A Fool's Errand: State "Personhood" Proposals

Paul Benjamin Linton

There is no shortage of bad ideas in the pro-life movement. Here's the most recent one: state "personhood" proposals. These proposals, drafted as either state constitutional amendments or state statutes, purport to recognize unborn children as constitutional "persons," and are intended to challenge the Supreme Court's holding in *Roe* v. *Wade*[1] that the unborn child is not a "person," as that word is used in § 1 of the Fourteenth Amendment.[2] Failing that, they are intended to persuade the Court to overrule *Roe* and return the issue of abortion to the states. Such proposals, which, by last count, are being promoted in more than one-half of the states by Personhood USA, the American Life League, and the Thomas More Law Center (Ann Arbor), are unlikely to do either, even assuming that they are ultimately enacted by state legislatures or approved by the electorate (Colorado's Initiative 48, a "personhood" measure, was defeated by a margin of almost 3 to 1 last November).

In articles previously published in the *Human Life Review* and *First Things*, I've explained in detail why, in the absence of a federal constitutional amendment, the Supreme Court will not recognize the unborn child as a "person" within the meaning of the Fourteenth Amendment; why the recognition of "personhood," although desirable, is not the "cure-all" for ending abortion; and, further, why, in my opinion, we do not even have the votes on the Court to take the lesser, but critically important, step of simply overruling *Roe* and restoring the states' authority over abortion.[3] Pursuing "personhood" litigation and other purist goals at the expense of incremental advances in abortion law and policy will lead only to more pro-life defeats and demoralize the pro-life movement. It will do little or nothing to end abortion. In law, as in politics, there is no such thing as a "no-cost" defeat. I would refer interested readers to those articles for my analysis.

Rather than going over the same ground yet again, I want to focus in this article on the language and underlying suppositions of state "personhood"

Paul Benjamin Linton is an attorney in private practice who specializes in state and federal constitutional law. The author of many law review articles, he has also published the first comprehensive analysis of abortion rights under state constitutions, *Abortion under State Constitutions*: *A State-by-State Analysis* (Carolina Academic Press 2008). The author would like to express his appreciation to Christopher Dodson, Executive Director and General Counsel of the North Dakota Catholic Conference, for his insightful and helpful comments on earlier drafts of the article.

proposals. These proposals, in my judgment, have been drafted with breathtaking, indeed, stunning, ignorance, or even defiance, of basic state and federal constitutional principles.

The Hierarchy of the Law

Probably the most elementary error that infects state "personhood" proposals is the failure to recognize the hierarchy of the law. Neither a state constitution nor a state statute can define words used in the federal constitution or dictate how those words shall be interpreted by state and federal courts. The starting point for the discussion here is the Supremacy Clause of the United States Constitution, which provides, in relevant part, that "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*."[4] In the hierarchy of the law, the federal Constitution is supreme and takes precedence over a conflicting state constitutional provision or state statute. As Justice Brennan stated in *Reynolds* v. *Sims*,[5] "When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."[6] But, it may be asked, who decides what the federal constitution means? The judiciary.

It is basic "Civics 101" that the legislature makes the laws, the judiciary interprets them, and the executive enforces them. In the case of the federal Constitution, the law, *i.e.*, the Constitution, was made by the Framers and adopted by the states. And its interpretation is quintessentially a matter for the judiciary. As the Supreme Court has said, "It is the responsibility of this Court . . . to define the substance of constitutional guarantees."[7] In rejecting an attempt by Congress to overturn a decision of the Supreme Court construing the Free Exercise of Religion Clause of the First Amendment,[8] the Court stated, "The power to interpret the Constitution in a case or controversy remains in the Judiciary."[9] More than 50 years ago, the Supreme Court, in a case involving the enforcement of the school-desegregation cases, stated that the Court's interpretation of the United States Constitution *is* "the supreme law of the land," which is of binding effect on the states by virtue of the Supremacy Clause, art. VI, cl. 2.[10]

