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THE UNREALIZED EXPECTATIONS OF ARTICLE I, SECTION 17

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Illinois was the last large northern industrial state to enact a fair employment practices law, and it has never passed open housing legislation, despite strenuous efforts by its proponents. Therefore, it is surprising, indeed, that the Illinois Constitution of 1970 contains the strongest nondiscrimination provisions of any state constitution.

Three specific provisions in the Bill of Rights combine to prohibit the major part of both public and private discrimination in Illinois, but each is worded differently and each has a different purpose and impact. Article I, section 18[1] expands the general guarantee of equal protection of the laws contained in article I, section 2[2] to prohibit discrimination by the state and local governments on the basis of sex. Article I, section 19[3] guarantees physically and mentally handicapped persons freedom from discrimination in housing and from discrimination unrelated to ability in employment. However, the most important of the antidiscrimination provisions is article I, section 17, which reads:

> 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.
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> 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.[4]

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1. ILL. CONST. art. I, § 18: "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."
2. *Id.* § 2: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."
3. *Id.* § 19: "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."
4. *Id.* § 17.

It is the purpose of this article to analyze this provision and to tell how it came about, what it portends, and why, despite the high expectations for it, it has been little used so far. The article concludes with an analysis of a recent important case involving section 17.[5]

FAIR HOUSING AND FAIR EMPLOYMENT IN ILLINOIS BEFORE 1969

Although it prides itself upon being "the land of Lincoln," Illinois did not pass a fair employment practices law until 1961.[6] Through unique circumstances, I played a special role in its passage. During my tenure as president of the Greater Chicago Council of the American Jewish Congress, I urged that we give a special award to Bell & Howell and its then president, Charles H. Percy, ostensibly for their courage in sponsoring a series of enlightened television programs. Eventually I prevailed. Primarily because of a conversation I had with Mr. (now Senator) Percy at this award ceremony, the Fair Employment Practices Act (FEPA) was passed.[7]

However, from its inception, the FEPA was beset with problems. The General Assembly continually emasculated any potential effectiveness of the Act.[8] Delays and frustrations were built

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5. Davis v. Attic Club, No. 73 L. 18515 (Cook Cnty. Cir. Ct., June 18, 1975), *aff'd*, 371 N.E.2d 903 (1977); *see* notes 117-62 *infra*.

6. ILL. REV. STAT. ch. 48, §§ 851-867 (1975).

7. *See* E. GERTZ, TO LIFE 103-04 (1974):

> I had in mind more than praise for good works. The Congress, in league with similar organizations, had been giving leadership for years to a drive to persuade the Illinois General Assembly to pass fair employment practices legislation. We repeatedly failed because we could not pressure any Republican legislators, other than black ones, to join us. It was my plan to seize upon the award luncheon as an opportunity to persuade Percy to obtain the necessary Republican votes. I found him a bright, far-seeing, and charming man, and I had no difficulty in firing him with the ambition to deliver enough votes to assure passage of our bill. 'There won't be many votes from my Party' he said, 'but I promise enough to turn the tide.' And he kept his word and Illinois, at last, had some sort of F.E.P.C., not as good as we wanted, but good enough to start.
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> My experience with Percy, who later became a distinguished United States Senator, illustrated for me the fortuitous nature of much accomplishment. A budget, a staff, persistent lobbying, much public support produced no F.E.P.C. A conversation with a man on the way up was the magical element that brought about success.

8. The General Assembly sniped at all those who would make such legislation effective. The Governor named two extremely well-qualified persons to be members of the enforcement commission: Earl B. Dickerson, one of the outstanding black leaders of the nation, a former alderman, a former assistant Attorney General and an insurance company president; and Ralph Helstein, a lawyer of great ability and the president of the packinghouse workers union. The senatorial committee subjected both men to a cruel inquisition and then rejected them, ostensibly because of their outspoken views, but more likely because they would have taken their duties seriously. With Dickerson and Helstein in the lead, the commission would have gotten off to an effective start. Charles

into the administration of the law. From time to time the law was amended to place more people under it, but it was excessively difficult to get money for enforcement purposes.

The *Motorola* case is illustrative. In *Motorola, Inc. v. Illinois Fair Employment Practices Commission*[9] the Illinois Supreme Court sustained the constitutionality of the FEPA,[10] which created the Fair Employment Practices Commission (FEPC). The FEPC had found that Motorola had falsely recorded the examination of a black job applicant in order to avoid hiring him. Instead of acquiescing in the FEPC ruling, Motorola fought it all the way to the Illinois Supreme Court and ultimately lost. Although it was undoubtedly the company's right to contest this FEPC ruling, it illustrates industry's general hostility and dilatory actions directed against the enforcement of the FEPA. The combination of a reluctant General Assembly and an antagonistic industry had greatly diminished the effectiveness of the FEPA.

However, the FEPA was not the only nondiscrimination statute in Illinois. Earlier, in 1885, the Illinois General Assembly passed a statute making it a crime to discriminate on the basis of race, religion, color or national ancestry in the use of public accommodations.[11] It covered restaurants, hotels and most other public places. Moreover, by 1969 the United States Congress had also enacted laws prohibiting discrimination in employment,[12] housing,[13] and public accommodations.[14] In addition, there was the fourteenth amendment of the U.S. Constitution, which had been expressly created to wipe out discrimination. Why, then, was it necessary to consider the advisability of a state constitu-

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Gray, a respectable white businessman, was more to the legislature's liking, but as soon as he tried to do an honest job, he fared no better than Dickerson and Helstein would have fared.

9. 34 Ill. 2d 266, 215 N.E.2d 286 (1966).

10. ILL. REV. STAT. ch. 48, §§ 851-867 (1975).

11. ILL. REV. STAT. ch. 38, §§ 13-1 & 13-2 (1975). In 1971 the legislature added "physical or mental handicaps" to the list of impermissible bases for discrimination, thereby providing a statutory remedy for a violation of article I, section 19. So far it has not added "sex" to the list, despite the existence of article I, section 18. ILL. REV. STAT. ch. 38, § 13-1 (1975), defines "public accommodations" as including:

> inns, restaurants, eating houses, hotels, soda fountains, soft drink parlors, taverns, roadhouses, barbershops, department stores, clothing stores, hat stores, shoe stores, bathrooms, restrooms, theatres, skating rinks, public golf courses, public golf driving ranges, concerts, cafes, bicycle rinks, elevators, ice cream parlors or rooms, railroads, omni-busses, busses, stages, airplanes, street cars, boats, funeral hearses, crematories, cemeteries, and public conveyances on land, water, or air, public swimming pools and other places of public accommodation and amusement.

12. 42 U.S.C. § 2000e, e-1 to e-17 (1970).

13. *Id.* §§ 3601-3607 (1970).

14. *Id.* § 2000a, a-1 to a-6 (1970).

tional provision? First, the Federal Constitution does not extend to discrimination committed by private individuals; nor do the federal statutes extend to discrimination outside of interstate commerce.[15] Second, the scope of the Illinois Fair Employment Practices Act was too limited as to the kinds of discrimination involved and remedies available;[16] there could be no money damages, and the exemptions, such as the exemption of employers of fewer than 25 people,[17] tended to vitiate the effect of the law. Third, enforcement of the penal statute on discrimination in public accommodations was difficult and erratic. Finally, there was no statewide law in Illinois with respect to discrimination in housing or, indeed, any other kind of property.[18] Having once embarked upon a course of deterring discrimination, it was unlikely that the advocates of nondiscrimination would be content to let the matter rest.

The Constitutional Convention

The Sixth Illinois Constitutional Convention of 1969-70 was a gigantic step toward achieving genuine freedom from discrimination. Fortunately, the enabling legislation required the nonpartisan election of delegates to the convention.[19] This meant that in both the primary and final elections no party labels would be attached to the candidates, even if, in fact, they had been selected or approved by either the Republican or Democratic organization. Thus, enough independent liberals were elected to make a vast difference in the deliberations of the convention. In addition, many of the party winners were well-meaning, "good government" people, not as hidebound as many of the legislators who had been hostile to the strengthening of the FEPA and completely opposed to open housing legislation.

The delegates, either on their own or at the behest of civic groups, introduced "member proposals," which were suggested provisions for the new constitution, similar to bills in the legislature. The proposals were sent by the president of the convention to the appropriate committees for consideration as they heard testimony and deliberated on the articles that they would present to the convention. The committees could originate proposals of their own and modify or reject any proposals submitted to them by the president.

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15. *See* notes 63-70 and accompanying text *infra*.
16. *See* notes 95-116 and accompanying text *infra*.
17. Ill. Rev. Stat. ch. 48, § 852(d) (1975).
18. The legislature had only passed a law enabling municipalities to regulate real estate brokers. *See* note 75 and accompanying text *infra*.
19. Act of 1969, Pub. Act No. 76-40, § 5, 1969 Ill. Laws 58.

Several proposals assigned to the Committee on the Bill of Rights concerned discrimination. One proposal, inspired by a provision in the Michigan Bill of Rights, guaranteed that no person would be denied the enjoyment of, or be discriminated against in the exercise of, his "civil or political rights."[20] Another stated that "the right of the people to education, employment, housing, voluntary association and political participation" should not be infringed on the basis of race, creed, color, national origin or sex.[21] These and other proposals left uncertainty as to the meaning of the term "rights," and especially as to whether they applied to discrimination in the private sector as well as the public sector.[22]

By rare good fortune, I had been named Chairman of the convention's important Bill of Rights Committee by President Samuel W. Witwer. This was a personal triumph, but, more significantly, it gave impetus and leadership to the fight for suitable nondiscrimination provisions. I tried from the beginning to win converts, particularly among the conservative members of the committee. One person whom I especially courted was Lewis D. Wilson, a delegate from Moline. He was a "gray haired, courtly, conservative, informed and unflappable lawyer and businessman."[23] He had been active in the Goldwater presidential campaign, and some thought he would have made an ideal chairman of the committee to keep it from the control of the liberals. He was the retired general counsel and vice-president of John Deere and Company, a one-time director and vice-president of the state Chamber of Commerce, a long-time trustee of the Taxpayers Federation, and a member of the Board of Governors of the United Republican Fund. I was determined to win him over to the nondiscrimination cause and courted him assiduously. During one of the first days of the convention, Mr. Wilson and I took a long walk, during the course of which we discussed nondiscrimination in employment. Wilson said that he favored it in the public sector and had no objection to a constitutional provision in that area, but he was opposed to such a provision in the private sector. He thought that this was an area for voluntary action, rather than any constitutional edict.

