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American State Constitutional Equalities

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TABLE OF CONTENTS

I. INTRODUCTION................................................................................773
II. THE BENEFITS OF EXPLICIT CONSTITUTIONAL EQUALITIES...............776
III. CURRENT STATE CONSTITUTIONAL EQUALITIES.............................779
IV. GREATER STATE CONSTITUTIONAL EQUALITIES .................................... 788
V. CONCLUSION ................................................................................. 795

I. INTRODUCTION

As with the United States Constitution, many American state constitutions contain provisions condemning equal protection denials by government. State provisions often have the same wording as the Equal Protection clause of the federal Constitution. Many state courts also read such state equal protection provisions, as well as other state constitutional equalities, to guarantee no greater protections than are afforded federally. They are “in lockstep,” though spurring occasional criticism.2

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1. They do so at times even when state constitutional equalities predate the federal Equal Protection clause. At times, state constitutions themselves effectively require “lockstep” judicial decisions. See, e.g., CAL. CONST. art. I, § 24 (“This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes....”).

2. 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) (criticizing those who say “proceeding in lockstep with the Supreme Court is the only way to avoid irrational law enforcement”); JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW, at xx, xxi, 15-18 (2008) (criticizing “the older version of Our Federalism” while praising the significant trend toward “the New Judicial Federalism”). While state courts can interpret independently state equal protection guarantees, they 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
But some American state constitutions contain special equality provisions that go beyond general equal protection and that have no federal counterparts. These provisions necessitate independent state constitutional interpretation as there can be no lockstepping. For example, some state constitutional rights are self-executing or self-operative. As well, in Illinois, there are three special equality provisions, dealing with employment, housing, local government and school districts. Of course, special state constitutional equality provisions can extend, but not diminish, any federal constitutional equalities.

Not all special state constitutional equality provisions speak expressly about equality. Some insure freedom from discrimination while others demand uniformity or sameness of treatment. However, these provisions often are read as requiring equality. Yet there are sometimes reasons to treat differently equal protection, on government than the federal Constitution requires.”). But see Gordon Eddy, The Development of Independent New York Constitutional Jurisprudence in Chief Judge Kaye’s Judicial Opinions: An Empirical Study, 71 ALB. L. REV. 1137, 1137 (2008) (measuring the success of one state high court justice to advance independent state constitutional interpretation).


As well, local government initiatives can extend, but not diminish, federal constitutional equalities as well as any other federal laws or laws of statewide applicability. The New York City Human Rights Law serves as an example. See, e.g., Jyotin Hamid & Mary Beth Hogan, The New York City Civil Rights Restoration Act Grows Teeth, 81 N.Y. St. B.J. 34, 34 (2009) (showing how sexual harassment claims are easier to pursue under city rather than federal or state laws).

4. 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 (citing 42 U.S.C. § 1982 (2006)). Thus, in determining whether a retaliation right is statutorily included, the right should be construed like other federal statutes that are more explicit about nondiscrimination, but do not mention such a right. Id. at 1942-43 (discussing whether 29 U.S.C. § 633a(a) (2006) which mandates that “[a]ll personnel actions affecting employees . . . who are at least 40 years of age . . . shall be made free from any discrimination based on age” prohibits retaliation). Typically state agencies, often designated as Human Rights Commissions, are established legislatively to enforce, and perhaps define, state constitutional equality. See, e.g., S.C. CODE ANN. § 1-13-40(a) (2005) (“There is hereby created 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 this chapter . . . .”); S.C. CODE ANN. § 1-13-20 (2005) (“[T]he 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 . . . .”). However, they can be created constitutionally. See,
equality, nondiscrimination, and uniformity provisions. Nevertheless, all such provisions can be described as American state constitutional equalities.

General state equal protection guarantees are usually limited to governmental acts, as in the federal Constitution, while nondiscrimination and other equality responsibilities have been extended by state constitutions, on occasion, to private acts. State constitutional equalities may speak of positive rights rather than limits on government, arguably prompting greater judicial responsibilities for protection. Further, where state constitutions guarantee equal protection by governments, inequalities caused by others also occur. State constitutional provisions could explicitly impose an affirmative duty to end such inequalities upon governments, though the federal constitutional Equal Protection clause provides no similar mandate.

This article explores the extent to which American states have and should further promote constitutional equalities. It first explores the benefits of explicit constitutional guarantees. It then examines current American state constitutions. Finally, it demonstrates how new state constitutional mandates can prompt greater equalities.


6. For example, while the Bill of Rights in the District of Columbia recognizes “a fundamental right . . . to be free from historic group discrimination, public or private, based on race, ... sex, ... poverty, or parentage,” and other criteria, it goes on to say: “Affirmative action to correct consequences of past discrimination against women, and against racial and national minorities, shall be lawful.” D.C. Const. art. I, § 3.

7. In the absence of an express mandate, the U.S. Supreme Court has recognized in some settings (particularly race and sex) that federal constitutional equal protection allows governments to act affirmatively to limit de facto discrimination. See, e.g., Jennifer S. Hendricks, Contingent Equal Protection: Reaching for Equality After Ricci and Picos, 16 Mich. J. Gender & L. (forthcoming 2010) (arguing that federal constitutional equal protection, in sex and race, has allowed (if not always mandated), and should continue to allow, governments to pursue “a positive right to substantive equality” in contexts where de facto inequality continues). Some might say contemporary inequalities are pursued in order to diminish longstanding inequalities.

II. THE BENEFITS OF EXPLICIT CONSTITUTIONAL EQUALITIES

American state constitutions can play a key role today in protecting individuals.9 State constitutional laws can afford protections beyond those dictated by federal lawmakers. While the federal Constitution chiefly implies individual rights through recognizing federal and state governments with express and limited powers, state constitutions often “contain positive or affirmative rights.”10 At worst, expansive state constitutional rights are hortatory, simply duplicating important federal values or iterating unenforceable local values. At best, they extend new rights locally, deeming unlawful any oppressions that are irrational or un compelling.11

Because of their narrower setting, in constitutional matters states are more able “to experiment, to improvise, [and] to test new theories.”12 Thus, if “a state experiment succeeds, others may follow,” and if an experiment fails, the failure will be isolated.13 As well, because they are more prone to amendment than the federal Constitution,14 state constitutions can more quickly respond to failed experiments,

9. Brennan, supra note 2, at 552 (arguing that federalism protects individual rights at both the state and federal level); Ann Lousin, Challenges Facing State Constitutions in the Twenty-First Century, 62 LA. L. REV. 17, 27 (2001) (arguing that in the coming century all American states should have constitutions with “a strong bill of rights”); Kahn v. Griffin, 701 N.W.2d 815, 828 (Minn. 2005) (“As the highest court of this state, we have said that we are and should be the ‘first line of defense for individual liberties .... ’ “) (quoting State v. Fuller, 374 N.W.2d 722, 726 (Minn. 1985)).