In *Roe*, as previously noted, the Supreme Court held that the unborn child is not a "person" as that word is used in § 1 of the Fourteenth Amendment.[11] That holding, *which no Justice on the Court has ever questioned*, is an interpretation of the federal Constitution. Neither the meaning of the word "person," as used in the Fourteenth Amendment, nor the interpretation the Supreme Court has given that word—that it does not include unborn children—may be changed by a *state* constitutional amendment (or by a

state statute), only by a *federal* constitutional amendment (or by a decision of the Court overruling the personhood holding). That the meaning of words used in the federal Constitution cannot be defined by a state constitutional amendment (or statute) is, or should be, self-evident. Otherwise, there could be conflicting interpretations of what those words mean. The federal Constitution cannot mean one thing in one state and something entirely different in another state. With respect to the issue at hand, could a state, by amending its own constitution, redefine the word "person" as that term is used in the Fourteenth Amendment to *exclude* members of a minority group or, say, aliens?[12] Could another state, by amending its own constitution, redefine the word "person" to *include* other species? It cannot be the case that each state has the authority to define—by a *state* statute or a *state* constitutional amendment—what words in the *federal* Constitution mean, yet that is precisely what the proponents of state "personhood" proposals apparently believe. To the extent that they are aware of the doctrine of judicial supremacy—that the Supreme Court has the last word in interpreting the Constitution—they deplore it, but they offer no intellectually coherent explanation of how they expect to circumvent that doctrine.

A related error infects state "personhood" bills that purport to define, by statute, what the words in a state constitution mean.[13] Although none of these bills has been enacted into law, they suffer from the same infirmity as state constitutional amendments that attempt to define the meaning of words used in the federal Constitution. A state legislature may not, *by enacting a statute*, define, interpret, amend, modify, repeal, or add to language set forth in a state *constitution*. If this were not the case, then there would be no need for the amendment process established by the state constitution requiring, among other things, a favorable vote of the people. The state legislature could simply amend the state constitution (without a vote of the people) anytime it decided that it needed amending or did not approve of a state-supreme-court decision interpreting the state constitution. But that is quite obviously not within the power of any state legislature.[14]

State Action vs. Private Action

Another flaw in state "personhood" amendments, of which their proponents seem oblivious, is their failure to recognize the distinction between state action and private action. With very few exceptions, none of which is relevant here, constitutional guarantees—both state and federal—are guarantees against the government only, not private individuals.[15] As the late Chief Justice Rehnquist stated in his opinion for the Court in *DeShaney* v. *Winnebago County Dep't of Social Services,*[16] the Due Process Clause of the Fourteenth

Amendment "was intended . . . to protect the people from the State, not to ensure that the State protected them from each other."[17] Accordingly, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[18] The distinction between state action, which is subject to constitutional constraints, and private action, which is not, may be illustrated by an example. If the police, without a valid search warrant and in the absence of exigent circumstances, forcibly enter my neighbor's house and discover that he has been cultivating marijuana plants, their conduct violates his state and federal constitutional right not to be subjected to an unreasonable search. Because of the exclusionary rule, any incriminating evidence they seize (the marijuana plants and any accompanying drug paraphernalia) could not be used in any criminal prosecution against him. If, on the other hand, a private citizen breaks into my neighbor's house and steals his coin collection, a crime has been committed (burglary), but my neighbor's constitutional rights have not been violated.

Without exception, state "personhood" amendments, by their own terms, do not reach private conduct. Instead, they amend various provisions in state Bills (or Declarations) of Rights. But those provisions secure rights only against the state, not private actors. Such amendments, if adopted, would directly affect only state action, not the acts of private individuals. For example, a state "personhood" amendment may well prevent the state itself from engaging in abortion, e.g., by using state funds to pay for abortions or allowing abortions to be performed by publicly employed physicians or in public hospitals. But it would have no effect on abortions performed by physicians in private practice or employed by privately owned and operated clinics. Virtually all abortions are performed in the private sector. Without implementing legislation (which is discussed in the next section of this article), state "personhood" amendments would not reach private conduct. That, in turn, suggests that these amendments would not necessarily generate the "test case" to challenge *Roe* that their supporters think that they would. Apart from the limited categories of abortion for which federal reimbursement is available under the current version of the Hyde Amendment (life-of-the-mother, rape and incest),[19] states have no federal constitutional obligation to use state funds to pay for any portion of the cost of abortions for indigent women,[20] much less to make public hospitals available for such procedures.[21] Properly understood, a "personhood" amendment, in and of itself, would not forbid what *Roe* says must be allowed (abortion for any reason before viability).[22] Moreover, unlike some state courts, federal courts may not render advisory opinions. Under the Constitution, they may adjudicate only "Cases" or "Controversies."[23] But, without an actual or threatened conflict between

the language in a "personhood" amendment and the abortion liberty recognized in *Roe*, there is no "Case" or "Controversy." So, where is the "test case"? And if, contrary to my opinion, state "personhood" amendments (or statutes) *are* interpreted to prohibit abortion (in which case, of course, they would be declared unconstitutional to that extent), they could overturn the entire body of law developed over the years regulating the practice of abortion. That is because, by definition, you cannot *regulate* what you *prohibit* (e.g., drugs and prostitution).