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20. 7 RECORD OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION, at 2941 (1969-70) [hereinafter cited as PROCEEDINGS].

21. *Id.* at 2876.

22. For the texts of the other proposals see *id.* at 2879, 3043. The committee rejected some proposals that were sufficiently definite but of possibly limited appeal, such as one forbidding discrimination against persons who had been arrested absent subsequent conviction. *See id.* at 2966. *See also* E. GERTZ, FOR THE FIRST HOURS OF TOMORROW: THE NEW ILLINOIS BILL OF RIGHTS 103-04 (1972) [hereinafter cited as GERTZ].

23. GERTZ, *supra* note 22, at 23.

I persisted. The committee had received several skillfully drafted proposals for revision of the Bill of Rights from the Welfare Council of Metropolitan Chicago. One called for a revision of Illinois' due process clause,[24] to which they had added the words:

> No person shall be subject to any discrimination in his rights for or in employment, housing, public accommodation or public education, or in any other of his inherent and inalienable rights because of race, color, religion, national ancestry, sex, or physical or mental disability, by any individual or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.[25]

Satisfied that I was committed to its general aims, I translated the Welfare Council proposal into my own member proposal and submitted it to the convention.[26] Other delegates soon submitted other proposals to ban discrimination in one form or another[27] and then Lewis Wilson came forth with his proposal,[28] ultimately the one adopted by the committee, and, with only changes in style, by the full convention and the people of Illinois. Mr. Wilson had come to believe in nondiscrimination in the private sector as well as the public, a notable shift in viewpoint. Other organizations lent support to the movement for nondiscrimination as well. Apparently, its time had come, and we seized upon the opportunity.

Although with respect to discrimination by government, the provision may have simply supplemented the existing state equal protection clause, with respect to discrimination by private persons, it created important new rights. Our committee report summarized the weeks of controversy, argument and hearings on the various antidiscrimination proposals:

> The Committee finally concluded that there should be a constitutional provision forbidding discrimination, and that the provi-

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24. ILL. CONST. art. I, § 2 (1870).

25. *See* GERTZ, *supra* note 22, at 63 for a fuller discussion of this suggestion.

26. 7 PROCEEDINGS, *supra* note 20, at 2934. I had ten cosponsors, including another member of the Bill of Rights Committee, Virginia B. Macdonald.

27. *See id.* at 2876, 2878-79, 2879, 3043.

28. The proposal was originally designated section 22 of the Bill of Rights and read:

> Every person shall have a right to freedom from discrimination on the basis of race, color, creed, national ancestry or sex in the hiring and promotion practices of any employer or in the sale or rental of property.
>
> These rights shall be enforceable without action by the General Assembly, but the General Assembly may establish reasonable exemptions relating to these rights and may prescribe additional remedies for the violation of these rights.

6 *id.* at 12. For the text of the section as enacted *see* text accompanying note 4 *supra*.

> sion should be specifically directed at and limited to the important areas of employment and the sale or rental of property. The Committee resolved that the time had arrived when all persons subject to the laws of the State of Illinois should enjoy a constitutional right to freedom from discrimination by private persons as well as by public agencies in these important areas.[29]

In addition to a discussion of the application of the provision to the private sector, the report dealt with the kinds of reasonable exemptions that might be established by the legislature.[30] For example, few could disapprove of the indirect discrimination involved in providing housing for "the aged members of certain religious or ethnic organizations, or women's groups."[31] The report suggested that there might also be permitted some discrimination in "employment or rental relationships that are on so small a scale and under circumstances so intimate that they are of a highly personal nature,"[32] but it did not give examples.

The report dealt almost summarily with the declared self-enforcing nature of the provision, the obvious legislative power to provide additional remedies for victims of discrimination, and the lack of legislative power to impair existing remedies.[33] Finally, the report defined "rentals" as "leaseholds and all other arrangements by which the possession or use of property is exchanged for a valuable consideration."[34] Somewhat cryptically, it added that "property" meant "all property,"[35] apparently intending the term to include anything that might be considered as property, without limitation. When one compares the committee proposal with the provisions in other state constitutions, one realizes that none is as far-reaching as that of Illinois.

Naturally I selected Lewis Wilson, our new and highly respectable convert, to lead the floor fight in favor of our nondiscrimination provision. There really was no fight. On first[36] and later[37] readings, the provision was approved overwhelmingly. We had thought that there might be strenuous opposition to the proposed constitution because of our nondiscrimination provision

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29. 6 PROCEEDINGS, *supra* note 20, at 68.
30. *See* GERTZ, *supra* note 22, at 102 for a more detailed discussion of the committee report.
31. 6 PROCEEDINGS, *supra* note 20, at 68. *See* note 116 *infra*.
32. 6 PROCEEDINGS, *supra* note 20, at 69.
33. "Since the right is explicitly made 'enforceable without action by the General Assembly', an aggrieved person could have recourse to existing judicial or legislative remedies for a violation of the right. The General Assembly is also authorized to prescribe additional remedies." *Id.*
34. *Id.* at 70.
35. *Id. See* notes 125-34 and accompanying text *infra*.
36. The vote on first reading was Aye-90, Nay-6. 3 PROCEEDINGS, *supra* note 20, at 1613.
37. The vote on second reading was a voice vote on the entire article. 4 *id.* at 3634. The vote on third reading was also on the entire Bill of Rights, and was Aye-88, Nay-1, and Pass-14. 5 *id.* at 4281.

and the two that were added on the floor of the convention (section 18, barring discrimination on the basis of sex, and section 19, barring discrimination against the handicapped).[38] Yet little opposition developed on the part of the electorate.

The Debates

Some of the discussion at the convention is worth recalling to arrive at our meaning and to illuminate the nature of some of the questions propounded to us by the delegates. I wanted to get the floor discussion off to a start on the highest possible level before turning over the floor leadership to Lewis Wilson. Alas, the alleged transcript of my remarks was so badly garbled as to make little sense. I began by reminding my fellow delegates that we were debating nondiscrimination in the very chamber where, more than a century before, Abraham Lincoln had delivered his historic "House Divided" speech in which he had so eloquently depicted the dilemmas before a nation that was half slave and half free. I concluded, "[d]iscrimination is the slavery of our day. We must end it before it kills us, as slavery almost did."[39]

Then Delegate Wilson took over. Patiently, he explained every aspect of the nondiscrimination section, emphasizing one point of special importance:

> The job of a bill of rights always is a job of balancing and trying to evaluate competing interests. Sometimes these are the interests of one private citizen versus the interests of another private citizen. Sometimes it's the balancing of the rights of an individual citizen against society or against all of us collectively.[40]

He then summed up the rationale for the position that we were taking:

> Why do we have such a provision? I think the answer is really a pretty simple one. I think the majority of the committee felt that the right to be free from discrimination because you are black or because you are an Oriental or because you are a Catholic or because you are a Jew or because of any of those things, is pretty fundamental. We feel that it's on the same plane with the other basic rights guaranteed by the constitution —freedom of speech, freedom to assemble, freedom to worship, due process of law. It seems to us that in the year 1970 that the right to be free from discrimination because you have a different color or a different religion or a different national ancestry are

38. *See* 5 *id.* at 3669 (introduction of § 18); *id.* at 3678 (introduction of § 19). For the text of the two sections respectively *see* notes 1 & 3 *supra*.
39. 3 PROCEEDINGS, *supra* note 20, at 1592.
40. *Id.* at 1592-93.

very, very basic rights and are eminently properly included in the constitution.[41]

These were eloquent, moving words from a man who had once opposed prohibition of private discrimination. Yet each delegate had his own strong reasons for supporting the proposal. While some believed that it was a matter of simple justice, an idea whose time had come, for others there were very practical economic considerations. The Vice-Chairman of the Bill of Rights Committee, James Kemp, a black man of much shrewdness and vigor, long a trade union leader, and member of the Illinois Fair Employment Practices Commission, gave what was for many the basic reason for nondiscrimination:

> I believe that I now know what it takes to heal the wounds of Gilead. It is a poultice, green in color, freely transferable in the market of commerce, varying in value depending on figures printed on its face; it is commonly known as money. As a practicing trade unionist of thirty years' experience, this delegate has observed a healthy respect for that item, both in the employer and employee community. It often appears to transcend race, religion, rank, or serial number. It forms up friendships, creates vendettas, and—when properly distributed by agreement of the parties—provides lasting and sympathetic understandings. It is such a common denominator that all citizens are keenly aware of its existence and seeming importance. It is then in this context that this delegate will attempt to address you and hopefully persuade you and your constituents voting support [sic] of this proposal.[42]

Delegates then proceeded to question Delegate Wilson about various aspects of our proposal. A Republican from a Chicago suburb asked why the committee had limited the scope of the provision to the "sale or rental of property" and "the hiring and promotion practices of any employer."[43] Mr. Wilson explained that these two fields were "the worst areas of discrimination" and that prohibitions of discrimination in these two areas would be most acceptable to the public, which would later vote to adopt or reject the constitution.[44]

Delegates also asked for clarifications of definitions of key terms. Questions by Delegate Connor, a banker from Peoria, helped develop the meaning of some of the terms used:

> MR. CONNOR: What does employment mean? Is hiring—
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> MR. WILSON: It certainly means hiring. It certainly means —to me, at least—it means the treatment that the employee gets after he is hired, the condition under—

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41. *Id.* at 1593.
42. *Id.* at 1594.
43. *Id.* at 1595 (the question was posed by Delegate Thomas E. Miller).
44. *Id.* at 1595.

MR. CONNOR: Does it include separation?

MR. WILSON: What's that?

MR. CONNOR: Does it include separation, lay-offs, et cetera?

MR. WILSON: I would certainly think so, Mr. Connor, yes.[45]

Along the same line, Delegate Meek, who had long been a lobbyist for the Illinois Retail Merchants Association, asked if "employment and hiring practices" included an employer's "demotion" of an employee. Delegate Wilson could give no reason why the committee had not been that specific in its wording and Delegate Meek withdrew the question.[46] There seems no doubt that "demotions" are covered, as are, indeed, all employment practices.

One of the most important words in the section is "property," a term which had not been defined precisely in the committee report. Delegate Jaskula of Chicago asked if the term, which he said was normally used to describe the "real property" involved in housing discrimination, also included "personal property." Delegate Wilson's reply and the ensuing exchange are important:

MR. WILSON: The word, Mr. Jaskula, is 'property', and I assume that it would include personal property. However, I think the real rub comes in real estate which is not movable, of course. I—we didn't—I must say that I recall that we heard no testimony about discrimination in the sale of portable property—property that people can take and move around.

