GREATER EMPLOYMENT EQUALITIES IN THE NEW SOUTH THROUGH NEW CONSTITUTIONAL GUARANTEES

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I. INTRODUCTION

Most American state constitutions contain equal protection clauses. The words in these clauses often follow the words in the Equal Protection Clause of the federal Constitution. Not surprisingly perhaps, many state courts read such clauses as providing no greater equalities than are afforded federally, following "in lockstep."[1] But some American state constitutions

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1. *See, e.g.*, William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions As Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550-51 (1986) [hereinafter Brennan, *Revival*] (criticizing those who say "proceeding in lockstep with the Supreme Court is the only way to avoid irrational law enforcement). While they can interpret independent state equal protection guarantees, state courts often do not do so. *See, e.g.*, Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 230 n.9 (2008) ("By most estimates, state courts have not often exercised their uncontested authority to read their state constitutions independently and to place greater restrictions on government than the federal

have special equality provisions having no federal counterparts. Such clauses not only facilitate, but often require, greater independent state constitutionalism. For example, in Illinois there are three special equality provisions beyond the general equal protection clause.[2] They deal with employment, housing, local government, and school districts.[3] Of course, special provisions can extend, but never diminish, the federal constitutional, statutory, and regulatory equalities afforded particular state citizens.[4]

In Illinois and elsewhere in the United States, constitutional equalities are promoted by provisions guaranteeing the equal protection of the laws and insuring freedom from discrimination. These two types of provisions typically are read as seeking comparable forms of equality and anticipating similar types of remedies.[5] State human rights commissions and their equivalents have been broadly delegated powers in many states regarding both equal protection and nondiscrimination.[6]

Constitution requires.").

2. ILL. CONST. art. I, §§ 17-19.

3. *Id.*

4. *But see* Miller & Wright, *supra* note 1, at 227 (finding "below the floor" readings by state courts of certain federal constitutional rights of criminal defendants).

5. For example, in *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008), the U.S. Supreme Court recently afforded comparable treatment to differently worded equality statutes. It ruled that the "plain meaning" of a federal statute guaranteeing all U.S. citizens "the same right . . . as is enjoyed by white citizens . . . to inherit . . . property" involves banning "'discrimination based on race.'" *Id.* at 1936 (quoting 42 U.S.C.A. § 1982). Thus, as to whether retaliation claims were included, that statutory right should be construed like another federal statute that is more explicit about nondiscrimination, but without a mention of a right, in that it mandates "'[a]ll personnel actions affecting employees . . . who are at least 40 years of age . . . shall be made free from any discrimination based on age.'" *Id.* at 1944 (quoting 29 U.S.C.A. § 633 a(a)).

6. Typically such agencies are established legislatively. *See, e.g.*, S.C. CODE ANN. § 1-13-40(a) (2005) (providing for creation "in the executive department the South Carolina Human Affairs Commission, to encourage fair treatment for, and to eliminate and prevent discrimination against, any member of a group protected" by the enabling legislation); S.C. CODE ANN. § 1-13-20 (2005) (declaring "the practice of discrimination against an individual because of race, religion, color, sex, age, national origin, or disability is . . . a matter of state concern and . . . unlawful and in conflict with the ideals of South Carolina and the nation"). But they can be created constitutionally. *See, e.g.*,

Nevertheless, there are sometimes reasons to treat differently equality and nondiscrimination provisions. Equality duties are often limited to governmental acts, as in the federal Constitution, while nondiscrimination responsibilities are extended at times to private acts. As well, even where laws treat people and entities equally, discrimination may continue or arise. Anti-discrimination provisions can be read to impose upon government some affirmative duties to end discrimination even if not caused by government.

This paper explores the extent to which American states in the New South should promote greater constitutional equalities and nondiscrimination than are afforded federally. It begins by examining the benefits of explicit equality and nondiscrimination guarantees. It then examines American state experiences inside and outside the New South. Finally, it explores the employment arena where new guarantees seem necessary, finding at least one Illinois provision particularly inviting.

II. THE BENEFITS OF EXPLICIT CONSTITUTIONAL EQUALITIES

American state constitutions can play a key role today in protecting individuals.[7] State constitutional laws can afford protections beyond those dictated by federal lawmakers. Further, while the federal Constitution contains individual rights implied through the recognition of federal and state governments with express, but limited powers, state constitutions can "contain positive or affirmative rights."[8] At worst, such expansive state constitutional rights can be hortatory, reiterating important

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MICH. CONST. art. V, § 29 (creating a civil rights commission "to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law . . . and to secure the equal protection of such civil rights without such discrimination").

