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NOTES

THE ELECTION BALLOT AS A FORUM FOR THE EXPRESSION OF IDEAS—GEORGES V. CARNEY

The election ballot traditionally has been recognized as the vehicle by which voters select candidates and either adopt or reject propositions or measures. In a broader sense, however, the ballot also may be viewed as a means for voters to express their opinions on various matters of public policy. Candidates who are closely identified with a particular issue or cause often have placed their names on the ballot to provide voters with an opportunity to cast a protest vote or to "send a message" to their leaders.

Recently, a coalition of citizen groups, advocating a halt to the testing, production, and development of nuclear weapons, has attempted to use the ballot to send a message to the national leadership on the subject of the nuclear arms race. These groups have attempted to place propositions on state and local ballots throughout the nation asking voters to register their approval or disapproval of a freeze on nuclear weapons. Unlike most ballot

1. The word ballot is derived from the Greek word ballo which means to throw. Ex Parte Owens, 148 Ala. 402, 410, 42 So. 676, 678 (1906). In ancient Greece, ballots consisted of shells, balls, pebbles, or beans cast into boxes as a means of voting in legislative and judicial bodies. Id. Some early laws in colonial America provided for ballots consisting of an Indian corn (for an affirmative vote) and a bean (for a negative vote). City of Detroit v. Inspectors of Election, 139 Mich. 548, 552, 102 N.W. 1029, 1031 (1905).

2. See, e.g., Straughan v. Meyers, 268 Mo. 580, 589, 187 S.W. 1159, 1162 (1916) (ballot is means by which person votes); Richardson v. Caputo, 46 N.J. 3, 9, 214 A.2d 385, 388 (1965) (ballot permits voters to record their will); City of Wellsvile v. Connor, 91 Ohio St. 28, 33, 109 N.E. 526, 527 (1914) (ballot is instrument by which voter expresses his choice between candidates or on questions); Porter v. Oklahoma City, 446 P.2d 384, 391 (Okla. 1968) (ballot is an instrumentality that records voter's choice for or against a candidate or proposition).

3. The assertion that the act of voting is an expression of opinion on issues, as well as an expression of preference for certain candidates, is supported by studies which have documented the increasingly important role that political issues play in determining voter behavior. See generally N. Nie, S. Verba & J. Petrock, THE CHANGING AMERICAN VOTER (1976) (today's voters generally are aware of political issues and are likely to rely on their own positions with respect to issues in deciding which candidates to support).


5. By placing nonbinding proposals on the ballot, the groups hope to gain publicity for the nuclear arms freeze movement and demonstrate to the nation's policy makers that there is widespread popular support for a "freeze" on the development, production, and deployment of nuclear weapons. See N.Y. Times, May 4, 1982, at A23, col. 1.

6. To a large extent, the nuclear arms freeze advocates have been successful in their ballot
propositions, however, the nuclear arms freeze proposals have no binding effect; they merely solicit the voters' opinions on the nuclear arms freeze issue. The existence of these measures raises a number of first amendment and equal protection issues regarding the extent to which a state can regulate access to the ballot for citizen-sponsored advisory questions. The Court of Appeals for the Seventh Circuit recently became the first court to address these issues when it upheld an Illinois law that made it virtually impossible for citizens to place nonbinding advisory questions on local ballots.

7. See infra notes 18-26 and accompanying text.

8. Generally, the states have broad powers to regulate elections. See, e.g., Kusper v. Pontikes, 414 U.S. 51, 57 (1973) (Constitution entrusts to states the administration of the electoral process); Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (power to regulate state elections reserved to the states by the tenth amendment); U.S. Const. art. 1, § 4 (time, place, and manner of holding congressional elections determined by states subject to congressional supervision). Until recently, federal courts were extremely reluctant to intervene in state electoral processes. See, e.g., MacDougal v. Green, 335 U.S. 281 (1948) (per curiam) (state law upheld requiring 200 signatures from each of at least 50 counties to form a new political party); Colegrove v. Green, 328 U.S. 549 (1946) (plurality opinion) (Supreme Court has no jurisdiction to hear challenge to state law prescribing malapportioned congressional districts); Snowden v. Hughes, 321 U.S. 1 (1944) (candidate denied certification as nominee due to unlawful administration of state election law not entitled to relief under fourteenth amendment); Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118 (1912) (Supreme Court lacks jurisdiction to decide whether state initiative violates guaranty clause).


Georges v. Carney, the court of appeals held that a state has no federal constitutional obligation to make the election ballot available to citizens as a public forum for first amendment expression. The court left open the possibility, however, that an election ballot could become a public forum if the state provided for nonbinding initiatives.

This Note will analyze the Georges decision and attempt to determine its effect on citizen ballot access rights and on the concept of the ballot as a first amendment public forum. First, it will summarize the state of the law regarding citizen-sponsored ballot propositions, ballot access for political candidates, and public forums. A discussion of Georges will follow, with an analysis and critique disapproving of the reasoning employed by the court. Finally, this Note will examine Georges's probable effect on future cases involving citizen-sponsored ballot propositions and the first amendment public forum theory.

BACKGROUND

 Citizen-Sponsored Ballot Propositions

Approximately twenty-one states allow citizens to propose state laws by petition and to enact them by direct vote independent of the legislature.
In addition, citizens in those states, and in most other states, have the power to propose and vote upon certain kinds of local laws.\textsuperscript{19} This method of enacting legislation, known as the initiative,\textsuperscript{20} was adopted by a number of states at the turn of the century to provide a check on state legislatures, which were perceived as corrupt and unresponsive to the will of the electorate.\textsuperscript{21}

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\textsuperscript{19} Many of the state constitutions that grant citizens the power to propose and enact state legislation give citizens the same broad authority to sponsor local laws as well. See \textit{Ariz. Const.} art. 4, pt. 1, § 1; \textit{Ark. Const.} amend. 7, § 1; \textit{Calif. Const.} art. 2, § 11; \textit{Colo. Const.} art. V, § 1; \textit{Nev. Const.} amend. XIX, § 4; \textit{Ohio Const.} art. II, § 1(f); \textit{Okla. Const.} art. 5, § 5-5(a); \textit{Ore. Const.} art. IV, § 1; \textit{Utah Const.} art. VI, § 1. In contrast, the Maine Constitution merely grants cities the option of adopting an initiative procedure. \textit{Me. Const.} art. IV, pt. 3, § 21. In a number of other states, the power of citizens to propose local ordinances is derived from statutory law. See, e.g., \textit{Mass. Gen. Laws Ann.} ch. 43, §§ 37-41 (West 1968 & Supp. 1982-83) (ordinances may be initiated by petition in any city); \textit{N.J. Rev. Stat.} § 40:69A-184 (1967) (same); \textit{Wash. Rev. Code} § 35.17.260 (1965) (ordinances may be initiated by petition in cities with commission form of government); \textit{Wis. Stat.} § 9.20 (1981) (ordinances and resolutions may be initiated by petition in any city). Although many states do not give citizens this broad grant of authority to initiate local laws, citizens still have the power to some jurisdictions to propose and enact specific types of local measures. See, e.g., \textit{Ala. Code} § 28-2-1 (1975) (citizens of a county can propose and enact a law prohibiting the sale of alcohol in county); \textit{Ill. Rev. Stat.} ch. 34, § 2442 (1981) (citizens of county may propose and enact property tax to support a county fair); \textit{Mich. Comp. Laws} § 117.21 (1967) (any existing home rule charter can be amended by initiative). For an examination of local initiatives, see Bruce, \textit{Participation in Local Policy Making: The Case of Referenda}, 56 Soc. Sci. Q. 55 (1975).