MR. JASKULA: But you do intend to include the personal property also. Is that correct?

MR. WILSON: The term is broad enough to include personal property, yes sir.[47]

The two aspects of the provision that generated the most questions were the power given the legislature to grant "reasonable exemptions" to the antidiscrimination provisions and the self-enforcing nature of the right. The committee report had made it clear that any legislative exemptions must be "reasonable" and could not "undermine the substance of the right to

45. *Id.* at 1596. It is interesting to note that immediately afterward, Mr. Connor also asked why the committee had not included "age" in its list of impermissible bases for discrimination and Mr. Wilson replied that the committee had not heard any complaints or arguments "on the question of age." *Id.* This was, of course, before the campaign against "ageism" had taken hold, which actively seeks to end mandatory retirement.

46. *Id.*

47. *Id.* at 1598. *Cf.* Vollmer v. McGowan, 409 Ill. 306, 315, 99 N.E.2d 337, 341 (1951), in which the Illinois Supreme Court said that "property" was a term "sufficiently comprehensive to include every interest one may have in any and every thing which is the subject of ownership." *See* notes 125-34 and accompanying text *infra*.

freedom from discrimination."[48] Mr. Wilson expanded upon that statement:

> Now, let me give you an idea of some of these possible exemptions which we feel are reasonable and which the legislature would be empowered to enact. For example, the right of religious organizations to employ or provide housing for members of their own faith only. This could be such things as children's homes, old people's homes, and various things of that kind. The right of truly private clubs to provide housing for their own members only would be another example, in the committee's view, of a reasonable exemption. And then we run into that category which has come in popular jargon to be known as the exemption relating to Mrs. Murphy's boarding house—that type of exemption, or—and I think under the Federal Housing Act this runs up to as much as a building with four apartments or four flats in it in which one of the apartments is actually owned —actually occupied by the owner as his own residence. Another example of a reasonable exemption would be that relating to small employers—employers, that is, of small numbers of employees. Just what this number would be, I don't know, of course; but in all these areas it was the committee's feeling that *the relationship between landlord and tenant or between employer and employee was of such an intimate and personal nature* that the greater value there lies in leaving a freedom of choice to the landlord or to the employer, as the case might be. Hence, we have provided that the legislature may enact these exemptions. It's not required to do so, but it has the—has the power under the clause to do so.[49]

Delegate Lawlor, a priest long associated with the so-called "block clubs" in Chicago's racially changing southwest side, asked if the legislature could exempt "a fifty-seven apartment building in which the owner knows from experience that by renting to one person or three persons of a particular minority group that all the other occupants of that building will move out?" Mr. Wilson quickly countered: "In my opinion Father, the exemption of an apartment building having as many as fifty-seven apartments—no matter what the circumstances are that you hypothesize here —would never be a reasonable exemption under the provisions of this clause."[50]

There were other questions with respect to the meaning of the term "self-executing." Mr. Wilson put the phrase in its proper context when he said that "practically all provisions of a constitution are self-executing,"[51] but some delegates had doubts. Delegate Connor asked:

I'm interested in the expression, "These rights shall be enforce-

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48. 6 PROCEEDINGS, *supra* note 20, at 69.
49. 3 *id.* at 1593 (emphasis added).
50. *Id.* at 1598.
51. *Id.* at 1602.

able without action by the General Assembly." No other provision of the bill of rights contains those words. Is that because—I have heard that this is because this was an attempt to override the nonaction of the Illinois legislature, is that true?

MR. WILSON: Well, I don't know anything about that. We didn't talk about the Illinois legislature in our committee; but these words are in there for the express purpose of avoiding any contention that (1) this is a hortatory kind of statement or (2) that it is a right which does not come into play or into being or does not become effective until action is taken by the General Assembly.[52]

This led Delegate Johnson to delve more deeply:

MR. JOHNSON: Delegate Wilson, I'd like to ask you two or three questions about this self-enacting provision. Exactly how would that work? Supposing—supposing I had a grievance against someone and no remedy was found in statute law; how would I file a charge and what would happen after that?

MR. WILSON: Well, if we are right—and I think we are right about this, Mr. Johnson—that this provision does create a right and the legislature has not set up any procedure, the courts are not powerless to find a remedy and to establish a remedy. This is what courts are doing all the time. You know there is no statutory definition, for example, of due process of law. The courts are—decide what is due process of law, and they decide this; and this has been the genius, of course, of the English common law. They decide this on a case-by-case basis whether or not there has been discrimination within the purview of this . . . constitutional provision.[53]

The delegates did not discuss extensively the relationship between this provision and others in the proposed Bill of Rights. In a colloquy between Convention Vice-President Elbert Smith and Delegate Wilson it was made clear that our intent was not to limit the rights of any person under the due process and equal protection clauses of the constitution.[54] However, the convention never asked whether the newly proposed right to privacy provision[55] could limit the broad scope of the ban on discrimination. Nor did anyone ask if the rephrased constitutional guarantee that everyone could "find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation"[56] made the self-enforcement language in the antidiscrimination provision superfluous. While perhaps redundant, the value of the self-enforcement language lay in the express grant of the right to take action against discrimination.[57]

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52. *Id.* at 1596.
53. *Id.* at 1597.
54. *Id.* at 1598 (discussing ILL. CONST. art I, § 2).
55. ILL. CONST. art. I, § 6. *See* notes 151-58 and accompanying text *infra*.
56. ILL. CONST. art. I, § 12.
57. The committee comments state that this self-executing provision

By the time the question period had ended and the time for approval or disapproval had arrived, it was clear that our novel, far-reaching proposal had a broad base of support. It went as far, but no further, than the majority of the convention—and the public—were willing to go. Efforts to weaken the provision by the familiar legislative device of making it too broad or too narrow were defeated handily.[58]

After the approval of the general nondiscrimination section, it became apparent that there was increasing demand for other nondiscrimination sections, which became the subjects of proposals, discussions and successful votes on second and third readings. Linda Mayer of the Welfare Council of Metropolitan Chicago, not a delegate, but a regular and invaluable attendant at the meetings of the Bill of Rights Committee, urged that we adopt provisions giving greater rights to the physically and mentally handicapped. Through her efforts and the cooperation of many delegates from all points on the political and philosophical spectrum, particularly Delegate Richard M. Daley, we eventually succeeded in extending to the handicapped protection from discrimination "in the sale or rental or property" and from discrimination "unrelated to ability in the hiring and promotion practices of any employer."[59] Unfortunately, an examination of this provision, which has not yet been utilized by any complainants and is apparently regularly overlooked, is beyond the scope of this article.[60]

Late in the convention, Delegates Oda Nicholson and Betty Howard became active in circulating a petition to incorporate in the Bill of Rights a general provision attacking sex discrimination in the public sector, a provision much like the Equal Rights Amendment (ERA) proposed nationally,[61] ultimately tailored to conform with our stylistic requirements. The two women ac-

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was included to avoid the effects of Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), where the court held that a general civil rights provision in New York's constitution did not outlaw racial discrimination in housing in the absence of legislative action. *See Constitutional Commentary*, ILL. ANN. CONST. art. I, § 17 (Smith-Hurd).

58. *See* 3 PROCEEDINGS, *supra* note 20, at 1603-10.

59. ILL. CONST. art. I, § 19.

60. For a fuller discussion of its development see GERTZ, *supra* note 22, at 62-63.

61. The proposed twenty-seventh amendment of the U.S. Constitution, which reads:

> SECTION 1: Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> SECTION 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> SECTION 3. This amendment shall take effect two years after the date of ratification.

U.S. CONST. amend. XXVII (proposed).

quired enough signatures to assure passage of the provision on the third reading, where a more substantial vote was required. Some delegates felt that the matter was sufficiently covered by the equal protection provision or that it was relatively meaningless, but these arguments were brushed aside and the provision was added to the Bill of Rights.[62]

In the beginning we sought to incorporate one strong antidiscrimination provision in the Illinois Bill of Rights and, in retrospect, it seems almost a miracle that we succeeded. In the end we incorporated not one, but three provisions banning discrimination in the Bill of Rights, which seems almost more than a miracle. Yet the task remains incomplete. We have these rights on paper, but we may not yet have them in practice.

SECTION 17 AND FEDERAL REMEDIES: CO-EXTENSIVE? CONTRADICTORY? DOES SECTION 17 GO FURTHER?

Discrimination in Employment

Before one goes directly into court via section 17, the effect of federal law must be considered. The federal legislation against discrimination in employment may be found in Title VII of the Civil Rights Act of 1964.[63] Employers covered by the Act are defined as persons engaged in an industry affecting commerce,[64] which the Act defines as one in commerce, or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce.[65] Legislative history indicates that Congress thought that the strongest power base by which it could control discrimination was through its power to regulate commerce,[66] which the Supreme Court acknowledged in *Heart of Atlanta Motel, Inc. v. United States*,[67] where the Court held that the scope

62. ILL. CONST. art. 1, § 18. Strange to say, it has not led to the adoption of the ERA by Illinois. Indeed, ERA has several times been defeated in Illinois, and one cannot be sure of its ultimate fate. On the few occasions when the Illinois Supreme Court has considered cases brought under article I, § 18, the court has held it to be a specialized version of the equal protection clauses of the fourteenth amendment to the U.S. Constitution and of article I, § 2 of the Illinois Constitution of 1970, in that it makes sex a "suspect classification," which must be subjected to close scrutiny and may be justified only by a compelling state interest. *See, e.g.*, Cessna v. Montgomery, 63 Ill. 2d 71, 344 N.E.2d 447 (1976); People v. Grammer, 62 Ill. 2d 393, 342 N.E.2d 371 (1976); People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974). *See also* People v. Williams, 32 Ill. App. 3d 547, 336 N.E.2d 26 (1975); People v. Yocum, 31 Ill. App. 3d 586, 335 N.E.2d 183 (1975); People v. York, 29 Ill. App. 3d 113, 329 N.E.2d 845 (1975).

63. 42 U.S.C. § 2000e (1970).

64. *Id.* § 2000e(b).

65. *Id.* § 2000e(h).

66. *See generally Hearings Before the Senate Committee on Commerce on S. 1732*, 88th Cong., 1st Sess. (1963).