10. 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.


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. Id.


13. Mosk, supra note 12, at 652 (citing Liebmann, 285 U.S. at 311 (Brandeis, J., dissenting) (arguing 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).

14. Williams, supra note 10, at 228. On the values of citizen-sponsored state constitutional initiatives, see Ward Connerly, Achieving Equal Treatment Through the Ballot Box, 32 HARV. J.L. & PUB. POL’Y 105, 105 (2009), arguing that direct democracy is key to protecting individual freedoms in face of governmental abuse.
social changes, and new values.\(^{15}\) Of course, for many, too many amendments may diminish the enhanced or special status of constitutional law.\(^{16}\)

State constitutional rights can be read to be independent of, and thus to reach beyond, federal constitutional rights even when the federal and state constitutions are both applicable and employ the same or similar language.\(^ {17}\) For example, a reasonable search or seizure for federal constitutional purposes may be an unreasonable search or seizure under a state constitution.\(^ {19}\) A state constitutional right

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15. See, e.g., 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.”). But see Bruce E. Cain & Roger G Noll, Malleable Constitutions: Reflections on State Constitutional Reform, 87 TEX. L. REV. 1517 (2009) (recommending that constitutional provisions establishing political and human rights should be changed only through the revision process, while provisions on the details of government should be subject to change through an easier amendment process).


17. William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 491 (1977) (“State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”).

18. Id. at 495 (recognizing that independent interpretations are possible even when state constitutional rights are “identically phrased”). Courts often use certain factors in determining whether to extend broader rights under a state constitution than are required by the federal constitution. See, e.g., Washington v. Gunwall, 720 P.2d 808, 812-13 (Wash. 1986) (“We deem the following six nonexclusive neutral criteria . . . relevant to determining whether . . . the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution.”); Kahn v. Griffin, 701 N.W.2d 815, 828 (Minn. 2005) (“[W]hen both constitutions use identical or substantially similar language . . . [w]e . . . will apply the state constitution if we determine that the Supreme Court has retrenched on Bill of Rights issues, or if . . . federal precedent does not adequately protect . . . basic rights and liberties.”). Timing may be especially important if the state provision predated the federal provision.

19. See, e.g., State v. Brown, 792 N.E.2d 175, 178, 180 n.1 (Ohio 2003) (“Section 14, Article I of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution against warrantless arrests for minor misdemeanors,” though the words of
can also follow the federal constitutional language on federal rights, even though that federal right is inapplicable to the states.20 State constitutions can also expressly recognize rights and limits on governmental conduct that are unaddressed in the federal Constitution.21 Thus, they can expand rights by condemning private as well as public acts resulting in inequalities.22 They can explicitly speak to privacy and other enumerated rights,23 thus avoiding the difficulties in recognizing similar protections through vague terms like liberty and through unenumerated rights analyses.24 Further, state constitutions can explicitly limit state governmental acts directed at certain citizens who are far less protected or relatively unprotected under the federal Constitution.25 Finally, the two constitutional provisions are quite similar, meaning the interpretations of the Ohio and federal constitutions are “harmonize[d] . . . unless there are persuasive reasons to find otherwise”) (quoting State v. Robinette, 685 N.E.2d 762, 767 (Ohio 1997) (internal quotation marks omitted)); People v. Scott, 593 N.E.2d 1328, 1338-45 (N.Y. 1992) (finding that the New York constitutional provisions on searches and seizures limited administrative searches to help police uncover evidence of crimes in ways that were not limited by the Fourth Amendment to the United States Constitution).

20. See, e.g., State v. Forfeiture of 2003 Chev. Pickup, 202 P.3d 782, 783 (Mont. 2009) (finding that while the federal and Montana constitutional provisions on excessive fines “are virtually identical,” the federal provision has not been applied by the U.S. Supreme Court to the states).

21. As well, state constitutions can establish very different executive, legislative, and judicial branches of state government, and quite varied schemes for their checks and balances, than operate for the federal government under the United States Constitution. For example, constitutionally recognized executive branch officers often go beyond the Chief. See, e.g., PA. CONST. art. IV, § 1 (“The Executive Department . . . shall consist of a Governor, Lieutenant Governor, Attorney General, Auditor General, State Treasurer, and Superintendent of Public Instruction . . . .”). At least one American state legislature is unicameral. See NEB. CONST. art. III, § 1. The state judiciary is at times limited to courts whose authority is not ordained and established by the legislature and whose judges and justices are elected by popular vote. See, e.g., ILL. CONST. art. VI, §§ 1, 12. In addition, some state high courts (as in Maine and New Hampshire) can render advisory opinions on proposed legislation.

22. See, e.g., ILL. CONST. art. I, § 19 (“All persons with a physical or mental handicap shall be free from discrimination . . . unrelated to ability in the hiring and promotion practices of any employer.”).

23. See, e.g., ILL. CONST. art. I, § 6 (“The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means.”); CAL. CONST. art. I, § 1 (“All people . . . have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy.”). This California constitutional provision was read to apply to private acts in Sheehan v. San Francisco 49ers, Ltd., 201 P.3d 472, 476, 480 (Cal. 2009) (“[A] private entertainment venue’s security arrangements [i.e., patdown inspections] . . . implicate the state constitutional right of privacy . . . .”).


25. See, e.g., MONT. CONST. art. II, § 4 (“Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”); HAW.
comparable constitutional rights and limits may themselves be read differently from state to state. Thus, there can be varying interstate levels of judicial protection for certain comparable rights with heightened judicial review required at times.\(^26\)

Greater equalities should be especially promoted by state constitutions where significant and unfair inequalities continue without other federal or state law remedies.\(^27\) One example is discrimination based upon sexual orientation. A quick review of contemporary American state constitutions reveals there is already a wide range of local constitutional initiatives furthering equality.

