TENNESSEE LAW AND THE SANCTITY OF LIFE

Ned Williams[1]

Tennessee, long known as the Volunteer State, has a cultural and political history that reflects a maverick and pioneering spirit. Tennessee figures like Andrew Jackson, Davy Crockett, and Sam Houston accepted the challenges of our nascent republic's frontier and notoriously volunteered to face similar challenges in places like the Alamo and New Orleans.[2] With a history of valuing independence, Tennessee has elevated political and social leaders that exhibit independence, which has allowed Tennessee's leaders to operate as proverbial "free agents." Thus, at least in recent decades, a disproportionate number of national leaders from both major political parties have hailed from Tennessee, a fact which reflects that this state produces politicians with broad ideological appeal . . . or no ideology to speak of.[3]

Accordingly, it is unsurprising that the Tennessee Supreme Court would be in the vanguard of the "New Federalist" movement—a movement wherein state supreme courts rely upon their state constitutions to provide expanded rights or freedoms as compared with those provided by the Federal Constitution.[4] This relatively recent movement to assert independence from Federal precedent provides both opportunities and challenges for those concerned about the sanctity of life on the state level. And Tennessee's Supreme Court over ten years ago had established itself as one of the most activist courts in the nation, deciding constitutional issues using state grounds more than fifty percent of the time.[5]

Despite granting Republicans significant electoral success on the Federal level since 1994, Tennesseans have elected Democratic majorities in *both* houses of the General Assembly

[1] Ned Williams is an attorney with a solo practice in Nashville, Tennessee.
[2] *National Guard* Magazine, Darrin Haas, Oct. 2006.
[3] For example, Senators Howard Baker, Al Gore, Jr., Jim Sasser, Lamar Alexander and Bill Frist—representing a state ranked in the upper teens in population among all U.S. states, rose to leadership positions in the Senate and Executive branches in the past 2.5 decades. *See* U.S. Census Data for 1980, 1990, 2000, 2006. Tennessee 2005-2006 Bluebook, pp. 445, 448-50
[4] *See* Carolyn Jourdan, Note, *Tennessee Judicial Activism: Renaissance of Federalism,* 49 TENN. L. REV. 135, 135 (1981).
[5] *See* William C. Koch, *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 339.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

in every session prior to the 2004 elections, and 21 out of 30 Tennessee governors since Reconstruction have been Democrats. As a result, the Democratic Party has maintained a veritable choke hold over Tennessee's judicial selection process. Because the Democratic Party is the more Liberal of the two major American political parties, Tennessee's appellate courts have predictably ruled contrary to the sanctity of innocent human life.

In sum, the "New Federalism" movement has provided a license for Tennessee courts to move against the national tide toward honoring innocent human life. In light of these jurisprudential trends in Tennessee, pro-life Tennesseans will have difficulty accomplishing more than minor objectives. Nevertheless, there are a variety of pro-life reforms that could occur in Tennessee.

I. LIFE ISSUES

Abortion

Tennessee became a state in 1796 and began regulating abortion in 1883, making the act illegal except to preserve the "life" of the pregnant woman.[6] And the law on abortion was largely unchanged from 1883 until after the U. S. Supreme Court's decision in *Roe v. Wade*[7]. *Roe v. Wade* struck down a Texas abortion statute which, like Tennessee's statute, banned all abortions except to protect a woman's life.[8] More specifically, the U. S. Supreme Court held in *Roe* that the U. S. Constitution implicitly provides a right to privacy which includes a woman's "fundamental right" to terminate her pregnancy, and this right is deserving of heightened scrutiny against state restrictions.[9] The *Roe* Court also held, however, that the State has legitimate interests in health, medical standards, and potential life.[10] As part of this determination, the Court established a trimester framework pursuant to which the State's interests in maternal health and potential life should be balanced against the mother's right to an abortion.[11]

---

[6] 1883 Tenn. Pub. Act, ch. 140 (codified as TENN. CODE ANN. § 5371 (2007) and TENN. CODE ANN. § 5372 (2007)).
[7] 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)
[8] *Id.* at 154-55.
[9] *Id.*
[10] *Id*. at 162-63.
[11] *Id*. at 163-64.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

According to the *Roe* decision, the State's interest *in maternal health* becomes compelling after the first trimester, and the State's interest *in potential life* becomes compelling after the second trimester. Lastly, the *Roe* decision provided that the State may prohibit abortion in the third trimester unless a mother's health necessitates an abortion. Despite this ostensible prohibition, the Court intended that "health" be construed rather broadly, as stated in *Doe v. Bolton*, 410 U.S. 179 (1973), an opinion released on the same day as *Roe*:

> Whether, in the words of the Georgia statute, "an abortion is necessary" is a professional judgment that the Georgia physician will be called upon to make routinely. We agree with the District Court, 319 F. Supp., at 1058, that the medical judgment may be exercised in the light of all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the wellbeing of the patient. All these factors may relate to health."[12]

Following the Supreme Court's decision in *Roe v. Wade*, the Tennessee General Assembly enacted legislation which adopted the trimester framework set forth in *Roe* and purported to restrict abortion in a variety of ways.[13] In particular, the amended law allowed abortion for any reason in the first trimester if the woman consented and the abortion were performed pursuant to the medical judgment of a licensed physician. *See* Tenn. Code Ann. § 39-301(c)(1). Also, the amended statute allowed abortion for any reason during the second trimester (and prior to "viability") if the woman consented, if the abortion occurred in a hospital and if it was performed by the woman's attending physician. *Id.* at subsection (2). Finally, the amended statute allowed abortion during the third trimester where it was deemed "necessary to preserve the life or health of the mother" and if the woman consented, if the abortion was performed in a hospital by the woman's attending physician, if the woman's physician stated in writing that an abortion was necessary "to preserve the life or health of the mother," and if the woman demonstrated that she was a bona fide resident of Tennessee. [14]

[12] *Id*. at 192
[13] Public Chapter 235, 1973 Tenn. Pub. Acts, ch. 235 (codified as Tenn. Code Ann. § 39-301 (Supp.1973)).
[14] *See* Tenn. Code Ann. § 39-301(c)(1-3) and 39-301(f).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

Subsequently, the Tennessee legislature enacted additional regulations on abortion. In 1974, the General Assembly increased the punishment for statutory violations.[15] In 1978, the General Assembly provided for State custody of a fetal human born alive during an abortion,[16]enacted the physician-only informed consent requirements, and a waiting period requirement.[17] The two latter provisions required the "attending physician" to verbally inform the woman of statutorily-prescribed information, and required a two-day waiting period after which the woman could return to the physician, provide written consent, and obtain the abortion. In 1989, the legislature re-codified the abortion statutes as a part of a general re-codification of Tennessee's criminal code.[18]

Most of Tennessee's post-*Roe* statutes have been the subject of constitutional challenges in either state or Federal court; in particular, litigants attacked waiting period requirements, informed consent requirements and the criminal penalties for violating these restrictions.[19] These legal stop-gap measures notwithstanding, the current state of the law on abortion in Tennessee is anchored to a decision by the state Supreme Court in one case: *Planned Parenthood of Middle Tenn. v. Sundquist*.[20]

In *Sundquist*, the Tennessee Supreme Court ruled that abortion is part of an implied right to privacy protected by the Tennessee Constitution and not contingent on the U.S. Constitution.[21] Further, the *Sundquist* opinion departed from Federal precedent on abortion by holding that the right to abortion was fundamental and protected by the highest standard of judicial review. The *Sundquist* majority wrote:

---

[15] 1974 Tenn. Pub. Acts, ch. 471 (codified as TENN. CODE ANN. § 39-301 (1975)).
[16] 1978 Tenn. Pub. Acts, ch. 811, § 2 (codified as TENN. CODE ANN. § 39-307 (1978)).
[17] 1978 Tenn. Pub. Acts, ch. 847 (codified as TENN. CODE ANN. § 39-302 (1978)).
[18] 1989 Tenn. Pub. Acts, ch. 591, § 1 (codified as Tenn. CODE ANN. §§39-15-201 – 39-15-208 (1989)); *Planned Parenthood Ass'n v. McWherter*, 817 S.W.2d 13, 16 (Tenn. 1991); *Sundquist*, 38 S.W.3d at 14.
[19] *See Planned Parenthood of Memphis v. Blanton,* No. 78-2310, 1978 U.S. Dist. LEXIS 20391 (W.D. Tenn. July 14, 1978) (continuing the temporary injunction against the waiting period requirements); *Planned Parenthood of Nashville, Inc. v. Alexander*, No. 79-843-II, slip op. (Cir. Ct. Davidson County Oct. 19 & 24, 1979) (temporarily enjoining imposition of criminal penalties as related to informed consent and waiting period requirements); *Planned Parenthood of Memphis v. Alexander*, No. 78-2310, 1981 U.S. Dist. LEXIS 18617 (W.D. Tenn. Mar. 23, 1981) (permanently enjoining enforcement of the 1978 waiting period statute); *Sundquist,* 38 S.W.3d at 15.
[20] 38 S.W.3d 1 (Tenn. 2000).
[21] *Id.* at 11, 15.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