\textsuperscript{20} An initiative may be direct or indirect. A direct initiative allows citizens to place a proposed measure on the ballot without action by the legislature. See \textit{The Council of the States}, \textit{supra} note 18, at 65. An indirect initiative gives the legislature an opportunity to act upon the measure before it is voted on by the electorate. See, e.g., \textit{Me. Const.} art. IV, pt. 3, § 18 (legislature can enact the proposal without change or submit it to the voters together with an alternative proposal). Of the 21 states that have initiative provisions for state legislation, 12 have direct initiative procedures, three have indirect procedures, and six provide for both types of procedures. See \textit{The Council of the States}, \textit{supra} note 18, at 65.

Another process by which citizens can vote directly on a measure is the referendum. \textit{Id.} at 67 n.a. Under a referendum procedure, voters approve or reject any measure previously adopted by the legislature. \textit{Id.} A referendum can take place in one of three ways: (1) voters can petition for a referendum to repeal an existing state law; (2) the legislature can voluntarily refer legislative acts to the voters for their approval; or (3) the state constitution can require that certain legislation be submitted to the voters. \textit{Id.} Presently, 37 states provide for one or more of the referendum procedures. \textit{Id.} at 66-67.

\textsuperscript{21} See \textit{R. Luce, Legislative Principles} 572-74 (1930). In 1897, municipalities in Nebraska were given the opportunity to use the initiative in local affairs, and, shortly thereafter, South Dakota became the first state to enact a statewide initiative procedure. \textit{Id.} at 573. Most of the states which currently have initiative provisions for state legislation adopted these provisions by 1918. See Ranney, \textit{The United States of America}, in \textit{Referendums: A Comparative Study of Practice and Theory} 70 (D. Butler & A. Ranney eds. 1978). Since 1918, only two states have given their citizens the power to initiate legislation—Alaska in 1959 and Wyoming in 1968. \textit{Id.}
In recent years, the initiative has undergone renewed popularity as a legislative tool and has generated a great deal of discussion among legal commentators. Although the constitutionality of initiatives once was questioned, modern courts accept them as an appropriate lawmaking method. When laws enacted by popular vote are subjected to judicial review,

22. In the November 1978 general election alone, nearly 200 initiatives and referendums appeared on ballots in 38 states. Beck, Issues, Issues, Issues, Newsweek, Nov. 20, 1978, at 53. Many of these measures were proposals to cut taxes or to limit government spending, the results of a “taxpayers revolt” spurred by the enactment of a tax reduction proposition in California. See Comment, Judicial Review of Laws Enacted by Popular Vote, 55 Wash. L. Rev. 175, 180 (1979) [hereinafter cited as Comment, Judicial Review].


24. See Note, Constitutional Constraints on Initiative and Referendum, 32 Vand. L. Rev. 1143, 1147-48 (1979) [hereinafter cited as Note, Constitutional Constraints]. When the use of initiatives first became popular, critics of the initiative process often cited the guaranty clause as a basis for challenging its constitutionality. Id. at 1147-48. The guaranty clause states in part, “The United States shall guaranty to every State in this Union a Republican Form of Government. . . .” U.S. Const. art. IV, § 4. The critics charged that the initiative process violated article IV because it denied the states a republican form of government. Note, Constitutional Constraints, supra, at 1147-48. In Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912), the Supreme Court refused to pass judgment on the constitutionality of adopting a statute by initiative, holding that the question was political in nature and, thus, beyond its jurisdiction. Id. at 150-51. In Kiernan v. City of Portland, 223 U.S. 151 (1912), the Court applied the political question doctrine to initiatives at the municipal level as well. Id. at 164.

25. See, e.g., City of Eastlake v. Forest City Enters., 426 U.S. 668, 679 (1975) (initiatives are a “basic instrument of democratic government”); James v. Valtierra, 402 U.S. 137, 141...
they are held to the same constitutional standard as laws passed by a legislative body.\textsuperscript{16}

In addition to providing a means of enacting binding laws, ballot propositions also serve as vehicles for measuring public opinion.\textsuperscript{27} Initiatives or referendums used in this manner have no binding effect; rather, they are designed to advise government officials of public sentiment on particular issues.\textsuperscript{28} A number of states and the District of Columbia have specific statutes that permit legislative bodies or citizens to submit advisory questions on public policy to the electorate.\textsuperscript{29} A specific law providing for advisory questions, however, is not necessarily a prerequisite to placing non-binding ballot propositions on state or local ballots. Attempts have been made to place advisory questions on the ballot through initiative statutes that did not specifically provide for nonbinding questions.\textsuperscript{30} Many of these

(1971) (initiatives and referendums are a demonstration of "devotion to democracy"); see also City of Eastlake v. Forest City Enters., 426 U.S. 668, 693 (1975) (Stevens, J., dissenting) ("I have no doubt about the validity of the initiative or the referendum as an appropriate method of deciding questions of community policy.").


attempts have been successful, but they have not gone unchallenged.\textsuperscript{31} Most of these challenges arose in the late 1960's as a result of efforts to place Vietnam peace proposals on municipal ballots.\textsuperscript{32} In \textit{Farley v. Healey},\textsuperscript{33} the California Supreme Court upheld the right of an antiwar group to place on the San Francisco city ballot an initiative urging an immediate cease-fire and withdrawal of United States military forces from Vietnam. Relying on the broad language of the initiative statute,\textsuperscript{34} and on the fact that the board of supervisors and the city council often made declarations on policy matters beyond their legislative control, the \textit{Farley} court rejected arguments that the only initiatives which could be placed on local ballots were measures that concerned municipal affairs.\textsuperscript{35} According to the court, the only limitation on the ability of citizens to place advisory questions on the ballot was the requirement of a petition signed by a certain number of registered voters.\textsuperscript{36}