7. *See* Brennan, *Revival*, *supra* note 1, at 552 (stating that federalism protects individual rights at both the state and federal level).

8. Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions As Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 192 (2002). In other words, since the federal government is limited to acting only where it is specifically authorized by the Constitution to do so, "federal constitutional rights are primarily negative in nature." *Id.*

values. At best, they can extend important principles locally, if not nationally, while making majoritarian oppressions of minorities more difficult and reflecting the distinct political wills of local citizenry on equality.[9]

Because of their smaller scale, in constitutional matters states are more able "to experiment, to improvise, [and] to test new theories."[10] Thus, if a state experiment succeeds, others may follow and if it fails, only one of fifty states is affected.[11] As well, because they are easier to amend than the federal Constitution,[12] state constitutions can more quickly respond to failed experiments, social changes, and societal needs.[13]

State constitutional provisions on individual rights can be read to be independent of, and thus to reach beyond, federal constitutional provisions[14] even where the federal and state provisions contain similar language.[15] For example, while a

9. *See, e.g.*, Christopher W. Hammons, *State Constitutional Reform: Is It Necessary?*, 64 ALB. L. REV. 1327, 1342 (2001) ("The inclusion of particular . . . policy type provisions in the constitution indicates that these policy areas are important to the citizens of the state. In this sense, the constitution of the state can be tailored to reflect the political culture or values of the people who live under it . . . . To this end, a very detailed constitution may actually have greater utility than the more generic model that many constitutional reformers propose.").

10. Stanley Mosk, *The Power of State Constitutions in Protecting Individual Rights*, 8 N. ILL. U. L. REV. 651, 652 (1988) (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

11. *See* Brennan, *Revival*, *supra* note 1, at 550 (stating that states are political and social laboratories). This has been recognized by others on the United States Supreme Court. *See, e.g.*, Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring).

12. Williams, *supra* note 8, at 228.

13. *See* Stanley H. Friedelbaum, *Judicial Federalism: Current Trends and Long-Term Prospects*, 19 FLA. ST. U. L. REV. 1053, 1084-85 (1992) ("Rights of privacy, environmental protection provisions, equal rights guarantees, and other innovative reforms have been found in recent additions to state constitutions.").

14. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) [hereinafter Brennan, *Protection*] (State constitutions serve as "a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

15. *Id.* at 495 (Independent interpretations are possible even when state constitutional rights are "identically phrased."). For an example of the factors

successful federal constitutional equal protection claim based on race discrimination requires proof of discriminatory intent or purpose,[16] a state constitutional equal protection claim need not require similar proof. State constitutions can also expressly recognize broader equalities. They can speak to private as well as public conduct. They can make judicial review of discriminatory acts more probing.[17]

III. EXPLICIT CONSTITUTIONAL EQUALITIES IN THE NEW SOUTH

The Fourteenth Amendment to the federal Constitution demands that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[18] This equality principle has been extended judicially to the federal government. Its words thus bind all American governments. Its words on state and local governmental duties are repeated in varying state constitutions in the New South. Thus, in South Carolina,[19] Louisiana,[20] North Carolina,[21] and Georgia,[22] no person is to be "denied the equal protection of the laws." By contrast, in Texas, a self-operative provision declares that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."[23] Some New South constitutions recognize

used by courts in determining whether to extend broader rights under a state constitution than are required by the federal Constitution, see *Washington v. Gunwall*, 720 P.2d 808, 812-13 (Wash. 1986) (listing "six nonexclusive neutral criteria").

16. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

17. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 401 (Cal. 2008) (maintaining classifications based on sexual orientation are constitutionally suspect and subject to strict scrutiny).

