

## **SCHIAVO LAW PROMPTS CONSTITUTIONAL QUESTIONS** Federal Courts Sidestep, But the Issues Raised by Congress Trouble Experts

BY DAVID L. HUDSON JR.

The Terri Schiavo case presented an array of challenging moral, philosophical and legal questions as it moved through the American federal judicial system this week.

The U.S. Supreme Court yesterday declined to hear an appeal of the case from the Atlanta-based 11th U.S. Circuit Court of Appeals after the federal appeals court denied a petition for an expedited en banc rehearing.

But had the justices taken it, they may have had to trek through a thicket of perplexing constitutional issues stemming from what the appellate court called "extraordinary" legislation that Congress passed earlier this week.

The measure, Pub. L. No. 109-3, was signed into law by President Bush at 1 a.m. Monday. It was specifically tailored to give a federal district court in Florida jurisdiction to hear suits filed on behalf of Schiavo by her parents.

But experts say the legislation raises questions of such weighty constitutional issues as federalism, separation of powers, abstention, standing and the proper conferral of jurisdiction to federal courts.

"There is no perfect paradigm for analyzing this law," says Vikram Amar, a law professor at the University of California Hastings School of Law. "But it certainly raises eyebrows when Congress passes a procedural regime for one person only."

Under the law, "the district court shall determine de novo any claim of a violation of any right of Theresa Marie Schiavo ..... notwithstanding any prior state court determination and regardless of whether such a claim has previously been raised, considered or decided in state court proceedings."

The legislation enabled Schiavo's parents to file a federal lawsuit immediately with the U.S. District Court for the Middle District of Florida in Tampa. *Schiavo ex rel. Schindler v. Schiavo*, No. 8: 05-CV-530-T-27TBM.

The suit asked the court to issue a temporary restraining order, preliminary injunction and permanent injunction preventing the continuance of a Feb. 25 state-court order to withhold or withdraw foods, fluids and medical treatment necessary to keep Terri Schiavo alive. The lawsuit asserted a variety of claims, both constitutional and statutory.

On Tuesday, U.S. District Judge James D. Whittemore sidestepped the constitutionality of the law, dismissing the plaintiffs' motion by finding no "substantial likelihood of success on the merits."

The plaintiffs quickly appealed to the 11th Circuit, which affirmed the district court in a 2-1 decision Wednesday. [\*Schiavo ex rel. Schindler v. Schiavo\*](#), No. 05-11556.

"There is no provision in Pub. L. No. 109-3 addressing whether or under what conditions the district court should grant temporary or preliminary relief in this case," the majority opinion said. "To interpret Pub. L. No. 109-3 as requiring that temporary or preliminary relief be entered regardless of whether it is warranted under pre-existing law would go beyond reading into the act a provision that is not there. It would require us to read into the act a provision that Congress deliberately removed in order to clarify that pre-existing law did govern this issue."

In a dissent, Judge Charles Wilson, an appointee of President Clinton, said denying the motion "frustrates Congress" intent, which is to maintain the status quo by keeping Theresa Schiavo alive until the federal courts have a new and adequate opportunity to consider the constitutional issues raised by plaintiffs."

Although the federal courts avoided the law's complex constitutional questions, the measure nevertheless unsettled experts who question whether it comports with fundamental constitutional principles of separation of powers and federalism.

Some scholars point to the Supreme Court's *Rooker-Feldman* doctrine, drawn from the cases *Rooker v. Fidelity Trust Co.*, 261 U.S. 114 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The doctrine provides generally that lower federal courts may not hear appeals from state courts.

"It violates the basic principles of federalism that the *Rooker-Feldman* doctrine embodies," says Duke University School of Law professor Erwin Chemerinsky. "It allows a federal district judge to review a final judgment issued by a state court. Habeas corpus allows this, too, but never before has Congress created federal jurisdiction with the goal of overturning a single state court decision."

Others point to the abstention doctrine, also rooted in federalism, that if a party is in state court on state and federal claims, the party cannot suddenly switch gears to federal court.

Vanderbilt University Law School professor Tom McCoy questions whether Congress could constitutionally suspend the doctrine, confer standing on Schiavo's parents and confer jurisdiction on the federal district court.

"There are problems with all three of the things that Congress did in this statute," McCoy says. "Even if abstention is not technically based on Article III" of the Constitution, which sets up the judicial branch, "it is based on Article III concerns about the relationship of the federal courts and the state courts."

McCoy points to similar concerns with standing "because if the standing requirement is rooted in Article III, Congress can't confer it. There is also a problem with jurisdiction if the constitutional claims that are the basis of the jurisdiction are not plausible."

Legal experts also question whether the legislation comports with fundamental separation-of-powers principles. "Under separation of powers, it is the judicial role to decide specific cases," Chemerinsky says. "The legislature adopts laws of general

applicability. This is Congress attempting to determine the outcome of a specific case. The bill adopted on Monday morning applies to one, and only one, case."

Amar of Hastings agrees, adding his concerns about the "person-specificity" of the law. "This is a law passed only about Schiavo and for Schiavo."

Amar points to the two hallmarks of legislation: generality and prospectivity, which means making sure laws apply to a large number of people and that they are forward-looking. "This bill fits uncomfortably in that matrix," he adds.

However, Amar says, "Congress can pass person-specific laws that extend to individuals" special benefits. For instance, one can pass a law that cuts a company a tax break or that allows a particular person to become a citizen."

Another constitutional expert views the legislation as unwise but doesn't necessarily see constitutional problems. "Congress clearly has the power to set procedural rules for federal courts and to determine what kinds of federal issues can be heard by federal courts," says George Mason University School of Law professor Ilya Somin. "There are constitutional constraints on this general principle, but given the limited scope of this law, I don't see such constraints in this case.

"This is not a law that creates substantive rights," he adds. "It is a purely procedural law that provides that a person can bring a claim in federal court on specific federal statutory and constitutional issues."

The law is part of a pattern in which some conservatives undercut federalism to accommodate policy goals, Somin says. "To that extent, I find the law troubling."