67. 379 U.S. 241 (1964).

of the commerce power was broad enough to allow Congress to prohibit discrimination. As a consequence, the federal provisions can go no further than the commerce clause will allow. Although the Supreme Court has interpreted the commerce clause liberally,[68] it is theoretically possible for a private employer to be beyond its reach. In contrast, article I, section 17 was intended to root out discrimination even in the private sector,[69] subject only to the legislature's enactment of reasonable exemptions. Since these exemptions would be reasonable only if they excluded "relationships that are on so small a scale and under circumstances so intimate that they are of a highly personal nature,"[70] section 17 clearly goes further than the federal employment legislation.

The Sale and Rental of Property

Federal Housing Legislation

Section 17 also covers the sale and rental of property.[71] For most people, "property" means "housing." Federal housing legislation (Title VIII of the Civil Rights Act of 1968),[72] until 1974, did not prohibit sex discrimination. Moreover, probably because it is limited by the commerce clause, it does not prohibit discrimination in the sale or rental of single family dwellings without the aid of any sales or rental agency, provided that the owner does not own more than three single family dwellings. Initially, one might argue that the sale of a single family dwelling is within the "intimate relationship" guideline to reasonable exemptions under section 17. However, since the buyer of a single family dwelling does not live with or have a highly personal relationship with the seller, the sale of a single family home should not be the subject of an exemption. Therefore, in every respect section 17 exceeds the scope of federal housing legislation.[73]

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68. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964) (restaurant using certain food supplies which had traveled through interstate commerce held to be a business affecting commerce).

69. *See* note 29 and accompanying text *supra*.

70. *See* notes 49-50 and accompanying text *supra*. For a more detailed discussion of reasonable exemptions, *see* notes 135-43 and accompanying text *infra*.

71. For a more thorough examination of the term "property" *see* notes 125-34 and accompanying text *infra*.

72. 42 U.S.C. §§ 3601-3607 (1970).

73. With regard to the invasion of privacy issue which section 17 enforcement might create, *see* notes 151-57 and accompanying text *infra*. Note also that 42 U.S.C. § 3603b-2 (1970) exempts from its coverage apartment dwellings of less than four units where the owner actually maintains one of the units as his place of residence. However, it may be argued that such an exclusion is not of such a "highly personal nature" that it could be the subject of a reasonable exemption under § 17.

Illinois Housing Legislation

At this juncture it is appropriate to discuss Illinois statutes in the housing area. Illinois fair housing legislation is almost a complete nullity. Although Illinois has failed to enact a statewide open housing provision, there is an Illinois statute which allows municipalities to prohibit discriminatory practices by real estate brokers.[74] However, this provision applies only to the regulation of real estate brokers and not to private owners who engage in unfair housing practices.[75] Nevertheless, another Illinois statute allows municipalities to "create effective regulation of housing accommodations in order to prohibit discrimination on the basis of race, creed, color, ancestry or national origin."[76] This statute fails to prohibit sex discrimination; however, the chief weakness of this statute lies in its optional nature. If a municipal council did not enact a fair housing ordinance, then an aggrieved person in that municipality would have no avenue of relief. This is, at best, piecemeal progress. However, section 17 in essence moots all these problems by providing a statewide remedy against housing discrimination.

Other Types of Property

Although whether section 17 covers the sale and rental of personal property is currently being litigated,[77] it is clear that personal property is included.[78] There are no Illinois statutes directly on point. Sections 1981 and 1982 of the federal civil rights acts together prohibit discrimination in the areas of property and contract, and are not inhibited by the affecting commerce limitations.[79] In *Jones v. Alfred H. Mayer Co.*,[80] the Supreme Court

74. ILL. REV. STAT. ch. 24, § 11-42-1 (1975).

75. Two Hundred Nine Lake Shore Bldg. Corp. v. City of Chicago, 3 Ill. App. 3d 46, 51, 278 N.E.2d 216, 220 (1971). "Thus, it is apparent that the city's power to prohibit real estate brokers from committing unfair housing practices did not permit it to extend that regulation to private owners . . . ." *Id.* at 50, 278 N.E.2d at 219.

76. *Id.* at 49, 278 N.E.2d at 218 (dictum) (construing ILL. REV. STAT. ch. 24, § 11-11.1-1 (1969)).

77. *See* notes 125-34 and accompanying text *infra*.

78. *Id.*

79. 42 U.S.C. § 1981 (1970) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, given evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1982 (1970) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

80. 392 U.S. 409 (1968).

construed these sections to cover private acts of discrimination, by reason of the thirteenth amendment and legislation passed pursuant to it. At least in their own limited sphere, these sections can go as far as section 17. However, because they are based on the thirteenth amendment, they generally are held to prohibit only racial discrimination, whereas section 17 prohibits not only racial discrimination but also discrimination based on sex, creed, and national origin.

Another area of potential overlap lies in the federal and state statutes dealing with public accommodations.[81] Again, accommodations which do not affect commerce are not subject to the federal statutes.[82] Since in many public accommodations, such as restaurants or clothing stores, the primary activity is transactions in goods, section 17 might very well overlap both state and federal legislation in this area.

Overlapping State and Federal Remedies: Which to Pursue First?

Should a person having both a federal and a state remedy proceed under federal law first? Both 42 U.S.C. § 2000e and the Supreme Court have given an answer. The enforcement provisions of 42 U.S.C. § 2000e describe the procedure by which a complaint is filed with the Equal Employment Opportunity Commission (EEOC).[83] If a state or local agency has enactments similar to the federal statutes, the EEOC will defer action until the complainant has exhausted his state remedies.[84] In addition, the Supreme Court stated in *Alexander v. Gardiner-Denver Co.*[85] that "Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination."[86] Thus, in *Abshire v. Chicago and Eastern Railroad Co.*,[87] the court held that the victim of alleged employment discrimination was required to proceed under the Illinois Fair Employment Practices Act[88] before a charge could be filed with the EEOC.[89] The same logic would appear to require a complainant to proceed under section 17 before he could pursue his federal remedies because, as has been pointed out, section 17 goes further than

81. *See* 42 U.S.C. § 2000a (1970); ILL. REV. STAT. ch. 38, §§ 13-1, 13-2 (1975).
82. Note also that 42 U.S.C. § 2000a exempts private clubs. The question of whether private clubs are exempt from § 17 is discussed in notes 123-24, 135-57 and accompanying text *infra*.
83. 42 U.S.C. § 2000e-5(b) (1970).
84. *Id.* § 2000e-5(c).
85. 415 U.S. 36 (1974).
86. *Id.* at 48-49.
87. 352 F. Supp. 601 (E.D. Ill. 1972).
88. ILL. REV. STAT. ch. 48, §§ 851-867 (1975).
89. 352 F. Supp. at 603-04.

Title VII. However, until there have been court decisions to breathe life into section 17, it would be unfair to require a complainant to exhaust his section 17 remedies before invoking Title VII.

SECTION 17'S EFFECT ON ILLINOIS STATUTES

Shortly after the adoption of the 1970 Illinois Constitution, the Illinois Institute for Continuing Legal Education asked me to summarize the significant features of article I, section 17 for a seminar on the new constitution. Virtually everything I wrote then, especially regarding its effect upon Illinois law, remains true today.[90]

To summarize, there are four significant features of article I, section 17 of the Illinois Constitution of 1970. First, it is meant to prohibit discriminatory acts by private individuals as well as by government. Bills of rights in the past have been directed primarily against governmental encroachments upon individual freedoms and have seldom sought to protect the rights and privileges of individuals as against other individuals. Second, it is self-enforcing; that is, the rights granted under section 17 are "enforceable without action by the General Assembly."[91] One who is wronged need not wait until the legislature enacts implementing legislation. Third, it adds a broad prohibition against sex discrimination in hiring and promotion and the sale or rental of property. This is in addition to the more traditional prohibition of discrimination on the basis of race, color, creed, or national ancestry. In this respect, it is a pioneering provision. Finally, it contains an exemption provision under which the legislature may establish "reasonable" exemptions. The Bill of Rights Committee did not intend that this power be used to "substantially undermine the substance of the right to freedom from discrimination"; rather, the provision was intended to exempt only discrimination in "relationships . . . on so small a scale and under circumstances so intimate that they are of a highly personal nature."[92]

I also suggested that there would have to be changes made in existing statutes to achieve compliance with the spirit of the antidiscrimination provision of the new constitution. I then explored the law at that time to assess what changes might be re-

90. *See generally* E. GERTZ, *The 1970 Illinois Constitution Affects Individual Clients* in HOW THE NEW CONSTITUTION AFFECTS THE PRACTICE OF LAW § 3-1 (Ill. Inst. for Contin. Legal Educ. 1971).

91. ILL. CONST. art. I, § 17, cl. 2. *See also* notes 51-53 and accompanying text *supra*.

92. 6 PROCEEDINGS, *supra* note 20, at 69.

quired to achieve that compliance. To the extent that the prior law deviated from the letter or the spirit of the new constitution, the statutory provisions could be invalid. The following represents the effect of section 17 on the prior Illinois law with comments on legislative action since 1971.

Public Accomodations

An Illinois criminal provision prohibits discrimination in the use of "public places of accommodation or amusement" on the basis of race, religion, color, or national ancestry.[93] The 1970 constitution requires that sex be added as a prohibited basis for discrimination, at least with respect to areas involving the sale or rental of property. However, the statute also designates such facilities as elevators and restrooms as areas which may not be the subject of discrimination. Obviously, discrimination in the use of elevators and restrooms would not constitute discrimination in the sale or rental of property. To this extent, the prior law might be broader than the section 17 requirements. The Bill of Rights Committee realized this and chose to omit any reference to discrimination in public places of accommodation or amusement, as the current law was deemed effective and complete.