In Ohio, however, the state supreme court prevented a Vietnam peace proposal from appearing on a municipal ballot by holding that the initiative petition did not present any issue which the municipality was authorized to control by legislative action.\textsuperscript{37} A New York court similarly blocked an attempt to place a Vietnam-related question on a local ballot in \textit{Silberman v. Katz}.\textsuperscript{38} In that case, an antiwar group attempted to place on the New York City ballot an initiative asking voters whether a new municipal office known as the Anti Vietnam War Coordinator should be created.\textsuperscript{39} The group relied on a city charter provision that permitted initiatives to establish new city offices.\textsuperscript{40} The \textit{Silberman} court, however, noting that the office would be devoid of power, refused to allow the initiative on the ballot.\textsuperscript{41} In the court's view, the group's true intention was to place an advisory question on the ballot, a measure that specifically was proscribed by New York law.\textsuperscript{42}

\begin{enumerate}
\item See cases cited supra note 30.
\item 67 Cal. 2d 325, 431 P.2d 650, 62 Cal. Rptr. 26 (1967).
\item The statute gave registered voters the power to initiate "any ordinance, act or other measure which is within the power conferred upon the board of supervisors to enact. . . ." \textit{Id.} at 328, 431 P.2d at 652, 62 Cal. Rptr. at 28. In addition, the statute stated that "any declaration of policy may be submitted to the electors. . . ." \textit{Id.}
\item \textit{Id.} at 328-29, 431 P.2d at 652-53, 62 Cal. Rptr. at 28-29. The court noted that the San Francisco Board of Supervisors recently had passed a resolution praising President Johnson for his stand on the 1967 Middle East War. \textit{Id.}
\item \textit{Id.} at 328, 431 P.2d at 652, 62 Cal. Rptr. at 28. At about the same time \textit{Farley} was decided, a Massachusetts superior court upheld the right of an antiwar group to include a Vietnam peace proposal on the Cambridge, Massachusetts, ballot. See Note, \textit{Vietnam Peace Petitions}, supra note 27, at 183-84.
\item \textit{Id.} at 957, 283 N.Y.S.2d at 895.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 963, 283 N.Y.S.2d at 901.
\item \textit{Id.} at 959, 283 N.Y.S.2d at 898.
\end{enumerate}
Thus, the Vietnam War initiative cases appear to indicate that advisory questions can be placed on the ballot when a statute specifically provides for advisory questions or when an initiative statute permits a flexible construction that would provide for advisory questions.

Notwithstanding legal challenges, most state ballot access laws make it difficult for private citizens to submit propositions to the voters. In states that provide for initiatives, citizens who wish to place a proposition on the ballot must convince a certain number of registered voters to sign a petition. Placing a legislative initiative on a statewide ballot usually requires the signatures of a certain number of qualified voters, generally between one and five percent of the total votes cast in the last election for governor.

43. Once a statute allows citizen-sponsored advisory questions on the ballot, nearly any subject matter can be covered by a question. For example, in Thompson v. Secretary of the Commonwealth, 265 Mass. 16, 163 N.E. 192 (1928), the Massachusetts Supreme Judicial Court refused to hear a challenge to the inclusion on a local ballot of an advisory question regarding the repeal of prohibition. Under a Massachusetts law that remains in effect today, an advisory question can be placed on state legislative district ballots subject to a determination by the state attorney general that the question is one of public policy. Mass. Gen. Laws Ann. ch. 53, § 19 (West 1975). The plaintiffs in Thompson claimed that the advisory question on the prohibition amendment was not a question of public policy for Massachusetts within the meaning of the statute. 265 Mass. at 17, 163 N.E. at 192. The court, however, held that the attorney general's determination that the measure should appear on the ballot should not be disturbed absent a finding that the attorney general acted in bad faith. Id. at 19, 163 N.E. at 193.


In addition to the Vietnam War initiative cases, there are records of other attempts to place advisory questions on ballots in states that did not have specific provisions for nonbinding propositions. In a 1928 advisory opinion, the Massachusetts Supreme Court held that a proposed statewide initiative measure concerning the repeal of prohibition was unconstitutional. Opinion of the Justices, 262 Mass. 603, 163 N.E. 439 (1928). The measure asked voters whether the state's congressmen should be requested to support the repeal of prohibition. Id. at 605, 163 N.E. at 440. The court held that the question was not a "law" or a "measure" as required of statewide initiatives. Id. at 607, 163 N.E. at 440. Similarly, a New York appellate court held that a referendum providing for the appointment of a committee to study and report on the possibility of providing off-track betting in the state was actually an advisory question on the off-track betting issue and, consequently, was unauthorized by state law. Kupferman v. Katz, 19 A.D.2d 824, 243 N.Y.S.2d 773, aff'd on other grounds, 13 N.Y.2d 932, 294 N.Y.S.2d 47, 244 N.Y.S.2d 217 (1963). The court allowed the measure to remain on the ballot, however, because the challenge to its validity did not occur until well after the machinery and expenditures for conducting the proposition had gone forward. Id.


46. See Note, Initiative and Referendum, supra note 18, at 930-32. For a list of the signature requirements in each state for constitutional and statutory initiatives, see id. at 928-29 (table 1).

The typical signature requirements for placing an initiative on a municipal or county ballot range from ten to fifteen percent of registered voters in the jurisdiction where the measure is to be placed on the ballot. Some states, however, have required signatures of as many as twenty-five percent of all registered voters to place an initiative on a local ballot.

One of the major rationales for a signature requirement is to ensure that only serious initiatives with more than a modicum of popular support will appear on the election ballot. Proponents of an initiative must support it strongly enough to be willing to expend the significant amount of time, energy, and financial resources necessary to collect the required number of signatures. There also must be a substantial number of registered voters who are willing to sign their names to a petition to place an initiative on the ballot. Signature requirements, therefore, guard against frivolous initiatives that would serve only to crowd the ballot and confuse the voters.

Candidate Ballot Access

There have been few federal constitutional challenges to state ballot access laws restricting initiatives. The vast majority of legal challenges to burdensome ballot access requirements have concerned restrictions on candidacy. Most of these challenges have been brought by independent and minor party candidates who have charged that laws in certain states effec-

48. See, e.g., ARIZ. CONST. art. 4, pt. 1, § 1(b) (signatures of 15% of all registered voters required to place initiative on local ballot); ARK. CONST. amend. 7, § 1 (same); MASS. GEN. LAWS ANN. ch. 53, § 18A (West Supp. 1982-83) (petition to place advisory question on municipal ballot must be signed by 10% of the registered voters in a municipality); N.J. REV. STAT. § 19:37-1.1 (Supp. 1982-83) (same).

49. See, e.g., ILL. REV. STAT. ch. 46, § 28-6 (1981) (petition to place advisory questions on a political subdivision ballot requires signatures of 25% of the political subdivision's registered voters); N.J. REV. STAT. § 40:69A-184 (1967) (petition to place proposed ordinance on ballot of municipality of 70,000 or less requires signatures of 25% of municipality's registered voters).