### III. CURRENT STATE CONSTITUTIONAL EQUALITIES

The Fourteenth Amendment to the federal Constitution declares that “No state shall... deny to any person within its jurisdiction the equal protection of the laws.”\(^28\) This equality principle is applicable to local units of government within American states and to the federal government under the Fifth Amendment.\(^29\) Its words thus

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\(^26\) Compare Varnum v. Brien, 763 N.W.2d 862, 878, 880 (Iowa 2009) (holding that because the Iowa constitution article 1, section 1, recognizes “[a]ll men and women are, by their nature, free and equal,” classifications based on sexual orientation are suspect and subject to “intermediate scrutiny”), and Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 507 (Conn. 2008) (recognizing that CONN. CONST. art. I, § 20 assures that “[n]o person shall be denied the equal protection of the law . . .”), with Conaway v. Deane, 932 A.2d 571, 635 (Md. 2007) (holding that sexual orientation is not a suspect or quasi-suspect class so that a rational basis test applies with regard to Maryland constitution article XX1V, which embodies the federal constitutional equal protection concept, even though it speaks of “due process” and is independent of the federal constitution), and Anderson v. King County, 138 P.3d 963, 987-88 (Wash. 2006) (holding that prohibitions to same-sex marriage does not violate Washington constitution article XXXI, § 1, which assures “[e]quality of rights . . . shall not be denied . . . on account of sex”). Intrastate variations in protections for comparable rights can also arise. Compare, e.g., Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2351-52 (2009) (holding that adverse employment decisions are reviewed differently in “mixed-motive” Title VII and ADEA cases), with Hughes v. Pair, 209 P.3d 963, 974 (Cal. 2009) (holding that the requirements governing sexual harassment under a civil code provision regarding business relationships are similar to the requirements for a statute governing workplace discrimination).

\(^27\) See, e.g., 2 FRANK P. GRAD & ROBERT F. WILLIAMS, STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 15 (2006) (“[S]ubjects ... appropriate for constitutional treatment . . . necessarily include . . . matters deemed so important to that particular state as to call for constitutional treatment.”); id. at 23 (discussing the consideration of the “enduring nature” and “popular consensus” for inclusion of constitutional subjects where resolution by legislative or other governmental measures is not assured). Compare REG GRAYCAR & JENNY JANE MORGAN, Equality Rights: What’s Wrong?, in RETHINKING EQUALITY PROJECTS IN LAW: FEMINIST CHALLENGES 105 (Rosemary Hunter ed. 2008), available at http://ssm.com/abstract=1371315 (questioning whether equality principles might develop better if there were no formal recognitions of equality in constitutions or statutes).

\(^28\) U.S. CONST. amend. XIV, § 1.

\(^29\) See, e.g., Bolling v. Sharp, 347 U.S. 497, 499 (1954) (explaining that the Fifth
bind all American governments. Similar wording on state and local governmental duties are repeated in many American state constitutions. In South Carolina, Illinois, Louisiana, Maine, North Carolina, Nebraska, Georgia, and Montana, no person is to be "denied the equal protection of the laws." In Texas and Massachusetts, constitutional equalities are more specific as it is declared that equality under law "shall not be denied or abridged because of sex, race, color, creed, or national origin." Equal protection sometimes is an affirmative duty, rather than a constraint, as in Kansas where governments "are instituted for the equal protection and benefit" of "the people." "While the federal conception of equality has become relatively static, its state counterpart is dynamic..." [so that c]onstitutional equality is now a joint federal and state enterprise.

American state constitutions expressly recognize equality in other ways. For example, the Arkansas Constitution declares: "All men are created equally free and independent" with "certain inherent and inalienable rights" secured as a result of the Fourteenth Amendment provides a norm of equal protection indistinguishable from that within the Fourteenth Amendment; "concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive"; Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This... approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."). See also Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.") (citing Weinberger, 420 U.S. at 638 n.2).

In a state without a constitutional provision on equality, equal treatment can also be read into the state constitutional due process clause. See, e.g., Kirsch v. Prince George's County, 626 A.2d 372, 375 (Md. 1993).

32. LA. CONST. art. I, § 3.
33. ME. CONST. art. I, § 6-A.
34. N.C. CONST. art. I, § 19.
35. NEB. CONST. art. I, § 3.
36. GA. CONST. art. I, § 1, ¶ 2.
38. Until 1970, only seven states had state constitutional equal protection clauses. Since then, the number has more than doubled. SHAMAN, supra note 2, at 41.
39. 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) ("[T]he... Amendment elevates sex to a suspect classification.").
40. MASS. CONST. art. I, § 2.
41. KAN. CONST. Bill of Rights, § 2; see also MASS. CONST. art. III, § 4 ("[G]ood citizens... shall be equally under the protection of the law... ."); MO. CONST. art. I, § 2 ("[A]ll persons are created equal and are entitled to equal rights and opportunity under law... ."); TEX. CONST. art. I, § 6 ("[I]t shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.").
42. SHAMAN, supra note 1, at 44.
43. ARK. CONST. art. 2, § 2. Similar is KY. CONST. of Bill of Rights § 1 ("All men are, by
Instituting “governments... among men.” In Indiana, “all people are created equal,” being “endowed by their CREATOR with certain inalienable rights...” In Wyoming, “all members of the human race are equal.” In Arizona, “[n]o law granting... privileges or immunities... shall not equally belong to all citizens or corporations.” In Utah, not only are “all free governments” founded on the people’s “authority for their equal protection and benefit,” but also “[a]ll laws of a general nature... have uniform operation.” In Alaska “all persons are equal and entitled to equal rights, opportunities, and protection under the law...” Colorado “[c]ourts of justice shall be open to every person...” In New Mexico, “[a] uniform system of free public schools” shall be “established and maintained” “for... all the children of school age...” And in Georgia, governmental “[p]rotection to person and property... shall be impartial and complete.”

Some states have more particular equality norms in addition to very general equal protection guarantees. Thus in Louisiana, the constitution says:

No 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.

In Montana, the constitution declares:

Nature, free and equal, and have certain inherent and inalienable rights.”). Compare FLA. CONST. art. I, § 2 (“All natural persons, female and male alike...”), and MASS. CONST. art. I, § 2 (“All people are born free and equal...”).