> We specifically hold that a woman's right to terminate her pregnancy is a vital part of the right to privacy guaranteed by the Tennessee Constitution. We further hold that the right is inherent in the concept of ordered liberty embodied in our constitution and is therefore fundamental. Accordingly, the statutes regulating this fundamental right must be subjected to strict scrutiny analysis. When reviewed under the correct standard, we conclude that none of the statutory provisions at issue withstand such scrutiny.[22]

The *Planned Parenthood v. Sundquist* decision had a radical, two-fold impact on abortion law in Tennessee. First, the *Sundquist* court's two-faceted jewel of "new federalism" ensured that the practice of abortion in Tennessee could not be affected by any future changes in the abortion-friendly, Federal precedent of *Roe v. Wade*. Second, the *Sundquist* decision departed from Federal precedent and effectually "remove[d] from the people all power, except by constitutional amendment, to enact reasonable regulations of abortion."[23]

The Tennessee Supreme Court cited *Miller v. State* as precedent in holding that Tennessee's Constitution contained protections for privacy rights beyond those previously found in the U.S. Constitution:

> [A]s to Tennessee's Constitution, we sit as a court of last resort, subject solely to the qualification that we may not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional guarantees. But state supreme courts, interpreting state constitutional provisions, may impose higher standards and stronger protections than those set by the federal constitution. It is settled law that the Supreme Court of a state has full and final power to determine the constitutionality of a state statute, procedure, or course of conduct with regard to the state constitution, and this is true even where the state and federal constitutions contain similar or identical provisions. . . .[24]

While acknowledging the validity of this unremarkable assertion of federalist principle, Justice William M. Barker authored a lengthy, detailed dissent from the majority opinion. Regarding the finding that Tennessee's Constitution contained a privacy right "far more extensive" than that provided by the federal Constitution, Barker argued that the majority's opinion had departed from the history, language and precedent regarding the pertinent clause--

---

[22] *Id.* at 4.
[23] *Sundquist*, 38 S.W.3d at 39 (Barker, J., dissenting). As Justice Barker ~~would~~ noted in his dissent, there was no recorded instance in Tennessee of a challenged law withstanding the application of the strict scrutiny standard.
[24] *Id.* at 15 (*citing* Miller v. State, 584 S.W.2d 758, 760 (Tenn. 1979)).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

"Law of the Land" Clause, in order to reach the "judicially desired result in this case."[25]. Barker wrote:

> ". . . this court has consciously decided to ignore two centuries of settled constitutional interpretation concerning the proper scope of our Constitution. Despite the settled meaning of Article I, section 8, the Court has taken it upon itself to suddenly change the import of this provision so as to reach its desired conclusion."[26]

The *Sundquist* majority reasoned that because Tennessee's right to privacy is a fundamental right, statutes restricting that right--as well as other "rights" emanating from it, must be evaluated under the "strict scrutiny" standard.[27] This holding was a departure from the existing federal precedent established by the U.S. Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), that the U.S. Constitution requires review under the "undue burden" standard and not strict scrutiny.[28] The result of the *Sundquist* decision is that abortion is protected for any reason until the developing fetus is "viable," and even after "viability," an abortion cannot be prohibited where it is deemed "necessary to protect the life or the health of the mother."[29]

Justice Barker also strenuously dissented from the majority's finding that strict scrutiny of abortion regulations was required by Tennessee's Constitution. Barker noted with incredulity the majority's holding "that the rights to privacy and abortion are 'inherent' and fundamental, though neither enjoys textual support in the [state] Constitution.[30] In sum, Barker provided this splendid defense of "rule of law"—one tenet of "old federalism":

> The Court's decision today illustrates well the dangers of constitutional interpretation that is akin to "making it up as you go." The majority can offer no legitimate reason why strict scrutiny analysis is compelled other than it can require this standard through exercise of its inherent authority. Because the right of privacy enjoys no textual support in our Constitution, the right serves at the pleasure of the judiciary, and therefore, it can be easily manipulated by courts desiring to legislate from the bench. Expansion and

---

[25] *Id.* at 38 (Barker, J., dissenting).
[26] *Id.* at 26 (Barker, J., dissenting).
[27] *Sundquist*, 38 S.W.3d at 15.
[28] *Casey*, 505 U.S. at 877. As Justice Barker stated in his *Sundquist* dissent, the *Casey* decision defined the phrase "undue burden" as "shorthand for those regulations which have the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Sundquist*, 38 S.W.3d at 43 (Barker, J., dissenting).
[29] *Sundquist*, 38 S.W.3d at 25.
[30] *Id.* at 40 (Barker, J., dissenting).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

> "interpretation" of this "fundamental right" of privacy allow courts to impose upon the people their own view of the wisdom, propriety, and desirability of challenged legislation.[31]

Barker's lengthy dissent argues convincingly that the Court's opinion was more a demonstration of judicial will than judicial reasoning.