51. Id. The financial cost of placing a measure on the ballot can be especially burdensome. See Lee, California, in Referendums, supra note 23, at 101; Note, California Initiative Process, supra note 23, at 939-40. In California, for example, $400,000 was spent in a drive to place a state employees' salary measure on the 1972 ballot, and $436,000 was spent to qualify a tax limitation measure in 1973. Lee, supra, at 101.

52. A substantial portion of the signatures collected often prove invalid. See N.Y. Times, Aug. 7, 1979, at A1, col. 1 (of 47,328 signatures collected for a recall petition, only 18,061 were valid). Therefore, in order to ensure a place on the ballot, proponents of an initiative must gather significantly more signatures than the minimum required. This necessitates a well-organized campaign consisting of a substantial number of people. See Lee, supra note 51, at 101.


54. See supra note 9.

tively prevented their names from appearing on election ballots. Although modern Supreme Court analysis of ballot access restrictions has been poorly defined and inconsistent, it is clear that laws are unconstitutional if they make ballot access virtually impossible for candidates or political parties that demonstrate substantial popular support.

In Williams v. Rhodes, the 1968 landmark decision in the ballot access field, the Court invalidated an Ohio statutory scheme that effectively kept third parties off state election ballots. Applying a fourteenth amendment equal protection analysis, the Court held that the ballot restrictions impaired the fundamental rights of voting and association. The Williams Court observed that the right to vote is effectively burdened if a voter must cast his ballot for only one of two parties when other parties are " clamoring

56. Ballot access restrictions that have been challenged successfully include burdensome petition requirements, see, e.g., Williams v. Rhodes, 393 U.S. 23 (1968) (statutory requirement that new party collect signatures of 15% of the electorate to be placed on ballot was too high); filing fees, see, e.g., Lubin v. Panish, 415 U.S. 724 (1974) (filing fee requirements for indigent candidates violate first and fourteenth amendments); early filing deadlines, see, e.g., Anderson v. Celebrezze, 103 S. Ct. 1564 (1983) (early filing deadline for independent candidates violates voting and associational rights); and disaffiliation requirements, see, e.g., Anderson v. Babb, 632 F.2d 300, 305-06 n.2 (4th Cir. 1980) (state interest in requiring independent candidates to disaffiliate themselves from political parties at early date is not as great in national elections as in state elections).

59. 393 U.S. 23 (1968).
60. Id. at 35. Prior to Williams, the Court had failed to recognize a constitutionally protected right of ballot access under the United States Constitution. See Snowden v. Hughes, 321 U.S. 1, 7 (1944) (right to become a candidate for state office is a "right or privilege of state citizenship, not of national citizenship").

61. In most equal protection cases, the Court requires the state to show that the statutory classification is reasonably related to a legitimate legislative purpose. See, e.g., Vance v. Bradley, 440 U.S. 93, 97 (1979) (test is whether differential treatment is so unrelated to achievement of legislative purpose that court can only conclude that legislature's actions were irrational); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (test is whether any state of facts may be reasonably conceived to justify classification). However, when a classification affects a suspect class, e.g., McLaughlin v. Florida, 379 U.S. 184 (1967) (racial classifications), or a fundamental interest, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting), strict scrutiny review is "triggered." See G. Gunther, Cases and Materials on Constitutional Law 671 (1980). To survive a strict scrutiny analysis, the classification must be narrowly drawn and must serve a compelling state interest. Id. In recent years, the Court has moved away from this rigid two-tiered approach. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976) ("intermediate scrutiny" used to analyze gender-based classifications). The ballot access cases exemplify this departure from the old equal protection analysis. See infra notes 66-71 and accompanying text.
62. 393 U.S. at 34. In order to obtain ballot access in Ohio, a third party was required to obtain signatures of registered voters equal to 15% of the number of votes cast in the last gubernatorial election. Id. at 36 (Douglas, J., concurring). The third party also had to create an elaborate party structure and conduct primary elections. Id. at 36-37 (Douglas, J., concurring). The two major parties, on the other hand, could remain on the ballot simply by receiving 10% of the votes in the last gubernatorial election. Id. (Douglas, J., concurring).
for a place on the ballot." Similarly, the Court recognized that the right to associate by forming a new political party means little if that party is prevented from gaining access to the election ballot.

In subsequent ballot access decisions, the Court has continued to emphasize fourteenth amendment standards. The degree of scrutiny employed in these cases generally has been determined by the importance of the state interests protected by such restrictions and the extent to which they burden ballot access. The Court has recognized legitimate state interests in avoiding overcrowded ballots and in restricting the ballot to serious candidates. Yet, at the same time, the Court has noted that restricting ballot access to achieve voting rationality may conflict with another important goal: expanding political opportunity. Although the Court never has held candidacy to be a fundamental right, a number of decisions have emphasized the importance of ensuring that candidates are elected in a "free and unimpaired fashion."

Furthermore, the Court has observed that a ballot access restric-

63. Id. at 31.
64. Id.
66. See, e.g., Clements v. Fashing, 457 U.S. 957 (1982) (Court engaged in extremely deferential standard of review after concluding there was de minimus burden on candidate access); see also Williams v. Rhodes, 393 U.S. 23 (1968) (Court used strict scrutiny after finding ballot access to be foreclosed completely to third parties).
67. See Clements v. Fashing, 457 U.S. 957, 965 (1982); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184-85 (1979); Storer v. Brown, 415 U.S. 724, 732-33 (1974). Overcrowded ballots have been thought to create voter confusion and discourage voter participation. See Elder, Access to the Ballot By Political Candidates, 83 Dick. L. Rev. 387, 389-90 (1979). This notion has its origin in the short-ballot movement of the early twentieth century. Id. Those who advocated the "short-ballot principle" believed that only important offices should be elective and that few offices should be filled by election at any one time. Id. at 389 (citing R. Childs, The Short-Ballot Principles 170 (1911)). In the reformers' view, long ballots resulted in voter confusion, thereby preventing an intelligent exercise of the franchise. Id. Over a period of time, the emphasis on the short-ballot concept shifted from the state interest in restricting the number of elective offices appearing on the ballot, to an interest in restricting the number of candidates appearing on the ballot for each office. Id. at 390. In Lubin v. Panish, 415 U.S. 709 (1974), for example, the Court expressed concern that allowing the names of frivolous or insincere candidates to appear on the ballot would unduly lengthen the ballot and, hence, discourage voter participation and confuse those who do participate. Id. at 715.
69. A number of lower federal courts, however, have held that the right to run for public office is a fundamental right. See, e.g., Mancuso v. Taft, 476 F.2d 187, 189 (1st Cir. 1973) (running for office is a fundamental right protected by the first amendment); Duncantell v. Houston, 333 F. Supp. 973 (S.D. Tex. 1971) (same).
70. Reynolds v. Sims, 377 U.S. 533, 562 (1964); see also Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (citizens have a constitutionally protected right to participate in elections on
tion may exclude certain classes of candidates from the electoral process. As a result, political participation by the supporters of those candidates may be sharply limited. In its most recent ballot access case, Anderson v. Celebrezze, the Court noted that "it is especially difficult for the state to justify a restriction that limits a political group whose members share a particular viewpoint, associational preference, or economic status." Thus, while the Court has recognized that unduly lengthy ballots threaten the integrity of the electoral system, it nevertheless has invalidated restrictions that prevent reasonably diligent persons from obtaining ballot access.