44. ARK. CONST. art. 2, § 2.
45. IND. CONST. art. I, § 1. The same constitution says “[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” Id. at art. I, § 23.
46. WYO. CONST. art. I, § 2.
47. ARIZ. CONST. art. II, § 13 (exempting laws on municipal corporations).
50. ALASKA CONST. art. I, § 1.
51. COLO. CONST. art. II, § 6.
52. N.M. CONST. art. XII, § 1 (equalities across schools and among all children in the schools).
54. LA. CONST. art. 1, § 3. This provision has been read to go beyond the decisional law construing federal constitutional equal protection. State v. Granger, 982 So. 2d 779, 787-88 (La. 2008). Where a Louisiana state constitutional provision has been read to “go beyond” the comparable federal provision, in some settings it may still provide no “additional protections.” State v. Kennedy, 957 So. 2d 757, 779 n.1 (La. 2007) (addressing a “cruel, excessive, or unusual punishment” claim in death penalty case involving aggravated rape of a minor).
Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.\textsuperscript{53}

In North Carolina, “discrimination by the State” is also constitutionally prohibited if based on “race, color, religion, or national origin.”\textsuperscript{56} And in Florida, a constitutional provision, after declaring “[a]ll natural persons . . . are equal before the law,” goes on: “No person shall be deprived [sic] of any right because of race, religion, national origin, or physical disability.”\textsuperscript{57}

State constitutional equality provisions generally are unlike other provisions. For example state constitutional health care provisions typically express only public concerns, not public duties, and therefore such provisions infrequently set forth health care rights.\textsuperscript{58} Thus, “state constitutions and case law offer little support for a cognizable right to health [or healthcare].”\textsuperscript{59} State constitutions provide much support for enforceable equality rights.

One American state has quite strong express constitutional equalities. In Illinois three constitutions preceded the current 1970 constitution.\textsuperscript{60} The 1818 Illinois Constitution, drafted and debated within three weeks,\textsuperscript{61} contained no explicit provision on equality.\textsuperscript{62} The 1848 constitution contained a “substantially unchanged” Bill of Rights\textsuperscript{63} and the 1870 constitution contained a Bill of Rights like its predecessors.\textsuperscript{64} The 1870 constitution remained in place for a century.\textsuperscript{65}

\begin{footnotesize}
\begin{itemize}
\item[55.] MONT. CONST. art. II, § 4.
\item[56.] N.C. CONST. art. I, § 19.
\item[57.] FLA. CONST. art. I, § 2.
\item[59.] Id. at 71. On the promises of state constitutional protections against sex-based discrimination, see generally Linda J. Wharton, State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination, 36 RUTGERS L.J. 1201 (2005).
\item[60.] ILL. CONST. of 1818; ILL. CONST. of 1848; ILL. CONST. of 1870.
\item[61.] JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS, 1818–1970 at 10 (1972).
\item[62.] While it had no general or special equal protection/nondiscrimination provision, the 1818 constitution did declare “[t]hat all men are born equally free and independent.” ILL. CONST. of 1818, art. VIII, § 1. It also said “[t]hat elections shall be free and equal.” Id. art. VIII, § 5. It clearly did not contemplate equality for women or nonwhites, as the right to vote was recognized for “all white male inhabitants.” Id. art. VIII, § 27.
\item[63.] CORNELIUS, supra note 61, at 40.
\item[64.] Id. at 65.
\item[65.] ELMER GERTZ & JOSEPH P. PISCIOTTE, CHARTER FOR A NEW AGE: AN INSIDE VIEW OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 3-4, 12 (1980).
\end{itemize}
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to its amendment began in the 1940s and ended with a call in 1968 for a constitutional convention. Interestingly, a new Bill of Rights was not part of the initial agenda, though a Bill of Rights Committee was formed. This Committee began its work by studying similar bills in other states, the model state constitution, and scholarly articles. Four new equality provisions emerged, with some very independent provisions. In approving the 1970 constitution, the people adopted equality provisions within the Bill of Rights quite different from not only earlier Illinois provisions, but also from constitutional provisions in other American states. The 1970 Illinois Bill of Rights contains both explicit equal protection and antidiscrimination provisions. Given earlier difficulties in undertaking constitutional reforms in Illinois through the General Assembly, as well as the historical lack of independent state constitutional interpretation by the Illinois courts, the 1970 initiatives were quite significant. They replaced stagnant Illinois

66. Id. at 6 (regarding the formation of the Committee on Constitutional Revision of the Chicago Bar Association, with Chicago lawyer Samuel W. Witwer as chair).
67. Cornelius, supra note 61, at 144.
69. Gertz & Pisciotte, supra note 65, at 66.
70. Gertz, supra note 68, at 7-15.
76. Samuel W. Witwer, Introduction, 8 N. Ill. U. L. Rev. 567, 567 (1988) (“The 1870 Constitution had become virtually unamendable.”) accord Cornelius, supra note 62, passim. 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. Witwer, supra, at 567. Previously, the General Assembly had sole discretion to convene a constitutional convention. Id.
78. Gertz, supra note 73, at 283.
constitutional doctrine that failed to fulfill the distinctive role of state constitutionalism urged by many.

In 1970, Section 2 of Article I was added. It contains the general proposition that "[n]o person shall be ... denied the equal protection of the laws." 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 or 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 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.

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.

79. GERTZ & PISCOTTE, supra note 65, at 3-6 (viewing the Illinois constitution as antiquated).
80. See, e.g., Brennan, supra note 17, at 503 ("[S]tate courts ... [have a] manifest purpose .. . to expand constitutional protections.").
81. ILL. CONST. art. I, § 2.
82. Id. § 17.
83. Compare id. § 18 with ARIZ. CONST. art. XI, § 6 ("The University and all other State educational institutions shall be open to students of both sexes.").
84. ILL. CONST. art. I, §§ 18-19.
The General Assembly enacted the Illinois Human Rights Act to implement the new equality provisions.\textsuperscript{85} Unfortunately, it falls short in its guarantees by unduly restricting those who can seek remedies.\textsuperscript{86} To date the Illinois Supreme Court has paid excessive deference to the General Assembly, thus abandoning many who suffer the very inequalities specifically addressed in the new constitution.\textsuperscript{87} Nevertheless, the Illinois provisions demonstrate the potential scope of explicit state constitutional equality norms.

Elsewhere in the United States, the Illinois pattern is followed, with general equal protection statements as well as specific equality mandates. As noted, general equality norms are often\textsuperscript{88} expressed in different terms, like “uniform operation”? and sameness.\textsuperscript{90} Some special state constitutional equality norms go beyond employment, property transactions, and governmental acts, including schooling. Some go beyond race, color, creed, national ancestry, sex, and handicap. On the other hand, inequalities are sometimes encouraged by state constitutions, though subject to federal constitutional limits.