Employment

Because the Illinois Fair Employment Practices Act[94] did not include a prohibition against sex discrimination, it could well have been inconsistent with the spirit of the 1970 constitution. In 1971 the General Assembly remedied this defect by adding "sex" to the list of impermissible bases for discrimination.[95]

Moreover, numerous classes of employees exempted by the present FEPA do not appear to be within the exemption limits of section 17. The FEPA excludes from the definition of "employee" domestic servants in private homes and those not employed by an "employer,"[96] which is defined as one employing more than 25 persons.[97] The statute provides additional exemptions for associations and not-for-profit corporations organized by religious or fraternal groups.[98]

If the new antidiscrimination provision is to be effective in prohibiting acts of private discrimination, with reasonable exemptions, the present statutory exemptions must be revised. For

93. ILL. REV. STAT. ch. 38, § 13 (1975).
94. *Id.* ch. 48, §§ 851-867 (1975).
95. *Id.* § 853(b) (1975).
96. *Id.* § 852(c).
97. *Id.* § 853(d).
98. *Id.*

instance, anyone employing less than 25 persons clearly should be considered, at least in many circumstances, an "employer" within the 1970 constitution's ban on private discrimination in employment. 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. Because it is unclear what number of employees is so small that the legislature might reasonably exempt their employer from the antidiscrimination section, the *nature* of the employment, not the mere number of employees, should be the proper basis for the reasonableness of an exemption. For example, the highly personal relationship between a domestic employee and an employer might be entitled to exemption. Certain religious activities, such as the hiring of a clergyman, are also of a "highly personal nature" and could be validly exempted. However, the FEPA also exempts employees of religious organizations whose jobs have no special religious functions because religious organizations are exempted from the definition of "employer."[99] Clearly neither these employees nor those employed by fraternal organizations should be exempt.

Except for the addition of "sex" to the list of prohibited bases of discrimination in the FEPA, the General Assembly has failed to amend any of these statutory provisions. But because no exemptions have been enacted since the constitution became effective, anyone ought to be able to bring an action under section 17 without fear that an exemption might preclude judgment.

The FEPA: Legislative Limit on Section 17 Remedy?

As clause two of section 17 expressly states, the legislature may provide additional remedies for violations of section 17, clause one. Thus, even though the legislature may create reasonable exemptions to section 17, it most assuredly cannot curb or set up procedural impediments to a section 17 complainant's right to immediate access to the courts. By expressly stating only that the legislature could provide additional remedies, clause two necessarily prohibits legislative limitation of section 17 remedies.[100]

A good example of a potentially unconstitutional legislative

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99. *Id.* *See also* notes 115-16 and accompanying text *infra.*

100. The power of the legislature to create reasonable exemptions should not be construed to allow the legislature to limit remedies. As is apparent from the debates, the power to establish reasonable exemptions deals with taking certain limited transactions or employment situations out of the scope of section 17. Nowhere in the debates was the reasonable exemption power construed to allow the legislature to limit remedies under section 17. *See* notes 48-50 and accompanying text *supra.*

limit on a section 17 complainant's right to a remedy in court is the FEPA.[101] As stated earlier, Illinois was the last large northern industrial state to enact a fair employment practices law, and from the start, delays and frustrations were built into the administration of the law.[102] Section 17 was drafted partly in response to the ineffectiveness of the old FEPA,[103] which was revised in 1971.[104] Like section 17, the 1971 FEPA includes the new category of sex discrimination in employment or promotions. However, even though the FEPA seems somewhat similar in spirit to section 17, the FEPA's adoption by incorporation of the Administrative Review Act[105] would pose serious constitutional questions if a court were to require a complainant to exhaust his FEPA remedies before bringing a section 17 suit, despite the language of section 17. Because the legislature can provide additional remedies but cannot restrict existing constitutional remedies, delaying a complainant's right to immediate access to the courts and requiring him to proceed under the FEPA would be unconstitutional.[106] Illinois case law on the relationship between agencies and courts further illustrates why such a requirement of exhaustion of administrative remedies would be unconstitutional in this instance.

In *Nye v. Foreman*,[107] the Illinois Supreme Court delineated the relationship between the courts and agencies:

> It is the province and duty of the courts to determine the meaning and true construction of constitutions and statutes, but when the legislative department, in the enactment of laws, and the executive officers, charged with the duty of enforcing or applying constitutional provisions and statutes "have given it a particular and definite meaning" this conclusion will, in view of the great injury and injustice which would result from a change in such construction and meaning, be accorded great weight by the judiciary . . . and will, in general, control, whenever the question is in degree doubtful or open to reasonable debate.[108]

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101. ILL. REV. STAT. ch. 48, §§ 851-867 (1975).

102. *See* note 8 and accompanying text *supra*.

103. As the Vice-Chairman of the Bill of Rights Committee, James Kemp, stated: "The citizens of our state, through legislative action in 1960, approved the theory that fair employment shall be the policy of Illinois. Nine years of service on that administrative commission compels me to report to you that this state policy needs bolstering by way of this constitutional proposal." 3 PROCEEDINGS, *supra* note 20, at 1594.

104. The amendments to the FEPA became effective August 27, 1971, and the Illinois Constitution of 1970 became effective July 1, 1971.

105. *See* ILL. REV. STAT. ch. 48, §§ 860-861 (1975) (incorporating ILL. REV. STAT. ch. 110, §§ 264-279 (1975)).

106. It would not be unconstitutional to provide the FEPC as an agency in which a complainant could voluntarily submit his complaint to be administered and decided. Such an agency can provide valuable investigative resources that the normal complainant cannot afford.

107. 215 Ill. 285, 74 N.E. 140 (1905).

108. *Id.* at 289, 74 N.E. at 141. *Accord*, Monsanto Co. v. Pollution Con-

When the FEPA adopted the Administrative Review Act, by implication it also adopted the Illinois case law that defines the relationship between agencies and the courts. The FEPA allows the FEPC to establish guidelines,[109] and because of *Nye v. Foreman* a court would have to give "great weight" to these guidelines. This would, in effect, prevent the complainant from getting a de novo ruling on the law. Thus, if a court required a section 17 complainant to proceed first under the FEPA and exhaust his administrative remedies, the court's subsequent giving of great weight to FEPC rulings would unconstitutionally impede the complainant's right to a court ruling on the law in his case.

The FEPA may also impose questionable restrictions on the way in which findings of fact are made in employment discrimination cases. In *Fenyes v. State Retirement System*,[110] the court stated that the findings of fact made by an administrative agency were prima facie correct and could be set aside only if they were against the manifest weight of the evidence. "Where there is evidence to support the findings of the administrative agency, its decision will be affirmed."[111]

In *Klein v. Fair Employment Practices Commission*,[112] the court restated the *Fenyes* proposition in applying it to a FEPA action:

> Section 8 of FEPA provides that a charge shall be dismissed if the Commission determines after investigation that there is a lack of *substantial evidence* to support it . . . this evidentiary standard was left deliberately vague by the legislature, we believe, to permit the Commission some degree of discretion in ascertaining and evaluating the facts. . . . *Upon review a court cannot try the case de novo or question the wisdom of the Commission's judgment.* Rather the proper scope of review should be to ascertain from an adequate record *whether the Commission's order of dismissal is arbitrary, capricious, or an abuse of discretion.*[113]

Thus, not only would a court have to give great deference to the Commission's rulings on the law, but it would also have to bow to the Commission's findings of fact. This would unconstitution-

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trol Bd., 39 Ill. App. 3d 333, 350 N.E.2d 289 (1976); Tegg v. Fair Employment Practices Comm'n, 28 Ill. App. 3d 932, 329 N.E.2d 486 (1975).

109. ILL. REV. STAT. ch. 48, § 857.

110. 17 Ill. 2d 106, 160 N.E.2d 810 (1959).

111. *Id.* at 111-12, 160 N.E.2d at 812. *Accord*, Kellogg Switchboard & S. Corp. v. Department of Rev., 14 Ill. 2d 434, 153 N.E.2d 45 (1958).

112. 31 Ill. App. 3d 473, 334 N.E.2d 370 (1975).

113. *Id.* at 481-82, 334 N.E.2d at 376 (emphasis added). It is interesting to note that the court in *Klein* also held that a complainant would not be allowed to participate in the commission's investigations or initial determination. As a result the complainant is virtually bound by the commission's findings of fact, although he cannot even follow the investigation to make sure that this semi-binding decision is made fairly.

ally deprive the complainant of his right to a de novo trial, and would effectively extinguish his right to have a jury find the facts of the case.

To require the delay that an agency involves and to require a court to give deference to an agency's guidelines on the law and its findings of fact would be an unconstitutional limit on the direct court remedy provided in section 17.[114] The FEPA is not unconstitutional in itself. The FEPC's investigative tools and resources may be invaluable to complainants who cannot afford to foot the bill themselves. The FEPA only becomes of

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114. Another potential indirect threat that the FEPA poses can be found in an appellate court decision. In City of Cairo v. Fair Employment Practices Comm'n, 21 Ill. App. 3d 358, 315 N.E.2d 344 (1974), the court noted that the racial discrimination provisions of Illinois and the federal government were so similar that in the absence of Illinois case law, "the federal decisions regarding racial discrimination in employment, while not controlling are relevant and helpful precedents." The court then went on to utilize the decision of Griggs v. Duke Power Co., 401 U.S. 424 (1970), to determine the standard to be used to determine whether racial discrimination existed. *Griggs* dealt with a job examination that was racially neutral on its face, but which had the effect of excluding a disproportionate amount of blacks. The Court held that even though no intent to discriminate was evidenced from the test, the test was discriminatory in its impact since it operated to freeze the status quo of prior discriminatory practices. The Court in *Griggs* decided that the object of Title VII was to remove arbitrary and artificial barriers to employment when they operate to discriminate invidiously, intentionally or not. The court in *Cairo* applied the *Griggs* impact test to invalidate a hiring practice by the City of Cairo. The *Cairo* adoption of the impact test in FEPA cases is in itself a boon for discrimination complainants, for the impact test imposes a far easier burden of proof than does the intent test. But, with the Burger Court's recent adverse decisions on discrimination complaints (*see, e.g.*, General Electric Co. v. Gilbert, 429 U.S. 881 (1976); Washington v. Davis, 429 U.S. 229 (1976)), the infusion of federal decisions might portend a bleak future for discrimination complainants in Illinois and could, if not carefully watched, greatly limit the effectiveness of section 17. For example, in Washington v. Davis, 429 U.S. 229 (1976), the Supreme Court was confronted with a complaint brought under the fifth amendment against an employment test given by the District of Columbia. Title VII did not apply to the District of Columbia at that time; any discrimination complaint, therefore, had to be based on the U.S. Constitution. As in the *Griggs* case, the test complained of was racially neutral on its face. However, the Court held that the test was not racially discriminatory, even though it had a disproportionate impact, because the statutory impact test of *Griggs* was held not to apply to a constitutional issue. The Court then went on to state that in federal constitutional discrimination cases, the intent test was the appropriate test.