Prohibitions vs. Mandates

In an attempt to remedy the deficiencies of state "personhood" proposals, which, by their own terms, would not reach private (as opposed to public) conduct, a few of these proposals have been recast to include language directing the legislature to implement the "personhood" language by "appropriate legislation."[24] What the drafters of these proposals do not appear to understand, however, is that state constitutional *mandates* (language in a state constitution directing the legislature to enact legislation with respect to a given issue), as opposed to state constitutional *prohibitions* (language limiting what the legislature may do) are not self-executing, nor are they judicially enforceable.[25] Legislatures normally comply with constitutional mandates, but their failure (or refusal) to do so does not present a justiciable controversy. Thus, notwithstanding language in a state "personhood" amendment directing the legislature to enact "appropriate legislation" to enforce the provisions of the amendment, such language is not judicially enforceable in the event the legislature in question fails (or refuses) to enact such legislation.

Specific Examples

Apart from the general criticisms I have set forth, space does not permit me to provide specific comments on all of the "personhood" amendments that have been proposed to date. Nevertheless, two of them—from Mississippi and Montana—will be illustrative of the lack of thought that has gone into their drafting.

In Mississippi, petitions are currently being circulated for signatures to place Initiative Measure No. 26 on the ballot for the November 2010 election. Initiative Measure No. 26 would define the terms "person" or "persons," as used in art. III of the Mississippi Constitution (the state Bill of Rights), to include "every human being from the moment of fertilization, cloning or the functional equivalent thereof." The proposed measure, however, violates the limitations placed on initiatives by the state constitution. Section 273(5)(a)

of the Mississippi Constitution provides: "The initiative process shall not be used: (a) For the proposal, modification or repeal of any portion of the Bill of Rights of this Constitution.[26] The Bill of Rights *is* art. III of the state constitution. In flagrant disregard of the limitations placed on the initiative mechanism by § 273(5)(a), however, Initiative Measure No. 26 purports to amend art. III by adding a new section to the Bill of Rights defining the term "person" or "persons" as those terms are used therein. What the proposed initiative purports to do *cannot* be done via the initiative process.

The Mississippi Supreme Court has recognized that the initiative process may not be used to amend any portion of the Bill of Rights.[27] Moreover, the state supreme court has held that any elector of the state has standing to challenge an initiative measure.[28] In any such challenge, an opponent of an initiative measure may question the constitutionality of the measure, i.e., "whether it is constitutional on its face or satisfies the conditions and requirements as set forth in section 273."[29] A challenge to an initiative may be brought "before the initiative petition is either circulated among the voters for signatures or before it is placed on the ballot for consideration by the people in a general election."[30] The bottom line is that Initiative Measure No. 26 violates § 273 and, if challenged, will be struck from the ballot. And, assuming that no such challenge is brought *before* the initiative is voted on by the people (if sufficient signatures are obtained to place the measure on the ballot) and the initiative is approved, it will be challenged *thereafter* and will be declared invalid, as exceeding the express limitations placed on the initiative by § 273(5)(a).[31]

In Montana, petitions are currently being circulated for signatures to place Constitutional Initiative 102 (CI-102) on the ballot for the November 2010 election. CI-102 would define the word "person," as used in the due process clause of the Montana Constitution (art. II, § 17), to include "all human beings, irrespective of age, health, function, physical or mental dependency or method of reproduction, from the beginning of the biological development of that human being." CI-102, § 1. The initiative measure does not amend any other provision of the Montana Constitution. The drafters of CI-102 have obviously overlooked the Montana Supreme Court's decision in *Armstrong* v. *State*,[32] which recognized a state right to abortion under the *privacy* guarantee of the Montana Declaration of Rights (art. II, § 10),[33] not the *due process* guarantee (art. II, § 17).[34] CI-102, which would amend only the due process provision of the Declaration of Rights, would not eliminate the privacy-based right to abortion recognized in *Armstrong*. *If* CI-102 qualifies for the ballot (a similar effort failed to attract enough signatures to be placed on the November 2008 ballot), *if* it is allowed to remain on the

ballot by the Montana Supreme Court (which is unlikely),[35] and *if* it is approved by the electorate (which is equally unlikely), Montana will have the most schizophrenic state constitution in the country with respect to the issue of abortion. One section of its Declaration of Rights (due process) would effectively prevent the state itself (or physicians employed by the state) from paying for or performing abortions which, under CI-102, would violate the due process rights of unborn children, while another section (privacy) would prevent the state from prohibiting abortions from being performed by privately employed physicians in their offices or in privately owned and operated clinics.[36]

