Inequalities in Illinois Constitutional Equality

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I. INTRODUCTION

When the Illinois Constitution expressly recognizes an equality right for all persons, allowing the legislature only to make reasonable exemptions, can the legislature exempt lots of folks for little or no reason? The General Assembly has answered this question in the affirmative in the Human Rights Act, with high court deference. We answer no.

In exploring this question, we will examine the equal protection and antidiscrimination provisions of sections 2, 17, 18, and 19 of article I of the Illinois Constitution that were added in 1970. Part Two of the paper will briefly examine the history behind the 1970 equality provisions. Part Three

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will generally review constitutional rights in Illinois, providing context for examining the new equality provisions. Part Four will review the particular promises of equality in 1970. Part Five will examine General Assembly implementation. Part Six will explore judicial precedents. Finally, Part Seven will suggest how Illinois lawmakers should better promote equality in order to realize more fully the expectations of the constitutional drafters and the electorate in 1970.

II. THE MOVE TO PROMOTE EQUALITY UNDER THE 1970 ILLINOIS CONSTITUTION

In Illinois, three constitutions preceded the current 1970 Illinois Constitution. The 1818 Illinois Constitution was drafted and debated within three weeks in order to achieve the goal of statehood status before Missouri. Written as a “frontier constitution” by inexperienced drafters, it chiefly adopted existing provisions from other American constitutions. Because the goal was to attain statehood quickly, there was little concern about ratification by the people. Approval by the United States Congress and the President, required for statehood, was accomplished in 1818. The Bill of Rights in the 1818 Illinois Constitution contained no equal protection or nondiscrimination provision.

Soon, shortcomings resulting from haste became apparent. A vote for a new constitutional convention failed in 1824. A convention call was approved by a majority of voters actually casting a ballot in 1842. The affirmative votes fell short of the numbers required, however, because those

1. ILL. CONST. of 1870; ILL. CONST. of 1848; ILL. CONST. of 1818.
3. Id. Missouri, expected to be admitted as a slave state, was viewed as a competitor by both those favoring and those opposing slavery in Illinois. Id. at 6.
4. Id. at 11 (“Wholesale borrowing can be seen in the preamble.”).
5. Id. at 18-19 (“Although some states were submitting their proposed constitutions to a popular vote . . . no suggestion of such a procedure seems to have been made in Illinois.”).
6. Id. at 19-20 (noting that President Monroe signed the resolution to admit Illinois after much debate in the House of Representatives on the slavery issue).
7. While the 1818 Illinois Constitution had no general or special equal protection/nondiscrimination provision, it did declare that “all men are born equally free and independent,” ILL. CONST. of 1818, art. VIII, § 1, and that “elections shall be free and equal,” id. § 5. It seemingly did not contemplate equality for women (or nonwhites, perhaps), as a right to vote was recognized for “all white male inhabitants.” Id. § 12.
8. CORNELIUS, supra note 2, at 23. Although Illinois had been admitted to the union as a free state, the goal of this failed convention call was to change the constitution to allow slavery. Id. at 20. Interestingly, Illinois had once been a colony of Virginia. Id. at 5.
9. Id. at 28.
not voting at all were counted as negative. The voters finally prompted a
convention in 1846. The underlying concern was that the 1818 Illinois
Constitution had become ineffective due to increased population, changing
demographics, and financial difficulties arising from an overly zealous legis-

lature. A new constitution became effective in 1848. Because individual
rights were of little concern then, the 1848 Illinois Constitution con-
tained a “substantially unchanged” bill of rights.

An 1856 convention call is said to have failed primarily due to lack of
newspaper attention. Although increased publicity resulted in a successful
convention call in 1860, the resulting proposal did not gain ratification in
1862. The voters again approved a convention call in 1868, which re-
resulted in a new constitution in 1870. While longer and more detailed, the
1870 Constitution contained a bill of rights similar to its predecessors.

Broad equality provisions were nowhere to be found.

The 1870 Constitution remained in place for a century. As many years
passed, Kenneth Sears warned “that Illinois was probably in the worst posi-
tion constitutionally of any state in the Union.” A long journey toward
constitutional reform truly began in the 1940s in Chicago with the forma-
tion of the Committee on Constitutional Revision of the Chicago Bar Asso-

Citation:
10. Id. Consider also that the amendment process outlined in the Illinois Constitu-
tion of 1870, article XIV, section 2, stated that adoption required a majority of those voting
at the election to vote for an amendment. ILL. CONST. of 1870, art. XIV, § 2. Thus, those
voting in the election that chose not to vote on the amendment issue would be counted as
“no” votes. On the other hand, the 1970 Illinois Constitution requires a three-fifths majority
by those voting on the amendment question, which was provided on a separate ballot. ILL.
CONST. art. XIV, § 2(b). Therefore, voters choosing not to vote on the amendment issue did
not affect the outcome either way.
11. CORNELIUS, supra note 2, at 29.
12. Id. at 25-27 (noting that there was also interest, “in accordance with the national
trend toward popular control of government,” in changing some state offices from appoint-
tive to elective).
13. Id. at 44.
14. Id. at 40.
15. Id. at 45-46 (“That year political attention centered on the bitter state and na-
tional elections, where a major party alignment was taking place.”).
16. CORNELIUS, supra note 2, at 46. Newspapers warned the voters that failure to
cast a ballot on the constitutional issue would be counted as a vote against it. Id.
17. Id. at 54. The 1862 Constitution was defeated mainly because of the ongoing
Civil War and mutual charges of disloyalty by the partisan groups. Id.
18. Id. at 59.
19. Id. at 83.
20. Id. at 65.
21. ILL. CONST. of 1870, art. II.
22. ELMER GERTZ & JOSEPH P. PISCOTTE, CHARTER FOR A NEW AGE: AN INSIDE
VIEW OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 8 (1980). Sears was a University
of Chicago constitutional scholar. Id.
The march ended with an overwhelming voter call in 1968 for another constitutional convention. Interestingly, a new bill of rights was not part of the initial agenda. Yet, a Bill of Rights Committee nevertheless 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.

In approving the 1970 Illinois Constitution, the people adopted equality provisions within the Bill of Rights quite different from, not only earlier Illinois provisions, but also from provisions in most other American state constitutions. The 1970 Illinois Bill of Rights includes two explicit equal protection provisions and two explicit 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 a stagnant Illinois constitu-

23. *Id.* at 6. Chicago lawyer, Sam Witwer, was Chair. *Id.*
24. **CORNELIUS, supra** note 2, at 144.
27. **GERTZ, supra** note 25, at 7-15.
28. **ILL. CONST.** art. 1, §§ 2, 17-19.
31. **ILL. CONST.** art. 1, §§ 2, 18.
32. *Id.* §§ 17, 19.
33. Samuel W. Witwer, *Introduction*, 8 N. ILL. U. L. REV. 567, 567 (1988) (concluding that the 1870 Illinois Constitution became “virtually unamendable”). The 1970 Illinois Constitution included for the first time an “automatic 20-year question,” whereby a possible constitutional convention would be placed on the general election ballot every twenty years in the absence of General Assembly action. *Id.* (citing **ILL. CONST.** art. XIV, § 1(b)). Previously, the General Assembly had sole discretion to convene a constitutional convention. *Id.*
35. **Gertz, supra** note 30, at 283.
tional doctrine\textsuperscript{36} that failed to fulfill the distinctive role of state constitutionalism in the federal system.\textsuperscript{37}

American state constitutions should play a key role in protecting individuals.\textsuperscript{38} Expanded state constitutional law protections differ from the uniform protections afforded by federal lawmakers. While the Federal Constitution contains individual rights implied through the recognition of federal and state governments with express, but limited, powers, state constitutions often "contain positive or affirmative rights."\textsuperscript{39} State constitutions can also speak to private (or nongovernmental) conduct, as in two of the 1970 Illinois equality provisions.

Because of their smaller scale, in constitutional matters states are more able "to experiment, to improvise, [and] to test new theories."\textsuperscript{40} Thus, if "a state experiment succeeds, others may follow," and if it "fails, only one of 50 states is affected."\textsuperscript{41} As well, because they are easier to amend than the Federal Constitution,\textsuperscript{42} state constitutions can more quickly respond to failed experiments, social changes, and societal needs.\textsuperscript{43}

A state constitutional provision on individual rights can be independent from the Federal Constitution in that it can extend protections beyond those compelled nationally.\textsuperscript{44} Even where federal and state constitutional

\textsuperscript{36} Gertz & Pisciotta, supra note 22, at 3-6 (viewing the Illinois Constitution as antiquated).

\textsuperscript{37} See, e.g., William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 503 (1977) (stating that state courts have a "manifest purpose . . . to expand constitutional protections").


\textsuperscript{39} 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.


\textsuperscript{41} Brennan, supra note 38, at 550 (explaining 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).

\textsuperscript{42} Williams, supra note 39, at 228.

\textsuperscript{43} 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.").

\textsuperscript{44} Brennan, supra note 37, at 491 (stating that state constitutions serve as "a font of individual liberties").
provisions are similar, their interpretations can be different.\(^{45}\) In the 1960s many in Illinois believed that their lawmakers had failed to adequately protect individual equality interests by not creating explicit new laws\(^{46}\) and by not independently interpreting the Illinois Constitution.\(^{47}\)

The 1970 constitutional initiatives promised greater equality in varying settings. In the three major equality initiatives, the protections extended far beyond any protections in the Federal Constitution, prompting the need for independent, state constitutional interpretation.\(^{48}\) The delegates to the Sixth Constitutional Convention in Illinois hoped the new Bill of Rights provisions in 1970 would help eliminate discrimination,\(^{49}\) the “slavery” of the day.\(^{50}\) They projected that newly recognized freedoms from discrimination in employment and housing would elevate equality to the same status as other constitutional rights, like free speech and free worship.\(^{51}\) The Chairman of the Bill of Rights Committee for the Convention, Elmer Gertz, remarked that the strength of the equality provisions were “surprising,” given that “Illinois was the last large northern industrial state to enact a fair employment practices law” and that it had never passed “open housing legislation.”\(^{52}\)

\(^{45}\) Id. at 495 (stating that independent interpretations are possible even when state constitutional rights are “identically phrased”). For an example of the factors 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, 812-813 (Wash. 1986) (listing “six nonexclusive neutral criteria”).

\(^{46}\) See ILL. CONST. of 1870, art. II.

\(^{47}\) See, e.g., Thomas B. McAffee, The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine, 12 S. ILL. U. L.J. 1, 10 (1987) (stating that in following U.S. Supreme Court holdings on “identical issues,” Illinois courts have generally not paused to consider the merits of the underlying constitutional questions). At times outside of Illinois, state courts are constitutionally barred from independent state constitutional interpretation. See, e.g., CAL. CONST. art. I, § 7 (discussing “pupil school assignment or pupil transportation”); id. § 24 (discussing the rights of criminal defendants and minors in juvenile proceedings); see also R.I. CONST. art. I, § 2 (addressing abortion and abortion funding).

\(^{48}\) See, e.g., York v. Wahkiakum Sch. Dist. No. 200, 178 P.3d 995, 999-1006 (Wash. 2008). Because of the “stark differences in the language,” id. at 999, of the federal and state constitutions, the court declines to “adopt a doctrine similar to the federal special needs exception in the context of randomly drug testing student athletes,” id. at 1006.

\(^{49}\) Gertz, supra note 25, at 170 (“I am proud indeed that we in Illinois have gone beyond all other states and the federal government in eliminating discrimination.”).

\(^{50}\) 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1592 (1970) (introduction by Elmer Gertz, Chairman, Bill of Rights Committee) [hereinafter 3 PROCEEDINGS].