Although the Court has often relied on an equal protection analysis in its ballot access decisions, the first amendment has provided the essential foundation for most decisions invalidating burdensome ballot access restrictions. The right to engage in association for the advancement of political beliefs and ideas has long been held to be a first amendment interest. The Court consistently has recognized that this right may be im-

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72. See, e.g., Anderson v. Celebrezze, 103 S. Ct. 1564, 1571-72 (1983) (early filing deadlines for independent presidential candidates limit political participation of those dissatisfied with the choices presented by the two major parties); Bullock v. Carter, 405 U.S. 134, 144 (1972) (filing fee requirement burdens less affluent people whose favorite candidates may be unwilling to pay large fees.)

73. 103 S. Ct. 1564 (1983).

74. Id. at 1572.


77. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). Writing for the Court, Justice Harlan stated:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniable enhanced by group association. ... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideals is an inseparable aspect of the "liberty" insured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.

Id. at 460 (citations omitted); see also Kusper v. Pontikes, 414 U.S. 51, 57 (1973) (right of association is a basic constitutional freedom); Shelton v. Tucker, 364 U.S. 479, 486 (1960) (right of association lies at the foundation of a free society).
paired by onerous ballot access requirements.78 In addition, the Court's ballot access decisions indicate that the right to vote also has first amendment implications.79 Unjustifiable ballot restrictions limit an important method of expressing political preferences: casting a vote for the candidate of one's choice.80 Finally, the Court has recognized that the ability of candidates and political parties to express their ideas effectively is dependent upon ballot access.81 In Illinois State Board of Elections v. Socialist Workers Party,82 the Court noted that "an election campaign is a means of disseminating ideas as well as attaining political office. Overbroad restrictions on ballot access jeopardize this form of political expression."83

The First Amendment and the Right to a Public Forum

The Court's invalidation of burdensome ballot access restrictions is consistent with a long line of decisions that has extended first amendment protection to various modes of expression.84 Activities such as spending money to advocate either a candidate85 or referendum,86 engaging in litigation,87 canvassing door-to-door,88 wearing a black armband,89 and picketing in front of a school90 have been afforded first amendment protection. Implicit in each of these decisions is the recognition that the right to freedom of expression includes not only the right to be free from censorship, but also the right to use an effective means of communication.91 As one commentator noted, each mode of communication possesses unique characteristics

79. See cases cited supra note 78; see also Elder, supra note 67, at 402 (voting is the most common means of political expression in our mass society); The Supreme Court, 1968 Term, 83 HARV. L. REV. 60, 95 (1969) (Court has interpreted right to vote effectively to protect a full range of self-expression); cf. Storer v. Brown, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting) (right to vote derives from the right of association that is at the core of the first amendment).
80. See cases cited supra note 78.
83. Id. at 186; see also Anderson v. Celebrezze, 103 S. Ct. 1564, 1572 (1983) (ballot access restrictions "reduce diversity and competition in the marketplace of ideas").
90. See Grayned v. City of Rockford, 408 U.S. 104 (1972); Police Dep't v. Mosley, 408 U.S. 92 (1972).
and advantages, and each contributes to the "robust exchange of ideas."\textsuperscript{92}

The Court also has acknowledged that in order to enhance the effective exercise of first amendment rights, appropriate forums must be made available for people to express their ideas freely.\textsuperscript{93} Initially, the public forum doctrine\textsuperscript{4} was invoked by the Court to ensure minimum access for speech in areas traditionally associated with first amendment activities, such as streets and parks.\textsuperscript{93} Speech activities in these forums are subject only to narrow regulations affecting their time, place, and manner.\textsuperscript{96} The fact that other forums might be available does not justify prohibiting the exercise of first amendment rights in a public forum.\textsuperscript{97}

\textsuperscript{92} Stone, supra note 84, at 256-57.


\textsuperscript{94} The term \textit{public forum} was used first in a 1946 California Supreme Court opinion. \textit{See} Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 546, 171 P.2d 885, 892-93 (1946). The contemporary use of the term, however, is based on a definition provided by Professor Kalven approximately 20 years ago. \textit{See} Kalven, \textit{The Concept of the Public Forum: Cox v. Louisiana, 1965 SUP. CT. REV. 1. According to Professor Kalven, "the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer..." Id. at 11-12. For further discussion of the public forum doctrine, see L. Tribe, supra note 57, at §§ 12-20 to 22; Horning, \textit{The First Amendment Right to a Public Forum}, 1969 DUKE L.J. 931 (discussing the constitutional underpinnings of the public forum doctrine); Stone, supra note 84 (examining the evolution of the public forum doctrine); Note, Public Forum: Equal Access, and the First Amendment, 28 STAN. L. REV. 117 (1975) (comparing the "minimum access" and "equal access" views of the public forum doctrine).

\textsuperscript{95} See, e.g., Niemotko v. Maryland, 340 U.S. 268 (1951) (denial of permit to give speech in park for no apparent reason violates first amendment); Saia v. City of New York, 334 U.S. 558 (1948) (city ordinance banning use of loudspeakers in public places violates first amendment); Martin v. Struthers, 319 U.S. 141 (1943) (ordinance forbidding door-to-door canvassing denies freedom of speech); Jamison v. Texas, 318 U.S. 413 (1943) (ordinance prohibiting distribution of handbills on city streets violates first amendment); Schneider v. State, 308 U.S. 147 (1939) (ordinances regulating distribution of literature in streets violate freedom of speech and press); Hague v. CIO, 307 U.S. 496 (1939) (right to assemble peacefully, to speak, and to distribute literature on city streets is protected by first amendment).

\textsuperscript{96} See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969) (law requiring license to demonstrate on city streets must provide narrow, objective, and definite standards to guide licensing authority); Kunz v. New York, 340 U.S. 290, 293-94 (1951) (public officials cannot be given authority to limit exercise of first amendment freedoms in public places upon criteria unrelated to proper regulation of such places); Saia v. City of New York, 334 U.S. 558, 560 (1948) (ordinances regulating use of loudspeakers in public places must be narrowly drawn); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941) (only time, place, and manner of speech in public places should be regulated).