Special equalities under law can also be promoted in some states without express reference to equal protection or nondiscrimination.\textsuperscript{91} 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.\footnote{92} Additionally, in California “[n]oncitizens have the same property rights as citizens.”\footnote{93} In Kansas, “[n]o distinction shall ever be made between citizens [and noncitizens] in reference to” certain property matters.\footnote{94} In New Mexico, “perfect equality” exists for “[c]hildren of Spanish descent … with other children in public schools.”\footnote{95} And in Arizona “free” schools “shall be open to all pupils between the ages of six and twenty-one years.”\footnote{96}

Special equality norms occasionally go beyond employment, property sale or rental, and more specific constraints on government, as with schooling. For example, some states explicitly direct equalities and nondiscrimination in certain railroad matters. Thus in Kentucky, railroads and other common carriers are to be “regulated, by general law, as to prevent unjust discrimination”\footnote{97} in freight and passenger transportation. As well, Kentucky railroads are to operate all cars and freight “with equal promptness and dispatch, and without any discrimination as to charges.”\footnote{98}

In Hawaii, citizens cannot “be denied enlistment” or “segregated” while in a state “military organization . . . because of race, religious principles or ancestry.”\footnote{99} In Missouri “[n]o citizen shall be disqualified from jury service” or from holding state office because of sex.\footnote{100} In Wyoming, there is “political equality” so that laws “affecting the political rights” of citizens shall not distinguish based on “race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court.”\footnote{101} In Connecticut, there are equalities “in the exercise or enjoyment of . . . civil or political rights.”\footnote{102} In Illinois, “taxes upon real property shall be levied uniformly.”\footnote{103} In California, there is to be no discrimination or preferential treatment of individuals or groups “on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public

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93. Id. § 20.
94. KAN. CONST. Bill of Rights, § 17.
95. N.M. CONST. art. XII, § 10.
96. ARIZ. CONST. art. XI, § 6.
97. KY. CONST. § 196; see also COLO. CONST. ANN., art. XV, § 6 (containing a similar provision).
98. KY. CONST. § 213; see also ARK. CONST. art. XVII, § 3 (containing a similar provision).
100. MO. CONST. art. VII, §§ 22(b), 10; see also W. VA. CONST. art. III, § 21 (prohibiting sex discrimination in jury service).
101. WYO. CONST. art. I, § 3.
103. ILL. CONST. art. IX, § 4(a).
contracting." And in North Dakota, "[a]ll individuals" possess the "inalienable right[] to keep and bear arms . . . for lawful . . . recreational . . . purposes." 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. Equality mandates operate in Connecticut for any person with "physical or mental disability," which is, perhaps, different from the Illinois provision on "physical or mental handicap." Nondiscrimination protections extend in New Jersey to "religious principles." Mandates are also found in Montana regarding "political . . . ideas," "culture," and "social origin or condition." In the District of Columbia, there are equality assurances for "sexual orientation, poverty, or parentage." In Iowa, "[f]oreigners" who are or may become Iowa residents "enjoy the same rights" in property as native-born citizens. In South Dakota, "privileges or immunities" must belong "equally" to "all citizens or corporations." In Delaware "all persons professing the Christian religion ought forever to enjoy equal rights and privileges." And in Arkansas, no citizen may be "exempted from any burden or duty, on account of . . . previous condition." While equality and nondiscrimination mandates commonly appear, state constitutional inequalities are occasionally promoted. Sometimes they benefit state

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104. CAL. CONST. art. 1, § 31(a).
105. N.D. CONST. art. 1, § 1.
106. COLO. CONST. art. II, § 27. Accord MICH. CONST. art. X, § 6 ("Aliens who are residents of this state shall enjoy the same rights and privileges in property as citizens of this state."); S.D. CONST. art. VI, § 14 (disallowing property "distinction . . . between resident aliens and citizens"); CAL. CONST. art. I, § 20 ("Noncitizens have the same property rights as citizens."). Contra NEB. CONST. art. I, § 25 (disallowing "discrimination between citizens of the United States in [property matters]" and stating that "the rights of aliens . . . may be regulated by law").
108. Compare BLACK'S LAW DICTIONARY 494 (8th ed. 2004) (defining disability as "[a]n objectively measurable condition of impairment"), with ENCARTA WORLD ENGLISH DICTIONARY, http://encarta.msn.com/dictionary_handicap.html (last visited Mar. 20, 2010) (handicap is "something that hinders or is a disadvantage to somebody"). See also Ill. Pub. Act 95-668 (amending 775 ILCS § 5/1-103(l)) and replacing the term "handicap" with the term "disability").
109. N.J. CONST. art. I, § 5; see also MONT. CONST. art. II, § 4 (prohibiting discrimination based on "religious ideas").
110. MONT. CONST. art. II, § 4.
111. D.C. CONST., Bill of Rights, art I, § 3. The District of Columbia's constitution goes on to declare that "[t]hose who exercise or advocate" the expressly-granted rights involving choices about procreation and sexual behavior have "the right to be free from all forms of discrimination." Id. at § 4.
112. IOWA CONST. art. I, § 22.
113. S.D. CONST. art. VI, § 18.
114. DEL. CONST., Declaration of Rights, § 3.
115. ARK. CONST. art. 2, § 3.
residents over nonresidents. Sometimes they benefit discrete groups of residents, and, other times, they burden discrete groups of residents. Thus, Alaska is not prohibited “from granting preferences on the basis of Alaska residence,” though property taxes cannot be different for in-state and out-of-state U.S. residents. In Montana, “servicemen, servicewomen, and veterans may be given special consideration determined by the legislature.” In Virginia, while “governmental discrimination” upon the basis of sex is banned, “the mere separation of the sexes shall not be considered discrimination.” A number of American states have recently denied equalities to committed same sex couples by constitutionally banning marriages for them. Finally, in Rhode Island, while “no person shall ... be denied equal protection of the laws” or subject to discrimination by the state or those doing business with the state, these guarantees shall not be “construed to grant or secure any right relating to abortion or the funding thereof.”