\(^{51}\) Id. at 1593 (equating the right to be free from discrimination with “freedom of speech, freedom to assemble, freedom to worship, due process of law”); id. at 1598 (stating intent to “raise to constitutional stature . . . anti-discrimination in these two very important areas”).

\(^{52}\) Gertz, supra note 30, at 283.
Beyond the expectations of the delegates, there were the hopes of the people.\(^{53}\) State constitutions are often unique in that they "owe their legal validity and political legitimacy to the state electorate," not just to the framers.\(^ {54}\) In contrast to statutes, where the only direct role of the people is in the election of representatives, constitutional revisions frequently require that people vote to call a convention, elect delegates, and then approve the final product.\(^ {55}\) Such voter involvement makes it much more difficult to change a constitution than it is to create, amend, or repeal a statute.\(^ {56}\) A state constitution is the "highest source of law" in the state.\(^ {57}\)

In 1970, the people, as well as the Convention delegates, called for significant expansions of equality. Expectations arose from the four distinct equality provisions added to the Illinois Bill of Rights, effective July 1, 1971. Section 2 of article I contains the general proposition that no person shall be "denied the equal protection of the laws."\(^ {58}\) Section 17 embodies more particular assurances and the strongest of the guarantees of equality. 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 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.\(^ {59}\)

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:

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53. See, e.g., Williams, supra note 39, at 194; Samuel W. Witwer, Introduction to JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS, 1818-1970 xi, xii (1972) ("American constitutions are indeed people's documents.").

54. See, e.g., Williams, supra note 39, at 194; Witwer, supra note 53, at xii.

55. GERTZ & PISCOTTE, supra note 22, at 22.

56. Williams, supra note 39, at 229; Witwer, supra note 53, at xi ("Americans see a constitution as something which should rest upon a more certain basis than tradition, custom, and precedent.").

57. Williams, supra note 39, at 229.

58. ILL. CONST. art. I, § 2.

59. Id. § 17.
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.60

Unfortunately, the people and the delegates have been disappointed by both the Illinois General Assembly and the Illinois Supreme Court. The General Assembly enacted the Illinois Human Rights Act to implement the new equal protection and antidiscrimination provisions.61 But in doing so, it fell short in protecting all persons by unduly restricting those who can seek remedies for equality violations.62 As well, the Illinois Supreme Court has paid too much deference to the General Assembly. As a result, many who suffer inequalities addressed by new constitutional provisions are left remedyless.63 Thirty years after Elmer Gertz lamented that the new provisions of 1970 were still "unrealized expectations,"64 little has changed. The expectations of the delegates and the people should not be forgotten. Greater equality is long overdue. After briefly reviewing Illinois constitutional rights and the goals behind the new equality provisions, legislative and judicial failures in promoting equality will be exposed and reforms will be suggested.

III. OVERVIEW OF CONSTITUTIONAL RIGHTS IN ILLINOIS

The 1970 amendments to the Illinois Constitution expressly recognized several new equality principles. They joined other express Illinois constitutional rights. All Illinois constitutional rights, however, are not themselves equal. Before looking more particularly to the 1970 equal protection and antidiscrimination provisions, a general overview of other Illinois constitutional rights is in order as it will facilitate a better understand-

60. Id. §§ 18-19.
62. Within the definitions sections, the General Assembly has limited the persons covered by the protections of the Act. Id. at 5/2-101 to -102.
63. Lousin, supra note 29, at 602 ("In effect, then, there is no longer a constitutional remedy against employment discrimination in Illinois.").
64. Gertz, supra note 30, at 283.
ing of the four new provisions and the proper legislative and judicial approaches to their use.

A. EXPRESS RIGHTS

Of the twenty-four sections now in the Illinois Bill of Rights, eleven employ the term “right.” These sections can be divided into two main types distinguished by the contemplated role for the General Assembly. The first category includes sections for which there is no expressly articulated legislative role. The second contains sections explicitly recognizing at least some General Assembly responsibility.

The first category includes constitutional rights encompassing the following:
- The “inherent and inalienable rights” of “life, liberty and the pursuit of happiness” of section 1
- The “right to assemble and petition” of section 5
- The “right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communication by eavesdropping devices or other means” of section 6
- The “right [of an accused] to appear and defend in person and by counsel; to demand the nature and cause of the accusation and to have a copy thereof; to be confronted with the witnesses against him or her and to have process to compel the attendance of witnesses in his or her behalf; and to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed” of section 8
- Other rights “retained by the individual citizens” despite their absence from express recognition in article I, under section 24

As well, the “right of trial by jury” under section 13 is to “remain inviolate,” seemingly precluding significant General Assembly action. Other rights in article I expressly permit, or even require, General Assembly action. Legislation may include defining the right or providing for its enforcement. For example, the “right of the individual citizen to keep and bear

65. Although section 3 states that “no person shall be denied any civil or political right . . . on account of his religious opinions,” it is excluded from this discussion because its focus is on “religious freedom” rather than on a right (though, in practice, a freedom may be quite similar to a right in its content and enforcement opportunities). ILL. CONST. art. I, § 3.
66. Id. § 1.
67. Id. § 5.
68. Id. § 6.
69. Id. § 8.
70. ILL. CONST. art. I, § 24.
71. Id. § 13.
arms," under section 22, is expressly subject "to the police power." The section 8.1 "right to restitution" seemingly is even more dependent upon legislation since both the nature of the right itself and its "enforcement" are to be provided by law.

There are express constitutional rights outside of article I which also approach General Assembly responsibilities differently. For example, article VI, section 4 expressly recognizes certain appeals from both the trial courts and the intermediate appellate courts to the Supreme Court "as a matter of right." Likewise, article VI, section 6 states that certain appeals from the trial courts to the intermediate appellate courts are "a matter of right." Article VI is silent on action by the legislature. Similarly silent are the provisions on the "pension and retirement rights" recognized in article XIII, section 5. Such rights encompass "an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Here, the role of the General Assembly seems limited, while significant judicial enforcement responsibilities are implied.

Other Illinois constitutional rights outside of article I specifically anticipate legislation. Article III, section 1 recognizes a "right to vote" that may be subject to statutory registration and residency requirements. The role of the General Assembly in suffrage and election is recognized in article III, section 4, which declares that the General Assembly "shall define permanent residence for voting purposes, insure secrecy of voting and the integrity of the election process, and facilitate registration and voting by all qualified persons." It also says statutes on "voter registration and conduct of elections must be general and uniform." Section 5 delegates election supervision to a State Board of Elections whose "size, manner of selection and compensation" shall be determined "by law." Finally, section 6 of article III designates a particular day for the election of the General Assembly itself "or on such other day as provided by law."

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72. Id. § 22.
73. Id. § 8.1(a) (stating "rights," including "restitution" for "crime victims," "as provided by law"); id. § 8.1(b) (noting such rights are subject to "enforcement" as provided by the General Assembly).
74. ILL. CONST. art. VI, § 4(b)-(c).
75. Id. § 6.
76. ILL. CONST. art. XIII, § 5.
77. Id.
78. ILL. CONST. art. III, § 1.
79. Id. § 4.
80. Id.
81. Id. § 5.
82. Id. § 6; see also ILL. CONST. art. XI, §2 (recognizing a "right to a healthful environment" for every person, with enforcement through "legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law").
B. IMPLICIT RIGHTS

Article I of the Illinois Constitution, labeled the “Bill of Rights,” has several sections which seemingly recognize what most would deem rights even though the term “right” appears more obliquely, or not at all. For example, in section 12, called “Right to Remedy and Justice,” there is a recognized entitlement to “a certain remedy in the laws for all injuries and wrongs” as well as to “obtain justice by law, freely, completely and promptly.” In section 15, called “Right of Eminent Domain,” there is a recognized entitlement, upon the exercise of “eminent domain,” to “just compensation as provided by law,” to be determined by a jury.

Some article I sections that fail to employ the term “right” in either the title or text nevertheless yield what most would regard as rights. Thus, section 10, entitled “Self-Incrimination and Double Jeopardy,” simply says that no person in a criminal case “shall be compelled . . . to give evidence against himself nor be twice put in jeopardy for the same offense.” And section 2, entitled “Due Process and Equal Protection,” says no person “shall be deprived of life, liberty or property without due process of law.”

Outside article I there are additional implicit constitutional rights. Many expressly limit government. For example, the general obligation of government to make records and proceedings available to the public seemingly implies a right of access. Similarly, article IV, section 5 declares that sessions of the General Assembly and meetings of its committees “shall be open to the public,” though closure is permitted if there is a two-thirds vote involving “the public interest.” Article IV, section 7 requires the legislature to provide “reasonable public notice of meetings” and “to keep a journal of its proceedings and a transcript of its debates” that is “available to the public.” Article VIII, section 1 requires that reports and records of “the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection.

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83. ILL. CONST. art. I, § 12. But see People v. Martinez, 867 N.E.2d 24, 30 (Ill. App Ct. 2007) (stating section 12 “is merely an expression of a philosophy and not a mandate”).
84. ILL. CONST. art. I, § 15. Notably, the right to eminent domain resides in the government, while the right to just compensation flows to the private property holder subject to eminent domain. See id.
85. Id. § 10.
86. Id. § 2. Article I also uses other explicit terms to denote what most understand as rights. Thus, section 9 (entitled “Bail and Habeas Corpus”) speaks of a “privilege of the writ of habeas corpus.” Id. § 9. And section 3 (entitled “Religious Freedom”) speaks of the “the liberty of conscience” secured by the “guaranteed” freedom of “exercise and enjoyment of religious profession and worship, without discrimination.” Id. § 3.
87. ILL. CONST. art. IV, § 5(c).
88. Id. § 7(a).
89. Id. § 7(b).
by the public according to law.”90 Finally, a public access right to information is implied in article XIII, section 2 which mandates the filing of “a verified statement” of “economic interests” by a state officeholder and others “as provided by law,” as well as authorizes the General Assembly by law to impose a similar filing requirement upon a local government officeholder and others.91 Implicit rights to information held by government mean that at least certain individuals92 may sue to enforce access duties.93

Comparable treatment of express and implicit rights often presents no problems. The U.S. Supreme Court has long approached the “rights” of the criminally accused, in Amendment VI to the Federal Constitution, comparably to the restraints on government that protect the criminally accused in Amendment V to the Federal Constitution.

In Gomez-Perez v. Potter,94 the U.S. Supreme Court recently afforded comparable treatment of differently worded statutes dealing with equality. In particular, 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” is to ban “discrimination based on race.”95 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.”96

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90. ILL. CONST. art. VIII, § 1(c); see also Oberman v. Byrne, 445 N.E.2d 374, 380 (Ill. App. Ct. 1983) (holding that to effect the purpose behind the constitutional provision, “it is necessary that public disclosure be made of specific transactions and not mere disclosure of the source of the revenue and ‘broad direction’ to which expenditures went”).

91. ILL. CONST. art. XIII, § 2.

92. The standing to litigate such constitutional claims seemingly encompasses a broader range of plaintiffs than would have standing in the Federal Article III courts on comparable federal constitutional claims.

93. Other possible implied rights arising from duties imposed on the government outside of article I might inhere in article X, section 1, requiring the State to “provide for an efficient system of high quality public educational institutions and services,” with education “through the secondary level,” to be free. ILL CONST. art. X, § 1. Consider also article III, section 3, requiring that all “elections shall be free and equal.” ILL CONST. art. III, § 3. Although there is silence on the General Assembly’s role, given the explicit power delegations to the General Assembly in election processes covered in sections 1, 4, 5, and 6, seemingly there is implicit legislative responsibility to define and enforce any right to free and equal elections. See id.


