Loyola University Chicago Law Journal

Volume 24
Issue 4 *Summer 1993 Illinois Judicial Conference Symposium*
Article 6

1993

People v. DiGuida: Freedom of Expression on Private Property Under the Illinois Constitution

Douglas M. Poland

People v. DiGuida: Freedom of Expression on Private Property Under the Illinois Constitution

TABLE OF CONTENTS

I. INTRODUCTION

The right to freedom of expression, protected both by the First Amendment to the United States Constitution[1] and by Article I, Section 4 of the Illinois Constitution,[2] is one of the most treasured individual liberties in our society.[3] Similarly, the rights of private property owners are held in the highest regard.[4] Thus, when a person seeks to exercise his or her right to freedom of expression on the property of another who wishes to prevent the speech or activity, an inevitable tension between the competing rights arises.[5] Because the Supreme Court has held that the First Amendment operates only as a limitation on government,[6] a private property owner's right of exclusion takes precedence over the free speech rights of others unless the property assumes a "public function," thus subjecting the property to state regulation.[7]

1. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. ILL. CONST. art. I, § 4 provides: "[a]ll persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."

3. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . ."); Chicago Park Dist. v. Lyons, 237 N.E.2d 519, 522 (Ill.) ("[F]ree speech and a free press are fundamental personal rights and liberties thought by those who drafted our State and Federal constitutions to lie 'at the foundation of free government by free men.' " (quoting Schneider v. New Jersey, 308 U.S. 147, 161 (1939))), *cert. denied*, 393 U.S. 939 (1968); City of Blue Island v. Kozul, 41 N.E.2d 515, 519 (Ill. 1942) ("The freedom[s] of speech and of the press . . . are fundamental personal rights and liberties, and are essential to a free government by free men."); *see also* Curtis J. Berger, *PruneYard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 635, 637 (1991) [hereinafter Berger] ("The imperative of an informed, politically conscious electorate requires access to information and opinion . . . . Political expression, 'uninhibited, robust, and wide-open,' is the vital fluid of a free, participatory society." (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

4. Both the federal (U.S. CONST. amend. V) and state constitutions (ILL. CONST. art. I, § 15) protect persons from the uncompensated taking of private property by the government. *See also* Berger, *supra* note 3, at 635-36 (noting that "the gospel of private ownership regards as fundamental the right to control entry to one's land").

5. *See* Berger, *supra* note 3, at 635.

6. Hudgens v. NLRB, 424 U.S. 507, 513 (1976); Gitlow v. New York, 268 U.S. 652, 666 (1925); *see also Kozul*, 41 N.E.2d at 517 (stating "the freedom of speech and of the press secured by the first amendment against abridgement by the United States is similarly secured to all persons by the fourteenth amendment against abridgement by a State" (citations omitted)).

7. *Hudgens*, 424 U.S. at 513-15, 520; Marsh v. Alabama, 326 U.S. 501, 506-07, 509 (1946).

Until recently, the conflicting rights of property owners and persons asserting their right to free speech under Article I, Section 4 of the Illinois Constitution (the "free speech provision") had never been addressed. Rather, parties generally addressed this conflict under the First Amendment to the Federal Constitution. In the last two decades, however, the United States Supreme Court has foreclosed First Amendment protection of the right to free speech on private property in all but the narrowest of circumstances.[8] Consequently, those seeking to exercise free speech rights on private property have turned to the free speech provisions of state constitutions for protection.[9]

In *People v. DiGuida*,[10] the Illinois Supreme Court examined for the first time whether the Illinois Constitution prohibits property owners from using the Illinois trespass statute[11] to exclude from their property a person seeking to engage in speech or expressive activity. The court concluded that the Illinois free speech provision does not protect expression on the private property of another.[12]

8. The only situation in which the U.S. Supreme Court has invoked the public function doctrine to grant a right of free speech on private property involved a company-owned town. *See Marsh*, 326 U.S. at 502, 507-09; *see also infra* notes 13-27 and accompanying text for a more thorough discussion of the limited application of the public function doctrine.

9. *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 875-76, 878 (1976) [hereinafter Howard] (particularly noting the independent path taken by the California Supreme Court); *see also* Berger, *supra* note 3, at 651 (discussing "the need for state law to supplement the Court's limited view of a constitutionally protected forum"); Thomas B. McAffee, *The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine*, 12 S. ILL. U. L.J. 1, 3 (1987) [hereinafter McAffee] (stating that "[i]n the face of retrenchment by the Burger Court . . . state courts have increasingly departed from Supreme Court decisions applying federal provisions that are substantially identical with state constitutional counterparts"); Roger Kangas, Comment, *Interpreting the Illinois Constitution: Illinois Supreme Court Plays Follow the Leader*, 18 LOY. U. CHI. L.J. 1271 (1987) [hereinafter Kangas] (discussing the Illinois Supreme Court's refusal to recognize the Illinois Constitution as an independent source of protection); *cf.* People v. Tisler, 469 N.E.2d 147, 164 (Ill. 1984) (Clark, J., concurring) (stating that "[t]oday, the United States Supreme Court has been cutting back on the individual liberties provided by the Warren court, while State supreme courts have attempted to protect civil liberties in State constitutions" (citing Michigan v. Long, 463 U.S. 1032, 1065 (1983) (Stevens, J., dissenting))).

10. 604 N.E.2d 336 (Ill. 1992), *rev'g* 576 N.E.2d 126 (Ill. App. Ct. 1991). This Note will refer to the appellate court opinion as "*DiGuida I*" and to the Illinois Supreme Court opinion as "*DiGuida II*." Although the appellate court incorrectly failed to capitalize the *G* in Mr. DiGuida's name, the Illinois Supreme Court used the correct capitalization. References to the decisions of both courts will therefore follow the version used by the supreme court.

11. ILL. REV. STAT. ch. 38, para. 21-3(a) (1987).

12. *DiGuida II*, 604 N.E.2d at 344-47.

This Note addresses the inconsistencies in the Illinois Supreme Court's interpretation of the "state action" requirement of the Illinois free speech provision. Section II provides background for the opinion of the Illinois court by identifying persuasive authority under both state and federal constitutional law and by examining the legal history of the Illinois free speech provision. Section III discusses the Illinois Supreme Court's decision in *DiGuida*, and Section IV provides a critical analysis of the approach taken and conclusion reached by the Illinois court. Finally, Section V assesses the impact of the *DiGuida* opinion not only for free speech rights under the Illinois Constitution but also for the "lockstep" and state action doctrines.

II. BACKGROUND

A. Free Speech Rights Under the First Amendment

In *Marsh v. Alabama*,[13] the United States Supreme Court for the first time addressed the question of whether the First Amendment confers the right to engage in speech on the property of another. In *Marsh*, a Jehovah's Witness seeking to distribute religious literature in Chickasaw, Alabama, a company-owned town, was arrested for trespassing.[14] The Court first determined that the speaker's activity would have been protected by the First Amendment if it had occurred on public property.[15] In holding that the state violated the speaker's First Amendment rights by permitting the property owner to prohibit the speaker's activity, the Court stressed that the company town functioned just as any other American town.[16] The Court therefore established the doctrine that when private property becomes the functional equivalent of a municipality, the Fourteenth Amendment's limitations on state activity apply to the property owner.[17]

Two decades later in *Amalgamated Food Employees Union Local*

13. 326 U.S. 501 (1946).

14. *Id.* at 503-04.

15. *Id.* at 505. Prior Supreme Court opinions established that a municipality does not have a general right to prohibit speech or expressive activity on its streets, sidewalks, and public places merely by virtue of its ownership of the property. *Id.* at 504-05 (citing Jamison v. Texas, 318 U.S. 413 (1943)).

16. *Id.* at 502. A private corporation not only owned the homes and stores in the business district but also owned and operated the streets, the sewer system, and a sewage-disposal plant. *Id.*

17. *Id.* at 507-09. *Marsh* provided the first application of the "public function" doctrine to the area of First Amendment rights. *Hudgens v. NLRB*, 424 U.S. 507, 513-14 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 561 (1972); JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 12.2, at 457-59 (4th ed. 1991) [hereinafter NOWAK]; James Marcus

590 v. Logan Valley Plaza, Inc.,[18] the "public function" concept was extended to include large shopping centers.[19] The Court based this extension on its finding that the shopping center functioned as a community business block just as the business district did in *Marsh*.[20] Following the public function doctrine announced in *Marsh*, the Court held that the state could not permit the private owners of the shopping center to prohibit picketing activity that would have been protected by the First Amendment if it had been conducted on public property.[21] *Logan Valley* marked the greatest extent to which the Supreme Court was willing to expand protection for expressive activities on private property; subsequent decisions restricted the application of the public function exception.

The first step in checking the expansion of the public function doctrine came in *Lloyd Corp. v. Tanner*.[22] Although *Lloyd* did not expressly overrule *Logan Valley*, the Court avoided the constraints of the *Logan Valley* decision by distinguishing the operative facts

---

Boman, Note, *Robins v. PruneYard Shopping Center: Free Speech Access to Shopping Centers Under the California Constitution*, 68 CAL. L. REV. 641, 646-47 (1980).

The public function doctrine provides an exception to the general rule that private persons are not subject to the limitations that the Federal Constitution places on federal and state governments. It holds that when a private actor assumes the role of the state by assuming a function traditionally associated with government or operated almost exclusively by government, the private actor is subject to the same limitations that the Federal Constitution places on federal and state governments. *Hudgens*, 424 U.S. at 513-14; NOWAK, *supra*, § 12.2, at 457-58.

18. 391 U.S. 308 (1968).

19. *Id.* at 318, 325. This extension was not without its critics on the Court. Justice Black, who had written the Court's opinion in *Marsh*, criticized the majority's conclusion that the shopping center in *Logan Valley* was the equivalent of the company town in *Marsh*. *Id.* at 330-31 (Black, J., dissenting). Justice Black commented that the unique characteristics of the property in *Marsh*—property that "encompassed an area that for all practical purposes had been turned into a town"—were missing in *Logan Valley*. *Id.*

The Supreme Court's later opinions in *Lloyd* and *Hudgens* vindicated Justice Black's viewpoint. *See Hudgens*, 424 U.S. at 518 (stating that "the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*"); *Lloyd*, 407 U.S. at 570 (holding that "there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights").

20. *Logan Valley*, 391 U.S. at 318-19.

21. *Id.* at 318-19, 325. The Court noted that its holding did not confer a general right of access to all parties seeking to picket on the shopping center's property. *Id.* at 320-21. For example, the Court indicated that if expressive activity were to interfere with the owner's or the public's ordinary use of the property, the state could prevent picketing even if it occurred on state-owned property generally open to the public. *Id.* The shopping center was not permitted to deny the picketers in *Logan Valley* access because the property was generally open to the public and the picketers exercised their First Amendment rights in a manner and for a purpose consistent with the property owner's and the public's use of the property. *Id.* at 319-23.