18. U.S. CONST. amend. XIV, § 1.

19. S.C. CONST. art. I, § 3.

20. LA. CONST. art. I, § 3.

21. N.C. CONST. art. I, § 19.

22. GA. CONST. art. I, § 1, para. II.

23. TEX. CONST. art. I, § 3a. This provision has been read to go beyond "both the United States and Texas due process and equal protection guarantees." *In re* McLean, 725 S.W.2d 696, 698 (Tex. 1987) (The provision "elevates sex to a suspect classification.").

equality in different ways. For example, the Arkansas constitution declares, "[a]ll men are created equally free and independent," with "certain inherent and inalienable rights"[24] secured as a result of instituting "governments . . . among men."[25]

More particular equality norms exist in some states in the New South having very general equal protection guarantees. Thus in Louisiana, the constitution also says that "[n]o law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations."[26]

And in North Carolina, "discrimination by the State" is also constitutionally prohibited if based on "race, color, religion, or national origin."[27]

IV. EXPLICIT CONSTITUTIONAL EQUALITIES ELSEWHERE

Outside the New South, some American states have even stronger express constitutional equality norms. In Illinois, three constitutions preceded the current 1970 constitution.[28] The 1818 Illinois constitution, drafted and debated within three weeks,[29] contained no provision on equality.[30] A constitutional convention

24. ARK. CONST. art. II, § 2; *see also* KY. CONST. § 1 of Bill of Rights; FLA. CONST. art. I, § 2 (protecting "[a]ll natural persons, female and male alike").

25. ARK. CONST. art. II, § 2.

26. LA. CONST. art. I, § 3. This provision has been read to go beyond the decisional law construing federal constitutional equal protection. State v. Granger, 982 So. 2d 779, 788 (La. 2008).

27. N.C. CONST. art. I, § 19; *see also* FLA. CONST. art. I, § 2 (After declaring "all" natural persons "are equal before the law," the provision goes on: "No person shall be deprived of any right because of race, religion, national origin, or physical disability.").

28. These constitutions were ratified in 1818, 1840, and 1870.

29. JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS 1818-1970, at 10 (1972).

30. While it had no general or special equal protection/nondiscrimination provision, the 1818 constitution did declare that "all men are born equally free and independent." ILL. CONST. of 1818, art. VIII, §1. It also said that "elections shall be free and equal." ILL. CONST. of 1818, art. VIII, §5. It clearly did not contemplate equality for women (or nonwhites, perhaps) as the right to vote

was held in 1846 out of concern that the 1818 constitution had become ineffective due to increased population, changing demographics, and financial difficulties arising from an overly zealous legislature.[31] The resulting 1848 constitution contained a "substantially unchanged" bill of rights.[32] Another convention in 1869[33] resulted in a new constitution in 1870.[34] While more detailed, the 1870 constitution contained a bill of rights like its predecessors.[35] The 1870 constitution remained in place for a century.[36] The journey to its replacement began in the 1940s[37] and ended with a call in 1968 for a constitutional convention.[38] Interestingly, a new bill of rights was not part of the initial agenda,[39] though a bill of rights committee was formed.[40] This committee began its work by studying similar bills in other states, the model state constitution, and scholarly articles.[41] Four new equality provisions emerged.[42] In approving the 1970 constitution, the people adopted equality provisions within the bill of rights quite different from not only earlier Illinois provisions,[43] but also from constitutional provisions in most other American states.[44] The 1970 Illinois Bill of Rights contains both

was recognized for "[a]ll white male inhabitants." ILL. CONST. of 1818, Schedule, §12.

31. CORNELIUS, *supra* note 29, at 25-27 (There was also interest, "in accordance with the national trend toward popular control of government," in changing some state offices from appointive to elective.).

32. *Id.* at 40.

33. *Id.* at 59.

34. *Id.* at 65.

35. *Id.*

36. ELMER GERTZ & JOSEPH P. PISCIOTTE, CHARTER FOR A NEW AGE: AN INSIDE VIEW OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 12 (1970).

37. *Id.* at 6 (forming the Committee on Constitutional Revision of the Chicago Bar Association, with Chicago lawyer Sam Witwer as Chair).

38. CORNELIUS, *supra* note 29, at 58-59.

39. ELMER GERTZ, FOR THE FIRST HOURS OF TOMORROW: THE NEW ILLINOIS BILL OF RIGHTS 7 (1972) [hereinafter GERTZ, TOMORROW].

40. GERTZ & PISCIOTTE, *supra* note 36, at 66.

41. GERTZ, TOMORROW, *supra* note 39, at 7-15.

42. ILL. CONST. art. I, §§ 2, 17-19.

43. Ann Lousin, *The 1970 Illinois Constitution: Has It Made a Difference?*, 8 N. ILL. U. L. REV. 571, 599 (1988) ("The 1870 Constitution had guaranteed due process of law, but not equal protection of the laws.").