95. Id. at 1936 (quoting 42 U.S.C. § 1982 (2008)).

96. Id. at 1942 (alteration in original) (quoting 29 U.S.C. § 633a(a) (2000 & Supp. V)).
C. ENFORCEMENT OF EXPRESS RIGHTS WITH AND WITHOUT A SELF-
EXECUTION CLAUSE

Constitutions may not invite significant, or even any, legislation defining or enforcing certain constitutional rights. Here, constitutional claims can often then be pursued directly in court, as when the rights are self-executing. Article I, section 17 of the Illinois Constitution has a self-execution clause. It declares certain antidiscrimination rights "are enforceable without action by the General Assembly," though legislation may establish "reasonable exemptions" and "provide additional remedies." Enforcement by lawsuits, absent any enabling legislation, is contemplated.

When a constitutional right is not accompanied by an express self-execution clause, Illinois courts have still found that at least some justicable claims are contemplated. In *People ex rel. Wanless v. City of Chicago,* the eminent domain "right" was at issue. The right, now found in article I, section 15, says: "Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law." Enforcement by lawsuits, absent any enabling legislation, is contemplated.

When a constitutional right is not accompanied by an express self-execution clause, Illinois courts have still found that at least some justicable claims are contemplated. In *People ex rel. Wanless v. City of Chicago,* the eminent domain "right" was at issue. The right, now found in article I, section 15, says: "Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law." The court held, notwithstanding the recognized roles of the state and local legislatures in addressing some matters of compensation and court procedure, that the "constitutional requirement is self-executing, and neither requires any legislation for its enforcement nor is susceptible of impairment by legislation or ordinance." Seemingly, for property "taken or damaged for public use," there must be some reasonable form of compensation, with a jury available for assessment.

97. ILL. CONST. art. I, § 17.
98. As with constitutional rights, constitutional limits on governmental authority can be self-executing. In *Phillips v. Quick,* 63 Ill. 445 (1872), a city charter conferred jurisdiction on a police magistrate in the sum of $500 though a constitutional provision said jurisdiction should be "uniform" and a state statute limited jurisdiction to $100. *Id* at 446-47. A police magistrate judgment for over $300 was reversed, *id* at 449, with the court ruling that where constitutional provisions are "negative or prohibitory . . . they execute themselves," *id* at 447. Thus, where a governmental power is limited constitutionally, or where a governmental act is prohibited, the court observed that "no one would contend that the power might be exercised or the act performed until prohibited by the general assembly." *Id* at 448. The court further observed that where the constitution "requires the performance of an act," but provides no means of enforcement, then the constitution does not self execute. *Id.*
99. 38 N.E.2d 743 (Ill. 1941).
100. ILL. CONST. art. I, § 15. At the time of *Wanless,* article II, section 13 of the Illinois Constitution said: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, should be ascertained by a jury, and shall be prescribed by law." *Wanless,* 38 N.E.2d at 746 (quoting ILL. CONST. of 1870, art. II, § 13).
101. *Wanless,* 38 N.E.2d at 746 (relying on earlier precedents).
Similar approaches were urged in *AIDA v. Time Warner Entertainment Co.*, but there was a different result. The American Italian Defense Association (AIDA) sought declaratory relief against Time Warner because its television show, *The Sopranos*, “breached” the Individual Dignity Clause of the Illinois Constitution.  

That clause, which is located in article I, section 20, states in full: “To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation are condemned.”

The AIDA court found section 20 was completely “hortatory.” It relied on the earlier *Irving v. J.L. Marsh, Inc.*, case, where another appellate district court looked to the legislative history, specifically a Bill of Rights Committee Report, which stated:

> [Again [Victor Arrigo, the provision’s supervisor] want to reiterate, the individual dignity clause in no way qualifies or modifies the constitutional rights of free speech and press.] The provision creates no private right or cause of action . . . . It is purely hortatory, “a constitutional sermon.” Like a preamble, such a provision is not an operative part of the Constitution. It is included to serve a teaching purpose, to state an ideal or principle to guide the conduct of government and individual citizens.

So a constitutional condemnation of certain conduct can be “merely an expression of philosophy and not a mandate that a certain remedy be provided in any specific form.”

A different approach to Illinois constitutional rights unaccompanied by a self-executing clause was followed in *Amati v. City of Woodstock*. There, claims were brought under the article I, section 6 provisions, recognizing people’s rights to security against unreasonable searches, seizures, privacy invasions, or eavesdroppings.  

Upon examining Illinois state court

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104. *AIDA, 772 N.E.2d at 960.
105. *Id. at 961 (alteration in original) (citing Irving v. J. L. Marsh, Inc., 360 N.E.2d 983, 984 (Ill. App. Ct. 1977)).
106. *AIDA, 772 N.E.2d at 961.
108. *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.”).
precedents as well as constitutional commentary, the court found the claims would be viable with the use of the article I, section 12 “right to remedy” for “all wrongs and injuries” in the absence of legislation.\(^{109}\) Yet, because there was an applicable statute including “a comprehensive civil damage scheme including actual and punitive damages,” there was no “right to bring a separate action under article I, section 6” of the constitution.\(^{110}\)

IV. THE GOALS OF EQUALITY UNDER THE 1970 ILLINOIS CONSTITUTION

We now examine in greater depth the four separate equality provisions in the 1970 constitution. One is article I, section 2, theretofore solely a due process provision. The 1970 change added the statement that no person shall be “denied the equal protection of the laws.”\(^{111}\) This provision apparently was included for good measure, to replicate the Federal Constitution, or, in the words of Elmer Gertz, “for the sake of completeness.”\(^{112}\) Perhaps, it sets forth little more than a “sermon” or a “teaching” tool.\(^{113}\)

Yet, the aspirations of the drafters went beyond simple mimicking of the Federal Bill of Rights.\(^{114}\) As Gertz said, “we could not give our citizens less, but we could give them more.”\(^{115}\) And they did, in sections 17, 18, and 19.

Section 17 does not have a federal counterpart.\(^{116}\) It states:

109. *Amati*, 829 F. Supp. at 1006. In some ways, the “right to remedy” provision thus might operate like a general self-execution clause for constitutional rights whose provisions say nothing about implementation. See id.

110. *Id.* at 1006-07. The court did “not decide whether a party may bring an action directly under Article I, section 6” for acts that are not addressed within the statutory scheme. *Id.* at 1007 n.12.

111. ILL CONST. art. I, § 2.


114. GERTZ, *supra* note 25, at 14 (observing that, even for identical provisions, the Illinois Supreme Court could interpret them to guarantee protections beyond that acknowledged by the United States Supreme Court).

115. *Id.* at 12.

116. *Id.* at 102. We have found no very comparable state counterpart, though there are some state constitutional provisions protecting against some or all of these varying forms of discrimination (and others). See, e.g., CAL. CONST. art. I, § 31 (stating no discrimination based on “race, sex, color, ethnicity, or national origin”); LA. CONST. art. I, § 3 (stating no discrimination based on “birth, age, sex, culture, physical condition or political ideas or affiliations”). As well, some state constitutional equality provisions operate in similar or different contexts. See, e.g., COLO. CONST. art. XV, § 6 (stating equality and nondiscrimination “in charges or in facilities for transportation of freight or passengers”); MONT. CONST.
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.¹¹⁷

Section 17 is unique in two ways.¹¹⁸ First, its prohibitions encompass not only state action, but also private action.¹¹⁹ In contrast, equal protection under the Fourteenth Amendment to the Federal Constitution provides for only the “equal protection of the laws.”¹²⁰ The debates at the Illinois Constitutional Convention reveal that the delegates had two goals in mind for the more expansive section 17.¹²¹ The first was to recognize the fundamental nature of the right to be free from discrimination.¹²² The second was to prevent “drag” on the Illinois economy by those suffering from discrimination.¹²³ Given these goals, the areas of employment and housing were chosen both because of the past record of discrimination and because they were most connected to the economy.¹²⁴ Since any proposal would ultimately require voter approval, the delegates also decided to limit the coverage of section 17 to the areas deemed most likely to be understood by the electorate.¹²⁵

¹¹⁷. ILL. CONST. art. I, § 17.
¹¹⁸. 3 PROCEEDINGS, supra note 50, at 1592 (discussing restriction on private actions); id. at 1596 (discussing the self-execution clause).
¹¹⁹. Id. at 1592.
¹²⁰. The Civil Rights Cases, 109 U.S. 3, 11 (1883) (stating it is “state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment”).
¹²¹. 3 PROCEEDINGS, supra note 50, at 1593 (discussing creation of “very, very basic rights”); id. at 1594 (noting that § 17 was also “an economic proposal”).
¹²². Id. at 1593 (equating this right with other “very, very basic rights” such as those found in the First Amendment to the U.S. Constitution).
¹²³. Id. at 1594–95 (discussing the effect of discrimination on minorities as resulting in unemployment or lower pay for the same work as non-minorities). Delegate Kemp noted that this provides incentive to go on the welfare roll, decreases taxes collected, and increases crime. Id.
¹²⁴. Id. at 1595.
¹²⁵. Id. at 1592 (describing a “rifle-shot approach” rather than “shotgun approach” to specifically target the two most harmful areas of discrimination).
Section 17 is also unique because it includes a self-execution clause. The drafters made the rights “enforceable without action by the General Assembly” to ensure that the new section 17 rights were not merely statements of policy, not simply hortatory, and not just a constitutional sermon. The debates reveal a clear intent by the drafters to recognize a private cause of action in section 17. Since the rights in section 17 arise in the absence of implementing legislation, courts are authorized to provide judicially-crafted remedies for certain equality violations.

The “right to remedy” provision within section 12 covering “all injuries and wrongs” need not be employed.

The third new provision on equality parallels somewhat the failed Federal Equal Rights Amendment. Article I, section 18 states that “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 18 was included despite protests that it was redundant, given the section 2 equal protection guarantee and the section 17 protection against discrimination. Despite the testimony of two female delegates who stated that they never experienced gender discrimination, the drafters adopted


127. PROCEEDINGS, supra note 50, at 1596 (discussing the need to avoid judicial reluctance for enforcement in the absence of implementing legislation).

128. Id. at 1597.

129. Id. The delegates did not address the implications of the self-execution clause if the legislature were not to act. As will be seen, this clause was, in fact, applied by the courts prior to the passage of the implementing legislation for section 17. Following statutory enactments, the Illinois courts have not spoken much about the relationship between legislative action and the self-execution implemented by judicial action.

130. See Amati v. City of Woodstock, 829 F. Supp. 998, 1006 (N.D. Ill. 1993) (stating section 12 would be available to enforce a section 6 claim in the absence of comprehensive legislation, as section 6 has no self-executing clause).

131. PROCEEDINGS, supra note 50, at 3674.

132. ILL. CONST. art. I, § 18. Other states have somewhat comparable, but at times very different, constitutional equality provisions. See, e.g., CAL. CONST. art. I, § 31 (stating no state discrimination “in the operation of public employment, public education or public contracting”); N.J. CONST. art. I, § 5 (stating no segregation “in the militia or in the public schools”).

133. PROCEEDINGS, supra note 50, at 3669 (discussing concern that since “[w]omen have not been treated like ‘persons’ for such a long time that we prefer to have this matter spelled out specifically, rather than leaving [it] to a court interpretation”).

134. Id. at 3669 (noting that section 17 only covers the areas of housing and employment, while discrimination against women is more pervasive).