22. 407 U.S. 551 (1972).

in that case.[23] The Court held that because the owner had not dedicated its property to public use, the public did not have a First Amendment right to engage in expressive activities on the property.[24]

The implications of the Supreme Court decision in *Lloyd* were clarified in *Hudgens v. NLRB*.[25] In *Hudgens,* the Supreme Court held that although it had factually distinguished *Logan Valley* from *Lloyd*,[26] the latter opinion "amounted to a total rejection of the holding in *Logan Valley*."[27] By interpreting *Lloyd* as having effectively overruled *Logan Valley*, the Supreme Court eliminated from the public function exception the shopping center at issue in *Logan Valley*. Thus, *Marsh v. Alabama* is the only case in which the Supreme Court's application of the public function exception still stands.

The Supreme Court's most recent examination of First Amendment protection for speakers on private property involved the application of a state constitutional free speech provision.[28] In *PruneYard Shopping Center v. Robins*, the Court was asked to reverse a California Supreme Court decision[29] that had held that the California Constitution protected the right of a group of speakers to engage in expressive activity in a privately owned shopping mall.[30] In affirming the decision of the California Supreme Court, the U.S. Supreme Court held that although the speakers' rights in *PruneYard* would not have been protected by the First Amend-

23. *Id.* at 563-67. The Court noted that unlike the situation in *Lloyd*, in *Logan Valley* the speech had been directly related to the use of the property and that no other forums were available to the speakers. *Id.* at 563-64, 566-67.

24. *Id.* at 570. The Court rejected the argument that because the shopping center at issue was open to the public, it served the same purpose as a business district and therefore had been dedicated to public use. *Id.* at 569-70. Instead, the Court held that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store . . . assumes significant public attributes merely because the public is invited to shop there." *Id.* at 569.

25. 424 U.S. 507 (1976).

26. *Id.* at 517-18.

27. *Id.* at 518; *see also* Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 846 (1992) (stating "in *Hudgens* we made it clear that *Logan Valley* was overruled"); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 80-81 (1980) (stating that "[i]n rejecting [the respondents' claim in *Lloyd*,] we substantially repudiated the rationale of *Food Employees v. Logan Valley Plaza*, which was later overruled in *Hudgens v. NLRB*" (citations omitted)).

28. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

29. *See* Robins v. PruneYard Shopping Ctr., 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

30. *PruneYard*, 447 U.S. at 78.

ment,[31] states were nevertheless permitted to provide greater protection for expressive activities under their own constitutions.[32]

The only limitations on such protection, the Court held, were those imposed by the Federal Constitution.[33] Thus, if a state's constitutional protection of its citizens' speech were to violate a property owner's rights under the First or Fifth Amendment to the Federal Constitution, then the state constitution's free speech provision would be invalid.[34] The *PruneYard* Court concluded, however, that the speakers' activity of soliciting signatures for a political petition in the courtyard of a large, privately owned shopping center constituted neither a taking of property under the Fifth Amendment nor a violation of the owner's First Amendment rights.[35]

B. Free Speech Rights Under Other State Constitutions

Since the U.S. Supreme Court decision in *PruneYard*, many state supreme courts have considered whether their state constitutions confer upon speakers a right to engage in speech on the private property of another.[36] Although no state supreme court has yet held that its state constitution provides a general right to speech on private property regardless of the circumstances, neither has any state yet denied protection for expressive activity on privately owned property under all circumstances. The states that have interpreted their constitutions' free speech provisions[37] in the context of the right to speech on private property fall roughly into

---

31. *Id.* at 81.

32. *Id.*

33. *Id.*

34. *Id.*

35. *PruneYard*, 477 U.S. at 84, 87-88.

36. *See, e.g.*, State v. Schmid, 423 A.2d 615, 624 (N.J. 1980) ("Defendant asserts that under the [New Jersey] State Constitution he is afforded protection of his expressional rights even if it is not clear that the First Amendment would serve to grant that protection.").

37. The Supreme Judicial Court of Massachusetts has found a right to conduct certain activities on private property under a provision of its state constitution other than its free speech provision. *See* Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 595 (Mass. 1983) (applying the state constitution's provision concerning the right to free and equal elections to protect a speaker's right to gather signatures for a political petition at a privately owned shopping mall).

Similarly, the right to collect signatures on initiative petitions has been found to limit property owners in Oregon from excluding persons seeking to exercise this right. *See* State v. Dameron, 789 P.2d 707 (Or. Ct. App. 1990); State v. Cargill, 786 P.2d 208, 215 (Or. Ct. App. 1990). The application of provisions other than free speech provisions exceeds the scope of this Note.

two categories:[38] (1) states for which the question of state action is determinative; and (2) states that require a situational analysis of the degree to which the property owner has opened that property to the public.[39]

1. Jurisdictions Requiring State Action to Invoke Constitutional Protection for Expression

On the basis of the principle that their state constitutions protect speakers only from government activity, twelve states[40] have denied the protection of their constitutions' free speech provisions to

38. One state supreme court's interpretation of its free speech provision defies categorization. The North Carolina Supreme Court held without comment that the state's free speech provision did not protect the activities of a protestor who was soliciting signatures for a petition against the draft in the parking lot of a large privately owned mall. *See* State v. Felmet, 273 S.E.2d 708, 712 (N.C. 1981).

Most courts and commentators have classified each decision in the line of shopping-center cases by comparing the decision with the shopping-center decisions of other jurisdictions, rather than on the basis of its effect on free speech rights on private property generally. *See, e.g.*, Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1339 (Pa. 1986) (noting that "[u]nlike California, Massachusetts and Washington, other sister jurisdictions in addressing these situations have reached the result we do today" (citing Cologne v. Westfarms Assocs., 469 A.2d 1201 (Conn. 1984) and Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985))); Berger, *supra* note 3, at 634 n.10 (dividing the states into two groups: one in which mall owners have "prevailed," the other in which mall owners have "lost").

This Note seeks to address the broader scope of the protection afforded expression on all types of private property by the Illinois free speech provision, and thus categorizes the decisions of other jurisdictions by their implications for a more general right to free speech on all private property.

39. This second category includes decisions from courts in Oregon and Pennsylvania. *See* State v. Purdue, 826 P.2d 1037, 1039 (Or. Ct. App. 1992); Huffman & Wright Logging Co. v. Wade, 817 P.2d 1334, 1338 & n.6 (Or. Ct. App. 1991); *Cargill*, 786 P.2d at 215; *Western Pa. Socialist Workers*, 515 A.2d at 1333, 1336; Commonwealth v. Tate, 432 A.2d 1382, 1390 (Pa. 1981). Although courts in these states have held that state action is required to invoke the protections of their states' free speech provisions, they have generally provided a much broader exception to the state action requirement than have the states in the first category. *See infra* notes 53-71.

40. *See* Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719, 723-24 (Ariz. Ct. App. 1988); Cologne v. Westfarms Assocs., 469 A.2d at 1208-09; Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs., 392 S.E.2d 8, 10 (Ga. 1990); Estes v. Kapiolani Women's and Children's Medical Ctr., 787 P.2d 216, 221 (Haw. 1990); Woodland v. Michigan Citizens Lobby, 378 N.W.2d at 348; State v. Scholberg, 412 N.W.2d 339, 343-44 (Minn. Ct. App. 1987); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211, 1215, 1217-18 (N.Y. 1985); City of Cleveland v. Sundermeier, 549 N.E.2d 561, 564 (Ohio Ct. App. 1989); City of Columbus v. Kasper, No. 87AP-508, 1987 WL 31290, at *2 (Ohio Ct. App. Dec. 23, 1987); Charleston Joint Venture v. McPherson, 417 S.E.2d 544, 548 n.7 (S.C. 1992); Gibbons v. State, 775 S.W.2d 790, 793-94 (Tex. Ct. App. 1989); Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282, 1285, 1288, 1292 (Wash. 1989); Jacobs v. Major, 407 N.W.2d 832, 837, 845, 848 (Wis. 1987). *But see* Ferner v. Toledo-Lucas County Convention and Visitors' Bureau, Inc., No. L-91-236, 1992 WL 185683, at *4 (Ohio Ct. App. Aug. 7, 1992).

speakers on private property under virtually all circumstances.[41] In *Cologne v. Westfarms Assocs.*,[42] for example, the Connecticut Supreme Court refused to look simply to the plain text of the Connecticut free speech provision[43] to determine whether members of the Connecticut National Organization for Women could enjoin the owners of a large shopping mall from denying them access to the mall to solicit signatures for a petition on the proposed Equal Rights Amendment to the U.S. Constitution.[44] Instead, the court examined the history of the adoption of the Connecticut Bill of Rights and determined that its framers had intended the state constitution to protect individual liberties from government interference only.[45]

Moreover, the court found unpersuasive the speakers' argument that the lack of specific language referring to government action in the free speech provision created free speech rights that could be exercised on all private property.[46] As the court pointed out, it had previously concluded that the Connecticut equal protection clause[47] contained a state action requirement, despite wording "stated in absolute terms similar to [the free speech provision]."[48] The court then followed the U.S. Supreme Court holding in *Lloyd*, concluding that there was no state action because the public func-

41. On the basis of the textual similarities between the First Amendment and the free speech provisions of their states, Hawaii, Ohio, and South Carolina have held that their free speech provisions provide exactly the same protection for expressive activity on private property as that which is available under the First Amendment. *See Estes*, 787 P.2d at 221; *Sundermeier*, 549 N.E.2d at 564; *Charleston Joint Venture*, 417 S.E.2d at 548 n.7.

Appellate courts in Minnesota and Texas have held that their free speech provisions are to be interpreted as affording exactly the same protections as those provided by the First Amendment, but they have not based their conclusions on textual analyses. *See Scholberg*, 412 N.W.2d at 344 (basing its conclusion upon the finding that the Minnesota Supreme Court historically had been "cautious" about interpreting the state constitution more expansively than the Federal Constitution); *Gibbons*, 775 S.W.2d at 793-94 (basing its holding simply on its conclusion that "Texas constitutional principles guaranteeing freedom of expression are coextensive with the federal guarantees"). *But see* Zarsky v. State, 827 S.W.2d 408, 412 (Tex. Ct. App. 1992) (evaluating whether the Texas free speech provision protected the activities of an abortion-rights activist on private property by considering, *inter alia*, the size of the property, the degree to which the public was invited to use the property, and the disruptiveness of the speaker's activities).

42. 469 A.2d 1201 (Conn. 1984).

43. CONN. CONST. art. I, § 4 provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

44. *Cologne*, 469 A.2d at 1208-09.

45. *Id.* at 1207-08.

46. *Id.* at 1208-09.

47. CONN. CONST. art. I, § 20.

48. *Cologne*, 469 A.2d at 1209.

tion doctrine did not extend to shopping centers.[49] Quoting from *Lloyd*, the Connecticut court held that the mall did not "lose its private character merely because the public is generally invited to use it for designated purposes."[50]

Similarly, courts in Arizona, Georgia, Hawaii, Michigan, Minnesota, New York, Ohio, South Carolina, Texas, Washington, and Wisconsin have followed Connecticut in ruling that the free speech provisions of their state constitutions contain a state action requirement.[51] Nearly all of the courts in this group have adopted the First Amendment's state action standard and the public function exception to that requirement established by the Supreme Court in *Marsh* and *Lloyd*.[52]

2. Jurisdictions Using a Balancing Approach to Determine Constitutional Protection for Expression

Six states[53] have concluded that their free speech provisions may provide protection to speakers on private property regardless of the public function exception or the presence of actual governmental interference.[54] These courts have ruled that the conflict between

49. *Id.* at 1205, 1210.