A Practical and Useful Alternative

Instead of tilting at windmills with state "personhood" proposals, pro-life advocates may wish to consider supporting state constitutional amendments that would actually make a difference in the battle over abortion. Twelve state supreme courts have already recognized a state constitutional right to abortion that is separate from, and independent of, the federal right to abortion recognized in *Roe* v. *Wade*,[37] and other state supreme courts may be asked to recognize such a right, as well.[38] To overturn those decisions (and to forestall similar decisions in other states), I would suggest the following state constitutional amendment:

Section 1. The policy of the State of [insert name of state] is to protect the life of every unborn child from conception until birth, to the extent permitted by the federal constitution.

Section 2. Nothing in this constitution shall be construed to grant or secure any right relating to abortion or the funding thereof.

Section 3. No public funds shall be used to pay for any abortion, except to save the life of the mother.

Section 1 is based on Amendment 68, § 2, of the Arkansas Constitution.[39] Section 2 is based on the last sentence of art. I, § 2, of the Rhode Island Constitution (1986).[40] And section 3 is based on Amendment 68, § 1, of the Arkansas Constitution, and art. V, § 50, of the Colorado Constitution.[41]

The language of this proposed amendment would achieve three objectives: first, it would enunciate a public policy of protecting unborn human life, to the extent permitted by the federal constitution; second, it would neutralize the state constitution as an independent source of abortion rights, thus overturning or preventing state "mini-*Roe*" decisions; and third, it would prohibit public funding of abortion, except to save the life of the mother. The proposed draft language, or something similar, would also avoid creating a costly and useless "test case" prematurely challenging *Roe*.

Section 2 of the foregoing draft amendment could be used as the complete text of an "abortion neutrality" amendment that is intended simply to neutralize the state constitution as an independent source of abortion rights.[42] To avoid ambiguity over what "conception" means (fertilization or implantation) and to avoid a debate over IVF technology, § 1 could be redrafted to read as follows:

The policy of the State of [insert name of state] is to protect the life of every unborn child at every stage of gestation *in utero* [or "at every stage of pregnancy"] from fertilization until birth, to the extent permitted by the federal constitution.

And, to avoid any Supremacy Clause challenge based on the Hyde Amendment, § 3 could be redrafted to read as follows:

No public funds shall be used to pay for any abortion, except to save the life of the mother, or as otherwise required by the federal constitution.

Whether this language should be introduced in a given state legislature, or proposed through a citizen-sponsored initiative, is, of course, a question that must be answered on a state-by-state basis. Obviously, the amendment I have proposed, or even a streamlined, one-section neutrality amendment, is not likely to be proposed, much less passed, in many of the states whose supreme courts have recognized a state constitutional right to abortion (California, Massachusetts, New Jersey, New Mexico, New York, Vermont, and probably Minnesota). But in at least some of these states (Alaska, Mississippi, Tennessee, and perhaps Florida and Montana), as well as in a number of states whose supreme courts have not yet addressed this issue, an amendment along the lines I have suggested might be politically possible, either as a legislatively proposed amendment or a citizen-initiated measure (where such initiatives are permitted by the state constitution). Whether it *is* possible remains a judgment for the people in that state to make.

Conclusion

There is a tremendous amount of frustration in the pro-life movement. That frustration, born of 37 years of unrealized hopes, deferred dreams, and judicial betrayals, is entirely understandable, but it is also dangerous—because it leads well-intentioned pro-lifers to act on the basis of emotion and impulse instead of reason and thought. Great historical injustices–such as slavery and the denial of civil rights to minority groups–have taken far longer than 37 years to rectify. In the case of slavery, it took more than 250 years and a Civil War; in the case of civil rights, it took almost 60 years,[43] and a sea change in judicial thinking regarding the proper meaning of the Equal Protection Clause of the Fourteenth Amendment. We need to be patient

and persevere. If we fail to control our desire to end abortion with reason and thought and, instead, allow emotion and impulse to determine our legal and political strategies, we will reap a harvest of bitterness—

in defeats at the ballot box, in state courts, in federal courts, all without advancing our cause one yard down the field. Such defeats breed ever-greater frustration, alienation from the effort, and, in some unbalanced minds, even violence. None of this is in the interest of the pro-life movement.