135. Id. at 3674, 3676.
section 18\textsuperscript{136} based on the lack of case law applying the equal protection clause of the Federal Constitution to women, as well as on the unfortunate tendency of American courts to uphold troubling gender classifications.\textsuperscript{137}

Finally, there was added an equality provision applicable only to the handicapped,\textsuperscript{138} a matter not expressly addressed by the Federal Constitution.\textsuperscript{139} Article I, section 19 commands that "[a]ll 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."\textsuperscript{140} The debates on section 19 reveal some concerns over enacting specifically tailored protections.\textsuperscript{141} Some urged that the subject of section 19 was better suited for legislation.\textsuperscript{142} Eventually, however, section 19 was adopted.\textsuperscript{143} General Assembly wishes were not paramount.

At the convention there was much concern over securing voter approval.\textsuperscript{144} The delegates discussed worries about assuring positive press coverage.\textsuperscript{145} They noted the strong possibility of labor and business opposition.\textsuperscript{146} They also noted that the "aura of Judaic-Christian principles that appears to be the attitude of this convention . . . [may not be] pervasive in all of the Illinois communities."\textsuperscript{147} Equality protections in the private sector were limited to employment and housing, providing a "pragmatic approach" that would "be best understood and appreciated by the public at

\begin{footnotes}
\textsuperscript{136} Id. at 3677.
\textsuperscript{137} Id. at 3676. The discussion had a marked tone of sexism as a few of the delegates finally gave into approval of the provision in order "to give the girls a unanimous [vote]." Id. at 3677.
\textsuperscript{138} 3 PROCEEDINGS, supra note 50, at 3687 (recording the passage of section 19).
\textsuperscript{139} There are a few comparable state constitutional equality provisions for those with handicaps. See, e.g., CONN. CONST. art. I, § 20 (stating no inequality, segregation or discrimination in the exercise of certain rights because of "physical or mental disability"); FLA. CONST. art. I, § 2 (stating no deprivation of certain rights based on "physical disability"); R.I. CONST. art. I, § 2 (stating no state discrimination against "otherwise qualified person . . . solely by reason of . . . handicap").
\textsuperscript{140} ILL. CONST. art. I, § 19.
\textsuperscript{141} 3 PROCEEDINGS, supra note 50, at 3684, 3686.
\textsuperscript{142} Id. at 3679.
\textsuperscript{143} Id. at 3687; see also id. at 3683 (noting that protections existed for "fish, birds, game, wildlife, the environment, ethnic groups, regional groups, and women," and how it was impossible not to protect "those persons who are struggling, probably harder than anyone else . . . to become productive members of society").
\textsuperscript{144} Id. at 3678.
\textsuperscript{145} Id.
\textsuperscript{146} 3 PROCEEDINGS, supra note 50, at 3686.
\textsuperscript{147} Id. at 3678.
\end{footnotes}
large." The compromises worked as the voters approved a new constitution on December 15, 1970, to take effect July 1, 1971.

V. UNEQUAL STATUTORY PROMOTION OF EQUALITY SINCE 1970

Prior to 1970 the Illinois General Assembly had enacted some equality protections, most importantly the Fair Employment Practices Act (FEPA) in 1961. One stated reason for section 17 was to remedy parts of the FEPA. Following the new constitution, the FEPA was amended to include gender as a basis for illegal employment discrimination. Similarly, other statutes were amended in 1971 to avoid constitutional challenges, particularly under section 18.

The initial piecemeal reaction to the 1970 constitution was followed by the more comprehensive response in the Illinois Human Rights Act of 1979 (HRA or the Act). Effective in 1980, the Act was intended to assemble most equal protection and antidiscrimination laws into a single cohesive scheme that would implement the new constitutional equality principles. Thus, the HRA is intended to "secure and guarantee the rights" established by sections 17, 18, and 19. Specifically, the goal of the HRA is:

[T]o secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, military status, sexual orientation, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.

148. Id. at 1592.
150. Id.
151. Gertz, supra note 30, at 284.
152. Id. at 303.
153. Lousin, supra note 29, at 604. Private associations in particular also changed their rules to avoid sex discrimination challenges under the new constitution. Id. at 601.
156. 775 ILL. COMP. STAT. 5/1-102(A) (2008).
157. Id. at 5/1-102(F).
158. Id. at 5/1-102(A) (noting that higher education was added effective January 1, 1984).
The Act grants greater protections than those granted by sections 17, 18, and 19, by including national origin, age, marital status, military status, sexual orientation, and unfavorable military discharge. The Act also exceeds constitutional equality by including access to financial credit and public accommodations.

Further, the HRA seemingly extends the protections of sections 17 and 19. Those provisions only recognize freedom from discrimination in "the hiring and promotion practices of any employer." Under the HRA, civil rights violations include an employer’s refusal, "to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status."

Despite its seeming intent to protect "all individuals" from employment discrimination, because the definition section deems an "employee" to be "any individual performing services for remuneration within this State for an employer," the HRA does not protect "individuals employed by persons who are not 'employers' as defined" by the Act. The Act defines an "employer" as "any person employing fifteen or more employees within Illinois during twenty or more calendar weeks within the calendar year."

So, persons employed by employers having fewer than fifteen employees are not covered, meaning all people are not protected from employment discrimination.


161. 775 ILL. COMP. STAT. 5/1-102(A) (2008).

162. ILL. CONST. art. I, §§ 17, 19.

163. 775 ILL. COMP. STAT. 5/2-102(A) (2008). The delegates to the constitutional convention apparently understood the language of "hiring and promotion practices" to include the broader category of employment practices. Indeed, throughout the debates, employment discrimination was discussed in reference to section 17. See 3 PROCEEDINGS, supra note 50, at 1596.

164. 775 ILL. COMP. STAT. 5/2-101(A)(1)(a).

165. Id. at 5/2-101(A)(2)(b).

166. Id. at 5/2-101(B)(1)(a). The fifteen-person requirement in Illinois does not apply "when a complainant alleges civil rights violations due to . . . physical or mental handicap," id. at 5/2-101(B)(1)(b), nor does it apply to the "[s]tate and any political subdivision, municipal corporation or other governmental unit or agency," id. at 5/2-101(B)(1)(c). Federal laws barring similar forms of employment discrimination are now also limited to employers with at least fifteen employees. 42 U.S.C. § 2000e(b) (2000). At times, however, the relevant employee numbers had been one hundred, fifty, and twenty-five. Act of March 24, 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). These numbers, unlike the fifteen in Illinois, were founded on Congressional desires to meet the Federal Constitution’s Commerce Clause requirements (so as to avoid substantially regulating intrastate commerce). See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964); see also United Steelworkers of Am. v. Weber, 443 U.S. 193, 207 n.6 (1979).
discrimination even though the HRA is generally intended to protect "all individuals" and even though article I, section 17 recognizes rights in employment discrimination extending to "all persons." While smaller employers are not responsible under the HRA for all "unlawful discrimination" by their employees, they are responsible for certain "sexual harassment" by those same employees.\(^\text{167}\)

The intent of the HRA is to "secure and guarantee the rights established" by section 18,\(^\text{168}\) which declares that "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."\(^\text{169}\) Furthermore, the HRA is intended to "promote the public health, welfare[,] and safety by protecting the interest of all people in Illinois in maintaining personal dignity, in realizing their full productive capacities and in furthering their interests, rights and privileges as citizens."\(^\text{170}\) Unfortunately (and unconstitutionally we believe),\(^\text{171}\) the HRA falls short in promoting section 18 policies as it expressly seeks to "prevent . . . sexual harassment in higher education."\(^\text{172}\) Thus, the HRA covers only students connected to "an institution of higher education."\(^\text{173}\)

Most individuals who are protected by the HRA are required to adhere to strict procedures when they pursue equality claims.\(^\text{174}\) Effective January, 2008, those procedures were significantly altered, as claimants must no

\(^{167}\) 775 ILL. COMP. STAT. 5/2-101(B)(1)(b) (2008) (defining "employer" to include "any person employing one or more employees" when a complainant alleges "sexual harassment"); id. at 5/2-102(D) (stating that an "employer" is only responsible for sexual harassment by non-employees and non-managerial and non-supervisory employees where the employer knows of conduct and "fails to take reasonable corrective measures"); see also Sangamon County Sheriff's Dep't v. Ill. Human Rights Comm'n, 875 N.E.2d 10, 20-21 (Ill. App. Ct. 2007), review granted, 882 N.E.2d 83 (Ill. 2008) (identifying HRA managerial or supervisory employees whose acts prompt strict liability of employers for sexual harassment).

\(^{168}\) 775 ILL. COMP. STAT. 5/1-102(F) (2008).

\(^{169}\) ILL. CONST. art. I, §18.

\(^{170}\) 775 ILL. COMP. STAT. 5/1-102(E) (2008).

\(^{171}\) We limit our analyses to sections 17, 18, and 19 and thus do not consider whether the general equal protection guarantee of section 2 invalidates certain HRA classifications. See, e.g., In re Marriage Cases, 183 P.3d 384 (Cal. 2008) (holding that sexual orientation is a suspect class under the state constitutional general equal protection provision and the statutory ban on same-sex marriages falls under it as there is no compelling governmental interest).

\(^{172}\) 775 ILL. COMP. STAT. 5/1-102(B) (2008).

\(^{173}\) Id. at 5/5A-101(C).

\(^{174}\) Id. at 5/7A-102. Discussion of the validity of the exclusive administrative remedy for violation of constitutional rights is beyond the scope of this article. Id. at 5/8-111(C).
longer pursue fully their viable HRA claims within an agency. Rather, they can eventually go to the circuit courts, thereby procuring trials by jury.\textsuperscript{175}

VI. JUDICIAL FAILURES TO PROMOTE EQUALITY SINCE 1970

Following adoption of the 1970 constitution but before the enactment of the HRA, some Illinois courts resolved equality claims on a case-by-case basis.\textsuperscript{176} Following the Act, however, judges now mostly defer to the General Assembly. In some instances, this deference is consistent with the express directions of the constitutional drafters and the voters.\textsuperscript{177} But elsewhere, there are disturbing inconsistencies.

A. DECISIONS BEFORE THE ILLINOIS HUMAN RIGHTS ACT

In 1974, the Illinois Supreme Court in \textit{Illinois v. Ellis} construed the section 18 guarantees of equal protection.\textsuperscript{178} At issue was the constitutional validity of the differing treatment of males and females under the Juvenile Court Act\textsuperscript{179} which then prohibited criminal prosecution of males under 17 and females under 18. Seventeen-year-old Delbert Ellis was convicted and sentenced to prison for forgery and burglary.\textsuperscript{180} Ellis argued that the statute violated the equal protection guarantees of section 18. The appellate court agreed.\textsuperscript{181} Upon appeal by the State, the high court held that the effect of the statute's unconstitutionality was to require possible prosecutions of all seventeen-year-olds, male and female, resulting in an affirmation of Ellis's conviction.\textsuperscript{182}

The \textit{Ellis} court reasoned that to properly construe similar, but distinct, provisions within the constitution, the court must assume that each provision, and each separate clause, has significance.\textsuperscript{183} Given the general equal protection clauses in the Bill of Rights of both the Federal and Illinois Constitutions, the court found that the section 18 drafters must have “intended

\begin{enumerate}
  \item[175.] \textit{Id. at 5/7A-102} (dealing with employment discrimination); \textit{id. at 5/8B-102} (dealing with housing discrimination).
  \item[176.] \textit{See, e.g., Illinois v. Ellis, 311 N.E.2d 98 (Ill. 1974)} (recognizing private causes of action for unconstitutional discrimination).
  \item[177.] \textit{McAffee, supra note 47, at 4.}
  \item[178.] \textit{Ellis, 311 N.E.2d at 99.}
  \item[179.] \textit{Id. at 99-101} (discussing Ill. Rev. Stat. ch. 37, § 702-7(1) (1973), which had been amended to cover all seventeen-year-olds effective January 1, 1973).
  \item[180.] \textit{Id. at 99.}
  \item[181.] \textit{Id.}
  \item[182.] \textit{Id. at 102.}
  \item[183.] \textit{Ellis, 311 N.E.2d at 101} (citing Oak Park Fed. Sav. & Loan Ass'n v. Vill. of Oak Park, 296 N.E.2d 344, 347 (Ill. 1973)).
\end{enumerate}
to supplement and expand the guaranties” of those clauses.\textsuperscript{184} Furthermore, the court found the intent behind section 18 was to have courts apply the highest level of judicial scrutiny to gender classifications despite the fact that neither it nor the United States Supreme Court had done so in the past under the general equal protection provisions.\textsuperscript{185}