50. *Id.* at 1210 (quoting *Lloyd*, 407 U.S. at 569).

51. *See supra* note 40.

52. *See Fiesta Mall*, 767 P.2d at 724; *Cologne*, 469 A.2d at 1210; *Gwinnett Place Assocs.*, 392 S.E.2d at 9-10; *Estes*, 787 P.2d at 221; *Scholberg*, 412 N.W.2d at 343; *SHAD Alliance*, 488 N.E.2d at 1217; *Sundermeier*, 549 N.E.2d at 564; *Charleston Joint Venture*, 417 S.E.2d at 548; *Gibbons*, 775 S.W.2d at 793-94; *Southcenter Joint Venture*, 780 P.2d at 1292; *Jacobs*, 407 N.W.2d at 837, 845-46. The Supreme Court of Michigan, however, has characterized the public function exception to the state action requirement of the First Amendment as "subterfuge" and has expressly refused to adopt this doctrine as an exception to the state action requirement of the Michigan Constitution's free speech provision. *Woodland*, 378 N.W.2d at 351.

53. *See* Johnson v. Tait, 774 P.2d 185, 188-90 (Alaska 1989); Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); Bock v. Westminster Mall Co., 819 P.2d 55, 61 n.7, 62-63 (Colo. 1991); State v. Schmid, 423 A.2d 615, 632-33 (N.J. 1980); State v. Purdue, 826 P.2d 1037, 1039 (Or. Ct. App. 1992); Huffman & Wright Logging Co. v. Wade, 817 P.2d 1334, 1338 & n.6 (Or. Ct. App. 1991); State v. Cargill, 786 P.2d 208, 215 (Or. Ct. App. 1990); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1333 (Pa. 1986); Commonwealth v. Tate, 432 A.2d 1382, 1390 (Pa. 1981).

54. Only two of these states, Oregon and Pennsylvania, have acknowledged a state action requirement in their free speech provisions. *See Purdue*, 826 P.2d at 1038 (stating that Oregon's free speech provision "protects expressive activity from intrusion by any branch of government"); *Western Pa. Socialist Workers*, 515 A.2d at 1335. Oregon and Pennsylvania are, nevertheless, properly placed in this category because both states recognize broad exceptions to the state action requirement. *See Purdue*, 826 P.2d at 1039 (holding that the right to refer to activities as "constitutionally protected" turned on whether "the parking lot had . . . acquired the characteristics of a public forum"); *Tate*, 432 A.2d at 1390 (holding that where a private college invited the public onto its prop-

the fundamental rights of speakers and those of property owners requires an independent analysis of the particular facts of each situation.[55]

California was the first state to hold that its free speech provision[56] affords greater protection than the First Amendment. In *Robins v. PruneYard Shopping Center*,[57] the California Supreme Court first determined that the U.S. Supreme Court rulings in *Lloyd* and *Hudgens* did not prevent California from providing broader protection under the free speech provision of its state constitution than the protection offered to speakers under the First Amendment.[58] The court then considered whether the California Constitution protected the right of citizens to gather signatures for a political petition on property owned by a private shopping center.[59]

In holding that the California free speech provision did indeed protect the speakers' rights to expressive activity at the shopping center, the court emphasized that in contrast with the text of the First Amendment, the text of the California provision "broadly proclaims speech and petition rights."[60] The court further noted that its prior decisions had established that free speech rights take precedence over private property interests in many situations.[61] Finally, the court pointed to evidence that private shopping centers had replaced traditional business districts[62] and concluded that policy considerations supported the principle that shopping centers "provide an essential and invaluable forum for exercising [speech

---

erty and provided a "public forum" for speech, the college could not prohibit speakers from engaging in expressive activity).

55. *See, e.g., Schmid*, 423 A.2d at 630 (applying a "multi-faceted test . . . to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly"); *see also Tait*, 774 P.2d at 188-90; *Bock*, 819 P.2d at 61 n.7 (stating that the state free speech provision did not contain the same state action requirement as the First Amendment).

56. CAL. CONST. art. I, § 2 provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

57. *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd* 447 U.S. 74 (1980).

58. *Id.* at 344. This portion of the California Court's opinion was affirmed by the U.S. Supreme Court in PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980). For a more thorough discussion of *PruneYard*, see *supra* notes 28-35 and accompanying text.

59. *Robins*, 592 P.2d at 342, 346.

60. *Id.* at 347.

61. *Id.* at 346-47.

62. *Id.* at 345.

and petition] rights."[63]

Still, the California court did not give speakers "free rein" to exercise their speech rights on private property.[64] Instead, the court held that free speech rights are protected from private action only when (1) at the property owner's invitation, the public uses the property to such a degree that the private property assumes a "public character,"[65] and (2) the speaker exercises the right to expressive activity reasonably without interfering with the owner's use of the property.[66] The court further hinted that the size of the property might also factor into the determination of whether the expressive activity is protected.[67]

After the U.S. Supreme Court affirmed[68] the *Robins* decision, several other states followed California's lead. For example, the New Jersey Supreme Court found that the free speech provision of its state constitution[69] protects the reasonable exercise of free speech rights from transgression by private parties.[70] As in *Robins*, the New Jersey court limited free speech rights to accommodate the interests of property owners.[71] Thus, under the approach adopted by both California and New Jersey, each situation must be evaluated independently, and the outcome is driven not by whether state action is present but by balancing the interests at stake.

---

63. *Id.* at 347.

64. *Robins*, 592 P.2d at 347.

65. *Id.*

66. *Id.* at 347-48.

67. *Id.* The court stressed that it did "not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment." *Id.* at 347 (quoting Diamond v. Bland, 521 P.2d 460, 470 (Cal.) (Mosk, J., dissenting)), *cert. denied*, 419 U.S. 885 (1974).

68. *See PruneYard*, 447 U.S. at 81, 88.

69. N.J. CONST. art. I, § 6 provides: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

70. State v. Schmid, 423 A.2d 615, 628 (N.J. 1980). The *Schmid* court held that Princeton University violated a nonstudent political activist's rights of expression under the state constitution when it secured his arrest for distributing political literature on the Princeton campus. *Id.* Like the California Supreme Court, the New Jersey Supreme Court found that the text of its free speech provision was "more sweeping in scope than the language of the First Amendment." *Id.* at 626.

71. *Id.* at 629-30. Among the factors that New Jersey courts must weigh in attempting to balance the competing rights are:

> (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.

Id. at 630.

C. Scope of Protection Under the Illinois Free Speech Provision

1. Legislative History

Since the inception of Illinois as a state, the people of Illinois have placed a high priority on the protection of speech.[72] Although the legislative histories of the constitutional conventions prior to 1970 do not reveal the intended scope of the Illinois free speech provision,[73] the debates at the constitutional convention of 1970 do offer some insight into the framers' intent in adopting the current free speech provision.

For example, at the 1970 Convention, one of the delegates proposed a free speech amendment that would track the language of the First Amendment to the U.S. Constitution.[74] The stated purpose of adopting a free speech amendment that would parallel the First Amendment was to eliminate any differences in construing the Illinois and federal free speech provisions in favor of the First Amendment.[75] The delegates supporting this amendment expressed concern that if the Illinois provision were to conflict with the Federal Constitution, the Supremacy Clause of the U.S. Constitution dictated that the Constitution would control.[76]

---

72. Article VIII, § 22 of the first Illinois Constitution provided in pertinent part: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." ILL. CONST. of 1818, art. VIII, § 22. The Illinois Constitution of 1848 substantially retained this provision. *See generally* GEORGE D. BRADEN & RUBIN G. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS 18 (1969). The first major changes to the language of the free speech provision came in the Illinois Constitution of 1870. ILL. CONST., art. II, § 4 provided in pertinent part: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." The current constitution contains nearly identical wording. *See supra* note 2.

73. *See, e.g.*, 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 1567 (1870) (adopting the free speech provision of the Illinois Constitution of 1870 without comment).

74. *See* 4 RECORD OF PROCEEDINGS: SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 3643 (1972) [hereinafter 4 RECORD OF PROCEEDINGS] (proposed amendment of Delegate Kinney that contained language "substantially the same as the United States Constitution").

75. *Id.* In support of her amendment, Delegate Kinney stated:

> [I]f we do adopt the language of the United States Constitution, there will be no problem with uniform construction. All of these additional matters are developed by case law, and we can look to the cases construing the United States Constitution and know where we stand and not be balancing peculiar provisions or slightly different words to see if they do come out differently.

Id. She added that "above all [the proposed amendment] will give us uniform construction along the lines that we have honored and clung to since the beginning of our country." *Id.* at 3646.

76. *See Id.* at 3644. Delegate Ladd, who supported the Kinney amendment, stated:

Before submitting the proposal to the Convention delegates, the Bill of Rights Committee rejected this proposed language.[77] Members of the Bill of Rights Committee explained that their rejection was based on the desire to adhere to principles of federalism and to provide broader protection for speech under the Illinois Constitution than that which was available under the First Amendment.[78] The delegates, in turn, rejected the proposal in favor of retaining the current language of the Illinois free speech provision.[79]

"I think that we all know that the Federal Constitution is going to prevail where there is a conflict . . . ." In making these comments, the delegates were correct in noting that if a state constitution provides less protection than that available under an analogous provision of the Federal Constitution, the federal constitution prevails. However, the delegates apparently failed to consider that state constitutions can provide greater rights than those available under the Federal Constitution. Although it was not until 1980 that the Supreme Court held that states could provide greater protection for speech than that prescribed by the First Amendment, *Prune Yard*, 447 U.S. at 81, 88, as of 1970 the Court had held that states could provide broader protection for other individual liberties than that offered by the Federal Constitution. *See, e.g.*, Cooper v. California, 386 U.S. 58, 62 (1967) (explaining that the U.S. Supreme Court's interpretation of the Fourth Amendment's protection against unlawful search and seizure "does not affect [California's] power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so").

77. 4 RECORD OF PROCEEDINGS, *supra* note 74, at 3645-46 (statement of Delegate Foster).

78. *Id.* at 3645; 3 RECORD OF PROCEEDINGS: SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1403 (1972) [hereinafter 3 RECORD OF PROCEEDINGS]. Speaking for the Bill of Rights Committee, Delegate Foster stated: "It's the purpose of the Constitution of Illinois to describe the shape of Illinois government, and, therefore, if we simply relied on the Federal Bill of Rights we would end up with a document that was grossly incomplete." 3 RECORD OF PROCEEDINGS, *supra*, at 1403. He further explained the Committee's rationale for rejecting the proposed language:

> The committee did consider [the Kinney amendment] and did debate it thoroughly. . . . We don't think it necessary that every state have a carbon copy of the Federal Constitution. I seem to remember a Supreme Court case in which they pointed out that the different states constituted, in a sense, laboratories where different solutions to the same problems could be worked out.