The danger for section 17 in the combination of *Cairo* and *Washington* is obvious. A court confronted with a case brought directly under section 17 might decide that the holding in *Washington*, applying the intent test in federal constitutional cases rather than the impact test used in Title VII cases, would by analogy require application of the intent test in Illinois constitutional cases under section 17 rather than the impact test used in FEPA cases. This, I feel, would be a grievous error. Whereas the fifth amendment of the U.S. Constitution does not specifically prohibit discrimination and does not mandate either the intent or impact test, section 17 specifically mandates the eradication of discrimination in all its forms, and in this regard is closer to Title VII. Since the Illinois constitution has this specific section against discrimination, it would seem appropriate to apply the stricter standard of the impact test.

questionable constitutionality when it is forced upon an unwilling complainant who desires to proceed directly under section 17 without the impediments imposed under the FEPA.

CURRENT LITIGATION INVOLVING SECTION 17

Even though the 1970 constitution and section 17 have been in effect for almost seven years, only two cases have mentioned the section at all, and only one of these cases has analyzed some of the important aspects of section 17 in depth.

In the first case involving section 17, there is merely a passing reference. In *Fair Employment Practices Commission v. Rush Presbyterian St. Luke's Medical Center*,[115] a complainant brought suit under the FEPA alleging sex discrimination on the part of the center. The medical center claimed that it was a religious organization and as such was exempted under the FEPA, which excludes religious organizations from the definition of "employer."[116] The complainant claimed that the center was not a religious organization despite its religious affiliations. Although the trial court held for the center, the appellate court reversed on the ground that the center's religious affiliations were so minimal that it did not come under the religious organization exemption. The American Civil Liberties Union filed an amicus curiae brief attacking the constitutionality of the FEPA's religious organization exemption. One argument advanced was that it was in conflict with article I, section 17. The appellate court dismissed the argument because it had not been raised at trial

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115. 41 Ill. App. 3d 712, 354 N.E.2d 596 (1976).

116. ILL. REV. STAT. ch. 48, § 852(d) (1975), provides:

> The term "employer" does not include any not for profit corporation or association organized for fraternal or religious purposes, nor any school, educational or charitable institution owned and conducted by, or affiliated with, a church or religious institution, nor any exclusively social club, corporation or association that is not organized for profit.

There was some discussion during the debates about reasonable exemptions and religious organizations. In describing what a reasonable exemption might be, Delegate Wilson stated, "Now, let me give you an idea of some of these possible exemptions which we felt are reasonable and which the legislature would be empowered to enact. . . . For example, the right of religious organizations to employ or provide housing for members of their own faith only." 3 PROCEEDINGS, *supra* note 20, at 1593. From Delegate Wilson's example it seems clear that it would be perfectly justifiable for a religious organization to hire a minister or rabbi who followed its own faith. However, it might not be reasonable to allow a religious organization to discriminate in the hiring of secretarial or janitorial staff. The test of reasonableness might be the "job relatedness test" which has been applied in the federal area. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1970) (discussed at note 114 *supra*). A carte blanche religious organization exemption as contained in § 2(d) of the FEPA would almost certainly not be a reasonable exemption because it is overbroad.

and therefore could not be raised on appeal. Thus, the court did not consider the issues presented under section 17.

Davis v. Attic Club

A case recently decided by the Illinois Appellate Court (1st District) presents squarely many important issues under section 17. In *Davis v. Attic Club*,[117] the plaintiffs sought declaratory and other relief against certain Chicago clubs for their admittedly discriminatory practice of barring women from purchasing and being served alcoholic beverages in certain areas of the respective clubs. The plaintiffs based their complaint on two different theories.

Application of the Liquor Control Act

The plaintiffs' first theory was based on a construction of the Liquor Control Act which is helpful in understanding the section 17 problems. The plaintiffs maintained that if the clubs wanted to keep their liquor licenses, section 133 of the Liquor Control Act compelled them to provide equal access in their establishments to all persons.[118] The defendants claimed that section 95.24 of the same Act, in which the term "club" is defined, impliedly exempted them from the reach of section 133.[119] Although section 95.24 contains no language of exemption whatsoever, the trial court agreed with the defendants. The court stated that to hold that private clubs were not exempt from section 133 would make section 95.24 "inoperative," for this holding would make a definition of "club" unnecessary. It relied upon the rule of statutory interpretation that "[w]here different sections of a statute are in seeming conflict it is the court's duty to construe the pertinent sections in a manner that renders each section operative."[120]

Although section 95.24 does not contain any express state-

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117. Davis v. Attic Club, No. 73 L. 18515 (Cook Cnty. Cir. Ct., June 18, (1975) (Bua, J.), *aff'd*, 371 N.E.2d 903 (1977) [hereinafter cited as Davis v. Attic Club].

118. ILL. REV. STAT. ch. 43, § 133 (1975):
No licensee licensed under the provisions of this Act shall deny or permit his agents and employees to deny any person the full and equal enjoyment of the accommodations, advantages, facilities and privileges of any premises, in which alcoholic liquors are authorized to be sold subject only to the conditions and limitations established by law, and applicable alike to all citizens.

119. ILL. REV. STAT. ch. 43, § 95.24 (1975): "'Club' means a corporation organized under the laws of this State, not for pecuniary profit, solely for the promotion of some common object other than the sale or consumption of alcoholic liquors, kept, used and maintained by its members through the payment of annual dues. . . ."

120. Davis v. Attic Club, *supra* note 117, memo. op. at 5.

ment of intent to exempt clubs from section 133, the court decided that section 95.24 was a "condition and limitation established by law" as permitted under section 133. However, the court's contention that holding otherwise would make section 95.24 "inoperative" is rather tenuous, even assuming that there could be a conflict between a purely definitional section such as section 95.24 and a general prohibitory section like section 133. From the memorandum opinion and the defendant's appellate court briefs one receives the impression that bringing clubs under section 133 would turn private clubs into public houses, like taverns.[121] This would mean that the only distinguishing factor between a private club and a tavern would be the private club's ability to discriminate. Although some cynics and realists on both sides might agree that this is indeed the primary purpose of these clubs, the definition of "club" contained in section 95.24 in no way intimates, either expressly or implicitly, that, in order for an establishment to constitute a club, it must discriminate in some manner.

The pertinent language of section 95.24 defines a "club" as a not-for-profit corporation organized solely for the promotion of some common object other than the sale of alcoholic liquors, kept, used and maintained by its members through payment of annual dues. A club could theoretically exist for the sole purpose of discriminating against a certain group, but surely a club could be organized for some purpose other than discrimination. In short, even if section 133 prohibits clubs from discriminating, private clubs will not become public restaurants. They would still have to be not-for-profit and organized for some sole purpose, their members would still have to pay annual dues, and the "public" could be excluded. A club could set extremely high dues, retain its private nature and at the same time not violate section 133. Moreover, private clubs would not be eliminated by construing section 133 as applicable to them, since they conceivably could still discriminate so long as they did not serve alcohol. Thus, section 133 would not make section 95.24 inoperative if it were applied to clubs. Consequently the trial courts' opinion is on shaky ground, for clubs as defined under section 95.24 could still exist; they simply could not discriminate in membership and access.

However, the biggest weakness in the trial court's reasoning is its assumption that the sole purpose for defining "club" was somehow to impliedly exempt clubs from section 133. But there

121. *See generally* Brief for Appellee Chicago Club et al., Davis v. Attic Club, *supra* note 117.

appear to be two other, far more obvious purposes for the definition. First, establishments which fall under the definition of "club" in section 95.24 are *expressly* granted certain privileges elsewhere in the Act. For example, clubs may sell liquor within 100 feet of schools and churches, while taverns may not.[122] Second, the word "club" is only one of twenty-eight words and phrases defined, all without any language of exemption, in section 95, the general definitional section of the Liquor Control Act. Other words defined include "hotel," "restaurant," "bowling alley," "distributor," even "retailer"; in short, every establishment which could possibly be a liquor licensee and to which, therefore, section 133 could possibly apply, is defined in section 95. Consistent application of the trial court's method of statutory construction would require that each of these definitions be treated as an exemption, too. Such a construction would, ironically, render section 133 inoperative, an obviously absurd result. Primarily because of the trial court's shaky reasoning in this area, the supreme court might ultimately be able to avoid deciding the section 17 issues.

Application of Section 17

The trial court next faced the issue of whether section 17 applied to prohibit the clubs from discriminating in the sale of liquor. However, the trial court framed the issue as being "[w]hether the *exemption* for clubs (Ill. Rev. Stat. ch. 43 §95.24) is violative of Article I, section 17."[123] It should be pointed out that although the court characterized section 95.24 as an exemption for private clubs, nowhere in section 95.24 is there any reference to its being a reasonable exemption from section 17.[124]

"Property"—Real, Personal, or Both?

One of the first issues that the court examined was the meaning of the term "property" in section 17. The defendants maintained that it was the intent of the framers and of the electorate who adopted the constitution that the term "property" in section 17 include only real property.[125] Thus, the clubs' sale of alcohol

122. ILL. REV. STAT. ch. 43, § 127 (1975).
123. Davis v. Attic Club, *supra* note 117, memo op. at 6 (emphasis added).
124. For that matter, it most obviously would not have been termed an exemption by its drafters since section 95.24 was enacted in 1949, well before section 17 was a twinkle in its framers' eyes. For a more detailed discussion of this aspect of the case *see* notes 141-70 and accompanying text *infra*.
125. *See* Brief for Appellee Union League Club at 28-34, Davis v. Attic Club, *supra* note 117.

would not be covered by section 17's provisions against discrimination in the sale of property.

The defendants contended that the transcripts from the debates were inconclusive as to whether personal property was to be covered.[126] They contended that since the debates were inconclusive, the proper way to determine what the term "property" meant was to determine the meaning of the term in the minds of the voters when they ratified the constitution. They alleged that this meaning could be derived from the official explanation of the proposed constitution, which described the new protections in these terms: "all persons are guaranteed freedom from discrimination in housing and employment. . . ."[127]

The trial court accepted the defendants' major premise that in "construing constitutional provisions, the true inquiry is, what was the understanding of the meaning of the words used by the voters who adopted it."[128] Moreover, the court added, in construing provisions of a constitution "the words employed therein shall be given the meaning which they bear in ordinary use among the people. The natural and ordinary meaning of the words is to be accepted, *except where a word is used the meaning whereof is established by . . . judicial construction.*"[129] Since the term "property" does in fact have a well-established judicial construction and that construction is not doubtful,[130] the court held that "property" in article I, section 17 included all property, both real and personal.[131]

The court's holding on this point is supported by the fact that the term "property" is used in another context in the constitution. Article I, section 2 of the Illinois Constitution of 1970 is basically a reenactment of the 1870 Illinois Constitution's due proc-

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126. They cited various portions of the debates:

> Mr. JASKULA: . . . Did you mean to include personal property also?
>
> MR. WILSON: The word Mr. Jaskula, is "property" and I assume that it would include personal property. However, I think the real rub comes in real estate which is not movable, of course. I—we didn't—I must say that I recall that we heard no testimony about discrimination in the sale of portable property—property that people can take and move around.