Though the "new federalist" exercise of *Planned Parenthood v. Sundquist* was sweeping and seemingly aimed at enshrining abortion as a fundamental right in Tennessee, one impact of the decision was to clearly define which restrictions on abortion will not offend the Tennessee Constitution as construed by the *Sundquist* court. Accordingly, the following sections will address current and proposed legislation in Tennessee related to the sanctity of human life.

Parental Consent

There has been extensive litigation and substantial legislative activity on the issue of Parental Consent in Tennessee, and current statutes require parental consent from at least one parent before an unemancipated minor may obtain an abortion.[32] The statute contains a judicial bypass provision and an "imminent medical emergency" exception.

Tennessee's Attorney General has opined that this parental consent requirement also applies where a physician seeks to administer RU-486 to an unemancipated minor whom the physician knows to be pregnant, with pregnancy defined as beginning at implantation.[33]

Informed Consent

Tennessee ostensibly requires a physician to obtain the informed written consent of a woman before administering an abortion;[34] however, the restriction is of virtually no effect because other parts of the statute specifying the information to be conveyed to the pregnant woman were struck down in *Planned Parenthood of Middle Tenn.v. Sundquist*.[35] Indeed, in *Sundquist,* the Tennessee Supreme Court held that provisions of the law requiring (a) straightforward counseling about the medical risks and realities of an abortion, (b) physician-only counseling, and a mandatory two-day waiting period requirement (with an emergency

[31] *Id.* at 41 (Barker, J., dissenting).
[32] See TENN. CODE ANN. § 37-10-303.
[33] Op. Att'y Gen. No. 01-030 (Tenn. 2001).
[34] TENN. CODE ANN. §§ 39-15-201(c)(1) – 39-15-202(a) (enacted 1989; amended 1995).
[35] *Sundquist*, 38 S.W.3d 1; Nelson, *supra* note 6, at 163 and 166.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

exception for the “life” of the mother), were unconstitutional.[36] In subsequent amendments to the law, legislators have been careful to include language that makes the law severable, meaning that if one element of the law is held to be unconstitutional, the remaining provisions not found to be unconstitutional will stand.[37]

The *Sundquist* Court struck down all the informed consent provisions of title 39, chapter 15, section 202 of the Tennessee Code, even though the Court had only determined that a single provision requiring that the information be supplied by a physician, was unconstitutional. The Court declared unconstitutional the following elements of informed consent: (1) the number of weeks elapsed from the probable time of conception and, if more than twenty-four weeks have elapsed, that the "child" may be viable and the physician has "a legal obligation to take steps to preserve the life" of a viable "child"; (2) that "abortion in a considerable number of cases constitutes a major surgical procedure"; (3) that "numerous" public and private agencies and services are available to assist her during her pregnancy and after the birth of the child and that her physician will provide her with a list of such agencies and services upon request; and (4) the risks and benefits associated with abortion and with childbirth.

One area for potential legislative action in Tennessee would be to enact the substantive informed consent requirements struck down in *Planned Parenthood v. Sundquist* while providing that any health professional employed by a doctor performing an abortion to communicate the information to the woman. Legislation along these lines was introduced in both houses of the General Assembly in recent sessions but never made it out of committee.[38]

Likewise, the broad ruling in *Planned Parenthood v. Sundquist* provides opportunities for reform of our laws regulating abortion clinics. The Tennessee Legislature has previously attempted to raise operating standards in abortion facilities to a level commensurate with the nature of abortion as a highly invasive surgical procedure.[39] Despite reasonable regulations for this purpose, an unpublished and unchallenged Tennessee Court of Appeals decision struck down these regulations holding that the statute was unconstitutional because it failed to give “fair

[36] *Id.* at 22-23.
[37] TENN. CODE ANN. § 37-10-303, 2006 Public Acts c. 952 §§ 1.3 effective July 2006.
[38] 2007 SB 156—Herron; HB1848—Pinion.
[39] *See* TENN. CODE ANN. § 68-11-201(3) (2007).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

notice" of what it required and because it encouraged "arbitrary and discriminatory" enforcement.[40] In particular, the Court held that a law merely defining the facilities to be regulated as ones in which a "substantial number" of abortions are performed was unconstitutionally vague.[41]

That is a valid holding and one area of potential legislative action would be to re-enact the facility regulations codified at Tenn. Code Ann. § 68-11-201(3) while modifying them to include a clear definition of which medical facilities would be subject to higher standards.