4 RECORD OF PROCEEDINGS, *supra* note 74, at 3645. The Chairman of the Bill of Rights Committee, Elmer Gertz, was explicit in describing the Committee's desire to retain a free speech provision that it felt was more protective than the First Amendment:

> We [the Bill of Rights Committee] felt that there were certain elements added by the more expansive language in the Illinois bill of rights, and we felt that every protection that the citizen has by reason of the First Amendment, of course, he would continue to have by reason of the Illinois language and perhaps added protections in the field of libel and perhaps in other fields.

3 RECORD OF PROCEEDINGS, *supra*, at 1403. Gertz summarized the Committee's position as follows: "[I]nsofar as we can have an Illinois law that does not do violence to the Federal Constitution, we ought to have it." *Id.*

79. 4 RECORD OF PROCEEDINGS, *supra* note 74, at 3646.

2. Decisions of the Illinois Supreme Court

Illinois courts have not had many opportunities to compare the scope of protection under the Illinois free speech provision with that of the First Amendment.[80] In the instances in which the Illinois Supreme Court has addressed this issue, its remarks have referred only to the general scope of the Illinois provision, not to the particular question of whether it limits the actions of private landowners. In *Village of South Holland v. Stein*,[81] the Illinois Supreme Court concluded that the Illinois free speech provision was "even more far-reaching" than the First Amendment.[82] The court did not reach its conclusion after investigating the legislative history behind the Illinois provision but based its conclusion exclusively on a comparison between the texts of the Illinois provision and the First Amendment.[83]

Subsequently, in *City of Blue Island v. Kozul*,[84] the court cited *Stein* in holding that the city of Blue Island had violated the constitutional guarantee of free speech when it arrested a Jehovah's Witness for disseminating religious literature without a permit in violation of a Blue Island ordinance.[85] Still, the *Kozul* decision provided no further insight into how much more far-reaching that protection might be, because the court ruled that the city's application of its ordinance violated both the state and the federal constitutions.[86]

The court's opinion in *Montgomery Ward & Co. v. United Retail, Wholesale & Department Store Employees*[87] demonstrated the court's continued adherence to construing the text of the Illinois free speech provision as providing greater protection for expression than the First Amendment.[88] In denying the plaintiff employer's request that the defendant labor union be enjoined from distribut-

80. *See* Michael P. Seng, *Freedom of Speech, Press and Assembly, and Freedom of Religion under the Illinois Constitution*, 21 LOY. U. CHI. L.J. 91 (1989) [hereinafter Seng]. Professor Seng's article contains an in-depth analysis of both the legislative history and case law regarding the Illinois free speech provision. *Id.* at 110-20.

81. 26 N.E.2d 868 (Ill. 1940).

82. *Id.* at 871. The court did not purport to decide just how much more protection the Illinois provision provided, however, because the court ruled that the municipal ordinance at issue in *Stein* violated both the First Amendment and the Illinois free speech provision. *Id.*

83. *Id.*

84. 41 N.E.2d 515 (Ill. 1942).

85. *Id.* at 517, 520.

86. *Id.* at 520.

87. 79 N.E.2d 46 (Ill. 1948).

88. *Id.* at 50.

ing allegedly libelous literature to employees, the court held that such a prior restraint of publication would violate both the Illinois free speech provision and the First Amendment.[89] Thus, as in *Stein* and *Kozul*, the court's decision in *Montgomery Ward* does not reveal just how much broader the protection of expression is under the Illinois free speech provision than under the First Amendment.[90]

D. Illinois Law in Other Areas Affecting Free Speech

1. The "Lockstep" Doctrine

In construing provisions of the Illinois Constitution, the Illinois Supreme Court has historically followed the generally accepted method of statutory construction, which consists of examining the text and legislative history of the provision to determine the intent of the framers.[91] Beginning in 1961, the Illinois Supreme Court began to follow a method of construing the Illinois Constitution that changed the focus of the court's inquiry.[92] Rather than seeking to discern the general intent of the framers of the particular provision, the court attempted to determine whether the framers had specifically intended the particular provision to provide broader protection than that available under analogous provisions

89. *Id.* at 54.

90. Illinois Supreme Court Justice Clark has suggested an additional basis for concluding that the Illinois Constitution's guarantee of free speech is broader than the First Amendment guarantee. *See* People *ex rel.* Daley v. Joyce, 533 N.E.2d 873, 879-81 (Ill. 1988) (Clark, J., concurring). Instead of focusing on the textual differences between the state and federal constitutions, Justice Clark concluded that with the Federal Constitution already before them, the drafters of the Illinois Constitution of 1970 would not have adopted provisions analogous to those in the Federal Constitution had they not intended the Illinois provisions to provide more far-reaching protection. *Id.* at 880-81.

91. *See* League of Women Voters v. County of Peoria, 520 N.E.2d 626, 629-30 (Ill. 1987); People v. Tisler, 469 N.E.2d 147, 161 (Ill. 1984) (Ward, J., concurring); People *ex rel.* Kennan v. McGuane, 150 N.E.2d 168, 172 (Ill.), *cert. denied*, 358 U.S. 828 (1958); People *ex rel.* McDavid v. Barrett, 19 N.E.2d 356, 358 (Ill. 1939) (stating that "[i]n the construction of the constitution courts should not indulge in speculation apart from the spirit of the document, or apply so strict a construction as to exclude its real object and intent." (citing Peabody v. Russell, 134 N.E. 148, 149 (Ill. 1922))).

92. *See* People v. Jackson, 176 N.E.2d 803, 805 (Ill. 1961) (holding that the Illinois Supreme Court would "follow the decisions of the United States Supreme Court on identical State and Federal constitutional problems"), *cert. denied*, 368 U.S. 985 (1962); McAffee, *supra* note 9, at 7. The roots of this doctrine, at least in relation to the use of the lockstep approach to interpret the Illinois Constitution's protection against warrantless searches and seizures, appear to reach back even further. *See* People v. Tillman, 116 N.E.2d 344, 346-47 (Ill. 1953), *cert. denied*, 348 U.S. 814 (1954), *and cert. denied*, 350 U.S. 1009 (1956); People v. Castree, 143 N.E. 112, 113-14, 117 (Ill. 1924); McAffee, *supra* note 9, at 7-8 & n.28.

of the Federal Constitution.[93] If the court found no evidence of the framers' intent to provide broader protection, then the court interpreted the Illinois constitutional provision as providing the same protection as that afforded by the Federal Constitution.[94] This method of state constitutional interpretation has been termed the "lockstep" doctrine.[95] The court continued to use the lockstep approach to construe the Illinois Constitution throughout the 1980s,[96] when it interpreted the Illinois Constitution's protections against self-incrimination,[97] warrantless searches,[98] and trial by

93. *See, e.g.*, People v. Rolfingsmeyer, 461 N.E.2d 410, 412 (Ill. 1984) (basing its holding upon the court's failure to find anything "in the proceedings of the [Illinois] constitutional convention to indicate an intention to provide, in article I, section 10 [of the Illinois Constitution], protections against self-incrimination broader than those of the Constitution of the United States" (citation omitted)).

94. *See, e.g.*, *Joyce*, 533 N.E.2d at 875 (noting that the court would "follow or be bound by the construction placed on [a] Federal constitutional provision" unless the court found "in the language of [the Illinois] constitution, or in the debates or committee reports of the constitutional convention, an indication that a provision of our constitution is intended to be construed differently than similar provisions of the Federal Constitution").

95. *See Joyce*, 533 N.E.2d at 879 (Clark, J., concurring). The term *lockstep* appears to have been first used by Professor A.E. Dick Howard of the University of Virginia. *See* McAffee, *supra* note 9, at 3 n.11 (citing Howard, *supra* note 9, at 898). The use of this doctrine has been heavily criticized, not only by commentators, but by Illinois Supreme Court and appellate court justices. *See* Seng, *supra* note 80, at 120-22; McAffee, *supra* note 9, at 33-46; Kangas, *supra* note 9, at 1282-90; *Tisler*, 469 N.E.2d at 163-64 (Clark, J., concurring) (stating that "the majority's stance on [the lockstep] issue is dangerous because it limits our power to interpret our own State Constitution"); People v. Hoskins, 461 N.E.2d 941, 954 (Ill.) (Simon, J., dissenting) (stating that "[w]hen a majority of the United States Supreme Court has adopted an interpretation of the [Federal] Bill of Rights that we believe is insufficiently ample to effectively implement those guarantees, we are not frozen by it in interpreting the comparable provisions of our State Constitution"), *cert. denied*, 469 U.S. 840 (1984); People v. Exline, 456 N.E.2d 112, 116 (Ill. 1983) (Goldenhersh, J., dissenting) (stating "we are not required to blindly follow the action taken by the [U.S.] Supreme Court in determining the standards applicable under our own constitution").

96. In a more recent case, however, the court did not follow the lockstep approach when interpreting the scope of protection provided by Article I, § 2 of the Illinois Constitution (the due process clause). *See* Rollins v. Ellwood, 565 N.E.2d 1302, 1316 (Ill. 1990). Instead of scouring the legislative history of the due process clause to determine whether its framers intended that it provide broader protection than the Fourteenth Amendment's Due Process Clause, the court simply concluded that the Illinois Constitution's guarantee of due process "stands separate and independent from the Federal guarantee of due process." *Id.*

97. *Rolfingsmeyer*, 461 N.E.2d at 412 (finding "nothing in the proceedings of the [Illinois] constitutional convention to indicate an intention to provide . . . protections against self-incrimination broader than those of the Constitution of the United States," and concluding that "[t]he record of proceedings reflects a general recognition and acceptance of interpretations by the United States Supreme Court").

98. *Tisler*, 469 N.E.2d at 155-57 (holding that because "the [Illinois constitutional] convention manifested no intent to expand the nature of the protection afforded by the

jury.[99]

2. The Requirement of State Action in the Illinois Constitution

The notion that the Illinois Constitution limits only the actions of the state government has long been generally accepted in Illinois.[100] Similarly, the Illinois Supreme Court has found that many of the provisions of the Illinois Bill of Rights contain state action requirements.[101] In only one case has an Illinois Court addressed the state action requirement of the Illinois free speech provision.[102] In *Barr v. Kelso-Burnett Co.*, the plaintiffs brought an action against their former employer, alleging that their discharge violated, *inter alia*, the First Amendment of the U.S. Constitution and the free speech provision of the Illinois Constitution.[103] In rejecting the plaintiffs' constitutional claims, the court stated that the guarantee of free speech does not limit the actions of purely private parties.[104]

---

fourth amendment of the Federal Constitution," Article I, § 6 of the Illinois Constitution provides the same protection against warrantless searches as the Fourth Amendment); *accord Hoskins*, 461 N.E.2d at 945.

99. *Joyce*, 533 N.E.2d 873. Although it stated that it would adhere to the lockstep approach, the court refused to interpret Article I, § 13 of the Illinois Constitution in the same way as the analogous provision of the Federal Constitution, on the basis of what it perceived as substantive textual differences in the two constitutions. *Id.* at 875-76, 879.

100. *See, e.g.*, Peabody v. Russel, 134 N.E. 148, 149 (Ill. 1922) (stating that "[t]he Constitution of this state is a limitation upon the power of the Legislature").

