

Once again, the court system has become a focus of controversy and an engine for a cultural agenda. The vast expansion of court authority and judicial activism should cause a chill to go down every American spine. Unless these trends are checked, we are increasingly facing a government ruled by judges, for judges, in the name of the courts. This is no way to run a democracy.

Fourth, what does this mean for conservatism? The conservative movement is not monolithic, and that reality has been brought clearly to public attention as the controversy over Terri Schiavo has unfolded. Conservatives come in several flavors, and the conservative movement includes social conservatives primarily driven by moral conviction and worldview concerns, libertarians primarily concerned with limiting the power of the state and expanding the power of the individual, and fiscal conservatives who are primarily driven by economic concerns and a desire to limit government and

expand the private sector.

The Terri Schiavo tragedy has exposed what may be deep rifts and broadening divides among conservatives. Clearly, some liberals hope this is the case. Some, like David S. Broder, columnist for The Washington Post, go so far as to try to lecture conservatives for abandoning “sound conservative principles” in an effort to save Terri Schiavo’s life.

From within the conservative movement, some have pointed to increasingly important distinctions. “This is a clash between the social conservatives and the process conservatives, and I would count myself a process conservative,” said David Davenport of The Hoover Institution in comments published in the March 23, 2005 edition of The New York Times. As Davenport continued, “When a case like this has been heard by 19 judges in six courts and it’s been appealed to the Supreme Court three times, the process has worked—even if it hasn’t given the result that the social conservatives want. For Congress to step in really is a violation of federalism.”

By definition, conservatives are prone to trust established institutions, habits, and structures. The problem comes when an established institution like the courts violate matters of deep moral conviction. In the same article, Arkansas Governor Mike Huckabee acknowledged an apparent conflict between states’ rights and moral concern. “There’s a larger issue in play, and that is the whole issue of the definition of life,” the governor asserted. “The issue of when it is a life is a broader issue than just a state defining that. I don’t think we can have 50 different definitions of life.”

Conservatives and liberals need to be honest in acknowledging that each side can argue for federalism when it suits their cause. In the debate over same-sex marriage, social liberals have become converts to a states’ rights agenda, arguing as newly-convinced federalists that the federal government should allow the states to establish whatever definitions of marriage each may choose. On the issue of abortion, these same liberal activists are decidedly opposed to the right of any state to limit abortion in any manner. Conservatives need to acknowledge the divisions in the conservative movement and the reality of conflict in conservative principles. Nevertheless, Governor Huckabee is decidedly right. When an issue of life or death is at stake, concerns over federalism are a luxury conservatives cannot afford.

At the same time, this controversy points to larger issues that might well divide the conservative movement in years ahead. The libertarians, focused almost exclusively on individual liberty, are increasingly averse to morals legislation. Fiscal conservatives are more willing to negotiate on matters of deep moral concern. All conservatives must recognize that deep worldview implications underlie every significant question. The conservative movement that will not contend for the sanctity of human life is a conservative movement that does not deserve to survive.