\textsuperscript{97} Schneider v. State, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").
In the 1960's and 1970's, the public forum concept was expanded beyond the streets and parks. Government-owned facilities such as schools98 and libraries99 were given public forum status.100 In addition, the Court recognized that the government can create a public forum where none previously existed simply by opening a forum to the public for the expression of ideas.101 Speech in these forums is entitled to the same procedural safeguards as speech in streets and parks.102 Consequently, regulations are forbidden if they create a possibility of government censorship based on the content of the message expressed in government-created public forums.103 The Court has emphasized, however, that the manner of expression must be compatible with the normal activity of these forums.104 One of the rationales for ensuring minimal access to public forums is based on the belief that the "widest possible dissemination of information from

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102. See, e.g., City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 176 (1976) (when holding public meetings, school board cannot discriminate between speakers on the basis of their employment or the content of their speech); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560-61 (1975) (system for choosing performances for municipal auditorium must contain rigorous procedural safeguards to protect first amendment rights); Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972) (regulation of demonstrations on school grounds must be narrowly tailored to further state's legitimate interest).
103. See cases cited supra note 102.
104. See Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). Justice Marshall, writing for the Court, succinctly explained the rule:

The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Id. (citations omitted); see also Tinker v. Des Moines School Dist., 393 U.S. 503, 512-13 (1969) (student may express his opinions in school if he does so without substantially interfering with appropriate school discipline requirements). In a number of cases, the Court has found a public forum not to exist on some types of government-owned property because the particular exercise of first amendment rights was incompatible with the normal activity of the property. See, e.g., Greer v. Spock, 424 U.S. 828 (1976) (political rally at military facility); Adderley v. Florida, 385 U.S. 39 (1966) (demonstration on jailhouse grounds).
diverse and antagonistic sources is essential to the welfare of the public.\textsuperscript{105} By affording all people and all points of view access to public forums, the Court helps to maintain an open marketplace of ideas.\textsuperscript{106} Many members of the Court have noted that public forums provide an opportunity to exercise first amendment rights to those who cannot afford access to the mass media.\textsuperscript{107}

There have been a few cases in which the Court has upheld government regulations that restricted certain messages while permitting others.\textsuperscript{108} In neither of these cases, however, was a public forum found to exist. In \textit{Lehman v. City of Shaker Heights},\textsuperscript{109} for example, the Court upheld a city transit system policy that permitted commercial advertising on its buses but banned

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\textsuperscript{105} Associated Press \textit{v.} United States, 326 U.S. 1, 20 (1945); see also \textit{Terminiello v. Chicago}, 337 U.S. 1, 4 (1949) (vitality of civil and political institutions depends on free discussion); \textit{De Jonge v. Oregon}, 299 U.S. 353, 365 (1937) (free political discussion ensures that government will be responsive to the will of the people and that peaceful change will be effected).

\textsuperscript{106} See Stone, \textit{supra} note 84, at 233-35. One of the most effective judicial proponents of the “marketplace of ideas” concept was Justice Holmes. See \textit{Abrams v. United States}, 250 U.S. 616 (1919) (Holmes, J., dissenting). According to Justice Holmes, unfettered speech assists the advancement of knowledge and society’s search for truth. \textit{Id.} at 630 (Holmes, J. dissenting). In Holmes’s view, the best method for achieving the “ultimate good desired” is to subject as many ideas as possible to the competition of the public marketplace. \textit{Id.} (Holmes, J., dissenting). Although the marketplace theory has been criticized by a number of scholars, see, \textit{e.g.}, L. Tribe, \textit{supra} note 57, § 12-1, at 576-77 (marketplace of ideas argument for freedom of speech “relies too dangerously on metaphor for a theory that purports to be more hard-headed than literary”); Baker, \textit{Scope of the First Amendment Freedom of Speech}, 25 U.C.L.A. L. Rev. 964 (1978) (marketplace theory rests on a series of false assumptions), it nevertheless has provided the basis for a great many first amendment decisions. See, \textit{e.g.}, Gertz \textit{v.} Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (we depend for the correction of pernicious opinions “on the competition of other ideas”); Red Lion Broadcasting Co. \textit{v.} FCC, 395 U.S. 367, 390 (1969) (purpose of first amendment is to preserve an uninhibited marketplace of ideas in which truth ultimately will prevail); New York Times Co. \textit{v.} Sullivan, 376 U.S. 254, 270 (1964) (right conclusions are more likely gathered out of a “multitude of tongues”).

Closely related to the marketplace of ideas concept is Professor Alexander Meiklejohn’s theory that in order to govern effectively, people must be exposed to a wide range of ideas. See A. Meiklejohn, \textit{Free Speech and its Relation to Self-Government} (1948). Professor Meiklejohn limited the absolute protection afforded by the first amendment to “political speech,” but his definition of political speech was extremely broad, encompassing literature, theatre, and art. See Meiklejohn, \textit{The First Amendment is an Absolute}, 1961 Sup. Ct. Rev. 245, 256-57.

\textsuperscript{107} See, \textit{e.g.}, United States Postal Serv. \textit{v.} Council of Greenburgh Civic Ass’ns, 453 U.S. 114, 144 (1981) (Marshall, J., dissenting) (door-to-door hand delivery of messages is method of written expression most accessible to those who are not powerful, established, or well financed); Kovacs \textit{v.} Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting) (many people who wish to disseminate ideas cannot afford to own or control communications media); Marlin \textit{v.} Struthers, 319 U.S. 141, 146 (1943) (“Door-to-door distribution of circulars is essential to the poorly financed causes of the little people.”); see also Horning, \textit{supra} note 94, 938-39 (poor and unrepresented provided with a means of communication by the right to a public forum); Kalven, \textit{supra} note 94, at 30 (allowing the poor and underprivileged a means of communication contributes to the robust exchange of ideas).


\textsuperscript{109} 418 U.S. 298 (1974) (plurality opinion).
political and public-issue advertising. A plurality of the Court concluded that the city was not operating a public forum when it allowed commercial advertising on its buses; rather, it merely was engaging in commerce. Similarly, in United States Postal Service v. Greenburgh Civic Associations, the Court upheld a postal regulation barring people from depositing circulars and other messages in letterboxes without affixing postage. The Court found that letterboxes were not transformed into public forums merely because the United States mail was deposited in them.

The question of what is or what can be a public forum has often vexed the Court. Streets, parks, and government buildings open to the public clearly are public forums. It is perhaps less obvious that election ballots and other mediums of expression should be considered public forums. Nevertheless, in light of the Supreme Court's policy of extending first amendment protection to various modes of expression, it is not surprising that the Seventh Circuit in Georges v. Carney suggested that an election ballot could be used as a public forum.