Protection of the Unborn from Criminal Violence

Tennessee statute protects an unborn human determined to be a "viable fetus" from criminal violence except as allowed under Title 39 of the Tennessee Code—that is, unless the "violence" committed is pursuant to a "lawful abortion."[42] The statute even contains this sweeping statement: "It is the legislative intent that this section shall in no way affect abortion, which is legal in Tennessee."[43] There is a single reported case interpreting this statute and this type of legislation is fairly uncontested because it does not impinge on the premise that a pregnant woman is "master" of whether the developing life within her is something worthy of protection. Nevertheless, certain Attorney General's opinions affirm the State's interest, wholly apart from a pregnant woman's judgments, in protecting human life in the womb.[44]

Similarly, Tennessee's code provides a right of action for wrongful death where the deceased was a fetus "viable at the time of injury."[45]

One potential legislative change would be to amend the child abuse statute, Tenn. Code Ann. § 39-15-401, to include a viable fetus in the definition of "child."

---

[40] *Tennessee Dept. of Health v. Boyle*, M2001-01738-COA-R3-CV, 2002 WL 31840685 at 6* (Tenn. Ct. App. Dec. 19, 2002).

[41] *Id*. at 8*.

[42] *See* TENN. CODE ANN. §§ 39-13-107 and -214 (2007); §§39-15-205---207.

[43] TENN. CODE ANN.§ 39-13-214(c).

44 State v. Hudson, 2007 WL 1836840 (Tenn.Crim.App. Jun 27, 2007) (NO. M2006-01051-CCA-R9CO) (held that mother's injury/cocaine use during pregnancy and resulting injury to viable fetus did not fall under "assault.").

[45] *See* TENN. CODE ANN. § 20-5-106(c).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

Assisted Suicide

The Tennessee Code expressly prohibits "assisted suicide."[46] In particular, Tennessee prohibits intentionally providing another person with the means to directly and intentionally bring about such person's own death; or intentionally participating in a physical act by which another person directly and intentionally brings about such person's own death; to include knowingly and intentionally providing the means. The statute excludes medical care and recognizes the recent developments regarding self-determination as to medical treatment.

A statute similar to Tennessee's was affirmed by the U.S. Supreme Court in 521 U.S. 793, 804-09; 117 S.Ct. 2293; U.S.N.Y.,1997, (Jun 26, 1997).There is no reported Tennessee case law regarding this statute.

Healthcare Rights of Conscience

The Tennessee Code allows physicians, pharmacists and other healthcare agents working *privately* or employed by *private institutions* to refuse to provide contraception.[47] In addition, no physician or hospital may be forced to participate in an abortion, and no hospital may be required to permit the performance of an abortion or to accept a patient for an abortion.[48]

In recent sessions of the Tennessee General Assembly, State House member Glen Casada (R-Franklin) and State Senator Raymond Finney (R-Maryville) have proposed model legislation entitled the "Pharmacist's Freedom of Conscience Act."[49] In sum, the bill would allow any pharmacist to refuse to fill any prescription that violates his or her religious or ethical values. In the 2005 and 2006 sessions, these bills never made it out of committee.

There are no reported Tennessee state court decisions regarding these statutes.

Cloning

Although procedures such as "cloning" or "somatic cell transfer" are not specifically addressed in Tennessee statute or case law, the Tennessee Supreme Court's decision in *Davis v.*

[46] § 39-13-216.
[47] § 68-34-104.
[48] §§ 39-15-204 – 39-15-205.
[49] H.B. 1383, 2005 Leg., 103rd General Assemb. (Tenn. 2005); S.B. 76, 2005 Leg., 103rd General Assemb. (Tenn. 2005).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

Davis (concerning parental custody—or, in the alternative, ownership rights of fertilized eggs) may serve as negative precedent on the issue.[50]

In *Davis v. Davis*, the Court considered a divorced couple's custody dispute over several human embryos fertilized by the couple, for the purpose of in vitro fertilization, prior to their divorce.[51] The Court held that a fertilized egg which has not implanted in a woman's uterus falls into a developmental category called "preembryo," and is strictly speaking, neither a "person" nor "property." As such, the Court held the "preembryo" occupies an interim category that entitles the fertilized egg to special respect because of its potential for human life.

The *Davis* holding can readily accommodate treating a "cloned" cell as something less than a "person" or human life. This area of the law is wide open for legislative action.

Destructive Embryo Research

There are no laws in Tennessee related to destructive embryo research; however, Tennessee currently prohibits use of tissues derived from an abortion for research "without the prior knowledge and consent of the mother."[52] This same section prohibits the purchase or sale of an aborted fetus. [53]

Potential legislative action in this area includes amending Tenn. Code Ann. § 39-15-208 to read "fetal tissue" rather than "fetus" or "aborted fetus" and research on human embryos should be banned outright.

As observed in countless other contexts, if the objective for ruling in *Roe v. Wade* was to settle the issue of abortion, the U.S. Supreme Court failed to secure its objective. Though Tennessee's Supreme Court has gone well beyond its Federal counterpart in staking out a "right" to abortion, the existing state of law on the subject provides various opportunities for legal reform respecting innocent human life in all stages. Incremental changes in favor of the sanctity of life are thus possible.