101. Barr v. Kelso-Burnett Co., 478 N.E.2d 1354, 1356 (Ill. 1985) (stating that the Illinois Constitution's guarantees of freedom of speech, due process of law, equal protection, and privacy of communications are "limitations only on the power of government"); USA I Lehndorff Vermoegensverwaltung GmbH & Cie v. Cousins Club, Inc., 348 N.E.2d 831, 835 (Ill. 1976) (stating that "[w]e are not persuaded by the defendant's contention that the due process clause of the Illinois Constitution . . . prohibits an individual, as well as the State, from depriving another of his property without due process of law"); People v. Smith, 390 N.E.2d 1356, 1363 (Ill. App. Ct. 1979) (stating that "Article I, Section 6 of the Illinois Constitution[,] . . . creating a right to freedom from invasions of privacy[,] applies only to invasions of privacy by government or public officials").

102. *See Barr*, 478 N.E.2d at 1355-56.

103. *Id.* at 1355.

104. *Id.* at 1356 (noting that "[i]t is well established that the constitutional guarantee of free speech is only a guarantee against abridgement by the government . . . the Constitution does not provide protection or redress against private individuals or corporations which seek to abridge the free expression of others" (citations omitted)); *cf. Montgomery Ward*, 79 N.E.2d at 48 (referring to the "general principle" that "the constitutional guaranty of free speech as a general rule prohibits both the courts and the legislature from putting previous restraints on publications").

If the court intended its statement in *Barr* to apply to the Illinois free speech provision as well as to the First Amendment, its failure to support its conclusion by referring to text or to legislative history is a glaring omission. For example, in finding that the Illinois Constitution's guarantees of due process and freedom from invasion of privacy contained a state action requirement, the Illinois Supreme Court cited affirmative evidence in the

The implications of the court's statement in *Barr* for the Illinois free speech provision are uncertain. Although the plaintiffs in *Barr* brought a challenge to an Illinois statute pursuant to both the First Amendment and the Illinois free speech provision, the court did not reveal whether its comment on state action applied only to the First Amendment, to the Illinois provision, or to both.[105] It is noteworthy that in support of this proposition, the court cited exclusively to First Amendment cases, thus perhaps minimizing the impact of its statement on the Illinois provision.[106]

III. DISCUSSION

A. People v. DiGuida*: The Facts of the Case*

On December 12, 1987, Paul DiGuida attempted to solicit signatures for a petition to nominate a candidate for the position of Commissioner of the Cook County Board of Tax Appeals.[107] This otherwise noncontroversial activity acquired a dimension that distinguished it from other instances of solicitation: DiGuida engaged in his solicitation activity on private property owned by Dominick's Finer Foods, a supermarket.[108] DiGuida stood in an area located between the store entrance and the parking lot, separated from the adjacent public sidewalk by a railing to prevent shopping carts from being removed from Dominick's property.[109] DiGuida conducted his solicitation approximately twenty-five feet from Dominick's entrance and did not prevent any patrons from entering the store.[110]

Ted Scanlon, Dominick's manager, told DiGuida that he was on Dominick's property, that Dominick's did not permit solicitation, and that he would have to leave the premises.[111] When DiGuida

---

legislative history of each provision that the framers intended those provisions to apply to state action only. *USA I*, 348 N.E.2d at 835 (referring to due process); *Smith*, 390 N.E.2d at 1363 (referring to freedom from invasions of privacy).

105. *Barr*, 478 N.E.2d at 1356.

106. *Id.*

107. People v. DiGuida, 576 N.E.2d 126, 127 (Ill. App. Ct. 1991), *rev'd*, 604 N.E.2d 336 (Ill. 1992).

108. *DiGuida I*, 576 N.E.2d at 127.

109. *DiGuida II*, 604 N.E.2d at 337; *DiGuida I*, 576 N.E.2d at 127.

110. *DiGuida I*, 576 N.E.2d at 127.

111. *DiGuida II*, 604 N.E.2d at 337; *DiGuida I*, 576 N.E.2d at 127. Although Scanlon testified at trial that Dominick's maintained a "no solicitation" policy, *DiGuida I*, 576 N.E.2d at 128, he later admitted on cross-examination that Dominick's allowed solicitation when the store had granted permission. *Id.* Scanlon's testimony further revealed that Dominick's permitted political candidates to greet patrons inside the store, maintained a bulletin board inside the store on which members of the community could post messages, and did not post signs outside the store warning that solicitation was forbidden

refused to leave, Scanlon summoned the police, who arrested DiGuida for criminal trespass to land.[112] At trial, the judge convicted DiGuida of misdemeanor criminal trespass to land, rejecting DiGuida's argument that the First Amendment protected his activities.[113] The trial court sentenced DiGuida to twenty hours of community service.[114]

B. The Opinion of the Appellate Court

DiGuida appealed his conviction under the theory that the Illinois trespass statute, as applied to his case, violated the free speech provision of the Illinois Constitution.[115] After reviewing the current status of the law regarding the protection of speech on private property under the First Amendment,[116] the court concluded that because the only Illinois decision on point[117] had been decided solely on First Amendment grounds, that decision did not control DiGuida's claims.[118]

Next, the court noted that the U.S. Supreme Court had held[119] that states were free to interpret the free speech provisions of their

---

without permission. *Id.* One witness testified that she had been permitted to collect signatures on at least 20 previous occasions, both inside and outside the store, without being arrested or told to leave. *DiGuida II*, 604 N.E.2d at 338; *DiGuida I*, 576 N.E.2d at 128.

112. *DiGuida II*, 604 N.E.2d at 338; *DiGuida I*, 576 N.E.2d at 128. The Illinois criminal trespass statute in effect when Diguida was arrested, ILL. REV. STAT. ch. 38, para. 21-3(a) (1987), provided:

> Whoever enters upon the land or a building, other than a residence, or any part thereof of another, after receiving, prior to such entry, notice from the owner or occupant that such entry is forbidden, or remains upon the land or in a building, other than a residence, of another after receiving notice from the owner or occupant to depart, commits a Class C misdemeanor.

The statute further stated that oral notification by the owner or occupant satisfies the requirements of § 21-3(a). *See id.*

113. *DiGuida II*, 604 N.E.2d at 338; *DiGuida I*, 576 N.E.2d at 128.

114. *DiGuida II*, 604 N.E.2d at 338; *DiGuida I*, 576 N.E.2d at 128.

115. *DiGuida I*, 576 N.E.2d at 127. DiGuida also raised the claims that the Illinois trespass statute as applied to his case violated Article I, § 2 (equal protection clause) and Article III, § 3 (free and equal elections provision) of the Illinois Constitution of 1970. *Id.* Because this Note seeks only to investigate the Illinois Supreme Court's interpretation of the Illinois free speech provision, the courts' analyses of DiGuida's equal protection and free and equal election arguments will not be addressed.

116. *DiGuida I*, 576 N.E.2d at 128-30.

117. *See* People v. Sterling, 287 N.E.2d 711, 714 (Ill. 1972) (following Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), in holding that defendants convicted of trespassing on the grounds of a private shopping center had no First Amendment right to distribute political literature when the literature had no relation to the private property and other alternatives to disseminate the material existed).

118. *DiGuida I*, 576 N.E.2d at 130-31.

119. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81, 88 (1980).

state constitutions as providing more protection for expressive activity on private property than that provided by the First Amendment.[120] Surveying decisions by Illinois appellate courts, the court concluded that Illinois law was moving away from following the lockstep doctrine when construing provisions of the Illinois Constitution.[121]

The court identified previous statements by the Illinois Supreme Court and indications in the legislative history that the language of the Illinois free speech provision provided greater protection than that afforded by the First Amendment.[122] The court therefore held that, like the free speech provisions in the California and Washington constitutions,[123] the Illinois free speech provision differed from the First Amendment in that it did not contain a state action requirement.[124] Accordingly, the court held that DiGuida's actions were protected from infringement by Dominick's; Dominick's had violated DiGuida's free speech rights under the Illinois Constitution by preventing DiGuida from engaging in expressive speech on its property while permitting others to engage in the identical activity.[125]

C. *The Opinion of the Illinois Supreme Court*

The Illinois Supreme Court reversed the decision of the appel-

120. *DiGuida I*, 576 N.E.2d at 132-33. States are free to interpret their free speech provisions more broadly than they interpret the First Amendment unless the corresponding restrictions on an owner's use of his property contravene any federal constitutional provision, such as the Takings or Due Process Clauses. *PruneYard*, 447 U.S. at 81.

121. *DiGuida I*, 576 N.E.2d at 133-34.

122. *Id.* at 134-35.

123. For its interpretation of Washington's approach to this issue, the court relied on Alderwood Assocs. v. Washington Envtl. Council, 635 P.2d 108, 115-16 (Wash. 1981) (en banc) (holding that the Washington free speech provision does not contain a state action requirement). Although the appellate court did not cite subsequent decisions of the Washington Supreme Court, in 1989 the Washington court abandoned its interpretation in *Alderwood* that the Washington free speech provision did not contain a state action requirement. *See* Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282, 1285, (Wash. 1989).

124. *DiGuida I*, 576 N.E.2d at 134-35 (citing Robins v. PruneYard, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590 (Mass. 1983); State v. Schmid, 423 A.2d 615 (N.J. 1980); and *Alderwood*, 635 P.2d 108)). The court further rested its conclusion on the textual similarities between the Illinois, Washington, and California free speech provisions, and on the textual differences between the Illinois provision and the First Amendment. *DiGuida I*, 576 N.E.2d at 135.

Moreover, the court held that, even assuming *arguendo* that the Illinois free speech provision contained a state action requirement, Dominick's use of the state's criminal trespass laws constituted the requisite state action. *Id.* at 135, 137 (citing Marsh v. Alabama, 326 U.S. 501 (1946)).

125. *DiGuida I*, 576 N.E.2d at 137.

late court. Regarding the protection afforded by the Illinois free speech provision,[126] the court held that: (1) although the protection of speech under the Illinois provision is not limited to the protection afforded by the First Amendment in all circumstances, the Illinois free speech provision contains a state action requirement identical to that of the First Amendment;[127] (2) the invocation of the Illinois criminal trespass statute by a private landowner does not constitute state action;[128] and (3) because Dominick's did not assume such a public aspect that it became a public forum for free expression, the company was permitted to restrict the speech rights of those who desired to engage in expressive activity on its property.[129]

The court identified the central issue for review as whether the Illinois free speech provision prohibited Dominick's from using the Illinois trespass statute to exclude DiGuida from its property.[130] In its analysis, the court first provided a summary of cases in which the U.S. Supreme Court had defined the extent to which the First Amendment protects expression on the property of others.[131] Next, the court analyzed the decisions of other states that had interpreted the protection afforded by their respective speech provisions.[132] The court divided the decisions into two groups and identified one group of states that provided greater free speech rights than those available under the First Amendment,[133] and another group that provided no more protection than that available

126. The court also held that the use of the Illinois trespass statute in this situation did not violate the equal protection and free and equal election provisions of the state constitution. *DiGuida II*, 604 N.E.2d at 347-49.

127. *Id.* at 344.