110. Id. at 303. Justice Douglas provided the fifth vote for the majority but based his decision on a captive audience rationale. Id. at 305-08 (Douglas, J., concurring). In Justice Douglas's opinion, the commuters' right to be free from "forced intrusions on their privacy" by political advertising precluded the city from transforming its buses into public forums. Id. at 307 (Douglas, J., concurring). The dissent argued that by accepting commercial advertising on its transit system, the city voluntarily had created a public forum. Id. at 314 (Brennan, J., dissenting). Consequently, the dissent concluded that the ban on political advertising amounted to content-based discrimination in violation of the first and fourteenth amendments. Id. at 319-20.

The Lehman Court's conclusion that the city was not required to accept political advertising on its buses also has been criticized by many commentators. See, e.g., Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 21-22 (1975) (Lehman Court failed to consider first amendment equality principle); The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 153 (1974) (by permitting some advertising, transit system could not claim that political advertising would interfere with providing transportation). One commentator has noted that at the time Lehman was decided, commercial speech was not regarded as expression protected by the first amendment. See Note, Access to State-Owned Communications Media—The Public Forum Doctrine, 26 U.C.L.A. L. Rev. 1410, 1418 n.29 (1979) [hereinafter cited as Note, Access to Media]. Thus, the transit system was not providing a forum for speech when it permitted commercial advertising to be displayed because at that time, commercial advertising was not considered speech for purposes of first amendment analysis. Id. Commercial speech was not extended full first amendment protection until approximately two years after the Lehman opinion was written. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc., 425 U.S. 114 (1981).


112. Id. at 128. Justices Brennan, Marshall, and White asserted that the mails and letterboxes were public forums because of their use as vehicles for communicating information and ideas. See id. at 137-38 (Brennan, J., concurring); id. at 141 (White, J., concurring). Nevertheless, Justice Brennan, believing that a postage requirement was a valid time, place, and manner restriction, concurred in the judgment. Id. at 140-41 (Brennan, J., concurring). Justice White concurred because he viewed the postage requirement as a valid users fee which the government properly could charge for the use of the mails. Id. at 141-42 (White, J., concurring).

113. See supra notes 94-97 and accompanying text.

114. See supra notes 85-93 and accompanying text.

115. Georges v. Carney, 691 F.2d 297, 301 (7th Cir. 1982).
In May 1982, a private citizens group, the DuPage County Citizens for a Nuclear Arms Freeze, began an effort to collect the signatures necessary to place an advisory question on the DuPage County, Illinois, election ballot. The question which was to be submitted to DuPage County voters in the November 1982 general election asked whether the people of the county should "endorse the call to halt the nuclear arms race" and request municipal, county, state, and federal governments to adopt a "freeze on all further testing, production, and deployment" of Soviet and American nuclear weapons. To coordinate their ballot access efforts, the nuclear arms freeze group hired Wendy Georges, a professional political organizer with experience in petition drives.

Under Illinois law, advisory questions may be placed on the ballot by citizen-initiated petitions. Illinois law additionally provides that no more than three questions, binding or advisory, may be placed on the ballot in the same election. It further provides that if more than three questions are submitted, only the first three will appear on the ballot.

The Citizens for a Nuclear Arms Freeze needed to collect the signatures of 75,000 DuPage County voters in order to place its question on the county ballot. No group in DuPage County had ever been able to satisfy this requirement.

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116. Brief for Appellant at 7, Georges v. Carney, 691 F.2d 297 (7th Cir. 1982).
117. Georges v. Carney, 691 F.2d 297, 299 (7th Cir. 1982). The full question stated: Whereas one of the greatest challenges facing the people of the earth is to prevent the occurrence of nuclear war by accident or design, shall the people of the County of DuPage endorse the call to halt the nuclear arms race and request the DuPage County Board, in addition to our municipal governments, state legislature and the U.S. Congress and Senate, to adopt an immediate, mutual, and verifiable freeze of all further testing, production and deployment of nuclear warheads, missiles, and designed delivery systems by the U.S.S.R. and the U.S. governments, followed by reductions of present nuclear weapons?
118. Id. at 7-8, Georges v. Carney, 691 F.2d 297 (7th Cir. 1982).
120. Id. § 28-6. The signatures of 10% of the state's registered voters are required to place a citizen-sponsored advisory question on the statewide ballot. Id. § 28-9.
121. Id. § 28-1.
122. Id.
123. Id.
124. 691 F.2d at 299.
requirement, and the nuclear arms freeze group was no exception. By the time the deadline to submit questions to the local election board arrived, the group had collected only 8,500 signatures.

While the nuclear arms freeze advocates were collecting signatures, the DuPage County Board submitted four binding questions to appear on the ballot. Thus, even if the nuclear arms freeze group had satisfied the signature requirement, it still would have been unable to gain access to the November ballot since the first three questions submitted by the county board had already filled the spots set aside for ballot propositions in DuPage County. Nevertheless, the Citizens for a Nuclear Arms Freeze submitted their initiative to the DuPage County Board of Elections.

After the board of elections refused to include the nuclear arms freeze question on the ballot, the freeze advocates filed suit in federal district court seeking to enjoin the DuPage County election commissioners from preparing ballots for the November election that did not contain the nuclear arms freeze question. Holding the twenty-five percent signature requirement unconstitutional, the district court concluded that under the Storer v. Brown test, the requirement was "so high that a reasonably diligent person could not be expected to meet it." Nevertheless, the plaintiffs were denied relief because the district court determined that the three-question limit was rationally related to the legislature's interests in limiting the length of the ballot and minimizing voter confusion. In the district court's opinion, the three-question limit imposed only a minimal burden on the plaintiff's access to the ballot. Under Illinois law, the nuclear arms freeze question could have appeared on the ballot at the next regularly scheduled election if the plain-

125. *Id.*
126. *Id.* This was the largest amount ever gathered for this type of a petition drive in DuPage County. *Id.*
127. *Id.* All of the questions involved local issues. *Id.* One of the questions asked for voter approval of the issuance of water project bonds. Brief for Appellant at 9, Georges v. Carney, 691 F.2d 297 (7th Cir. 1982). The other three questions involved local property tax matters. *Id.*
128. 691 F.2d at 299.
129. Georges v. Carney, 546 F. Supp. 469 (N.D. Ill. 1982). The plaintiffs alleged that their first amendment rights of association and political expression were infringed by the 25% requirement, the three question per ballot limit, and the first-come-first-served method of deciding which questions were to be included on the ballot. 691 F.2d at 299-300. In addition, the plaintiffs asserted that the Illinois statutory scheme violated the equal protection clause because it was easier for private groups to place certain kinds of binding questions on the ballot than it was for such groups to place advisory questions on it. *Id.* The plaintiffs cited Illinois laws that required only 100 signatures in order to place on the ballot binding proposals to establish a home for wayward children and a binding proposal for a property tax to support a country fair. *Id.* at 300.
132. *Id.* at 478. Subjecting the three-question limit to minimal scrutiny, the district court held that there was no fundamental right to place an initiative on the ballot. *Id.* at 476, 478.
133. *Id.* at 479.
tiffs had not specifically requested that the question be included on the November 1982 ballot.\textsuperscript{134}