Supporters of the state "personhood" strategy firmly believe that they have found the "silver bullet" for bringing down *Roe*. But their belief is mistaken and their strategy is not a "silver bullet." It is, in fact, a blank, which may make a lot of noise and create an immense amount of fire and smoke, but will not have any impact on the abortion liberty recognized in *Roe*. *Roe* will be overruled only when we have at least five Justices on the Court who are convinced of its illegitimacy and understand that American society—men, women, and children—can live without legalized abortion. That day has not yet arrived but, in God's good time, it will.

NOTES

1. 410 U.S. 113 (1973).
2. *Id.* at 156-57. Section 1 provides, in relevant part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
3. "Sacred Cows, Whole Hogs & Golden Calves," *Human Life Review* (Summer 2007); "This Dog Won't Hunt: A Reply to Gregory J. Roden," *Human Life Review* (Fall 2008); "How Not to Overturn *Roe* v. *Wade*," *First Things* (November 2002). Remarkably, one of my critics, Dan Woodard, has written that Justice Kennedy "is proud of his record of always *decreasing* the right of abortion, and he would never ever put that [record] in jeopardy." Emphasis added. Mr. Woodard must have missed school on the day Justice Kennedy, along with Justices O'Connor and Souter, announced their Joint Opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which reaffirmed the core holding of *Roe*–that states may not prohibit abortion before viability. More generally, the obsession that Personhood USA and others have with Justice Kennedy, confidently assuming, even predicting, that he will be the "fifth vote" to overrule *Roe*, is entirely misplaced. Justice Kennedy has had many occasions to vote to overrule *Roe* and has never done so. Although it is always possible that he (or any other Justice on the Court) might change his mind, it would be presumptuous to assume that he will. As the psychologists are fond of saying, "The best predictor of future behavior is past behavior."
4. U.S. Const. art. VI, cl. 2 (emphasis added).
5. 377 U.S. 533 (1964).
6. *Id*. at 584.
7. *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 365 (2001).
8. *Employment Division, Dep't of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990).
9. *City of Boerne* v. *Flores*, 521 U.S. 507, 524 (1997).
10. *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958).
11. 410 U.S. at 156-57.
12. Somewhat less fancifully, could a state, by a state constitutional amendment, determine, contrary to Supreme Court precedent, *see Santa Clara County* v. *Southern Pacific Railroad*, 118 U.S. 394 (1886), that corporations are not "persons" within the meaning of § 1 of the Fourteenth Amendment?
13. *See*, e.g., North Dakota H.B. 1572 (61st Sess); South Carolina H.B. 3213 (116th Sess. 2005-

2006) (South Carolina H.B. 3526 (118th Sess.) (2009-2010) (carried over to next session).