---

[50] *Davis*, 842 S.W.2d at 600.
[51] *Id*. at 589.
[52] See TENN. CODE ANN. § 39-15-208(a).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

II. JUDICIAL RESTRAINT

Tennessee's historical spirit of "independence" is arguably manifested in its jurisprudence, at least inasmuch as it has boldly pursued what is termed "new federalism." The phrase "new federalism" describes the practice of state supreme courts—in response to perceived Conservative trending of the Burger and Rehnquist Courts, relying upon their state constitutions to provide expanded rights or freedoms as compared with those provided by the Federal Constitution.[54]

While some dismiss the term "judicial activism" as being defined "in the eyes of the beholder," it is generally reflective of a moral relativism and a willingness to use whatever means necessary to achieve a perceived moral end. In fact, jurists such as William Brennan unabashedly identify with the legal movement to act as needed to achieve their legal objectives. Thus, it stands to reason that the Left's judicial activism was not evident on the state level until recent decades because judicial activism was not necessar*y* on the state level . . . it was holding sway in the Federal system. It was more efficient to secure expansive interpretations of the constitution from that level and then impose said interpretations on the States through the 14th Amendment. But as activists lost their majority on the U.S. Supreme Court, the voice of judicial activism–Justice William Brennan, issued a challenge to state courts proffering the doctrine of adequate and independent state grounds as a justification for enacting a Liberal legal vision from the states up.[55]

Soon thereafter, a sitting member of the Tennessee Court of Criminal Appeals, Judge Martha Craig Daughtrey, cited Brennan's activist call to arms in an article of her own, *State Court Activism and Other Symptoms of the New Federalism*[56], an article in which she asserted that Tennessee's Supreme Court "would have to adopt a more aggressive stance in exercising its

---

[53] *Id.*.
[54] *See* Carolyn Jourdan, Note, *Tennessee Judicial Activism: Renaissance of Federalism,* 49 TENN. L. REV. 135, 135 (1981).
[55] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 502 (1977).
[56] 45 TENN.L.REV. 731 (1978).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

proper judicial function."[57] In order to reach needed conclusions, the Tennessee Supreme Court has relied on Federal rulings or rationale when necessary and on State rationale when necessary.

The Tennessee Supreme Court won national activist acclaim for its decision in *Davis v. Davis*. But, as explained by Michael D. Weiss in his article, *New Federalism and State Court Activism*, the *Davis* decision was based on shaky legal reasoning and little, if any, state-specific bases.[58]

Given the vagaries of Tennessee's process for selecting Supreme Court justices ("The Tennessee Plan"), the policy-directed decision of the Tennessee Supreme Court in *Planned Parenthood v. Sundquist* was not surprising. Ironically, advocates of "The Tennessee Plan"—in contrast to judicial elections which preceded "the Plan," assert that it removes politics from the process.

Accordingly, should the United States Supreme Court make any substantive changes to *Roe* or to *Casey*, it is unclear how the newly-configured Tennessee Supreme Court would respond. As of 2007, Justice Holder is the only member of the *Planned Parenthood v. Sundquist* majority who remains on the Court—the other three have retired.

Liberal ideologies clashed in filling the most recent vacancies on the Supreme Court as none of the candidates on either of two panels submitted by the Judicial Selection Commission to Governor Phil Bredesen contained a minority candidate to the Governor's satisfaction. This occurred even though the Tennessee Plan dictates that members of the Judicial Selection Commission "reflect[] a diverse mixture with respect to race, including the dominant ethnic minority population, and gender."[59] Consequently, William Koch—who was placed on the Court of Appeals by a Republican governor and who is viewed by many court watchers as conservative in judicial philosophy, rose to the top of a final list of candidates.

So, despite the Tennessee Plan's stated objective of diminishing the role of "politics"—to include campaign fundraising, from the system of selecting justices in Tennessee, the make-up of the Tennessee Supreme Court is predictably a reflection of Tennessee's political elites. The

---

[57] K. Lee Black, *Symposium: The Tennessee Supreme Court: Judicial Activists?*, Introduction, 24 Mem. St. U. L. Rev. 179, 180.
[58] 24 Mem. St. U. L. Rev. 229 (1994).
[59] *See* TENN. CODE ANN. § 17-4-102(d).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

justices appointed under the "Tennessee Plan" reflect the policy priorities and legal philosophy of the six organizations comprising the pool of possible commission members. With the possible exception of the District Attorneys General Conference, the organizations supplying commission members are not known for concern with judicial activism, so at least twelve of any given seventeen-member commission are likely to reflect the same philosophy.