44. Elmer Gertz, *The Unrealized Expectations of Article I, Section 17*, 11 J.

explicit equal protection[45] and antidiscrimination[46] provisions. Given earlier difficulties in undertaking constitutional reforms in Illinois through the general assembly,[47] as well as the historical lack of independent state constitutional interpretation by the Illinois courts,[48] the 1970 initiatives were quite significant.[49] They replaced stagnant Illinois constitutional doctrine[50] that failed to fulfill the distinctive role of state constitutionalism in the federal system.[51]

In 1970, Section 2 of Article I was added. It contains the general proposition that no person shall be "denied the equal protection of the laws."[52] Section 17 embodies more particular assurances, and the strongest of the guarantees of equality, as it says:

> Section 17. No discrimination in Employment and the Sale or Rental of Property
>
> All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any

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MARSHALL J. of PRAC. & PROC. 283, 283 (1978) [hereinafter Gertz, *Expectations*] (The new bill of rights contained the "strongest nondiscrimination provisions of any state constitution.").

45. ILL. CONST. art. I, §§ 2, 18.

46. ILL. CONST. art. I, §§ 17, 19.

47. *See* CORNELIUS, *supra* note 29, at chs. I-VI; Samuel W. Witwer, *Introduction*, 8 N. ILL. U. L. REV. 567, 567 (1988) (concluding that "the 1870 Constitution had become virtually unamendable"). The 1970 constitution included for the first time an "automatic 20-year question," whereby a possible constitutional convention was placed on the general election ballot every 20 years in the absence of general assembly action. *Id.* Previously, the general assembly had sole discretion to convene a constitutional convention. *Id.*

48. Brannon P. Denning, *Survey of Illinois Law: Constitutional Law*, 25 S. ILL. U. L.J. 733, 758 (2001); 14 ILL. LAW & PRAC. COURTS § 94. The so-called lockstop doctrine exists where a state high court generally applies United States Supreme Court analysis of the federal constitution when analyzing similar state constitutional provisions.

49. Gertz, *Expectations*, *supra* note 44, at 283.

50. GERTZ & PISCIOTTE, *supra* note 36, at 3-6 (viewing the Illinois constitution as antiquated).

51. *See, e.g.*, Brennan, *Protection*, *supra* note 14, at 503 (commenting state courts have a "manifest purpose . . . to expand constitutional protections").

52. ILL. CONST. art. I, §2.

> employer or in the sale or rental of property. These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation.[53]

Sections 18 and 19 are also more particular about equality than Section 2, though seemingly less protective than Section 17 since they do not contain self-executing clauses. These two sections say:

> Section 18. No Discrimination on the Basis of Sex
>
> The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.
>
> Section 19. No Discrimination Against the Handicapped
>
> All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.[54]

The general assembly enacted the Illinois Human Rights Act to implement the new equality provisions.[55] Unfortunately, it falls short in protecting all persons by unduly restricting those who can seek remedies.[56] As well, the Illinois Supreme Court has so far paid too much deference to the general assembly and has deserted many who suffer the very inequalities specifically addressed in the new constitutional provisions.[57] Nevertheless, the Illinois provisions demonstrate the potential scope of explicit

53. ILL. CONST. art. I, § 17.

54. ILL. CONST. art. I, §§ 18, 19.

55. 775 ILL. COMP. STAT. 5/1-101 to 5/10-104 (2006).

56. For example, within the definitions sections, the general assembly has limited the persons covered by the protections of the Act. 775 ILL. COMP. STAT. 5/2-101, 102. For a critique of the Act, see Jeffrey A. Parness and Laura J. Lee, *Inequalities in Illinois Constitutional Equality*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354060.

57. Lousin, *supra* note 43, at 602 ("In effect, then, there is no longer a constitutional remedy against employment discrimination in Illinois.").

state constitutional equality norms.

The Illinois pattern is followed elsewhere in the United States with general equal protection statements as well as specific equality mandates. At times, general equality norms are expressed in different words. Further, some special equality norms go beyond employment, property transactions, and governmental acts, including schooling; they also go beyond inequalities based on race, color, creed, national ancestry, sex and handicap. Moreover, inequalities are sometimes encouraged, though subject to federal constitutional limits.