128. *Id.* at 345-46.

129. *Id.* at 347.

130. *Id.* at 337.

131. *DiGuida II*, 604 N.E.2d at 338-40. Although the court noted that DiGuida had not raised any federal claims, the court extensively discussed the Supreme Court's treatment of First Amendment protection of expression on private property. *Id.* at 338, 342.

The court also agreed with the appellate court and the parties that its decision in *Sterling* did not control the outcome of this case, because *Sterling* had been decided "exclusively under the first and fourteenth amendments [of the Federal Constitution]." *Id.* at 344 (citing *Sterling*, 287 N.E.2d at 711). The court did note, however, that one aspect of federal law was controlling: under the Supreme Court's holding in *PruneYard*, a state may provide more generous protection under its state constitution than that available under the Federal Constitution. *DiGuida II*, 604 N.E.2d at 340.

132. *Id.* at 340-42.

133. *Id.* at 340-41 (citing *Robins*, 592 P.2d at 341; Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991); and *Schmid*, 423 A.2d at 615). The court also noted the decisions of courts in Massachusetts, Oregon, and Washington, which held that those states' initiative and free elections provisions protected the right to collect signatures for political petitions in large privately owned shopping centers. *Id.* (citing *Batchelder*, 445

under the First Amendment.[134]

After investigating the treatment of the right to expression on private property under the First Amendment and under the constitutions of other states, the court began its analysis of the protection afforded by the Illinois free speech provision. In conducting this analysis, the court faced the threshold issue of whether it should follow the lockstep doctrine in interpreting the Illinois free speech provision.[135] DiGuida and various *amici curiae* argued that the court should abandon its adherence to the lockstep doctrine and construe the Illinois provision without regard to the U.S. Supreme Court's interpretation of the rights protected by the First Amendment.[136] As the court noted, if it chose to follow lockstep in this case, DiGuida's rights under the Illinois Constitution would be no greater than they would be under the Federal Constitution.[137] The court, however, rejected the contention that it had always chosen to follow the U.S. Supreme Court's application of the Federal Constitution in construing the state constitution.[138]

The court stated that it had adhered to the principle that "where the language of the State constitution, or where debates and committee reports of the constitutional convention show that the Framers intended a different construction, it will construe similar provisions in a different way from that of the [U.S.] Supreme Court."[139] The court noted that, according to this principle, it had previously interpreted several provisions of the Illinois Constitution differently from their analogues in the Federal Constitution.[140]

N.E.2d at 590; State v. Cargill, 786 P.2d 208 (Or. Ct. App. 1990); and *Alderwood*, 635 P.2d at 108).

134. *Id.* at 341-42 (citing Cologne v. Westfarms Assocs., 469 A.2d 1201 (Conn. 1984); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985); State v. Felmet, 273 S.E.2d 708 (N.C. 1981); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 (Pa. 1986)).

135. *Id.* at 342.

136. *DiGuida II*, 604 N.E.2d at 342.

137. *Id.* Because DiGuida conceded that his actions were not protected by the U.S. Constitution, *id.*, had the court explicitly decided at the outset to follow federal law, it would not have needed to proceed any further.

138. *Id.*

139. *Id.* (citing People v. Tisler, 469 N.E.2d 147 (Ill. 1984)).

140. *Id.* at 342-43 (citing Village of South Holland v. Stein, 26 N.E.2d 868 (Ill. 1940) (holding that the Illinois free speech provision provides broader protection to unlicensed solicitors of publication subscriptions than is available under the First Amendment); People *ex rel.* Daley v. Joyce, 533 N.E.2d 873 (Ill. 1988) (holding that the Illinois Constitution does not give the prosecution in certain felony drug cases the right to a jury trial, although the Federal Constitution gives the prosecution such a right); and Rollins v. Ellwood, 565 N.E.2d 1302 (Ill. 1990) (holding that the due process clause of the Illinois

Therefore, the court embarked on an analysis of the legislative history and text of the Illinois free speech provision to determine the scope of protection that the framers had intended.[141]

The court identified language in the transcripts of the proceedings of the 1970 Illinois Constitutional Convention indicating that the Illinois free speech provision granted broader protection for speech than did the First Amendment.[142] Despite this language, the court determined that the transcripts of the constitutional convention proceedings did not conclusively support the idea that the Illinois free speech provision provided broader protection than the First Amendment.[143]

Turning to the text of the Illinois free speech provision, the court noted that the language adopted by the framers of the Illinois provision differed from that of the First Amendment.[144] The court concluded, however, that these textual differences were also not enough to establish that the free speech provision was intended to provide broader protection than the First Amendment by limiting the actions of private parties.[145] Indeed, the court identified previous decisions in which it had held that other provisions of the Illinois Constitution contained a state action requirement, even though the text of those provisions, like the text of the free speech provision, did not explicitly state that the provisions applied solely to government action.[146]

Thus, basing its decision on the lack of evidence showing that

---

Constitution is to be interpreted differently than the guarantee of due process provided by the Federal Constitution) (order of citation in original)).

Likewise, the court identified instances in which the absence of an indication in the text or legislative history of an Illinois constitutional provision that the provision was to be construed differently than its federal counterpart had led the court to interpret the state provision in the same way that the Supreme Court had interpreted the similar federal provision. *Id.* at 342 (citing People v. Hoskins, 461 N.E.2d 941 (Ill.), *cert. denied*, 469 U.S. 840 (1984); and People v. Rolfingsmeyer, 461 N.E.2d 410 (Ill. 1984)).

141. *DiGuida II*, 604 N.E.2d at 343-45.

142. *Id.* at 343. The court quoted the statement of Elmer Gertz, Chairman of the Bill of Rights Committee. For the text of this statement, see *supra* note 78.

143. The Illinois court read the legislative history as indicating only that the Illinois free speech provision "may" provide broader free speech rights on private property than those provided by the First Amendment. *DiGuida II*, 604 N.E.2d at 343.

144. *Id.* Specifically, the First Amendment contains an explicit prohibition on the actions of government, whereas the Illinois provision does not. *Id.*

145. *Id.* at 344.

146. *Id.* at 343-44 (citing Barr v. Kelso-Burnett Co., 478 N.E.2d 1354 (Ill. 1985); USA I Lehndorff Vermoegensverwaltung GmbH & Cie v. Cousins Club, Inc., 348 N.E.2d 831 (Ill. 1976); and People v. Smith, 390 N.E.2d 1356 (Ill. App. Ct. 1979)). For a discussion of the court's holdings in these cases, see *supra* note 101 and accompanying text.

the Illinois free speech provision was intended to limit the actions of private parties, the *DiGuida* court concluded that the free speech provision contains a state action requirement.[147] The court further held that the state action requirement of the Illinois free speech provision is the same as that in the First Amendment.[148]

The court found support for this conclusion in the "well-established constitutional doctrine" of both Illinois and other states.[149] The accepted role of the Illinois Bill of Rights, the court noted, is to "prevent either legislatures or courts from any interference with or deprivation of the rights therein declared and guarantied."[150] The court also found the decisions of jurisdictions that had interpreted their state constitutions as limiting only government action more persuasive than the decisions of jurisdictions that had interpreted their state constitutions as also placing limitations on private parties.[151] Therefore, the court rejected the appellate court's reliance on the textual similarity between the Illinois free speech provision and the analogous Washington and California provisions.[152] As the court noted, the Pennsylvania, Michigan, and New York provisions also contained "substantially" the same wording

147. *Id.* at 344.

148. *DiGuida II*, 604 N.E.2d at 344. Even though it held that the First Amendment's state action requirement applies to the Illinois free speech provision, the court rejected the notion that the Illinois free speech provision is, in all circumstances, to be interpreted as providing no greater protection for expression than the First Amendment does. *Id.*

149. *Id.*

150. *Id.* (quoting People *ex rel.* Decatur & State Line Ry. Co. v. McRoberts, 62 Ill. 38, 41 (1871)). The court also identified materials drafted in preparation for the 1970 Illinois Constitutional Convention and statements of delegates to the Convention which failed to contain "any stated intention that the constitution should attempt to set out the rights and powers of private individuals in their relations with others." *Id.*

151. *Id.* at 344-45. Among the states that require state action to raise a state constitutional claim, the court identified Michigan, New York, and Pennsylvania. *Id.* at 344. The court noted that California and Washington, in contrast, allowed plaintiffs to bring state constitutional claims against private parties in certain circumstances. *Id.*

The court's more favorable view of the decisions from the states holding that their free speech provisions contain a state action requirement is revealed in part by its quotation of the following language from a decision of the New York Court of Appeals:

> Actions of the Federal Government are limited by the Federal Constitution's reservation to State governments of all powers not expressly granted it. State governments are not similarly restrained. State constitutional provisions, therefore, protect the individual liberty by limiting the plenary power of the State over its citizens. Thus, State action is a crucial foundation for both private autonomy and separation of powers.

Id. at 345 (quoting *SHAD Alliance*, 488 N.E.2d at 1215-16 (citations omitted)).

152. *Id.* at 344-45. WASH. CONST. art. I, § 5 provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." For the text of the California free speech provision, see *supra* note 56.

as the Illinois provision, yet those states' free speech provisions limited only state actors.[153] Thus, implicit in the *DiGuida* court's analysis is the unstated conclusion that it did not consider California's interpretation of its free speech provision to be persuasive.[154] On balance, the court concluded that, on the basis of the legislative history and text of the Illinois free speech provision, previous decisions of Illinois courts, established constitutional doctrine, and persuasive authority from other jurisdictions, the Illinois provision contains the same state action requirement as the one present in the First Amendment.[155]

After determining that the Illinois provision contains a state action requirement, the court turned to the question of whether Dominick's use of the state trespass law rose to the level of state action.[156] The court rejected the authorities on which the appellate court had relied in reaching the conclusion that state action was present.[157] Instead, it noted that there was no connection between the reason for DiGuida's arrest and prosecution and his expressive activities; he was arrested and prosecuted because he remained on private property after its owner had requested that he leave.[158] Furthermore, the court stated that public policy supported a rejection of state action in the present circumstances—if state action were found to exist, this finding would encourage the use of self-help to rid one's property of trespassers.[159]

Finally, the court examined whether, despite the absence of state action, DiGuida's speech was nevertheless protected because Dominick's had become a forum for public expression.[160] In rejecting this contention, the court noted that Dominick's was a free-standing store and was not as large as a shopping center, nor had any governmental agency been involved in the construction or op-

153. *DiGuida II*, 604 N.E.2d at 344.

154. *See id.* at 344-45 (noting the similarity between the free speech provision of Illinois and those of Michigan, New York, and Pennsylvania).

155. *Id.* at 345.

156. *Id.*

157. *Id.* The appellate court had relied on New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and Shelley v. Kraemer, 334 U.S. 1 (1948) to reach the conclusion that the use of the Illinois criminal trespass laws against DiGuida constituted state action. *Id.* The Supreme Court rejected the logic of *Shelley*, commenting that its reasoning had fallen into disfavor. *Id.* The court also distinguished *Sullivan*, concluding that in that case the use of a state law imposed a prior restraint on the speaker, whereas DiGuida was punished not for his actual speech or activities but for trespassing. *Id.*

158. *DiGuida II*, 604 N.E.2d at 345.