IV. GREATER STATE CONSTITUTIONAL EQUALITIES

Additional American state constitutional equalities are best promoted by following the article I, section 17 approach in Illinois. “All persons” can be accorded nondiscrimination rights, not just those dealing with government. Equalities in employment (and perhaps in sale or rental of property) matters are usually broadly supported, embodying core contemporary local values provoking little dispute. As in Illinois, equality rights in employment could be enforced constitutionally “without action by the General Assembly,” though legislative voice regarding “reasonable exemptions” and possible “additional remedies” might be deemed appropriate.

The self-executing nature of a constitutional right, as in Section 17 in Illinois, should generally mean the right is not simply “hortatory.” Self-executing
constitutional rights should be protected against legislative usurpation through, for example, statutes that divert the right from trial courts to administrative agencies or similar alternative adjudicatory bodies that have: no jurors; diminished coercive authorities (like subpoena powers); and, fewer procedural safeguards for aggrieved claimants (such as formal discovery).

However, many explicit self-executing constitutional rights today are not free from all legislation. In the District of Columbia “[f]reedom from [d]iscrimination,” which encompasses both “public” and “private” acts, is “self-executing,” but “enforced by appropriate legislation.” In Michigan, while the constitutional provision outlawing discrimination and “preferential treatment” in public schools is “self-executing,” an accompanying constitutional provision declares the available “remedies” are “the same . . . as are otherwise available for violations of Michigan’s anti-discrimination law.” The Michigan courts have not clarified the extent to which this constitutional provision is “self-executing” in that legislative authorization is unnecessary. Michigan courts have suggested in other contexts that

provided in any specific form”). But see Burt Neuborne, Foreword, State Constitutions and the Evolution of Positive Rights, 20 RUTGERS L.J. 881, 895 (1989), who said:

Moreover, the very existence of a set of substantive state constitutional provisions dealing with poverty concerns should transform the approach to state due process and equality provisions. One can understand the reluctance of a federal judge to use the federal Equal Protection and Due Process Clauses to generate substantive floors in areas that are wholly foreign to the federal text. Where, however, the constitutional text demonstrates an intense substantive interest in the plight of the poor, a judge’s willingness to use the state’s Equal Protection and Due Process Clauses to reinforce the substantive concerns already present in the constitution’s text should be much greater.

See also GRAD & WILLIAMS, supra note 27, at 93 (“When a court holds that a particular provision is self-executing, it treats the state constitution as meaningful and operative law, and prevents the provision from being rendered nugatory by legislative inaction.”). Of course, constitutional rights without self-executing clauses may be still be protected judicially from legislative usurpation. For example, the intentions of the constitutional drafters might include limited roles for the General Assembly.

125. See WASH. CONST. art. 31, §§ 1-2 (equality of rights for both sexes, enforced by “appropriate legislation”); ALASKA CONST. art. I, § 3 (personal enjoyment of civil or political rights without regard to race, color and the like shall be implemented by the legislature); HAW. CONST. art. 1, § 3 (equality of rights under law not to be denied by the State on account of sex; the “legislature shall have the power to enforce” by “appropriate legislation”).

126. D.C. CONST. art. 1, § 3. Incidentally, all sections in the Bill of Rights are later deemed “self-executing” with no mention of legislation. Id. at § 24.

127. MICH. CONST. art. I, § 26(1).

128. MICH. CONST. art. I, § 26(7).

129. MICH. CONST. art. I, § 26(6). Similarly, in California, the antidiscrimination provision governing public employment, education and contracting is in a “self-executing” section but nevertheless has the same remedies as are “available for violations of then-existing California antidiscrimination law.” CAL. CONST. art. I, § 31.
"self-executing" rights somewhat diminish legislative discretion.  

One "self-executing" constitutional right was said to be not "a mere statement of abstract principles." Another "self-executing" provision "serves as an express limitation on the authority of the Legislature." Thus, legislative enactments sometimes cannot "impose additional obligations," or "undue burdens" on self-executing constitutional provisions "unless otherwise expressly indicated." The term "self-executing" suggests a more passive legislative role. It is defined by Merriam-Webster as "taking effect immediately without implementing legislation." In Texas assurances of "[e]quality under the law" are simply deemed "self-operative." The intent is unclear. While Texas judges have not precisely defined the term "self-operative," they have suggested that less legislative authority exists with respect to other "self-operative" provisions. They have also held that the legal consequence of a "self-operative" clause can be automatic. Black's Law

130. Woodland v. Mich. Citizens Lobby, 378 N.W.2d 337, 348 & n.30, 349 (Mich. 1985) (interpreting Michigan Constitution, article II, section 9 as a "self-executing" constitutional provision that "serves as a limitation on the powers of the legislature"). Article II, section 9 states: "The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum."

131. Durant v. Dep't of Educ., 463 N.W.2d 461, 469 (Mich. 1990) (interpreting as "self-executing" the constitutional provision granting taxpayer standing to enforce specific tax provisions in Michigan constitution article IX, section 32, while declaring the same section goes beyond "abstract principles" and was not meant to "remain dormant until given life by legislative enactment").

132. Woodland, 378 N.W.2d at 348 (referring to the right to referenda in Michigan constitution article II, section 9).

133. Wolverine Golf Club v. Hare, 185 N.W.2d 392, 395 (Mich. 1971) (interpreting as "self-executing" the constitutional provision granting taxpayer standing to bring suit to enforce specific tax provisions in Michigan constitution article IX, section 9, holding: It is "settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision. The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon").


135. TEX. CONST. art. I, § 3a (pertaining to equality in matters of "sex, race, color, creed or national origin").

136. Id.

137. A. & M. Consol. Indep. Sch. Dist. v. City of Bryan, 184 S.W.2d 914, 915 (Tex. 1945) ("Section 9 of Article XI appears to be self-operative and absolutely exempts from taxation the public property therein referred to, whereas Section 2 of Article VIII vests in the Legislature the power to determine whether or not the public property therein referred to shall be exempted from taxation; thus suggesting a greater legislative role in clauses that are not considered "self-operative").

138. Wackenhut Corr. Corp. v. Bexar Appraisal Dist., 100 S.W.3d 289, 291-92 (Tex. Ct. App. 2002) (the provisional constitutional provision barring the taxation of government property used for public purposes, article XI, section 9, is "self-operative" and thus is "effective immediately"); see
Dictionary defines “operative” as “being in or having force or effect.”

Seemingly, “self-operative” in Texas means, at the least, having force or effect independent of legislation.