General equality under laws is promoted in some states without express reference to equal protection or nondiscrimination.[58] For example, in California a "person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."[59] There as well, "[n]oncitizens have the same property rights as citizens."[60] In Iowa, "[a]ll laws of a general nature shall have a uniform operation."[61] In Kansas, "[n]o distinction shall ever be made" between citizens and noncitizens "in reference to" certain property matters.[62] And in New Mexico there is "perfect equality" for children of Spanish descent with other children in public schools.[63]

Special equality norms occasionally go beyond employment, property sale or rental, and government. For example, some states explicitly direct equalities and nondiscrimination in certain railroad matters. Thus, in Kentucky, railroads and other common carriers must be "regulated, by general law, as to

58. *See, e.g.*, CONN. CONST. art. I, § 20 ("[C]ivil or political rights" should be based on "[e]qual protection" as well as no "segregation or discrimination."); N.Y. CONST. art. I, § 11 (allowing no denial of "equal protection" and no "discrimination" in civil rights matters).

59. CAL. CONST. art. I, § 8.

60. CAL. CONST. art. I, § 20; *see also* ARIZ. CONST. art. II, § 13 (The "same terms" shall apply "equally" to "all citizens or corporations".); N.D. CONST. art. I, § 21 (granting privileges and immunities to all citizens "upon the same terms").

61. IOWA CONST. art. I, § 6; *see also* UTAH CONST. art. I, § 24.

62. KAN. CONST. Bill of Rights, § 17.

63. N.M. CONST. art. XII, § 10.

prevent unjust discrimination"[64] in freight and passenger transportation. As well, railroads must operate all cars and freight "with equal promptness and dispatch, and without any discrimination as to charges."[65] In Hawaii, citizens cannot "be denied enlistment" or "segregated" while in a state "military organization" because of "race, religious principles or ancestry."[66] In Missouri "[n]o citizen shall be disqualified from jury service" or from holding state office because of sex.[67] In Connecticut, there are equalities "in the exercise or enjoyment of . . . civil or political rights."[68]

Special equality norms also extend inappropriate classifications beyond the Illinois provisions on race, color, creed, national ancestry, sex, and handicap. For example, aliens who are bona fide residents have the same property rights as native born citizens in Colorado.[69] Equality mandates operate in Connecticut for any person with "physical or mental disability,"[70] and perhaps operate differently from the Illinois standards on "physical or mental handicap."[71] Nondiscrimination protections extend in New Jersey to "religious principles."[72] Mandates are found in Montana for "political . . . ideas," "culture," and "social origin or condition."[73] In the District of Columbia, there are equality assurances for "sexual orientation, poverty or parentage."[74] And in South Dakota, "privileges or immunities"

64. KY. CONST. § 196; *see also* COLO. CONST. art. XV, § 6.

65. KY. CONST. § 213; *see also* ARK. CONST. art. XVII, § 3.

66. HAW. CONST. art. I, § 3.

67. MO. CONST. art. I, § 22(b); MO. CONST. art. VII, § 10; *see also* W. VA. CONST., art. III, §21 (providing no sex discrimination in jury service).

68. CONN. CONST. art. I, § 20.

69. COLO. CONST. art. II, § 27; *see also* CAL. CONST. art. I, § 20 (noncitizens and citizens); MICH. CONST. art. X, § 6 (aliens and citizens); S.D. CONST. art. VI, § 14 (observing no property distinctions "between resident aliens and citizens"). *But see* NEB. CONST. art. I, § 25 (allowing no discrimination between U.S. citizens in property matters, but the rights of "aliens . . . may be regulated by law").

70. CONN. CONST. art. XXI.

71. ILL. CONST. art I, § 19.

72. N.J. CONST. art. I, § 5; *see also* MONT. CONST. art. II, § 4 (extending protection to "religious ideas").

73. MONT. CONST. art. II, § 4.

74. D.C. CODE art. I. Bill of Rights, § 3 (2001).

must belong "equally" to "all citizens or corporations."[75]

While equality and nondiscrimination mandates commonly appear, constitutional inequalities are occasionally promoted. Thus, Alaska is not prohibited "from granting preferences, on the basis of Alaska residence,"[76] though property taxes cannot be different for in-state and out-of-state U.S. residents.[77] In Montana, "servicemen, servicewomen, and veterans may be given special considerations determined by the legislature."[78] In Virginia, while "governmental discrimination" upon the basis of sex is banned, "the mere separation of the sexes shall not be considered discrimination."[79] Finally, a number of American states have recently denied equalities to same sex couples by constitutionally banning marriages for them.[80]