3 PROCEEDINGS, *supra* note 20, at 1578. The appellees contended that the above remarks were ambiguous in that Delegate Wilson did not expressly say that the committee intended to include personal property. Brief for Appellee Union League Club at 29, Davis v. Attic Club, *supra* note 117. *But see* text accompanying notes 35 and 47 *supra*.

127. 3 PROCEEDINGS, *supra* note 20, at 2673.

128. Davis v. Attic Club, *supra* note 117, memo op. at 4.

129. *Id.* (citing Burke v. Snively, 208 Ill. 328, 340, 70 N.E. 327, 329 (1904) (emphasis added).

130. *E.g.*, People *ex rel.* Keenan v. McGuane, 13 Ill. 2d 520, 527, 150 N.E.2d 168, 172 (1958).

131. Davis v. Attic Club, *supra* note 117, memo op. at 4.

ess clause.[132] This clause uses the term "property," and most assuredly "property" in this context means both real and personal property. Consequently, when section 17 uses the term "property" without any qualification, it must also mean both real and personal property. As the court noted:

> Should the court construe "property" in a restrictive sense to mean only real property, it would be difficult to apply the same to property as used in Article I, section 2 which states: "No person shall be deprived of life, liberty or property. . . ." With this word being used in two sections of Article I, only a comprehensive definition would allow these two constitutional sections to coexist and retain their strength. The Court will not dilute the meaning of property in Article I, section 2.[133]

Once the court determined that section 17 covered personal property, it was obvious that section 17 covered the private clubs' sale of alcoholic beverages, which are clearly personal property. The court was thus confronted with the central question of the case: whether private clubs were somehow exempt from the coverage of section 17.[134]

Private Clubs and Section 95.24: A Reasonable Exemption?

The Court's Holding

The trial court found that section 95.24 and its supposed grant of an exemption from section 133 constituted a "reasonable exemption" from article I, section 17, as allowed by section 17, clause 2.[135] The court reasoned that although section 95.24 was enacted before the 1970 constitution was ratified, the transition schedule of the 1970 constitution preserved the section as a reasonable exemption.[136] The court, therefore, treated the question of the reasonableness of a private club exemption on two levels.

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132. ILL. CONST. art. I, § 2: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

133. Davis v. Attic Club, *supra* note 117, memo op. at 4.

134. The actual issue before the court was whether private clubs were exempt from the provisions of section 17 in their sale of alcohol. However, as has been mentioned, the court seems to have read a general reasonable exemption for private clubs into section 95.24 of the Liquor Control Act, which by the court's previous ruling exempted private clubs only from the section 133 prohibitions against discrimination in the sale of liquor. The court's construction of a general exemption for private clubs from a section which, if it provides an exemption at all, provides one only for a specific transaction (the sale of liquor), is dubious, notwithstanding any questions of anticipatory legislation. *See* notes 144-50 and accompanying text *infra*.

135. It should be reiterated that, perplexing as it may seem, the court was treating section 95.24 of the Liquor Control Act as a general exemption for private clubs, even though it is purely a definitional section and contains no language of exemption whatsoever.

136. *See* ILL. CONST. trans. sched., § 9, which provides: "All laws, ordinances, regulations and rules of court *not contrary to, or inconsistent*

On one level, according to the court, the framers of section 17 intended a private club exemption to be a reasonable exemption. On the second level, according to the court, it would be reasonable to construe section 17 so that it potentially *could* exempt private clubs. So construed, it would not be in conflict with the rights of privacy guaranteed in article I, sections 5 and 6. The trial court's holding is vulnerable on both levels.

The Framers' Intent

In holding that the framers of section 17 intended that private clubs be exempted, the court quoted from Delegate Wilson's statement in the debates that ". . . the job of a bill of rights always is a job of balancing and trying to evaluate competing interests . . . the right of truly private clubs to provide housing for their own members only would be . . . a reasonable exemption."[137] From this the court concluded that "[i]f an exemption for private clubs in the area of housing would be recognized as reasonable, the mere recognition of 'clubs' would also be reasonable."[138] This conclusion is confusing and appears to be incorrect.

First, the court's view that the right of all persons to gain access to private clubs without discrimination would be the death knell to private clubs is simply not valid.[139] Clubs could still exist as long as they did not discriminate. Therefore, allowing them to discriminate would not confer *"mere recognition"* upon clubs,[140] as the court said, but would give them the ability to select their members solely from certain races, religious groups, nationalities, and one sex.

Delegate Wilson's hypothetical reasonable exemption related only to *housing* in private clubs. To expand this example to allow the type of discrimination in membership, access, and the sale of property complained of in *Davis* is therefore tenuous. There is, however, an even stronger reason for not allowing section 95.24 to be viewed as a reasonable exemption to section 17.

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with, the provisions of the Constitution shall remain in force. . . ." (emphasis added).

137. Davis v. Attic Club, *supra* note 117, memo op. at 7.

138. *Id.* at 8.

139. *See* notes 121-22 and accompanying text *supra.*

140. Moreover, section 95.24 is not the "mere recognition" of clubs, but instead is a definition of "clubs" for the Liquor Control Act. It seems that the court lost sight of what it was deciding. However, one could argue that the court unwittingly declared that an exemption for private clubs, in general, would be reasonable. However reasonable this might be, section 17, clause 2 makes it very clear that only the legislature, not the courts, may establish reasonable exemptions.

The Transition Schedule

Granting the premise that a private club exemption would be reasonable, has the legislature enacted such an exemption as per section 17, clause 2? The Union League Club's appellate brief tried to establish that the framers of section 17 recognized that a private club exemption would be reasonable.[141] From these passages in the debates, the defendants concluded that since the framers knew that private club exemptions were already in existence (presumably section 95.24), they necessarily intended that those already in existence at the time of the convention would continue to be valid.

However, this conclusion fails to take into account the express language of section 17, clause 2, which states that the legislature *may* enact reasonable exemptions, but they can do this only in the future . . . *after the section is adopted.* To say that the framers recognized the possibility that private clubs could be exempted does not mean that there necessarily had to be such an exemption nor that one already existed. Section 95.24 was passed in 1949, well before the 1970 Constitutional Convention. How could the 1949 legislature have used article I, section 17, clause 2 to enact a reasonable exemption to article I, section 17, clause 1, before article I, section 17 was even proposed?

The trial court countered this argument by invoking the transition schedule of the 1970 constitution.[142] The court reasoned that since section 95.24 was not in conflict with section 17, clause 1, it was validated or ratified by the transition schedule despite its priority in time. This conclusion is specious because it fails to take into account clause 2 of section 17. Even though section 95.24 might not conflict with the "reasonableness" requirement of clause 1, it does conflict with the "futurity" requirement of clause 2, since section 95.24 is not an exemption that was passed after the 1970 constitution was adopted. Thus, section 95.24 cannot be validated via the transition schedule since it is a prior law which is inconsistent with a provision of the constitution.

Moreover, it is important that the reasonable exemption requirement of section 17 work prospectively, because it requires the legislature to reevaluate statutes previously enacted in light of the spirit of the new section. This is bolstered by section 2 of the transition schedule, which states that "[a]ny rights, procedural or substantive created for the first time by Art. I shall be

141. Brief for Appellee Union League Club at 26-27, Davis v. Attic Club, *supra* note 117.
142. *See* note 136 *supra.*

prospective and not retroactive."[143] Section 17 was undoubtedly a newly created right and as such its allowance for reasonable exemptions should have only a prospective effect.

Anticipatory Legislation

One possible argument is that section 95.24 should be considered anticipatory legislation and that the clubs' exemption is a valid exemption under clause 2. The concept of anticipatory legislation to the 1970 Illinois Constitution derives from *People ex rel. Ogilvie v. Lewis.*[144] In that case the Illinois Supreme Court held that "the enactment of legislation in anticipation of an adopted but not yet effective constitutional provision is within the plenary lawmaking power of the legislature."[145] The court placed particular emphasis on the fact that the legislation in *Ogilvie* expressly stated that it was enacted in anticipation of the 1970 constitution,[146] and the court also noted that the statute's effective date was delayed until after the effective date of the 1970 constitution.[147] Applying the principles enunciated in *Ogilvie*, the Illinois Supreme Court in *Kanellos v. Cook County*[148] held invalid a statute enacted prior to the 1970 constitution which placed a limit on the home rule powers of municipalities:

> We therefore hold that this statute is inapplicable as applied to a home rule county. It was enacted *prior to and not in anticipation* of the constitution of 1970 which introduced the concepts of home rule. . . . *Such considerations were totally foreign in the contemplation of legislation adopted prior to the 1970 constitution.*[149]

If we apply the principles of *Ogilvie* and *Kanellos* to section 95.24, it is apparent that section 95.24 is not anticipatory legislation. Section 95.24 was not legislation enacted in anticipation of an adopted but not yet effective constitutional provision. Indeed, it was enacted in 1949, twenty-one years before the 1970 constitution was even written. Thus, it is in no way comparable to the legislation upheld in *Ogilvie.*[150] Section 95.24 more closely resembles the legislation invalidated in *Kanellos.* Like the provision for county home rule, section 17 was a newly created provi-

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143. ILL. CONST. trans. sched., § 2.
144. 49 Ill. 2d 476, 274 N.E.2d 87 (1971).
145. *Id.* at 483, 274 N.E.2d at 92.
146. *Id.* at 482, 274 N.E.2d at 92.
147. *Id.* at 482, 274 N.E.2d at 92.
148. 53 Ill. 2d 161, 290 N.E.2d 240 (1972).
149. *Id.* at 166-67, 290 N.E.2d at 243 (emphasis added).
150. Moreover, it is obvious that section 95.24 does not contain any anticipatory preamble nor does it delay its effective date like the legislation in *Ogilvie.*

sion. Its considerations must have been as totally foreign as county home rule was twenty-one years before the 1970 constitution was adopted. To say that section 95.24 is anticipatory legislation is to play havoc with the plain meaning of the word "anticipatory," for one cannot anticipate something unless one knows that it will indeed occur. Obviously the legislature in 1949 could never have anticipated section 17, because it could not have foreseen the drafting of the 1970 constitution.