When permitted, reasonable legislative “exemptions” can include, as in Illinois under section 17, certain religious institutions. Consider equalities in employment with religious groups. Unfortunately, in Illinois the legislators have also exempted small employers from the constitutional equality norms on employment, notwithstanding the express constitutional directive that “all” persons have equality rights and the implicit limit that any “exemptions” not undercut the broad constitutional protections.

Constitutional recognition of possible “additional” General Assembly remedies, as in section 17 in Illinois, would preserve traditional judicially-created remedies against those engaged in inequality/discrimination while also permitting new remedies through legislation, like attorney’s fee recoveries; vicarious liability, and responsibilities for unintentional acts. Unfortunately in Illinois, state legislators have so far read their powers regarding “additional” remedies to encompass powers regarding any, all, or no remedies, leaving far too many people suffering Illinois unconstitutional inequalities with no effective means of redress. Perhaps this resulted because other, relatively new, express Illinois constitutional rights, like those involving crime victims, explicitly permit the General Assembly to determine and enforce the possessor of the rights. Unfortunately, for lawyers and nonlawyers alike, all or most constitutional rights are perceived as similar. Notwithstanding its erroneous reading, section 17 stands as an exemplary model for those seeking to...


139. BLACK’S LAW DICTIONARY 1124 (8th ed. 2004).

140. See, e.g., Coulee Catholic Schs. v. Labor and Indus. Review Comm., 320 Wis.2d 275 (Wis. 2009) (finding Catholic school teacher’s age discrimination claim fails because it impinges upon school’s religious freedoms under federal and state constitutions).

141. See, e.g., Parness & Lee, supra note 86. The Illinois General Assembly has effectively 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. Compare WASH. CONST. art. XXXI, § 2 (equality rights provision shall be enforced by “appropriate legislation”), and HAW. CONST. art. I, § 3 (stating the same).

142. It is unclear whether the power, as in Illinois under article I, section 17, to provide “additional remedies” for violations of rights regarding freedom from discrimination encompasses authority to expand the categories of rights available, or only to expand the remedies for rights violations that are solely defined by the courts. See ILL. CONST. art. I, § 17.

143. Compare, e.g., MICH. CONST. art. I, § 26(6) (stating “remedies” available for certain constitutional violations “shall be the same . . . as are otherwise available for violations of Michigan’s anti-discrimination law”), and CAL. CONST. art. I, § 31 (similarly stating that remedies for certain constitutional violations are the same as those available under then-existing California antidiscrimination law).

144. ILL. CONST. art. I, § 8.1(a)-(b).
expand state constitutional equalities as it leaves primary responsibility for defining and enforcing rights to the courts.\textsuperscript{145}

Explicit state constitutional rights that are not expressly deemed “self-executing” are in danger of becoming simply hortatory in the absence of legislation. Some state constitutions seek to prompt legislation though a failure to enact may be difficult to challenge. Thus, the Michigan constitutional assurance of equal protection is followed by an apparent mandate for General Assembly implementation.\textsuperscript{146} By contrast, the United States Congress is only explicitly delegated the “power to

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145. Consider Justice Harlan’s concurring and dissenting opinion in Oregon v. Mitchell, 400 U.S. 112, 204-05 (1970), where he opined:

As the Court is not justified in substituting its own views of wise policy for the commands of the Constitution, still less is it justified in allowing Congress to disregard those commands as the Court understands them. Although Congress' expression of the view that it does have power to alter state suffrage qualifications is entitled to the most respectful consideration by the judiciary, coming as it does from a coordinate branch of government, this cannot displace the duty of this Court to make an independent determination whether Congress has exceeded its powers. The reason for this goes beyond Marshall's assertion that: "It is emphatically the province and duty of the judicial department to say what the law is." . . . It inheres in the structure of the constitutional system itself. Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of two-thirds of each House and of three-fourths of the States was needed for the political check to be adequate. To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure. Nor is that structure adequately protected by a requirement that the judiciary be able to perceive a basis for the congressional interpretation.

As with the federal constitution, American state constitutions do not permit easy amendment or revision by the state legislatures, though some state legislatures have been far more active than Congress in changing their constitutions. See, e.g., TARR & WILLIAMS, supra note 15, at 1076-1102 (reviewing American state revision, amendment, commission and initiative processes for state constitutional change).

Notwithstanding Justice Harlan’s observations, even those committed to significant federal judicial authority regarding defining and redressing federal constitutional rights recognize there must be greater shared congressional power than that held by the Illinois General Assembly power under section 17. Congress can provide a constitutionally adequate alternative remedial scheme outside the article III federal courts, via power to enforce, that the Illinois General Assembly can not establish under section 17. Section 17 rights are “enforceable without action by the General Assembly” and can only be served “additional” statutory “remedies” for constitutional violations. On this more expansive Congressional power, see Michael P. Robotti, Separation of Powers and the Exercise of Concurrent Constitutional Authority in the Bivens Context, 8 CONN. PUB. INT. L.J. 171, 203 (2009).

146. MICH. CONST. art. I, § 2 ("The legislature shall implement this section by appropriate legislation."). Incidentally, the same constitutional provision also recognizes the same legislative implementation authority for its special equality mandates. MICH. CONST. art. I, § 2 ("[N]or shall any person be denied the enjoyment of his or her civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.").
enforce... by appropriate legislation" federal constitutional equal protection
guarantees involving state and local governments.\textsuperscript{147} Similar enforcement authority
for constitutional equality in matters of sex is recognized in Hawaii\textsuperscript{148} and
Washington.\textsuperscript{149}

Enforcement authority in the Congress may be either broader or narrower than
the implementation authority of the Michigan General Assembly. Federal
enforcement authority, while restricted "to adopting measures to enforce the
guarantees" of the Fourteenth Amendment,\textsuperscript{150} is a broad power,\textsuperscript{151} "not limited to
mere legislative repetition"\textsuperscript{152} of the Supreme Court's constitutional jurisprudence
on individual rights. Thus, under certain circumstances legislative enforcement
can include an expansion of equality rights as well as a scheme for equality rights
enforcement.\textsuperscript{153} Implementation in Michigan may not be as broad a legislative
power. But, the U.S. Supreme Court has also generally denied Congress permission
to redefine governmental obligations under the Equal Protection Clause,\textsuperscript{154} as this
would intrude on the province of the courts who, and "not Congress, ... define the
substance" of equal protection.\textsuperscript{155} The determination of whether a statute "constitutes

\textsuperscript{147} U.S. Const. amend. XIV, § 5.