159. *Id.*

160. *Id.* at 346.

eration of the store.[161] The court further found that the previous activities of solicitors at Dominick's, the absence of No Soliciting signs on the premises, and the presence of a public bulletin board inside the store did not transform Dominick's into a public forum.[162] Thus, the court concluded that because the property owned by Dominick's was not public or quasi-public, the Illinois free speech provision did not prohibit Dominick's from excluding DiGuida from its property.[163]

IV. ANALYSIS

The *DiGuida* court's decision contains two inconsistent statements regarding the state action requirement, which make the opinion a bewildering interpretation of the Illinois free speech provision. The court purported to articulate the First Amendment's state action requirement as the standard for state action under the Illinois free speech provision;[164] nevertheless, the court's later statement that it had pursued an analysis "independent" of analogous First Amendment cases[165] puts the court's earlier emphasis on the First Amendment's state action requirement in considerable doubt. Because the Illinois court examined several factors not taken into consideration in analogous First Amendment cases,[166] the inconsistencies in the court's statements should be resolved in favor of the conclusion that the state action requirement of the Illinois free speech provision is not precisely that of the First Amendment. Indeed, the *DiGuida* decision seems to have established an exception to state action under the Illinois free speech provision that does not simply follow First Amendment law but is instead based more upon the state action standards of the free speech provisions of other states.

---

161. *Id.*

162. *Id.*

163. *DiGuida II*, 604 N.E.2d at 347.

164. *See id.*

165. *See id.*

166. The court's inquiry into "whether Dominick's had taken on such a public aspect that it became a forum for free expression" is an analysis that does not reflect the course of inquiry pursued in analogous First Amendment cases. *Compare DiGuida II*, 604 N.E.2d at 346-48 (considering, *inter alia*, whether the property was a free-standing store or a shopping center, whether government funds were used to build or maintain the property, and whether the property owner had given speakers the impression that its property was open to expressive activities) *with* Marsh v. Alabama, 326 U.S. 501, 505, 507-508 (1946) (considering whether the private property owner was the functional equivalent of a municipality).

A. The Court's Problematic State Action Analysis

The most serious flaws in the Illinois Supreme Court's opinion are its contradictory statements regarding a central issue in the *DiGuida* case: the nature of the state action requirement of the Illinois free speech provision.[167] Although it is possible that the internal inconsistencies of the *DiGuida* opinion were simply the result of an inadvertent statement,[168] it is more likely that the contradictions resulted, in part, from the method of analysis used by the court to interpret the Illinois free speech provision.

1. The Court's Approach to Interpreting the Illinois Constitution

Initially, the court considered how to interpret the Illinois free speech provision in the particular context of the *DiGuida* case. The court appropriately began its analysis by looking to the legislative history and text of the free speech provision to determine the intent of the framers.[169] The court followed the lockstep method of construing the Illinois Constitution, which required it to determine whether the framers intended the Illinois free speech provision to

167. *See DiGuida II*, 604 N.E.2d at 344. Before reaching this issue, the court initially had to determine whether the Illinois free speech provision contained any state action requirement at all. The court found that the legislative history of the Illinois free speech provision was inconclusive about whether the provision was intended to limit the actions of private parties as well as those of the government. *Id.* The court therefore turned to other legislative history and case law regarding the general role of the Illinois Constitution vis-á-vis the government. *Id.* at 344-45.

The cases cited by the court to support its decision to read a state action requirement into the Illinois free speech provision are of dubious precedential value, for in those cases the court either simply construed the Illinois constitutional provision in the same way that the U.S. Supreme Court had interpreted analogous provision of the Federal Constitution, or found that the legislative history of the Illinois constitutional provision contained a positive statement that the particular provision was not intended to apply to private parties. *See supra* notes 104, 106, 146 and accompanying text.

The legislative history cited by the court, however, provides ample support for the conclusion that the Illinois Constitution generally was intended to limit only governmental actions and not the actions of private individuals. *See DiGuida II*, 604 N.E.2d at 344-45; *see also supra* notes 72-79 and accompanying text (discussing the pertinent legislative history). Thus, on the basis of this legislative history, the court's decision to read a state action requirement into the Illinois free speech provision was appropriate and, as the court recognized, was consistent with generally accepted constitutional doctrine. *DiGuida II*, 604 N.E.2d at 345.

168. It is possible, for example, that by stating that "the State action requirement of the first amendment is also present in Article I, section 4 of the Illinois Constitution," *DiGuida II*, 604 N.E.2d at 344, the court simply meant that the Illinois free speech provision, like the First Amendment, contains a state action requirement, but that the court did not intend to imply that those requirements were identical.

169. *See supra* notes 141-43 and *infra* notes 170-71 and accompanying text.

be construed differently from its analogue in the Federal Constitution—the First Amendment.[170] This method of analysis required the court to discern whether the framers intended the Illinois free speech provision to limit the actions of private landowners. Failing to find conclusive evidence in the text or in the legislative history demonstrating that this was indeed the framers' intent, the court concluded that "the State action requirement of the first amendment is also present in Article I, Section 4, of the Illinois Constitution."[171]

Although some aspects of this method of constitutional interpretation were appropriate, the analysis contained two major flaws that led inevitably to the court's conclusion. First, by starting its investigation from a premise that required it to find affirmative evidence that the framers intended the Illinois free speech provision to limit the actions of private landowners, the court engaged in an inquiry that was too narrow and therefore almost certain to prove fruitless. The Illinois Constitution is not intended to be a code; therefore, neither the text nor the legislative history of its individual provisions can be expected to address each and every possible implication of those provisions.[172] Because no Illinois court had previously considered a case involving the particular issue in *DiGuida*, it is unlikely that the framers would have anticipated and addressed the application of the Illinois free speech provision to private landowners.

Furthermore, the narrow focus of the court's inquiry under the lockstep approach led it to disregard or downplay evidence that strongly suggested that the Illinois free speech provision should be

170. *DiGuida II*, 604 N.E.2d at 342. As the court summarized its method,

> [W]here the language of the State constitution, or where debates and committee reports of the constitutional convention show that the Framers intended a different construction, it will construe similar provisions in a different way from that of the [U.S.] Supreme Court.

Id. (citing People v. Tisler, 469 N.E.2d 147 (Ill. 1984)).

171. *Id.* at 344.

172. *See, e.g.*, *Tisler*, 469 N.E.2d at 165 (Clark, J., specially concurring). Justice Clark vehemently disagreed with the Illinois Supreme Court's reluctance to interpret the Illinois Constitution independently of the Federal Constitution in the absence of affirmative evidence showing that the framers of the Illinois Constitution intended it to provide broader protection than that provided by the Federal Constitution. He noted that:

> The Illinois Constitution, like the United States Constitution, is a living document. . . . I believe that the absence of certain comments at the Illinois constitutional convention should not tie our hands. The Illinois Constitution . . . is framed in general terms to prevent the document from being 19,000 pages long and to retain flexibility to deal with unforeseen questions.

Id. (citations omitted).

interpreted independently of the First Amendment. For example, the court ignored the introduction and rejection of the proposed Kinney amendment, which would have conformed the wording of the Illinois free speech provision to that of the First Amendment.[173] The proponents of this amendment championed their proposal specifically on the grounds that it would establish the First Amendment as the single measure of expressive rights under both the Illinois and the Federal constitutions. Significantly, the delegates to the Convention spurned the proposed amendment.

Rejection of the Kinney amendment, coupled with the statements of the Chairman of the Bill of Rights Committee,[174] demonstrates that the delegates to the constitutional convention intended the Illinois free speech provision to be construed independently of the First Amendment. Accordingly, because the *DiGuida* court's inquiry focused solely on identifying affirmative evidence demonstrating that the framers intended the Illinois free speech provision to limit the actions of private actors, the court overlooked evidence that contradicted the court's finding that the Illinois provision incorporated the state action requirement of the First Amendment.

The court's failure to adequately consider this evidence highlights another flaw in the court's method of constitutional interpretation. The lockstep approach used by the court to interpret the Illinois free speech provision led to its failure to find evidence of an intent to diverge from the First Amendment.[175] Essentially, the court followed a doctrine of constitutional interpretation that contained a rebuttable presumption that provisions of the Illinois Constitution should be construed like analogous provisions of the

173. For a more thorough discussion of the debates on the Kinney Amendment at the 1970 Illinois Constitutional Convention, see *supra* notes 75-76 and accompanying text.

174. The court acknowledged statements by the Chairman of the Bill of Rights Committee at the 1970 Illinois Constitutional Convention indicating that the Committee intended the Illinois free speech provision to provide broader protection than that of the First Amendment. *DiGuida II*, 604 N.E.2d at 343.

175. The *DiGuida* court did engage in an analysis that, on its face, made it appear as though the court based its conclusion regarding state action on a variety of persuasive authority. Among the sources on which the Illinois court purportedly based its holding were decisions from other jurisdictions, accepted constitutional doctrine, and previous decisions of the Illinois Supreme Court on related issues. *Id.* at 344. A closer scrutiny of the court's analysis, however, provides scant support for any claim that the court's conclusion rested on logic other than federal constitutional doctrine.

For example, the court reached its conclusion that the First Amendment state action requirement was present in the Illinois free speech provision before it ever considered any "well established constitutional doctrine." *See id.* Moreover, the only previous decision in which the court had considered whether the Illinois free speech provision contained a state action requirement was based exclusively on First Amendment principles. *See* Barr v. Kelso-Burnett Co., 478 N.E.2d 1354, 1356 (Ill. 1985).

Federal Constitution.[176] Predictably, once the *DiGuida* court failed to find persuasive evidence that the Illinois free speech provision was intended to limit the actions of private parties, the court concluded that the state action requirement of the First Amendment was also present in the Illinois free speech provision.

Although giving Illinois constitutional provisions the same effect as similar federal constitutional provisions is indeed the appropriate result when the framers have indicated that this was their intent, the court's method of analysis stands the principle of federalism on its head.[177] For example, when the legislative history of an Illinois constitutional provision contains affirmative evidence indicating that the framers intended the provision to be construed like an analogous federal constitutional provision, the method of interpretation that the court followed in *DiGuida* will achieve the correct result. When the delegates to the Illinois Constitutional Convention have soundly rejected the notion that an Illinois provision is to be construed like its federal analogue, however, the *DiGuida* court's method can result in an interpretation of the Illinois provision that is precisely the opposite of that intended by its drafters. Thus, the court's method of analysis, which presumes that provisions of the Illinois Constitution should be construed like similar provisions of the Federal Constitution, ignores an even more important doctrine: courts "are not legislatures, and neither are they constitutional framers and adopters of constitutions."[178] Instead, courts should give effect to the will of the people of Illinois as expressed through their elected representatives.[179]

2. The Court's Application of the State Action Requirement

Despite its reference to the lockstep doctrine in the *DiGuida*

176. *See* People *ex rel.* Daley v. Joyce, 533 N.E.2d 873, 879 (Ill. 1988) (Clark, J., concurring) ("[I]f the provisions [of the state and federal constitutions] are 'similar' it must be presumed that construction of the Federal provision controls. . . . [T]he lockstep principle can be rebutted with evidence that the State provision is intended to be construed 'differently'—*i.e.*, more broadly.").