14. State courts have uniformly held that the interpretation of a state constitution is an exclusive function (power) of the judiciary and that the legislature may not define language in the constitution, dictate to the courts the construction that should be given to constitutional provisions, or otherwise amend the constitution. *See People ex rel. Juhan* v. *District Court for the County of Jefferson*, 430 P.2d 741, 745 (Colo. 1968) ("[t]he interpretation given by the courts to the constitution are incorporated in the instrument itself and are beyond the power of the legislative branch of government to change"); *Richardson* v. *Hare*, 160 N.W.2d 883, 886 (Mich. 1968) (legislature has no authority "to take a term or language in the Constitution, interpret it and make that legislative interpretation the law"); *State ex rel. Dawson* v. *Falkenheiner*, 15 S.W.2d 342, 343 (Mo. 1929) (legislature "has no power to give to the Constitution an interpretation which would be contrary to its terms" and "must enact its laws in accordance with the Constitution as construed [by the courts]"); *Thompson* v. *Talmadge*, 41 S.E.2d 883, 889-90 (Ga. 1947) ("construing the Constitution . . . is the function of the judiciary, and . . . the General Assembly has not power to make such construction"); *State* v. *Kuhnhausen*, 272 P.2d 225, 232 (Or. 1954) ("the ultimate power and duty of the courts to construe the constitution must rest with the courts alone," not the legislature); *State* v. *Eaton*, 133 P.2d 588, 593-94 (Mont. 1943) (same).
15. The Thirteenth Amendment, which bans slavery and involuntary servitude, is an exception. A very few state constitutional guarantees have been applied to purely private conduct. Generally speaking, however, state Bills (or Declarations) of Rights, like the federal Bill of Rights, apply only to state actors, not private actors.
16. 489 U.S. 189 (1989).
17. *Id*. at 196.
18. *Id*. at 197.
19. Although the Supreme Court has declined to decide the matter, *see Dalton* v. *Little Rock Family Planning Services*, 516 U.S. 474 (1996) (*per curiam*), the federal courts of appeals have uniformly held, on federal preemption principles (a state law conflicting with a federal law), that states participating in the Medicaid program (which is a state option) must pay their share of the cost of abortions for which federal reimbursement is available under the Hyde Amendment. *Elizabeth Blackwell Health Center for Women* v. *Knoll*, 61 F.3d 170 (3d Cir. 1995); *Hope Medical Group for Women* v. *Edwards*, 63 F.3d 418 (5th Cir. 1995); *Planned Parenthood Affiliates of Michigan* v. *Engler*, 73 F.3d 634 (6th Cir. 1996); *Little Rock Family Planning Services, P.A.* v. *Dalton*, 60 F.3d 497 (8th Cir. 1995), *rev'd on other grounds*, 516 U.S. 474 (1996); *Orr* v. *Nelson*, 60 F.3d 497 (8th Cir. 1995); *Hern* v. *Bye*, 57 F.3d 906 (10th Cir. 1995).
20. *Maher* v. *Roe*, 432 U.S. 464 (1977) (Constitution does not require states participating in the Medicaid program to pay for nontherapeutic abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding Hyde Amendment prohibiting the use of federal funds to pay for abortion except those necessary to save the life of the pregnant woman); *Williams* v. *Zbaraz*, 448 U.S. 358 (1980) (upholding Illinois statute containing the same restriction).
21. *Poelker* v. *Doe*, 432 U.S. 519 (1977) (upholding municipal policy prohibiting the performance of abortions in city hospitals except when there was a threat of grave psychological injury or death to the pregnant woman); *Webster v. Reproductive Health Services*, 492 U.S. 490, 507-11 (1989) (upholding state statute prohibiting public employees from performing abortions and prohibiting the use of public facilities for the performance of abortions except those necessary to save the life of the pregnant woman).
22. It is at this point that some supporters of state "personhood" proposals interpose an objection. They claim that, with the adoption of a state "personhood" amendment, state equal protection principles would automatically bring unborn children within the scope and protection of the homicide statutes. Of course, if that were true, the amendment would be struck down as violating *Roe* v. *Wade*. But constitutional amendments are not criminal statutes. And courts have no constitutional, statutory, or common-law authority to extend the scope of criminal statutes (in this case, the homicide statutes) to persons or conduct that fall outside the reach of those statutes.
23. U.S. CONST. art. III, § 2.
24. This would include Montana Constitutional Initiative 102, which is currently being circulated for signatures in Montana and is discussed later in this article, as well as an earlier Montana initiative (Constitutional Initiative 100), which failed to qualify for the ballot in 2008.
25. *See*, e.g., *State of Arizona* v. *Boykin*, 508 P.2d 1151, 1154 (Ariz. 1973) (provision requiring the legislature to enact laws mandating an eight-hour day "in all employment by, or on behalf of the