An Illinois appellate court likewise construed section 17 broadly in 1978 in \textit{Walinski v. Morrison & Morrison}.\textsuperscript{186} As in \textit{Ellis}, the \textit{Walinski} court looked to the intent of the constitutional drafters as evidenced in the convention debates.\textsuperscript{187} Specifically, the court found the self-execution clause in section 17 revealed an intent for plaintiffs to have “compensatory and punitive damages” for violations of section 17.\textsuperscript{188} Nancy Walinski had alleged the defendant, a private employer, would not consider her for employment because of her gender.\textsuperscript{189} Her complaint seeking monetary damages for sex discrimination in hiring was dismissed by the trial court because section 17 did not include a damages remedy.\textsuperscript{190} The appellate court reversed, finding an intent by the drafters to allow “existing judicial or legislative remedies,” including damages.\textsuperscript{191} It distinguished \textit{Teale v. Sears, Roebuck & Company}, a 1976 Illinois Supreme Court decision finding the Age Discrimination Act precluded Illinois courts from expanding remedies beyond the “statutory sanction.”\textsuperscript{192} In \textit{Walinski}, there was no statutory language setting limits on fines or indicating those harmed “shall be protected as provided herein.”\textsuperscript{193}

In contrast to \textit{Ellis} and \textit{Walinski}, in \textit{Davis v. Attic Club}, an Illinois appellate court foreshadowed what was to come under the Illinois Human Rights Act as well as the “reasonable exemptions” clause of section 17.\textsuperscript{194} Plaintiffs (including females and one male) alleged that the Attic Club (among others) discriminated against females by requiring that they be served alcohol and lunch only in private rooms reserved far in advance,
while males did not face similar restrictions. The complaint alleged that this gender-based restriction violated the section 17 prohibition on discrimination in the sale of property. The court held that voluntary associations, such as private clubs, were exempt from section 17 prohibitions. The court construed the Illinois Liquor Control Act, in particular its sections on discrimination and definitions, as exempting private clubs. This statutory exemption was then held not to violate the section 17 bar on discrimination in the sale of property since its drafters "chose not to interfere" with voluntary associations.

Davis was strongly criticized by Elmer Gertz in his 1978 assessment of the effects of section 17. As the chairman of the Bill of Rights Committee at the 1968 Illinois Constitutional Convention, Gertz had firsthand knowledge of the constitutional debates. He disagreed that the drafters intended an exemption for private clubs. Citing language of the delegates at the debates regarding the reasonableness of private clubs discriminating by supplying housing for members only, the Davis court extrapolated that discrimination by private clubs, in general, was considered a reasonable exemption.

Noting that this extrapolation was "tenuous," Gertz argued that even if a private club could be a reasonable exemption contemplated by the drafters, it was not a reasonable exemption created by the legislature under section 17. The language of section 17 was said to be forward-looking as it declares that the General Assembly may enact reasonable exemptions.

Id. at 904. The male plaintiff was a Chicago attorney who complained that this discrimination resulted in his inability to entertain female associates and clients, inhibiting his business. Id.

Id. at 905 (alleging that the discrimination violated the Illinois Liquor Control Act).

Id. at 912.

Id. at 905 (barring denials of "equal enjoyment" of premises where alcohol is sold (citing Ill. Rev. Stat. ch. 43, ¶ 133 (1973))).

Davis, 371 N.E.2d at 909.

Id. at 911-12 (referencing 1970 Illinois Constitutional Convention proceedings recognizing other civil rights statutes that exempted truly private clubs). The dissent, however, had a different view. Id. at 916 (Simon, J., dissenting) ("The clear and simple words of the discrimination prohibition should not be obscured by the less precise statements of committees and delegates regarding provisions not adopted by the convention").

Gertz, supra note 30, at 313.

Id. at 287.

Id. at 312. He also disagreed that the Liquor Control Act itself supported such an inference of an exemption for private clubs. Id. at 307-09.

Davis, 371 N.E.2d at 912.

Gertz, supra note 30, at 312.

Id. at 313.

Id.

Lousin, supra note 29, at 601.
deemed by the court in *Davis* to have been effectively ratified by the drafters. Gertz disagreed, finding the Liquor Control Act conflicted with the "futurity" requirement of section 17.

**B. DECISIONS AFTER THE ILLINOIS HUMAN RIGHTS ACT**

The Illinois Human Rights Act implemented in a single scheme the specific equal protection and anti-discrimination principles within sections 17, 18, and 19. Unfortunately, within the HRA there is little recognition of the differences between constitutional rights with and without self-execution clauses or between constitutional rights with and without a recognized and limited role for the General Assembly. The courts have also failed to differentiate, leaving unfulfilled the equality promises of 1970.

1. **Section 17 Cases**

The early section 17 cases demonstrate some disagreement over the impact of the HRA. In 1982, the Illinois Appellate Court for the Fourth District, in *Greenholdt v. Illinois Bell Telephone Co.*, narrowly construed the phrase "hiring and promotion practices." Greenholdt had brought a discrimination claim solely under section 17, alleging sex discrimination when he lost his job due to his refusal to accept a transfer. Males were required to accept transfers while females could decline. The *Greenholdt* court found that the plain language of section 17 was limited to hiring and promotion practices. Since Greenholdt's transfer was lateral, it did not involve a promotion practice despite its nexus to promotion, since transfer would have put Greenholdt in line for a promotion.

Agreeing with *Greenholdt*, in 1983 the Illinois Appellate Court for the First District, in *Thakkar v. Wilson Enterprises, Inc.*, also narrowly construed "hiring and promotion practices" by excluding terminations and discharges. The *Thakkar* court, however, also considered plaintiff's allegations under the HRA as plaintiff argued he was fired due to his East In-

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210. *Id.; see also Davis*, 371 N.E.2d at 916 n.4 (Simon, J., dissenting) (stating a "statute passed long prior to the adoption of the Constitution cannot realistically be regarded as providing an exemption from constitutional prohibitions," especially as the new Bill of Rights provisions are "only prospective").
212. *Id.* at 247.
213. *Id.*
214. *Id.* at 248.
215. *Id.* at 249.
217. *Id.* at 986.
On this point the court rejected the plaintiff's argument that "section 17 constitutes a second or alternative avenue to redress an employment discrimination dispute." Relying on precedents requiring exhaustion of administrative remedies under FEPA, the court reasoned that plaintiffs must also exhaust administrative remedies for claims under the new HRA, including section 17 claims.

The Thakkar court did not speak to the plain language of section 17, which only authorizes the General Assembly to create "additional remedies." This language supported the plaintiff's argument that section 17 provides alternate (or supplemental) remedies to those within the HRA. The court focused on the HRA language that "except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation." If the intent of the legislature was, in fact, to include all alleged constitutional violations, whether or not addressed in the HRA, the court did not question whether the legislature had the authority to omit from the statutory scheme certain discriminatory acts under section 17. Of course, the legislature may have intended to speak only to those violations that were expressly addressed in the statute. Finding such intent would avoid constitutional problems, as the General Assembly can create "additional remedies" but seemingly has no power to eliminate the constitutional remedies arising directly under section 17, that is, to impair by legislative enactment a "constitutional guarantee" under a Wanless analysis.

Thakkar had a section 17 claim, as that provision bars discrimination based on "national ancestry." The language of section 17 was construed more broadly by the Illinois Appellate Court for the Fifth District in 1988 in Ritzheimer v. Insurance Counselors, Inc. There, the plaintiff, Janelle Ritzheimer, was discharged from employment due to pregnancy. While the court seemingly agreed

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218. Id.
219. Id. at 987.
220. Id.
221. Thakkar, 458 N.E.2d at 989. But see Gertz, supra note 30, at 303 (noting that one purpose of section 17 was to alleviate the ineffectiveness of FEPA).
223. Id. at 988 (noting the plaintiff's argument that "FEPA and the HRA are independent remedies for violations of the rights guaranteed by section 17").
224. Id. at 987 (stating that the General Assembly intended HRA "to be the preemptive vehicle for the resolution of employment discrimination cases in Illinois" (citing Ill. Rev. Stat. ch. 68, ¶ 8-111(D) (1981))).
226. ILL. CONST. art. I, ¶ 17.
228. Id. at 1282.
with *Greenhold* that section 17 "hiring and promotion practices" do not cover all employment practices, the court found it did include termination practices. It used two reasons: the language of the provision itself and the intent of the drafters. It determined that "the common understanding of the citizens, who by ratifying the constitution, gave it life," equates "hiring practices" with "the state of being hired." As "the state of being hired" necessarily ends upon termination, termination practices were part of "hiring practices."

Upon concluding that discriminatory termination was included within section 17, the court addressed whether Janelle could present a private civil action without first exhausting administrative remedies under the HRA. The court observed that judges have "uniformly recognized that where the Act applies, it is the exclusive source for redress of alleged civil rights violations." To avoid leaving Janelle, who had no claim under the HRA, with no remedy, the court found the HRA did not apply. Although the Act asserts that "no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act," it also defines civil rights violations as undertaken by "employers," defined to include "any person employing 15 or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation." As the defendant here employed less than fifteen persons, the court found Janelle Ritzheimer to be outside the HRA and thus with a viable circuit court action. The court concluded that

229. *Id.* at 1284.
230. *Id.* (disagreeing with the Thakkar decision).
231. *Ritzheimer*, 527 N.E.2d at 1285. The court also found that "the purpose of section 17 [was] to provide for equality of employment opportunity and upgrading based on merit," which necessitated the inclusion of termination and demotion practices. *Id.*
232. *Id.* at 1285-86 (noting that because the phrase "hiring and promotion practices" is "ambiguous," the "meaning which the delegates . . . attached to that provision before sending it to the voters for ratification is relevant").
233. *Id.* at 1285.
234. *Id.* The *Ritzheimer* court also noted that when Constitutional Convention Delegate Wilson was directly questioned at the debates about whether section 17 included "separation, layoffs, et cetera," he responded affirmatively. *Id.* at 1286. This statement is in harmony with the proceedings in general. Though the language of section 17 specifically addresses "hiring and promotion practices," the delegates consistently referred to section 17 as prohibiting employment discrimination. 3 PROCEEDINGS, *supra* note 50, at 1592, 1595.
236. *Id.* (citing Mein v. Masonite Corp., 485 N.E.2d 312, 315 (Ill. 1985)).
237. *Id.* at 1287.
238. *Id.* at 1286 (citing Ill. Rev. Stat. ch. 68, ¶ 8-111(C) (1985)).
239. *Id.* at 1286-87 (citing Ill. Rev. Stat. ch. 68, ¶ 2-102(A) (1985)).
241. *Id.* at 1288.
rather than "excuse any class of employers from . . . obligations under Article I, section 17 . . . what the Act does instead is simply to impose greater restrictions on and provide additional remedies for claims of discrimination against employers of a certain size."242