177. *See, e.g.*, People v. Rolfingsmeyer, 461 N.E.2d 410, 413 (Ill. 1984) (Simon, J., specially concurring) (stating that the assumption "that a guarantee in the bill of rights of our State Constitution has the same content as the comparable guarantee in the Federal Constitution unless there is some indication to the contrary in the proceedings of the constitutional convention . . . is the reverse of the correct one and inverts the proper relationship between the State and Federal constitutions").

178. *Tisler*, 469 N.E.2d at 161 (Ward, J., concurring).

179. *See id.* at 161 (Ward, J., concurring) (stating that "[t]he fundamental principle of constitutional construction is that effect must be given to the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions" (quoting 16 AM. JUR. 2D *Constitutional Law* § 92, at 418 (1979))).

opinion and its clear statement that the state action requirement of the Illinois free speech provision is coextensive with the First Amendment, the Illinois Supreme Court appears to have established an exception to the state action requirement that is quite different from the First Amendment's public function exception. The structure of the *DiGuida* court's analysis belies the notion that the court actually adhered strictly to a First Amendment state action inquiry. Instead, the court appears to have concocted its own exception to the state action requirement of the Illinois free speech provision; and that exception appears free of any First Amendment influences.

After it had decided that the Illinois free speech provision contains the same state action requirement as the First Amendment, the court engaged in a determination of whether state action was present in *DiGuida*.[180] Curiously, once the court had dismissed the notion that the enforcement of a trespass statute by police officers constituted state action,[181] the court did not simply conclude that there was no constitutional violation. Instead, delving into a new line of analysis, the court considered "whether Dominick's itself had taken on such a public aspect that it became a forum for free expression."[182] This factor had not been considered in analogous First Amendment cases.[183]

The court's public forum inquiry does bear at least some resemblance to the public function analysis that the U.S. Supreme Court has established as the state action exception in analogous cases arising under the First Amendment. For example, in *Marsh* the U.S. Supreme Court sought to determine whether certain private property had taken on such a public aspect that it had essentially functioned as a municipality. Similarly, in *DiGuida* the court attempted to gauge the extent to which Dominick's property assumed a public aspect. Unlike the U.S. Supreme Court in *Marsh*, however, the Illinois court did not seek to determine whether Dominick's performed the same functions as a municipality. Instead, the court focused on the degree to which Dominick's had

180. *DiGuida II*, 604 N.E.2d at 345.

181. *Id.* at 346.

182. *Id.*

183. In cases involving free speech rights on private property under the First Amendment, federal law currently holds that a private party's prohibition of expressive conduct on its property rises to the level of state action only when the private party assumes a "public function." For an explanation of the public function doctrine, see *supra* notes 17-35 and accompanying text. *Marsh* was the one instance in which the U.S. Supreme Court held that a private landowner satisfied the public function requirement and thus rose to the level of a state actor. *See Marsh*, 326 U.S. at 507-09.

opened its property as a "forum for public expression."[184]

In pursuing this public forum type of analysis—perhaps more appropriately termed the "public invitation" doctrine—the court's inquiry primarily sought to determine whether Dominick's had given DiGuida the impression that its property was public in nature and was open to the public for expressive activities.[185] The court concluded that the lack of No Soliciting signs and the presence of a bulletin board on which Dominick's customers could "advertise or request services and items for sale" did not transform the store into a public forum.[186] Moreover, the previous use of the same property by another person to collect signatures for political petitions was held to be insufficient to make Dominick's a forum for free expression.[187] These factors are similar to those that courts of other states have considered in interpreting their constitutions.[188] Thus, the *DiGuida* decision places Illinois among those states that have not simply followed the U.S. Supreme Court's interpretation of First Amendment protection of expression on private property but that have instead followed a situational analysis of the type of property involved.

The Illinois court's divergence from traditional public function analysis in analogous First Amendment cases may simply have been the result of the court's confusion over the public forum and the public function doctrines.[189] It is more likely, however, that

184. *DiGuida II*, 604 N.E.2d at 346.

185. *Id.*

186. *Id.* Oddly, the court concluded that a bulletin board on which customers could post commercial messages was not "a mechanism for the exchange of ideas." *Id.* This statement conflicts with the widely accepted view that commercial speech is not wholly outside constitutional protection. *E.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) ("Our question is whether speech which does 'no more than propose a commercial transaction' is so removed from any 'exposition of ideas' . . . that it lacks all [First Amendment] protection. Our answer is that it does not." (citations omitted)).

187. *DiGuida II*, 604 N.E.2d at 346. The reasoning that the court used to arrive at this conclusion is suspect. For example, despite the absence of any such testimony, the court was willing to "infer" that the solicitors who had preceded DiGuida in soliciting on Dominick's property "had asked for and received permission to be on Dominick's property." *Id.* The court then stated that "[a] search of the record does not reveal whether [DiGuida] asked Dominick's for permission." *Id.* Thus, by reading inferences into the testimony, the court casually dismissed a rather significant factor—DiGuida's justifiable reliance on the practices that Dominick's had permitted in the past.

188. For a more thorough discussion of those states' approaches to this issue, see *supra* notes 36-71 and accompanying text.

189. Many state courts have confused these disparate First Amendment doctrines. *See* Berger, *supra* note 3, at 634-35. The public function principle holds that the state action requirement of the First Amendment may be excepted in situations in which a private actor has assumed functions that are normally performed by the government. *See*

this course of analysis was a deliberate departure from the traditional test for state action under the First Amendment. Indeed, at the conclusion of its analysis the court unequivocally stated that it had conducted its analysis "independent of that given cases decided by the [U.S.] Supreme Court under the first and fourteenth amendments."[190] Thus, despite seemingly contradictory statements regarding the state action requirement of the Illinois free speech provision and its continued reference to the lockstep doctrine, the Illinois Supreme Court has apparently established an exception to the state action requirement of the Illinois free speech provision distinct from that of the First Amendment.

V. IMPACT

Because of the confused nature of the Illinois court's analysis, the impact of certain portions of the court's decision in *DiGuida* is difficult to assess. It is likely, however, that the *DiGuida* opinion will serve as important precedent in two areas of Illinois law: (1) most obviously, in the jurisprudence arising out of the Illinois free speech provision, and (2) in the method that Illinois courts use to interpret provisions of the Illinois Constitution.

A. Impact on the Illinois Free Speech Provision

Only two certainties emerge from the *DiGuida* opinion: (1) the Illinois free speech provision contains some type of state action re-

discussion of *Marsh*, 326 U.S. 501, *supra* notes 13-17. To date, the U.S. Supreme Court has held that this doctrine applies only to a private property owner who "perform[s] the full spectrum of municipal powers and [stands] in the shoes of the State." Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972) (citing *Marsh*, 326 U.S. 501). Thus, the public function doctrine seeks to determine whether private property has assumed such a public character that it should be treated as public property under the Federal Constitution.

Public forum doctrine, in contrast, involves the proposition that "[o]nce [public property] is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." NOWAK, *supra* note 17, § 16.47, at 973 (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972)). Therefore, the public forum doctrine is a means by which courts categorize public property according to the traditional use and intended purpose of that type of property, and, on the basis of that categorization, determine the extent to which the government may regulate expression on that property. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2705-06 (1992). *But see id.* at 2718 (Kennedy, J., concurring) (rejecting the majority's "forum based" analysis in favor of an approach that would accord property public forum status when "the objective, physical characteristics of the property at issue and the actual public access and uses which have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses").

190. *DiGuida II*, 604 N.E.2d at 347.

quirement[191]; and (2) the actions of police officers in enforcing the Illinois trespass statute do not constitute state action.[192] Certainly, in the wake of the *DiGuida* opinion, those who wish to bring a constitutional claim against an actor other than a government official for violating their rights under the Illinois free speech provision must demonstrate that the actor's interference rises to the level of "state action." Just what types of action will satisfy the state action test under the Illinois free speech provision remains an open question.

The uncertainty lies in whether the words of the Illinois Supreme Court should be taken at face value or whether the true holding of the opinion must be sought in the structure of the court's analysis. If the court chooses to refer to its language that the Illinois free speech provision and the First Amendment contain the same state action requirement,[193] then the Illinois free speech provision cannot act as a limitation on private parties unless, as in *Marsh v. Alabama*, the operation of the property by the parties assumes a public function. Because the only private landowner that has been held to satisfy this test was the owner of a company town, it is extremely unlikely that those seeking to engage in expression on the property of another would ever be able to find protection under the Illinois free speech provision.[194] If, on the other hand, as the structure of the court's analysis and the language of the opinion indicate, the First Amendment's public function doctrine is not the end of the state action inquiry under the Illinois free speech provision—a result that is certainly more consistent with the legislative history—the Illinois Constitution may indeed protect speech on some types of private property.

After *DiGuida*, the apparent test to determine whether a private property owner fits within the exception to the state action requirement of the Illinois free speech provision involves an analysis of whether the property owner has opened his property to expressive activities or has given the impression that the property is public in nature. Clearly, the absence of prohibitory signs, the previous use of the property for expressive activity by others, and the maintenance of a bulletin board for posting commercial messages will not be sufficient to invoke this exception. It is likely, however, that

191. *Id.* at 345.
192. *Id.* at 346.
193. *See id.* at 344.
194. The U.S. Supreme Court tacitly recognized as much, noting as far back as 1972 that the company-owned town was "an anachronism long prevalent in some southern States and now rarely found." Lloyd Corp. v. Tanner, 407 U.S. 551, 558 (1972).

given a set of circumstances involving a much larger property that is more open to the public—such as a shopping mall or a large private university—the Illinois Supreme Court may be willing to find that the Illinois Constitution protects expression on that property.

B. Impact on Interpreting the Illinois Constitution

The *DiGuida* opinion reveals the Illinois Supreme Court's continued divergence from the lockstep method of construing the Illinois Constitution. Although the opinion pays lip service to the imperative of following the lockstep approach,[195] the court's failure to examine whether Dominick's assumed a public function shows that the court may no longer blindly follow the U.S. Supreme Court on Illinois constitutional issues, or at least on questions involving the Illinois free speech provision. Instead, the court is now apparently willing to pursue "an analysis independent of that given cases decided by the Supreme Court under the first and fourteenth amendments."[196]

VI. CONCLUSION

Despite its statement that the state action requirement of the Illinois free speech provision is that of the First Amendment, in *DiGuida* the Illinois Supreme Court pursued a line of analysis that demonstrates a departure from First Amendment law. By establishing an exception to the state action requirement of the Illinois free speech provision that appears to be much broader than the exception recognized by the U.S. Supreme Court, the Illinois court has taken a positive step toward expanding the rights of persons who wish to engage in expressive activity in Illinois. Moreover, despite proclaimed adherence to the lockstep doctrine, the Illinois Supreme Court has demonstrated a renewed willingness to assert the independence of the Illinois Constitution.

DOUGLAS M. POLAND

195. *DiGuida II*, 604 N.E.2d at 342.
196. *Id.* at 347.