V. GREATER EMPLOYMENT EQUALITIES

Additional American state constitutional equalities in employment in the New South (and elsewhere) are best promoted by following the Article I, Section 17 approach in Illinois. "All persons" are accorded nondiscrimination rights, not just those dealing with government.[81] Equalities in employment matters (and perhaps in the sale or rental of property) are broadly supported, embodying core contemporary values evoking little dispute. And, equality rights in employment should be enforceable "without action by the General Assembly," though legislative voice regarding "reasonable exemptions" and possible "additional remedies" is appropriate.[82]

The self-executing nature of a constitutional right ensures

75. S.D. CONST. art. VI, § 18.

76. ALASKA CONST. art. I, § 23.

77. ALASKA CONST. art. IX, § 9.2.

78. MONT. CONST. art. II, § 35.

79. VA. CONST. art. I, § 11.

80. *See, e.g.*, CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California."); OR. CONST. art. XV, § 5a ("[O]nly a marriage between one man and one woman shall be valid or legally recognized as a marriage.").

81. ILL. CONST. art. I, § 17.

82. *Id.*

that the right is not simply "hortatory."[83] It also protects against legislative usurpation[84] through, for example, the total diversion of the right from trial courts to administrative agencies (or similar alternative adjudicatory bodies) having no jurors, diminished coercive authorities (like subpoena powers), and less procedural safeguards for aggrieved claimants (such as formal discovery).

Reasonable legislative "exemptions" can include, as in Illinois, certain religious institutions. Unfortunately,[85] in Illinois the legislators have also exempted all small employers from many of the constitutional equality norms, notwithstanding the express constitutional directives that "all" persons have rights and that any limits via "exemptions" not undercut the broad protections.[86]

Constitutional recognition of possible "additional" general assembly remedies would serve to preserve traditional remedies against those engaged in discriminatory conduct while permitting remedial expansions in such areas as attorney's fee recoveries, vicarious liability, and responsibilities for

83. AIDA v. Time Warner Entm't Co., 772 N.E.2d 953, 960-61 (Ill. App. Ct. 2002) (The court held that the Illinois constitution's individual dignity clause, ILL. CONST., art. I, § 20, that condemns communications inciting "violence, hatred, abuse or hostility toward, a person or group . . . by reason of . . . religious, racial, ethnic, national or regional affiliation," was only "hortatory," creating no private right; was like "a constitutional sermon," not "an operative part of the Constitution;" was included "to serve a teaching purpose, to state an ideal or principle to guide;" and, was "merely an expression of philosophy and not a mandate that a certain remedy be provided in any specific form.").

84. *See, e.g.,* ALASKA CONST. art. I, § 3 (The "legislature shall implement" enjoyment of civil or political rights without regard to race, color, and the like.); HAW. CONST. art. I, § 3 ("Equality of rights under the law shall not be denied . . . by the State on account of sex." The "legislature shall have the power to enforce, by appropriate legislation . . . ."); WASH. CONST. art. XXXI, §§ 1-2 (maintaining equality of rights for both sexes, enforced by "appropriate legislation").

85. The Illinois General Assembly effectively has read the limits regarding only "reasonable exemptions" as permitting quite broad discretion, not unlike settings where there is no self-executing right to sue and there is a requirement that there be implementing statutes. *See also* HAW. CONST. art. I, § 3 (requiring equality rights enforcement only by "appropriate legislation"); WASH. CONST. art. XXXI, § 2.

86. *See* ILL. CONST. art. I, § 17.

unintentional acts. Unfortunately in Illinois, legislators have read their powers regarding "additional" remedies to encompass powers regarding any, all, or no remedies.[87]

VI. CONCLUSION

Equality in employment opportunity has broad public support. Express state constitutional recognition of a self-executing right of all persons to be free from employment discrimination on the basis of race, sex, and other inappropriate classifications, subject to limited legislative oversight, would extend equality principles beyond federal mandates in conformity with fundamental local values; allow for experimentation in regulating constitutionally nongovernmental as well as governmental acts; and strike an appropriate balance between judicial and legislative authority. States in the New South should consider such new constitutional law initiatives on employment equalities.

87. *But see* CAL. CONST. art. I, § 31(g) (providing remedies for certain constitutional violations are the same as available under then-existing California antidiscrimination law); MICH. CONST. art. I, § 26(6) ("[R]emedies" available for certain constitutional violations "shall be the same . . . as are otherwise available for violations of Michigan anti-discrimination law.").