Unfortunately, in 1994, the Illinois Supreme Court, in Baker v. Miller, expressly rejected the approach in Ritzheimer.243 Plaintiff, Cathy Baker, was found exempted from coverage under the HRA because her employer had less than fifteen employees.244 Cathy filed a complaint directly in a circuit court, alleging that she was terminated because of her gender in violation of section 17.245

To reach its conclusion, the court analyzed both section 17 and the HRA.246 Noting that the plain language of section 17 granted the legislature the authority to create "reasonable exemptions," the court turned to the history of the 1970 constitution to shed light on the scope of such exemptions.247 Comments by Delegate Wilson, a member of the Bill of Rights Committee at the constitutional convention, were referenced. Wilson had described the "relationship" between an employer and employee as being "personal" and "intimate" when there are small employers, allowing greater "freedom of choice."248 The court then held that fifteen was a reasonable dividing point for a small employer exemption.249 The court did not reference Elmer Gertz, the Chair of the Bill of Rights Committee, who, a few years after the convention, said that while FEPA precluded employers with

242. Id.
244. Id. at 559 (noting that the HRA "implicitly exempts small employers," meaning "employees of small employers are 'covered' under the Act" so they "[cannot] bring a direct action under section 17").
245. Id. at 552-53. Incidentally, an unfortunate concession was made regarding the section 17/HRA interplay. The Baker court noted that the parties had agreed that "where the Act provides coverage, it is the exclusive remedy for employment discrimination." Id. at 554. It then cited Mein, a case involving age discrimination, clearly not covered by section 17. Id. (citing Mein v. Masonite Corp., 485 N.E.2d 312, 315 (Ill. 1985)). In Baker, the sex discrimination claim was covered by section 17. Id. Even the more sympathetic court in Ritzheimer found HRA exclusivity. Ritzheimer, 527 N.E.2d at 1286 (citing Mein, 485 N.E.2d at 315). Yet, such exclusivity forecloses, for example, a finding that the HRA simply provides, as section 17 invites, "additional remedies" that supplement (and do not supersede) the section 17 remedies already available through independent lawsuits. See ILL. CONST. art. I, § 17. For whatever reason(s), the Illinois General Assembly is expressly granted far less discretion regarding the parameters of section 17 claims than section 18 or section 19 claims. See id. § 17-19. With age discrimination claims outside explicit Illinois constitutional protection, statutory remedies are also subject to even broader legislative discretion.
247. Id. at 555.
248. Id.
249. Id. at 556.
less than twenty-five employees, "the employment of ten, fifteen, or twenty
people certainly does not necessarily constitute the relationship 'of a highly
personal nature' entitled to exemption under the new constitution."^250

The intent of the conventioneers to allow limited statutory exemptions
for only some small employers, recognized by Chair Gertz, is reflected in
some of the very same convention materials quoted by the court in Baker.
Delegate Wilson, for example, said there may be "situations" where there is
"greater value" in "a freedom of choice" on the part of a "small" employer
who has "an intimate and personal" relationship with employees.^{251} He
never said, nor implied, that every small employer had such a relationship.
Wilson did recognize, however, that such a relationship would allow a
statutory exemption from equality dictates for "religious organizations"
wishing "to employ . . . members of their own faith only."^{252} A Bill of
Rights Committee report during the constitutional convention, quoted in
Baker, also spoke to the limits of the new anti-discrimination initiatives. It
said "few would approve an anti-discrimination provision that absolutely
prohibited the kind of indirect discrimination involved in providing housing
exclusively to the aged members of certain religious or ethnic organiza-
tions, or women's groups," as here "relationships that are on so small a
scale and . . . so intimate that they are of a highly personal nature."^{253} Pre-
sumably, other exempted small employers would have to share at least
some of the attributes of religious, ethnic, or women's organizations. As
well, as noted in the HRA debates quoted in Baker, "private clubs" were
joined with "religious corporations" in HRA exemptions.^{254}

Would Delegate Wilson (as Chair Gertz would not) condone a law ex-
empting a for-profit tavern business from having to maintain gender equal-
ity in its employment practices? Here, Wilson and Gertz likely are on the
same page, though different from the court in Baker. Incidentally, as to the
fifteen and under rule of the HRA, a possible origin is the statutory limit in
federal civil rights laws deeming private employers and other private actors
responsible for equality.^{255} These laws are founded on, and limited by, the
Commerce Clause power of Congress. Such commerce concerns (beyond

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^250. Gertz, supra note 30, at 302.
^252. Id.
^253. Id. at 557-58.
^254. Id. at 556-57.
^255. See, e.g., Act of March 24, 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codi-
fied as amended at 42 U.S.C. § 2000e(b) (2000)) (stating that an employer "engaged in any
industry affecting commerce" is defined by employment of fifteen or more employees); H.R.
Rep. No. 92-238 (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2155 (noting, while recog-
nizing Commerce Clause constraints on Congress, "discrimination in employment is con-
trary to the national policy and equally invidious whether practiced by small or large em-
ployers").
federal preemption) should be immaterial to Illinois lawmakers. The fifteen and under rule for all employers in Illinois is overbroad if, in fact, it is intended to protect religious, ethnic, or women’s entities or wholly private clubs. Even if there is some reason to treat small employers somewhat differently from large employers under the HRA, such preferential treatment should not be extended across the board. Blanket immunity from all equality claims, for us, is unwarranted, at least in intentional or otherwise egregious misconduct settings\(^{256}\) as well as settings where only equitable relief is sought.

The court in *Baker* rejected plaintiff’s argument that the self-execution clause of section 17 provided her with a private right of action.\(^{257}\) The self-execution clause says section 17 “rights are enforceable without action by the General Assembly.”\(^{258}\) Relying on comments from the constitutional convention, the court found that this clause was intended to recognize a cause of action only if the legislature had done nothing.\(^{259}\) In construing the HRA, the court determined that the General Assembly intended to implement fully section 17.\(^{260}\) So, the legislature did something, and not nothing, by excluding certain people with constitutional claims of inequality.\(^{261}\)

The court in *Baker* also relied on the rule of statutory construction that courts presume that the General Assembly did not intend “absurdity, inconvenience or injustice.”\(^{262}\) It said its holding was necessary to avoid injustice. It found the HRA reflects a balancing between the interests of employees suffering discrimination and the interests of employers who might be subjected to frivolous charges.\(^{263}\) The court found that the HRA drafters, in allowing a small employer exemption, clearly anticipated that some em-

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256. Eliminating blanket immunity for employers of less than fifteen employees would extend significant civil rights protections. In 2005 in Illinois, there were 318,927 “establishments” with employees: 175,466 had one to four employees; 58,109 had five to nine employees; and 39,674 had ten to nineteen employees. U.S. Census Bureau, http://www.censusbureau.biz/epcd/susb/2005/il/IL--.htm (last visited Nov. 13, 2008).


258. ILL. CONST. art. I, § 17.

259. *Baker*, 636 N.E.2d at 558 (“[T]he self-executing provision does not operate where the General Assembly has acted.”).

260. Id. at 556 (providing that the Act is intended to secure and guarantee the rights established by sections 17, 18, and 19).

261. A limitation on common law suits by a special statutory scheme is similar to, but different in ways from, barriers to all suits under a general statute. See, e.g., Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 797 (2009) (finding that the comprehensive Title IX remedial scheme within 1972 Education Amendments is not an exclusive means of vindicating certain federal constitutional equality rights, thereby precluding 42 U.S.C. § 1983 suits).

262. *Baker*, 636 N.E.2d at 557 (citing Harris v. Manor Healthcare Corp., 489 N.E.2d 1374, 1379 (Ill. 1986)).

263. Id.
ployees (of small employers) would be left without a remedy.264 It reasoned 
that if these exempted employees could sue in court, the HRA would create 
injustice by leaving small employers to defend costly private suits while 
protecting large employers from similar suits.265 As well, the HRA limits 
punitive damages.266 If small employers could be sued in courts under sec-
tion 17, they would be vulnerable to such damages, while larger employers 
would not.267 Finally, the HRA would protect larger employers through the 
demand that claims be filed, in the agency, within 180 days, while small 
employers suable in court would be subject to litigation for up to five 
years.

Had the *Baker* court assessed differently the HRA exemption of small 
employers, there would have been no need to address the issues of inde-
pendent section 17 lawsuits and of avoiding injustices between large and 
small employers. Neither the constitutional nor the statutory histories actu-
ally referenced in the *Baker* opinion support exempting all small employers, 
and all their employees, from section 17 equality. The court in *Baker* should 
have explored better whether the exemption of all small employers under 
the HRA was reasonable.269 We find it unreasonable.

264. *Id.* at 555.
265. *Id.* at 557.
266. *Id.*
267. *See Baker,* 636 N.E.2d at 557.
268. *Id.* This approach is not always followed where small employers are exempted 
from special statutory remedy provisions. *See, e.g.*, Thurdin v. SEI Boston, LLC, 895 N.E.2d 
446, 459 (Mass. 2008) (noting that a plaintiff, who could not sue employer for gender and 
pregnancy discrimination under state’s general anti-discrimination law, could sue under 
state’s equal rights statute); Maggart v. Almany Realtors, Inc., 259 S.W.3d 700, 703 (Tenn. 
2008) (noting that as workers’ compensation law exempted smaller—less than five employ-
ees—companies, these companies could be sued in trial courts for their employees’ personal 
injuries arising from accidents).
269. We urge Illinois courts to better recognize the differences between exemptions 
in constitutional settings and in purely statutory claim settings. We are skeptical of wholly 
xempting all small employees from section 17 inequality claims. We recognize there are 
differences when the unreasonable¬ness of a fifteen-employee rule for equality claims arises 
wholly under legislation, i.e., acts unguided by specific constitutional mandates for equality. 
*See* Jarod S. Gonzalez, *State Anti-Discrimination Statutes and Implied Preemption of Com-
state statutes can preempt state common law torts in employment settings, as with provisions 
requiring fifteen or more employers). In the constitutional setting, we can imagine reason-
ableness in differences in damages for constitutional inequalities between some larger and 
smaller employers, though comparable differences in available equitable remedies may not 
be sustainable. Our thoughts on reasonableness are tentative, at best, though the broad ban 
on any remedies for all those suffering discrimination at the hands of small employers is 
unreasonable, especially given Elmer Gertz’s observations, Gertz, *supra* note 30, and the 
constitutional language within section 17, ILL. CONST. art. I, § 17.
In allowing an unreasonable HRA exemption, the Baker court effectively invites injustice for many with valid constitutional claims. Illinois law has remained unchanged since Baker. The Illinois HRA still ostensibly provides the exclusive avenue for relief for those experiencing unconstitutional inequality. Of course, some succeed under the Act. Unfortunately, there are many plaintiffs, like Cathy Baker, left remediless, often failing to press their constitutional claims in courts, perhaps because that would “invite sanctions for filing frivolous pleadings.” This approach to section 17 inequality is contrary to the approach to section 6 invasions in Amati v. City of Woodstock, where the court recognized there would be a section 12 “right to remedy” claim for a section 6 invasion in the absence of “a comprehensive civil damage scheme including actual and punitive damages.”

Exclusivity of the HRA extends beyond equality claims. For example, some who have causes of action separate from the constitution and from the HRA can be left without an initial judicial remedy due to the HRA. Melody Geise, one such person, brought “common law tort” claims in a circuit court against both a former co-worker and an employer based on sexual harassment by the co-worker. The complaint alleged that the co-worker caused her termination when she reported his conduct to the employer. Melody’s complaint included two counts against the employer, one for negligent employee retention and one for negligent employee hiring. On

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270. Baker, 636 N.E.2d at 559 (citing Ill. Rev. Stat. ch. 68, ¶ 8-111(C) (1991) (stating that “[e]xcept as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in” the HRA (current version at 775 ILL. COMP. STAT. 5/8-111(C) (2008))).