Inasmuch as the *Planned Parenthood of Mid-Tennessee v. Sundquist* decision reflects the Tennessee Supreme Court's concern for federalism, the decision provides opportunities and challenges for those seeking to influence public policy on the state level. The challenges are obvious, as our Supreme Court has created the legal foundation for the most abortion-friendly legal code in the United States.

But the detailed yet brazen ruling in *Sundquist* has not left us without opportunities. Incrementally changing Tennessee law so as to restrict the practice can lead to a growing appreciation by government leaders and the state's electorate that the practice of abortion involves serious moral issues about how we as a society will treat the weakest among us. The incremental changes should include—at minimum, assertive and unyielding action on the legislative roadmap provided by the court in *Sundquist*. The Tennessee Supreme Court has laid out all its cards on this issue, and legislators concerned about the sanctity of human life should not hesitate to seize these opportunities.

III. THE COURT

While aggressive efforts to regulate abortion can help push against judicial activism, keeping judicial activists off the court has the most potential for protecting the sanctity of life at this juncture in Tennessee's history. As noted above, only two of the five justices on the *Sundquist* Court are still on the Court, and one of them is Justice Barker, the lone dissenter in *Sundquist*.[60] Although the amount of turnover in recent years has been extraordinary, [61] it demonstrates the volatility of a five-person court. So while the current process of selecting

[60] Tennessee Attorney's Memo, 32 TAM 51, *Legal New—Supreme Court*, available at http://www.tennesseeattorneysmemo.com/documents/Koch.pdf (last visited December 13, 2007).
[61] There were only 100 different justices who served on the Tennessee Supreme Court from 1796 to 1998 while

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

justices is dominated by interests who are not concerned about judicial activism or "new federalism," there is a possibility that the current process may be replaced or simply dismantled as early as the summer of 2008.

The Tennessee Constitution establishes that the State "Supreme Court shall consist of five judges…."[62] The Constitution further requires that the judges "shall be elected by the qualified voters of the state. … The term of service shall be eight years."[63] In 1994, the Tennessee Legislature enacted a process of selecting judges that became known as "The Tennessee Plan." This process, a modified version of a judicial selection process which originated in Missouri, provides for appointment of judges by the Governor with subsequent yes/no "retention" elections. The Governor must choose a judge from panels of nominees approved by a judicial selection commission, the members of which are appointed by speakers of the House and Senate. All but five slots on the selection commission are filled by persons who were nominated by one of six Tennessee legal organizations and then chosen by the Speaker of the House or Senate to serve on the Commission. Obviously, this process drastically reduces the public's impact on the make-up of the Court and the real control over the judicial selection process rests in the power to select the judicial selection commission.

The 17-member judicial selection commission is composed of fourteen lawyers and three non-lawyers all of whom are appointed by the Speaker of the Tennessee Senate and the Speaker of the Tennessee House of Representatives. Each Speaker appoints a total of six lawyers selected from nominees submitted by the Tennessee Bar Association, the Tennessee Defense Lawyers Association, the Tennessee Association for Justice (formerly the Tennessee Trial Lawyers Association), the Tennessee District Attorneys General Conference, and the Tennessee Association for Criminal Defense Lawyers. In addition, the Speakers individually select one lawyer member not nominated by an organization, and one non-lawyer member. Lastly, the Speakers jointly appoint the third non-lawyer member.

Aside from the associational requirements, the speakers must select a commission, which "approximate[s] the population of the state with respect to race, including the dominant ethnic

---

eight different justices have served on the Court from 2005 to 2007.
[62] *See* TENN. CONST. art. VI, § 2.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

minority population, and gender." [64] The judicial selection committee then provides a panel of three nominees from which the Governor must select a replacement to fill any openings on the Tennessee Supreme Court. After being appointed to the Court, a judge or justice faces a retention vote on the next statewide ballot and every eight years thereafter. Accordingly, a Governor is rather limited as far as whom he or she may appoint to the Supreme Court, and the voters have virtually no direct impact on the process beyond a "yes" or "no" retention vote. A nearly identical process is provided for filling openings on the Court of Appeals and the Court of Criminal Appeals.

As enacted in 1994, the Tennessee Plan was to sunset on June 30, 2007; however, the General Assembly extended the sunset date until June of 2008.[65] As a result, there will be an opportunity for opponents of the Tennessee Plan—mainly those asserting that a retention vote is not the "election" contemplated in our State Constitution, to modify the system or simply dismantle it and return to a system of direct election for candidates to the Supreme Court.