State or any political subdivision of the State," art. XVIII, § 1, is not self-executing and is not judicially enforceable) (holding that art. XVIII, § 1, does not confer a "right to an eight-hour day"); *Arizona Eastern R. Co.* v. *Matthews*, 180 P. 159, 163 (Ariz. 1919) (same with respect to provision, art. XVIII, § 7, requiring the legislature to enact a law making an employer liable to an employee in "hazardous occupations"); *People v. Vega-Hernandez*, 225 Cal. Rptr. 209, 218 (Ct. App. 1986) (provision requiring the legislature to enact laws to implement the right of crime victims to restitution, art. I, § 28(b), is not self-executing) (holding that non-prohibitory constitutional provisions that direct the legislature to enact particular legislation are not self-executing); *Spinney* v. *Griffith*, 32 P. 974, 975 (Cal. 1896) (provision requiring legislature to enact laws "for the speedy and efficient enforcement" of statutes creating mechanics liens, art. XIV, § 3, is not self-executing and requires implementing legislation); *Borchers Bros.* v. *Buckeye Incubator Co.*, 28 Cal. Rptr. 697, 698-99 (Sup. 1963) (same); *Jack v. Village of Grangeville*, 74 P. 969, 974 (Idaho 1903) (provision requiring legislature to enact laws establishing "reasonable maximum rates . . . . to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose," art. VI, § 15, was not self-executing) (holding that until legislature provided a method for fixing rates, parties could contract for rates that were mutually agreeable); *State on behalf of Garcia* v. *Garcia*, 471 N.W.2d 388, 390-91 (Neb. 1991) (provision requiring legislature to enact laws governing lawsuits by and against the State, art. V, § 22, was not self-executing) (holding that trial court had no authority to award attorney fees incurred by a special prosecutor in an action to collect child-support payments in the absence of legislation authorizing such an award).

26. MISS. CONST. art. XV, § 273(5)(a).
27. *In re Proposed Initiative Measure No. 20*, 774 So.2d 397, 402 (Miss. 2000) (dictum).
28. *Id*. at 402.
29. *Id*. at 401.
30. *Id*.
31. When I brought this to the attention of one of the attorneys supporting the initiative effort in Mississippi, he assured me that he was aware of § 273(5)(a) and did not consider it "an absolute bar to the proposed amendment." For unspecified "strategic reasons," however, he declined to share his reasoning with me. Of course, I cannot comment on something I haven't heard or read, but, on the face of it, it would appear to me, as I think it would to any other reasonably intelligent attorney, that the initiative mechanism cannot be used to amend the Mississippi Bill of Rights. Initiative Measure No. 26 is going to be stillborn.
32. 989 P.2d 364 (Mont. 1999).
33. *Id*. at 374 (*Gryczan* v. *State*, 942 P.2d 112, 122 (Mont. 1997) (striking down state sodomy law)).
34. In a brief coda to its opinion, the *Armstrong* majority suggested that "the rights of personal and procreative autonomy at issue here also find protection in more than just Article II, Section 10." *Id*. at 383 (citing, as possible sources, art. II, §§ 3 (inalienable rights), 4 (individual dignity), 5 (freedom of religion), 7 (freedom of speech), and 17 (due process)). Nevertheless, the majority opinion was based squarely on art. II, § 10 (privacy). *Id*. at 384 (summarizing holdings).
35. Montana is one of a handful of states that allow pre-ballot challenges to the *substantive*, as opposed to the *procedural*, constitutionality of a ballot initiative. *See State ex rel. Montana Citizens for the Preservation of Citizens' Rights* v. *Waltermire*, 729 P.2d 1283, 1285 (Mont. 1986) (enjoining submission of citizen-initiated measure proposing state constitutional amendment directing the state legislature to apply to Congress under art. V of the United States Constitution to call a convention to consider a balanced budget amendment): *State ex rel. Steen* v. *Murray*, 394 P.2d 761 (Mont. 1964) (enjoining submission of citizen-initiated measure proposing statute on gambling). *See also Union Electric Co.* v. *Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. 1984); *State ex rel. Dahl* v. *Lange*, 661 S.W.2d 7, 8 (Mo. 1983); *State ex rel. Rotter* v. *Curtin*, 941 S.W.2d 498, 500 (Mo. 1997); *Hazelwood Yellow Ribbon Committee* v. *Klos*, 35 S.W.3d 457, 468-69 (Mo. Ct. App. 2000); *In re Initiative Petition No. 349*, 838 P.2d 1, 8 (Okla. 1992) (citing cases) (striking citizen-initiated abortion ban from ballot); *White* v. *Welling*, 57 P.2d 703, 705 (Utah 1936) (if proposed law "showed unquestionably and palpably on its face that it was unconstitutional . . . it is quite likely that this court would refuse to issue the mandamus [to order the secretary of state to place the proposition on the ballot] on the theory that it would not compel the secretary of state to do something which would in the end be unavailing"); *National Abortion Rights Action League* v. *Karpan*, 881 P.2d 281, 288 (Wyo. 1994) ("[w]e hold that an initiative measure that contravenes direct constitutional language or constitutional

language as previously interpreted by the highest court of a state or of the United States, is subject to [pre-ballot] review under the declaratory judgment statutes"). In states following the minority rule, if the state supreme court determines that the measure, on its face, would violate the state constitution (in the case of a statutory initiative) or the federal constitution (in the case of either a statutory or constitutional initiative), then it will strike the entire measure from the ballot or, at a minimum, sever the unconstitutional provisions. The majority rule, which is followed in the overwhelming majority of states that have an initiative mechanism in their constitution, is that challenges to the substantive constitutionality of a citizen initiative may not be brought before the measure is voted on by the people. Until then, the constitutionality of the measure is not considered "ripe" for judicial review.