272. Lousin, supra note 29, at 602.

273. 829 F. Supp. 998, 1006 (N.D. Ill. 1993). While section 17 does expressly allow for “reasonable exemptions” covering certain section 17 claimants, we do not find the exemption of all small employers to be reasonable given the constitutional drafters’ intentions that “all persons” have “the right to be free from discrimination,” and their discussions during debates about exempting employees with truly intimate relations with their employers. 3 PROCEEDINGS, supra note 50, at 1593.

274. The courts were apparently willing to interpret the provision’s mandate that “no court of this state shall have jurisdiction over the subject of an alleged civil rights violation” to include common law tort claims. 775 ILL. COMP. STAT. 5/8-111(C) (2008). Since the Act purports to implement the anti-discrimination provisions of, inter alia, section 17, this is a stretch indeed. 775 ILL. COMP. STAT. 5/1-102(F) (2008).


276. Id.

277. Id. at 1274-75 (noting that the first two counts involved the co-worker and were not at issue on appeal).
appeal to the Illinois Supreme Court, these claims were dismissed based on HRA exclusivity.278

Though pleaded as common law claims, the court found that this did “not alter the fundamental nature of her cause of action”279 against the employer. This fundamental nature involved sexual harassment allegations against a co-worker.280 In particular, the court held that these claims against the employer were “inextricably linked” to sexual harassment, a civil rights violation under the Act.281 Since “Geise would have no independent basis for imposing liability on her former employer” without alleging sexual harassment,282 the court held that her claims were precluded by HRA exclusivity.283 Consequently, Melody Geise was left in the same position as Cathy Baker—without an initial remedy in a trial court. Now, not only are many claimants not covered or exempted by the HRA left without recourse for inequality,284 but also many claimants with valid common law torts are denied an initial trial court forum because their claims are inextricably linked to the HRA.285 Melody was denied her common law claims even though section 17 expressly says the General Assembly may only “provide additional remedies” for section 17 violations.286

278. Id. at 1278.
279. Id. at 1277.
280. Geise, 639 N.E.2d at 1277.
281. Id.
282. Id.
283. Id. at 1278 (citing Ill. Rev. Stat. ch. 69, ¶ 8-111(C) (1989) (current version at 775 ILL. COMP. STAT. 5/8-111(C) (2008))). Incidentally, inextricable linkage analyses can operate in other settings and, on occasion, aid civil rights claimants. See, e.g., Thompson v. N. Am. Stainless, LP, 520 F.3d 644, 646 (6th Cir. 2008) (noting that Title VII of the Civil Rights Act of 1964 prohibits “employers from taking retaliatory action against employees not directly involved in protected activity, but who are so closely related to or associated with those who are directly involved, that it is clear that the protected activity motivated the employer’s actions”; here, the employee was fired after his fiancée filed a gender discrimination charge against the same employer).
285. See Geise, 639 N.E.2d at 1277-78. Examples of common law torts that are not inextricably linked to the HRA have been found. See, e.g., Naeem v. McKesson Drug Co., 444 F.3d 593 (7th Cir. 2006) (discussing intentional infliction of emotional distress); Spahn v. Int'l Quality & Productivity Ctr., 211 F. Supp. 2d 1072 (N.D. Ill. 2002) (discussing intentional infliction of emotional distress); Blount v. Stroud, 904 N.E.2d 1 (Ill. 2009) (discussing retaliatory discharge); Maksimovic v. Tsogalis, 687 N.E.2d 21, 23 n.2 (Ill. 1997) (recognizing that a plaintiff advancing with an HRA claim, along with independent intentional tort claims of assault, battery, and false imprisonment, have “but one satisfaction”). Inextricable linkage has also been found. See, e.g., Doe v. La Magdalena II, Inc., 585 F. Supp. 2d 984 (N.D. Ill. 2008) (discussing claims for assault, battery, and intentional infliction of emotional distress).
286. Preclusion of a general statutory remedy when there is a special statutory remedial scheme is far different than finding that a special statutory scheme preempts a constitutional remedy. See, e.g., Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 797 (2009).
The exclusivity approaches to the HRA run contrary, at least in a general way that goes unexplained, to the non-exclusivity allowed under similar provisions of the Workers’ Compensation Act (WCA), expressly recognized in Geise. The employer in Geise attempted to urge Melody’s claims against it were “barred by the exclusivity provision” of the WCA.287 “Without intimating any view as to the merits,” the court found the WCA exclusivity was “in the nature of a waivable affirmative defense” which the employer had waived.288 The Geise court looked to Doyle v. Rhodes, where it held that WCA exclusivity was waivable, as when the employer hopes the “common law negligence claim” will go unproven, allowing the employer “to escape liability completely.”289 By contrast, relying on the precedent in Mein v. Masonite, the Geise court noted HRA exclusivity was jurisdictional and thus nonwaivable.290 However, in Mein, the exclusive jurisdiction ruling was rendered in a case that did not involve an equality claim recognized in the Illinois Constitution, as only age discrimination was involved. Of course, Melody Geise had a constitutional equality claim under a provision which barred sex discrimination and which did recognize “additional remedies” for the constitutional violations could arise by statute. She did not simply have a common law or statutory right arising independently from any constitutional right. Under a Doyle, and not a Mein, approach, Melody could have chosen with her employer to go straight to court with her common law claims (if not her joined section 17 claims), waiving the jurisdictional opportunities afforded by the HRA (as they are at best only “additional remedies” under section 17).291

(noting that Title IX does not preempt suit under 42 U.S.C. § 1983, as it does not provide the exclusive means of vindicating gender discrimination claims against federally funded educational institutions).

287. Geise, 639 N.E.2d at 1275 (“No common law or statutory right to recover damages from the employer . . . for injury . . . sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by . . . this Act . . . ” (citing Ill. Rev. Stat. ch. 48, ¶ 138.5(a) (1989) (current version at 820 ILL. COMP. STAT. 305/5(a) (2008))).

288. Id. at 1275-76 (noting there was no “legal impediment” to a timely assertion and the untimeliness did not result from “inadvertent blunder”).

289. Id. at 1276 (noting that nothing in the record suggests the waiver by Melody’s employer was not “deliberate”).

290. Id.

291. The 2008 amendments to the HRA now allow a claimant to pursue a trial court action de novo, but only after first complying with HRA grievance procedures. See 775 ILL. COMP. STAT. 5/7A-102(A), (A-1), (D)(2)-(3) (2008) (noting charges under HRA articles 2, 4, 5, 5a, and 6); 775 ILL. COMP. STAT. 5/7B-102(A), (F) (2008); 775 ILL. COMP. STAT. 5/8B-102(A) (2002) (noting charges under HRA article 3). We are not sure that they now allow the Melody Geises of the world to pursue all common law as well as HRA claims. Even if they do, the Geise ruling remains a good example of a judicial approach that does not adequately take into account the differences between constitutional and purely statutory claims.
2. **Section 18 Cases**

Under section 18, "equal protection" is not to be "denied or abridged on account of sex by the State or its units of local government and school districts." This section seemingly duplicates some of the protections in section 17, which bans sex discrimination "in the hiring and promotion practices of any employer or in the sale or rental of property." Both speak to inequalities based on sex in employment and housing. Yet section 18 goes further by recognizing sex equality must be afforded by governments in such matters as schooling, health care, and welfare benefits. However, section 18 seemingly is also subject to greater General Assembly oversight than section 17 as its equality provisions are not deemed, like section 17 rights, "enforceable without action by the General Assembly." As well, statutes on section 18 rights, unlike section 17 rights, are not expressly limited to "reasonable exemptions" and "additional remedies for violation."

One important, and very troubling, section 18 case is *Teverbaugh ex rel. Duncan v. Moore*.293 There, a seventh grade student, Amy Teverbaugh, and her mother sued a school district directly under section 18 for sex discrimination by two male students. The appellate court held that any recovery must come under the HRA294 and that the Act contained no cause of action for damages to students arising from sex discrimination occurring in primary or secondary schools,295 though the HRA does prohibit "sexual harassment" against students "in higher education"296 and sex discrimination against employees by any public school.297

In reaching its conclusion, the *Teverbaugh* court compared section 18 to section 17. In interpreting constitutions, much like statutes, it said that

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292. We acknowledge that, even without express recognition of delegated power in section 18, the equality demanded of school districts in section 18 seemingly is subject to some General Assembly authority. Section 18 guarantees are certainly addressed in the HRA and seemingly are authorized by the Illinois Constitution. See ILL. CONST. art. X, § 1 ("The State shall provide for an efficient system of high quality public educational institutions and services.").


294. Id. at 229-30 (stating that "it is incumbent upon the Illinois legislature to acknowledge a right of action under the Human Rights Act" as, under Mein and Baker, the HRA is the "comprehensive remedial scheme for enforcing civil rights under the Illinois Constitution").

295. Id. at 230 ("[W]e are aware that the Human Rights Act does not expressly recognize a right of damages under the circumstances contemplated in this case.").


297. See, e.g., 775 ILL. COMP. STAT. 5/2-101(B)(1)(c) (1992) (noting that "employer" includes governmental units); 775 ILL. COMP. STAT. 5/2-101(G) (1992) (noting that "public employer" includes school districts); 775 ILL. COMP. STAT. 5/2-102(A) (2008) (discussing "unlawful discrimination" in employment by "any employer").
courts must first look to the words used as they provide the best indication of legislative intent. Additional bases for constitutional interpretation appear, of course, in constitutional convention debates and in conduct surrounding the “first legislative action” following the adoption of the constitutional provision in issue. While section 17 states that “all persons shall have the right to be free from discrimination” and that “these rights are enforceable without action by the General Assembly,” section 18 only says “equal protection” shall not be denied. After comparing sections 17 and 18, and examining the afore described Baker ruling on section 17, the Teverbaugh court found that the section 18 drafters did not intend an automatic private right of action. It said that where the drafters use different language, courts should usually presume different results were intended.

Unfortunately, the Teverbaugh court did not compare section 18, which says nothing of General Assembly responsibility, to constitutional provisions outside of section 17. Thus, it did not look, for example, to the very different language in section 8.1 of article I which expressly recognizes General Assembly authority to provide “by law” the guidelines on both the nature and the enforcement of a crime victim’s “right to restitution.” And, it did not consider section 15 of article I on eminent domain, which the People ex rel. Wanless v. City of Chicago court found “self-executing,” even though there was no express language on self-execution. In Wanless the court said that the eminent domain right could not be impaired by legislative enactment. Finally, the Teverbaugh court in 2000 did not look at any cases where the courts had spoken of a constitutional provision as “hortatory,” “merely an expression of philosophy and not a mandate that a certain remedy be provided in any specific form.”

For us, section 18 is more comparable to section 15 on eminent domain than to section 20 on individual dignity, as read in AIDA v. Time Warner

298. Teverbaugh, 724 N.E.2d at 229.
299. Id. (“The comparative texts of article I, section 17 and article I, section 18, evidence that where the drafters intended to provide a right of action for damages for discrimination, they purposefully included language to effect such a result in the absence of implementing legislation.”).
301. ILL. CONST. art. I, § 17.
302. Id. § 18.
303. Teverbaugh, 724 N.E.2d at 229.
304. Id.
305. People ex rel. Wanless v. City of Chi., 38 N.E.2d 743, 746 (Ill. 1941).
306. Id. (discussing an earlier constitutional provision on eminent domain, appearing in article II, section 13, of the Illinois Constitution).
Entertainment Co. Interests “taken or damaged” under section 15 and interests “denied or abridged” under section 18 are different from the interests in section 20 that are promoted by deeming certain communications “condemned.” The former seem more personal, more indicative of significant concerns for those whose protected interests are denied. As well, section 18 is unlike section 8.1 which expressly recognizes General Assembly authority to limit the restitution right to certain people. Thus, we think the court was wrong in Teverbaugh not to demand at least some protection for younger school children, far less capable of protecting themselves from inequalities than college students or adult employees.