Biographical information on the current members of the Tennessee Supreme Court

Member	**Appointed by / Year**	**Term Expires**	**Miscellaneous**
Chief Justice William M. Barker	D. Sundquist / 1998 retained 1998 and 2006 Elected Chief Justice / 2005	2014	-Biographical Information: B.S., University of Chattanooga, 1964; J.D., University of Cincinnati College of Law, 1967 -Professional/Social Affiliations: President, Chattanooga Trial Lawyers Association, 1977-1978; Director, Tennessee Trial Lawyers Association, 1978-1979; Fellow, Tennessee Bar Association; Chairman, Problem Solving Courts Committee of the Conference of

[63] *See* TENN. CONST. art. VI, § 3.
[64] *See* TENN. CODE ANN. § 17-4-102.
[65] HB544 (Kernell); SB1970 (Harper) would have extended the current judicial selection commission until June 30, 2011. The bills were amended to sunset the judicial selection commission on June 30, 2008, and enacted as Public Chapter 0445 (effective 06/18/2007).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

			Chief Justices, 2006-2007; Chairman, Board of Deacons, First Presbyterian Church of Chattanooga, 1995-1997; Ruling Elder, 2005-present. -Awards: Distinguished Alumni Award, University of Tennessee at Chattanooga; Distinguished Alumni Award, University of Cincinnati College of Law, 2006.
Justice Gary Wade	P. Bredesen / 2006 retained / 2006	2014	-Biographical Information: B.S., University of Tennessee, 1970; J.D., University of Tennessee College of Law, 1973. -Professional/Social Affiliations: Member, Tennessee Bar Association; Member, University of Tennessee College of Law Dean's Circle; Fellow, Tennessee Bar Foundation; Mayor, City of Sevierville, 1977-1987; Tennessee Sentencing Commission, 1990-1994; President, Tennessee Judicial Conference, 1995-1996; Tennessee Court of Criminal Appeals, 1987-2006.
Justice Cornelia "Connie" Clark	P. Bredesen / 2005	2014	-Biographical Information: B.A. Vanderbilt University, 1971; M.A.T. Harvard University, 1972; J.D., Vanderbilt School of Law, 1979; Graduate, National Judicial College and New York University Appellate Judges Program -Professional/Social Affiliations: Member, Lawyers Association for Women, Marion Griffin Chapter; Member, Tennessee Bar Association; Member, American Bar Association; Founding member, Tennessee Lawyers Association for Women; Chairman, Tennessee Judicial Council, 2006-present; Dean, Tennessee Judicial

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

			Academy, 1997-1998; Board Member, Conference of State Court Administrators, 2004-2005; -Awards: Liberty Bell Award (from the Williamson County Bar Association), 2005.
Justice William Koch Jr.	P. Bredesen / 2007	2014	-Biographical Information: B.A., Trinity College, 1969; J.D., Vanderbilt University, 1972; LL.M., University of Virginia, 1996. -Professional/Social Affiliations: Member, Court of Appeals, 1984-present; Member, American, Tennessee, and Nashville Bar Associations; Tennessee Bar Foundation, 1993-present; Nashville Bar Foundation, 1993-2007; Co-chair, Tennessee Supreme Court Advisory Commission on Technology, 1997-2001; Counsel to Governor Lamar Alexander, 1981-1984; Presiding Judge, Middle Section, 2003-2007; Episcopalian.
Justice Janice M. Holder	D. Sundquist / 1996 retained / 1998 retained / 2006	2014	-Biographical Information: B.S., summa cum laude, University of Pittsburgh, 1971; J.D., Duquesne University School of Law, 1975. -Professional/Social Affiliations: Member, American, Tennessee, and Memphis Bar Associations; Founding member, Tennessee Lawyers' Association for Women; Chair, Tennessee Bar Association Commission on Women and Minorities, 1994-1996; Trustee, Tennessee Bar Foundation, 1996-1999; Master of the Bench, Leo Bearman, Sr., American Inn of Court, 1995-1997. -Awards: Memphis Bar Association's Sam A. Myar Award

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

			as outstanding young lawyer, 1990; Charles O. Rond Outstanding Jurist Award, 1992; Divorce and Family Law Section Judge of the Year Award, 1992.

CONCLUSION

In light of the Tennessee Supreme Court's decision in two cases—*State v. Davis* and *Planned Parenthood of Middle Tennessee v. Sundquist*, opportunities for pro-life legislative action in Tennessee are limited but not difficult to discern. The decades-long concern of pro-life activists that adverse or "bad" court opinions would establish bad precedent is a reality in Tennessee. Nevertheless, in the battle to establish law consistent with the sanctity of innocent human life, there is little question about the legal terrain of the battlefield. To arms, to arms![66]

[66] *American Poetry*, Editor, Percy H. Boynton, p. 58, "To Arms, to Arms My Jolly Grenadiers," 1918 C. Scribner's Sons.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.