Section 17 and Privacy

The clubs contended, and the trial court held, that to construe section 17 as prohibiting discrimination by private clubs would bring it into conflict with the right of privacy guaranteed in article I, sections 5 and 6 of the 1970 Illinois Constitution.[151] The gist of the argument was that if the government mandated that the clubs grant equal access to all, it would infringe upon their right of privacy.

The first problem with this argument is that the plaintiffs in the instant case were not asking to be admitted as members, but were instead requesting that if clubs sell property, such as alcoholic beverages, then they must provide equal access for all to purchase this property. If the clubs do not want to associate with women, then all they have to do is to stop selling liquor or other property, which would probably render the section inoperative.

However, even on the broader question of whether section 17 may mandate equal membership opportunities, the privacy argument still will not pass muster. The line of federal cases starting with *Griswold v. Connecticut* show that there is only a constitutional right of privacy to be free from unwarranted government intrusion.[152] Cases brought under the Illinois constitution also view this right as one against governmental invasions.[153]

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151. ILL. CONST. art. I, § 5: "The people have the right to assemble in a peaceable manner, to consult for the common good. . . ." *Id.* § 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. . . ."

152. *E.g.*, Carey v. Population Serv. Int'l., 97 S. Ct. 2010 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). It is also interesting to note that in these cases the Court applied a balancing test, weighing the state's interest against the individual's right of privacy. If the state could show a compelling interest it could outweigh the individual's right of privacy. Thus if section 17 were ever attacked on the grounds that it violated federal constitutional rights of privacy, it could be defended on the grounds that Illinois has a compelling state interest in promoting harmony among its citizens by prohibiting discrimination.

153. *See generally* Illinois State Employ. Ass'n. v. Walker, 57 Ill. 2d

The committee report for article I, section 6 states that "every person [should] be guaranteed a zone of privacy in which his thoughts and highly personal behavior were not subject to disclosure or review. The new provision creates a direct right to freedom from such invasions of *privacy by government or public officials.*"[154]

Applying these principles to the *Davis* case, it is apparent that the defendants' complaint of an invasion of privacy is not in fact the type of governmental intrusion envisioned by the framers of article I, section 6 nor by the Supreme Court in the *Griswold* line of cases. In *Davis* it is not the government that is causing the "harm," but private individuals who voluntarily enter the clubs. By prohibiting discrimination in section 17 the government is not mandating that persons enter the clubs; instead it is breaking down a barrier so that other private individuals may enter. Clearly this is not a governmental intrusion into "highly personal behavior and thoughts." Moreover, since the plaintiffs only request equal access to the purchase of alcohol and do not desire membership, the question of privacy becomes even less important, since the defendants' thoughts and highly personal behavior are certainly not intruded upon by requiring them to refrain from discriminating in the sale of liquor.[155]

The trial court assumed that section 17 would conflict with sections 5 and 6 if it were construed to prohibit discrimination by private clubs. The court thus felt compelled to "harmonize them if practicable."[156] However, this contention fails because section 17's reasonable exemptions should be designed only to prevent infringement upon relationships of a highly personal nature.[157] Indeed, the scope of section 17 ends where the right of privacy begins; thus the trial court's manufacture of a purported clash between these rights is strained.

Nevertheless, even if one accepts the court's premise that sec-

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512, 315 N.E.2d 9 (1974); Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 509, *appeal dismissed*, 412 U.S. 915 (1972).

154. *Constitutional Commentary*, ILL. ANN. CONST., art. 1, § 6 (Smith-Hurd).

155. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976), where the Supreme Court held that to require a private school to open its doors to blacks did not violate that associational right of privacy which entitles persons to associate for the advancement of beliefs and ideas, because, as such, the requirement of black admission did not inhibit the school from teaching the idea of racial discrimination. This reasoning is directly applicable to the *Davis* case, for requiring admission of women to these clubs would not infringe on the members' rights to associate for the purpose of exchanging ideas and beliefs.

156. Davis v. Attic Club, *supra* note 117, memo op. at 8 (emphasis added) (quoting from Oak Park Fed. S. & L. v. Oak Park, 54 Ill. 2d 200, 203, 296 N.E.2d 344 (1973)).

157. *See, e.g.*, note 32 and accompanying text *supra*.

tion 17 clashes with sections 5 and 6, the court's "harmonization" of this problem is highly questionable. "The court need not 'harmonize' these conflicts by judicial fiat. The exemption for clubs in Ill. Rev. Stat. 43 § 95.24 is a legislative act that is reasonable in its *recognition and harmonization of the conflict between §§ 5 and 6 and § 17 in this case.*"[158] The absurdity of this proposition is apparent. How could the legislature of 1949 recognize and harmonize three sections of the 1970 constitution when two of the three sections were not even in existence at that time? And why would it choose to do so by means of an implied exemption by definition?

The Appellate Court

On December 21, 1977 (while this article was already in the publication process), the Illinois Appellate Court, First District, delivered an affirmance of Judge Bua's decision on the trial level. Justice Mel Jiganti wrote the majority opinion, with Justice Seymour Simon filing a strong dissent.[159] Although the majority opinion is confusing at some essential points, it seems to have followed, for the most part, the trial court's lead. With regard to the section 133 statutory question, as did the trial court opinion, the majority opinion assumes that a private club's selectivity in membership is synonymous with an unlimited right to discriminate. Consequently, it also reads the definition of "club" contained in section 95.24 as impliedly exempting private clubs from section 133's general prohibition against discrimination, without ever concretely addressing the question of why a "definitional" section like section 95.24 should be read as an "exemption" section.

With regard to article I, section 17, the appellate court reaches an even more disturbing conclusion. With reasoning both sparse and troubling, the court concludes that since the Bill of Rights committee comments contain a reference to the fact that a proposal on voluntary associations was rejected, the framers of section 17 must never have intended private clubs to fall within the scope of section 17. In support of this conclusion the court quotes from Delegate Wilson's remarks on the convention floor that a private club exemption in certain areas might be a reasonable exemption.[160] Armed with these somewhat limited comments made by the framers, the court carves out a broad and unlimited exemption for private clubs. This decision poses grave

158. Davis v. Attic Club, *supra* note 117, memo op. at 8.
159. Davis v. Attic Club, 371 N.E.2d 903 (Ill. App. 1977).
160. *See* text accompanying note 49 *supra*.

dangers, not only in its immediate impact, but also in its potential as a precedent for judicial emasculation of section 17.

Section 17, clause 2 provides that the legislature may create reasonable exemptions to the antidiscrimination provisions of the section. But here, the court, based upon very weak evidence from the convention proceedings, somehow concludes that private clubs are completely excluded from section 17. The trial court at least tried to follow the format of section 17 in holding that section 95.24 constituted a reasonable exemption enacted by the legislature. The appellate court, on the other hand, has sua sponte found that private clubs are totally exempted from the coverage of section 17. This is a blatant usurpation of a function granted only to the legislature by the express language of the constitution. Such a procedure would give courts the power to ride roughshod over the express language of section 17. When presented with a case brought under section 17, all that a court would have to do would be to peer selectively into some portion of the debates that supported its position and thus create another broad exclusion. It cannot be emphasized too much that the only role that the court should play under section 17, clause 2 is to determine whether a particular legislative exemption is in fact a reasonable exemption.

The Dissent

Justice Simon, in his dissent, attacked the majority's use of section 95.24 as an exemption to section 133 on the ground that it was purely a definitional section and not an exemption section. With regard to the court's section 17 argument he pointed out one of the most glaring weaknesses in the majority's reliance on the portion of the proceedings that they cited:

> Neither the Committee report nor the remarks of Delegate Wilson indicate the specific nature of the proposal on voluntary associations which was presented to the Committee. Thus, it is quite possible that the Committee members and delegates were content to forego a provision relating to voluntary associations because they regarded the proposal which actually was adopted as sufficient to prohibit discrimination in the sale of property by clubs such as the defendants.[161]

In short, Justice Simon felt that the majority's position relied on some tangential comments in the proceedings to avoid the intended purpose of section 17 and deflate "the energetic and far-ranging emphasis in recent years upon eliminating discrimination in our state."[162]

161. Davis v. Attic Club, 371 N.E.2d 903, 912 (Ill. App. 1977) (Simon, J., dissenting).
162. *Id.* at 912.

DAVIS AND THE FUTURE OF SECTION 17

Although the trial and appellate courts in *Davis* seem to have ruled properly on only one aspect of section 17 (the meaning of the term "property"), and although both seem to have misread article I, section 17, clause 2, ultimately these conclusions will almost surely be reconsidered in the Illinois Supreme Court. With supreme court decisions heralding the way, I hope that section 17 will be put to the use to which it was originally intended.

Would-be litigants are not content with a general warrant to sue, as is evidenced not only by the antidiscrimination sections of the Illinois Constitution of 1970, but also by section 12, the right to a remedy provision.[163] They want to have the rights, remedies and procedures spelled out in detail. They are not content with a general warrant even if it is labeled self-executing. Litigants and their lawyers are creatures of habit. They look to form books, precedents, what has already been decided in their situation. Should there suddenly be litigation in this area, particularly a helpful decision by the Illinois Supreme Court in the *Davis* case, it will encourage even more litigation. There will be an accelerated process. Meanwhile, with regard to employment practices, aggrieved persons will be content to appear before the Illinois Fair Employment Practices Commission. Why go to the expense, delay and uncertainty of preparing forms, obtaining discovery and going to trial when all of these things can be done, however slowly and painfully, by bureaucrats charged with such responsibility? With regard to the sale of property, since there is no administrative machinery, cases like *Davis* will hopefully open new vistas.

It must be stressed that among the great obstacles to litigation in this area, even more than in other areas, are the excessive costs, the delays, uncertainties, fears and frustrations of all kinds. Those discriminated against are often the most disadvantaged and the least knowledgeable of the legal options open to them. It could very well be that there will be no appreciable amount of litigation in this area until interested and potentially well-funded organizations take the lead.

It should not be concluded that the failure to use the nondiscrimination provisions of the Illinois Constitution of 1970 proves that the provisions are ineffective and that all of the effort that went into them has been futile. We have firmly established a basic policy for Illinois that in and of itself mandates nondis-

163. ILL. CONST. art. 1, § 12.

crimination. The new constitutional provisions are not dead letters. Nothing prevents their use. They set a realizable goal of nondiscrimination in two basic areas—employment and property. Cases like *Davis* can be used to make clear the meaning and utility of section 17. Meanwhile, time, the great ally, will decree the new day.