\textsuperscript{148} Haw. Const. art. I, § 3 (stating such matters shall be "enforce[d], by appropriate
legislation").

\textsuperscript{149} Wash. Const. Ann., art. I, § 2 (stating such matters shall be "enforce[d], by appropriate
legislation").

\textsuperscript{150} Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (limiting Congress' power under
amendment XIV, section 5, to enforcement).

\textsuperscript{151} Miss. Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982) (declaring Congressional
power to enforce under amendment XIV, section 5, is a "broad power indeed").

\textsuperscript{152} Board of Trs. of Univ. of Ala. V. Garrett, 531 U.S. 356, 365 (2001).

\textsuperscript{153} See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (finding
congressional power to enforce the Fourteenth Amendment at times may "include the power to
define situations which Congress determines threaten principles of equality and to adopt prophylactic
rules to deal with those situations"); Garrett, 531 U.S. 356 365 (finding legislative power to enforce
is not limited to repetition of Supreme Court jurisprudence; rather it includes both the authority to
remedy and to deter violation of guaranteed rights "by prohibiting a somewhat broader swath of
conduct, including that which is not itself forbidden by the Amendment's text" (quoting Kimel v. Fla.
Bd. of Regents, 528 U.S. 62, 81 (2000)) (internal quotation marks omitted)); City of Boerne v.
Flores, 521 U.S. 507, 518 (1997) ("Legislation which deters or remedies constitutional violations can
fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct
which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously

\textsuperscript{154} Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 722 (2003) (Congress "may not
attempt to substantively redefine the states'[Fourteenth Amendment] legal obligations").

\textsuperscript{155} See, e.g., Hibbs, 538 U.S. at 728 ("[I]t falls to this Court, not Congress, to define the
substance of constitutional guarantees."); id. at 756 (Congress may not "enforce a constitutional right
by changing what the right is." (quoting City of Boerne, 521 U.S. at 519) (internal quotation marks
omitted)); Kimel, 528 U.S. at 81 ("The ultimate interpretation of the Fourteenth Amendment's
substantive meaning remains the province of the Judicial Branch." (internal citation omitted));
appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult," as the "line between the two is a fine one." Implementation authority in Michigan would be broader if it allowed redefinitions of equality rights.

Although the Michigan general equal protection provision could be read to apply only to state action, the Michigan legislature has implemented equality extensions to the private sector. A similar extension of the federal Equal Protection Clause by Congress would be impossible. So here Michigan implementation is broader than Congressional enforcement.

Yet, the authority to implement rather than to enforce also arguably authorizes legislation in Michigan narrowing state constitutional equalities. The Michigan legislature has, for example, denied prisoners certain equality rights under the state’s Civil Rights Act. But, the Michigan courts have stopped short of allowing the legislature full “power to ultimately define the substantive meaning” of that state’s equal rights amendment. Thus in Sharp v City of Lansing, the court held that conduct permitted by a legislative implementation scheme is at times subject to judicial review and may infringe on constitutional protections. The Congressional enforcement authority regarding Fourteenth Amendment equal protection has not been read to allow Congress to redefine when equality violations occur (or when,

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156. Kimel, 528 U.S. at 81 (citing Boerne, 521 U.S. at 519-20).
158. See, e.g., Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) (Fourteenth Amendment generally offers no protections from private conduct). But see United States v. Guest, 383 U.S. 745, 762 (1966) (Congressional enforcement power under the Fourteenth Amendment covers “laws punishing all conspiracies ... that interfere with the exercise of Fourteenth Amendment rights”).

Congressional extensions of equality protections, as in employment, can be done legislatively by using powers outside section 5 of the Fourteenth Amendment, like the power to regulate interstate commerce. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (sustaining federal statute barring discrimination in public accommodations under Interstate Commerce Clause).

159. Mich. Comp. Laws Ann. § 37.2103 (West 2001) (legislature intends that prisoners are “not within the purview of this act”).
160. Sharp, 629 N.W.2d at 878 (holding the safe harbor provision of the Michigan Civil Rights Act does not extend to claims directly pursued under the Equal Protection Clause).
161. Id. (“[T]he mere existence of an ... affirmative action plan [approved by mechanisms created by the Michigan Civil Rights Act] does not insulate a state employer, or its plan, from all judicial scrutiny.”).
under due process, there is a “life liberty or property” interest) so as to alter authoritative judicial precedents.\textsuperscript{162}

Merriam-Webster says to “implement” is to “give practical effect to and ensure actual fulfillment by concrete measures,”\textsuperscript{163} which suggests a greater obligation than the word “enforce.” Black’s Law Dictionary says to “enforce” is “to give force or effect to”\textsuperscript{164} while Merriam-Webster says to “enforce” is simply “to give force to.”\textsuperscript{165} The constitutional mandate to “implement” and thus to insure actual fulfillment under these definitions seemingly imposes greater responsibilities on the Michigan legislature than are imposed on the Hawaii and federal legislatures who have only enforcement authority. In drafting new state constitutional equality mandates, care is needed regarding the language describing what role, if any, is played by legislators in rights definition, redefinition, and enforcement.

V. CONCLUSION

Equalities in employment, housing, schooling, and other settings have broad public support. Greater express state constitutional recognitions of self-executing rights of all persons to be free from employment, housing, schooling, and other discrimination on the basis of race, sex and other inappropriate classifications, subject to limited legislative oversight, would extend equalities beyond federal law mandates. They would reflect the establishment of fundamental local values and allow for experimentation. They could also prompt varying balances between judicial and legislative authority over equality, both between states and within states depending upon the equality context.

\textsuperscript{162.} See, e.g., Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (viewing the enforcement power under section 5 of the Fourteenth Amendment as “a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment”); id. at 653-56 (suggesting that Congress could have concluded itself that the English literacy requirement for voting at issue in the case violated the Equal Protection Clause); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) (“The ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch.”); id. at 81-83 (reasoning that a federal statute that is not designed to remedy or prevent unconstitutional behavior may exceed Congress’ enforcement power). Even when Congress simply enforces, its statutes must exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” City of Boerne v. Flores, 521 U.S. 507, 520 (1997). Further, enforcement authority may only arise when there is more than “anecdotal evidence” revealing “a widespread pattern” of Fourteenth Amendment violations. Kimel, 528 U.S. at 82.


\textsuperscript{164.} BLACK’S LAW DICTIONARY 569 (8th ed. 2004).