3. Section 19 Cases

Under section 19, discrimination against all persons “with a physical or mental handicap” is prohibited “in the sale or rental of property” and “in the hiring and promotion practices of any employer” where the discrimination is “unrelated to ability.” Section 19 is more like section 18 than section 17, as it contains no express mention of self-execution or of General Assembly responsibilities.

In Yount v. Hesston Corp., Lonnie Yount alleged that his private employer terminated his employment because of his known “mental handicap” for which he received treatment “with his employer’s knowledge and cooperation” and which “did not prevent him from performing his work duties.” As a result, Lonnie argued that he could proceed initially in an Illinois circuit court “directly under” section 19. Relying on Thakkar, albeit a section 17 case, the court in Yount found HRA exclusivity, resulting in Lonnie’s inability to sue. Those falling outside the HRA were pre-

308. See id.
309. The Teverbaugh court determined that under the decision in Ellis, “an action solely to challenge the constitutionality of classifications by the State” was contemplated under section 18. Teverbaugh, 724 N.E.2d at 228. Such an action, however, seemingly runs counter to the exclusivity analysis in Baker, as equitable relief is available under the HRA. See, e.g., 775 ILL. COMP. STAT. 5/7A-104(A) (1990).
310. ILL. CONST. art. I, § 19.
312. Id. at 1215-16.
313. Id. at 1216.
314. Id. at 1218. The Yount court also rejected Lonnie’s argument that the court had jurisdiction under article I, section 12, of the Illinois Constitution, which provides “a certain remedy in law for each wrong suffered.” Id. The court found that section 12 only operates “whenever the legislature has failed to provide a remedy,” and because the “the legislature has provided a legal remedy” under the HRA, section 12 was inapplicable. Id.
315. While Lonnie Yount fell outside the HRA when he sued in court because he did not earlier exhaust his administrative remedies, the rationale in Yount covers all who fall...
cluded from suing in trial courts as the HRA was "the preemptive vehicle for the resolution of employment discrimination cases" and thus provided "the exclusive remedy." Fortunately, for those harmed by "unlawful discrimination" in employment in the private sector based on "physical or mental handicap unrelated to ability," all employers are included, and not just those with fifteen or more employees. So, Lonnie lost only because he did not first litigate under HRA procedures. Incidentally, it is curious to us that small employers are immunized from HRA gender discrimination claims by the likes of Cathy Baker, but not from HRA disability discrimination claims by the likes of Lonnie Yount.

VII. SUGGESTIONS FOR MORE EFFECTIVE PROMOTION OF EQUALITY

The Illinois General Assembly and the Illinois Supreme Court have yet to meet the expectations of the drafters and the people regarding the new equality provisions of the 1970 constitution. They should act now to secure the equal protection and anti-discrimination guarantees intended in 1970.

"All persons" were, by the plain language of section 17, to be protected against discrimination in housing and employment. The General Assembly was authorized only to "establish reasonable exemptions" and to "provide additional remedies." Both the delegates and the voters anticipated that most who suffered such discrimination would have some recourse. Elmer Gertz described General Assembly authority over section 17 remedies as follows: "It could not take away any remedy, nor undermine the basic right." Accordingly, to effectuate the guarantees of the 1970 constitution, the General Assembly should amend the HRA to recognize more broadly causes of action for denials of equality in employment and

outside the HRA, whether by the procedural defaults of otherwise statutorily-recognized claimants or through the lack of statutory coverage of those claiming harm. See id.

317. Id.
318. Compare 775 ILL. COMP. STAT. 5/2-101(B)(1)(a) & (b) (1992), with 775 ILL. COMP. STAT. 5/2-101(B)(1)(c) (1992) (noting governmental employers are responsible "without regard to the number of employees"), and 775 ILL. COMP. STAT. 5/2-101(B)(1)(d) & (e) (1992) (noting employers responsible "without regard to the number of employees" if parties to public contracts or joint apprenticeship or training committees).
319. See 735 ILL. COMP. STAT. 5/2-101(B)(1)(b) (1992) (noting any employer is subject to liability for "sexual harassment").
320. ILL. CONST. art. I, § 17.
321. Id.
323. GERTZ, supra note 25, at 102.
housing. It is not uncommon for a North American legislature to override by later statute an earlier judicial precedent that too narrowly implements equality principles. The General Assembly should either expand the types of claimants with section 17 claims under the HRA or recognize that many not now statutorily covered (i.e., those improperly exempted from the HRA) can pursue claims initially in the circuit courts.

In the absence of new legislation, the Illinois Supreme Court should find that the General Assembly has impermissibly interfered with section 17 rights. The high court could adopt the Ritzheimer rationale that claimants not covered by the Act, rather than being exempted, generally have recourse through private causes of action. As “all persons” have section 17 rights, most employers and lessors (i.e., those not reasonably exempted) should be generally responsible in some way for discriminatory acts. The General Assembly could still maintain limited exemptions, as for those affiliated with religious, ethnic, or women’s organizations, or with private clubs, as such exclusions are consistent with the intent of the convention delegates that reasonable exemptions for truly intimate relationships are permitted.

Similarly, section 18 equality principles must be better recognized. Denials and abridgments of equal protection on account of sex “by the State or its units of local government and school districts” are barred by section 18, with no express indication that there is even room for “reasonable exemptions,” as there is in section 17. Amy Teverbaugh warrants some state constitutional law protection against governments that refuse “to restrain . . . repeated acts of sexual misconduct” against females and that acquiesce the sexual harassment of females. Section 18 demands are not simply hortatory. Those who suffer governmental denials of equal protection on account of sex should not be left, as suggested in Teverbaugh, to equity lawsuits that “challenge the constitutionality of classifications by the

324. In particular, amendments are needed to expand the definition of “employees” under 775 ILL. COMP. STAT. 5/2-101(B)(1)(a) (1992).
325. See, e.g., CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951, 1957-58 (2008) (demonstrating how Congress amended 42 U.S.C. § 1981, granting “all persons” the same rights regarding contracts as are enjoyed by “white citizens,” to include conduct after contract formation, including retaliation based on, for example, race, after the U.S. Supreme Court had excluded such conduct from the scope of the earlier version of the same statute).
326. See 3 PROCEEDINGS, supra note 50, at 1593; see also 775 ILL. COMP. STAT. 5/2-101(A)(2)(a) (1992) (noting domestic employees are exempted); 775 ILL. COMP. STAT. 5/2-101(B)(2) (1992) (noting employers do not include religion-based entities); Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008) (recognizing defenses for a Roman Catholic Diocese to federal Title VII claims for race discrimination in employment under the Religious Freedom Restoration Act, though the defenses may be waived).
328. See id. at 230.
assumption they even have such opportunities. Even if certain exemptions from section 18 dictates were permitted, they should not permit equality denials by such large groups as "primary and secondary schools." Rather, they should be narrowly tailored, like the religious, ethnic or women's group or private club exemptions permitted under section 17.

Section 19 commands that "[a]ll 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." Because section 19, like section 18, expressly articulates no role for the General Assembly, greater protections against unconstitutional discrimination must be available for people "with a physical or mental handicap." As with section 18, any exemptions should be narrowly drawn. Some narrower exemptions are already in play since section 19 employers, unlike section 17 employers, are included without regard to the number of employees. Yet what about claimants like Lonnie Yount, who go to court first rather than to the Illinois Department of Human Rights and thus lose their chance to complain about discrimination because HRA deadlines were missed? Should we not generally allow tolling of those HRA timing requirements, at least in cases where HRA exclusivity was unclear and common law claims were timely filed in circuit courts, as when common law and HRA claims may or may not reasonably seem "inextricably" linked?

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329. Id. at 228.
330. Given the exclusivity of the HRA for all who are covered, which include, under the *Baker* court analysis, those who are exempted by the HRA, equity lawsuits under Illinois section 18 equality principles may not even be available to the Amy Teverbaughs (and Cathy Bakers) of the world. See *Baker v. Miller*, 636 N.E.2d 551, 559 (Ill. 1994) (noting exempted employees are "covered" under the HRA though their employers are exempted). Federal claims are certainly not preempted, per the federal constitutional Supremacy Clause, but the mens rea requirements for claimants like Amy Teverbaugh under federal constitutional equal protection make federal equity lawsuits difficult. See, e.g., *Illinois v. R.L.*, 634 N.E.2d 733, 737-38 (Ill. 1994) (noting intent is needed for both federal and Illinois constitutional equal protection claims).

331. Such schools have been held accountable elsewhere. See, e.g., *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 915 A.2d 535, 553 (N.J. 2007) (holding that the school district is liable for student-on-student harassment when the district knew or should have known of the harassment but failed to act to end the offensive conduct).
334. In *Yount*, as Lonnie was governed by article 2 of the HRA (employment), he was required to file a charge with the Illinois Department of Human Rights "within 180 days after the date that a civil rights violation allegedly has been committed." 775 ILL. COMP. STAT. 5/7A-102(A)(1) (2008). Had Lonnie filed in circuit court within 180 days, and had he quite reasonably, but wrongly, believed he had a common law claim and no HRA claims that were inextricably linked, there would have been no forgiveness for missing the HRA filing
New equal protection and anti-discrimination initiatives in Illinois are demanded by the 1970 amendments to the Illinois Constitution. They are especially important where there is a failure/ inability of federal lawmakers to protect victims of inequality, including folks like Cathy Baker and Amy Teverbaugh.335

VIII. CONCLUSION

Expectations of greater constitutional equality in Illinois have not been met. Constitutional rights expressly recognized for “all” persons have been legislatively and judicially applied to exempt many persons, often with no legitimate rationale. Many victims of inequality have been forgotten. The Illinois Human Rights Act improperly restricts many with just complaints about inequalities in housing, employment, and other matters. The HRA, for example, is too restrictive under section 17 in affording freedom from discrimination in employment and housing and under section 18 in affording sexual equality protections against “the State and its units of local government and school districts.” The Illinois Supreme Court has acquiesced in unconstitutional inequalities by being too deferential to the General Assembly. Illinois lawmakers must now alter both statutes and case precedents in order to fulfill the legitimate expectations of greater constitutional equality. As Elmer Gertz said thirty years ago: “The new constitutional provisions are not dead letters. Nothing prevents their use.”336 Greater equality protections should now be afforded to Cathy Baker, Amy Teverbaugh, Lonnie Yount and many others “covered” but “exempted” from the HRA.

deadline under the Yount court analysis or under the express language of the HRA. In fact, Lonnie filed his claim with the court more than 400 days after his employment was terminated. Yount v. Hesston Corp., 464 N.E.2d 1214, 1215 (Ill. App. Ct. 1984). Incidentally, not all timing requirements on initial filings are the same under the HRA. See, e.g., 775 ILL. COMP. STAT. 5/7B-102(A)(1) (2008) (noting that an aggrieved party within an article 3 claim (e.g., real estate transactions) must file with the Department “within a year after the date that a civil rights violation allegedly has been committed or terminated”). Do certain civil rights claimants generally recognize misconduct more quickly than other civil rights claimants? 

335. Federal lawmakers may be unable to help much as Congress is constrained by section 5 of the Fourteenth Amendment. See U.S CONST. amend. XIV § 5. Congress only has the “power to enforce, by appropriate legislation,” the provisions of equal protection that limit solely governmental action and the ever changing Commerce Clause authority. Id.