36. The same problem affects the "personhood" initiative that is now being considered in California, which fails to amend the section of the California Constitution under which a right to abortion has been recognized. See *Committee to Defend Reproductive Rights* v. *Myers*, 625 P.2d 779 (Cal. 1981) (deriving state right to abortion from addition of privacy language to art. I, § 1, of the state constitution).
37. *State of Alaska* v. *Planned Parenthood of Alaska*, 35 F.3d 30 (Alaska 2001); *State of Alaska, Dep't of Health & Human Services* v. *Planned Parenthood of Alaska, Inc*., 28 P.3d 904 (Alaska 2001); *Valley Hospital Ass'n* v. *Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997); *Committee to Defend Reproductive Rights* v. *Myers*, 625 P.2d 779 (Cal. 1981); *In re T.W.*, 551 So.2d 1186 (Fla. 1980); *Moe* v. *Secretary of Administration & Finance*, 417 N.E.2d 387 (Mass. 1981); *Women of the State of Minnesota* v. *Gomez*, 542 N.W.2d 17 (Minn. 1995); *Pro-Choice Mississippi* v. *Fordice*, 716 So.2d 645 (Miss. 1998); *Armstrong* v. *State*, 989 P.2d 364 (Mont. 1999); *Right to Choose* v. *Byrne*, 450 A.2d 925 (N.J. 1982); *New Mexico Right to Choose/ NARAL* v. *Johnson*, 975 P.2d 841 (N.M. 1998); *Hope* v. *Perales*, 634 N.E.2d 183 (N.Y. 1994); *Planned Parenthood of Middle Tennessee* v. *Sundquist*, 38 S.W.3d 1 (Tenn. 2000); *Beacham* v. *Leahy*, 287 A.2d 836 (Vt. 1972).
38. Whether abortion has been, or would likely be, recognized as an independent state constitutional right is the subject of my book, ABORTION UNDER STATE CONSTITUTIONS *A State-by-State Analysis* (Carolina Academic Press 2008), the first full-length treatment of the topic by anyone on either side of the abortion debate.
39. "The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution." ARK. CONST. amend. 68, § 2 (1988).
40. "Nothing in this section [guaranteeing due process and equal protection] shall be construed to grant or secure any right relating to abortion or the funding thereof." R.I. CONST. art. I, § 2 (last sentence) (2004).
41. "No public funds will be used to pay for any abortion, except to save the mother's life." ARK. CONST. amend. 68, § 1. "No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, directly or indirectly, any person, agency or facility for the performance of any induced abortion, PROVIDED HOWEVER, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her unborn child under circumstances where every reasonable effort is made to preserve the life of each." COLO. CONST. art. V, § 50 (West 2001). The funding bans in the Arkansas and Colorado Constitutions have been declared unconstitutional, but only to the extent that they do not permit state funds to be used to pay for the state's share of those abortions for which federal reimbursement is available under the Hyde Amendment. *Little Rock Family Planning Services, P.A.* v. *Dalton*, 60 F.3d 497 (8th Cir. 1995), *rev'd on other grounds*, 516 U.S. 474 (1996); *Hern* v. *Bye*, 57 F.3d 906 (10th Cir. 1995). Otherwise, the amendments are constitutional and in force.
42. *See*, e.g., the first sentence of Tennessee Senate Joint Resolution 127: "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion." SJR 127, which the author assisted in drafting and is intended to overturn the Tennessee Supreme Court's decision in *Planned Parenthood of Middle Tennessee* v. *Sundquist*, 38 S.W.3d 1 (Tenn. 2000), was approved by the Tennessee Legislature in 2009 and, once it is approved again by the legislature (by a two-thirds vote), will be placed on the ballot for the voters' consideration.
43. From *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), to *Brown* v. *Board of Education* (1954).