The Appellate Court Decision

In a two-to-one decision, the Seventh Circuit upheld the Illinois statutory scheme.\textsuperscript{135} The rationale employed by the appellate court to reach its decision differed markedly from the analysis employed in the candidate ballot access cases. In fact, the court refused even to consider these cases, holding without elaboration that they involved issues different from those presented in \textit{Georges}.\textsuperscript{136} Instead, Judge Richard Posner, writing for the court, indicated that the issue in the case was whether Illinois extended to its citizens the right to use local ballots as forums for first amendment expression.\textsuperscript{137}

Judge Posner agreed that the Illinois signature requirement made it "practically impossible" to put advisory questions on the ballot in political subdivisions as populous as DuPage County.\textsuperscript{138} Standing alone, however, that fact did not render the statute unconstitutional. In Judge Posner's view, the signature requirement was merely a means of keeping all advisory questions off the ballot.\textsuperscript{139} Since the state is not constitutionally obligated to allow the ballot to be used as a forum for advocating policy,\textsuperscript{140} Judge Posner opined that the twenty-five percent requirement withstood first amendment challenge.\textsuperscript{141} According to the court, constitutional problems would arise only

\begin{itemize}
\item \textsuperscript{134} ILL. REV. STAT. ch. 46, § 28-5 (Supp. 1982). The law provides that when more than three questions are submitted, the extra questions will be the first questions placed on the ballot at the next regularly scheduled election. \textit{Id.} If the petition or resolution proposing a question specifies a particular election for its submission, however, the question cannot be placed on the ballot in a subsequent election. \textit{Id.}
\item \textsuperscript{135} 691 F.2d at 302.
\item \textsuperscript{136} \textit{Id.} at 300.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.} at 301.
\item \textsuperscript{139} The court reasoned that even a 100% requirement would be "lawful for it would be just an oblique way of keeping all advisory questions off the ballot. . . ." \textit{Id.}
\item \textsuperscript{140} \textit{Id.} at 300. The majority rejected arguments that Illinois is required to provide for citizen-initiated advisory questions simply because it provides for certain citizen-initiated binding questions. \textit{Id.} The court reasoned that "by opting for a measure of direct democracy," the state does not become obligated to allow the ballot to be used as a means of "pure advocacy." \textit{Id.}
\item \textsuperscript{141} In support of this proposition, the court cited United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (statute banned depositing of messages in mailboxes without affixing postage), and Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (regulations prohibited political advertising on city buses). 691 F.2d at 300-01. The majority noted that in both of those cases, there was a finding that a public forum did not exist despite the fact that the alleged forums in question—mailboxes and buses—were in fact vehicles for communicating messages. \textit{Id.} According to the majority, an election ballot is not even a communication vehicle. \textit{Id.} at 301. Rather, "it is a vehicle only for putting candidates and laws to the electorate to vote up or down." \textit{Id.}
\item \textsuperscript{141} \textit{Id.} at 300-01. The court did not address the three-question limit issue except to note that because the election ballot was not a public forum, it was unnecessary for the court to decide whether the three-question limit was too low. \textit{Id.} at 302.
\end{itemize}
if governmental bodies began to submit advisory questions. The majority agreed that if the state or county used the advisory question regulations as a means of taking sides in the nuclear arms debate, the case would be similar to *Southeastern Promotions, Ltd. v. Conrad*, a public forum case; only then would prior restraint problems arise.

Finally, Judge Posner concluded that the Illinois statutory scheme did not violate the equal protection guarantee. The judge determined that even though it was easier for governmental bodies to put a question on the ballot than it was for private groups to do so, the difference was not arbitrary because resolutions of legislative bodies, unlike those submitted by voters, have a "presumptive democratic legitimacy." Similarly, Judge Posner found that the preference given binding questions over advisory questions was based on a rational judgment that it is better to allow voters an opportunity to enact binding legislation than to "provide another soapbox for the advocates and opponents of great causes.

In a strong dissenting opinion, Judge Richard Cudahy asserted that the majority's reasoning "defies common sense." Judge Cudahy observed that the Illinois statute specifically provided that citizens should have access to the ballot for advisory questions. Thus, acceptance of the majority's argument, that the state never intended to grant citizens the right to place advisory questions on the ballot, necessarily would ignore "the canon of statutory interpretation that a statute should be interpreted to give effect to all its provisions." The dissenting judge added that even if the majority's interpretation of legislative intent were correct, the court should not allow the state to create a right that is entirely illusory.

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142. *Id.* at 301. The majority observed that there was no record of a public body ever placing an advisory question on the DuPage County ballot. *Id.*


144. 691 F.2d at 301. In *Southeastern Promotions*, the Supreme Court held that a municipal auditorium, "designed for and dedicated to expressive activities," was a public forum. 420 U.S. at 555 (1975). Consequently, a municipal board's denial of the use of the auditorium, for the production of a play that the board considered to be obscene, was a prior restraint of speech and was unconstitutional because there were no procedures to guard against content-based discrimination. *Id.* at 561-62.

145. 691 F.2d at 301.

146. *Id.* at 302.

147. *Id.* at 302.

148. *Id.* at 303 (Cudahy, J., dissenting). According to Judge Cudahy, "a state cannot simultaneously provide an avenue of political expression and burden its use with conditions that, as the majority concedes, can never be met." *Id.* (Cudahy, J., dissenting).

149. *Id.* at 304 (Cudahy, J., dissenting).

150. *Id.* (Cudahy, J., dissenting).

151. *Id.* (Cudahy, J., dissenting). Judge Cudahy wrote: Though the government may not be required "to create a well informed citizenry" surely we cannot approve a statutory technique the disingenuousness of which, as described by the majority, combines an apparent opportunity to speak with a real commitment to silence. The state has furnished a "soap box" fashioned of paper mache. *Id.* at 304-05 (Cudahy, J., dissenting).
Cudahy conceded that the state's objective of preserving the integrity of the advisory question system was legitimate, he concluded that the method Illinois had chosen to achieve this objective—the complete preclusion from the ballot of all citizen-initiated advisory questions—was "wholly irrational."\

Additionally, Judge Cudahy found the three-question limit to be invalid as well. In his opinion, the three-question limit, when combined with the first-come-first-served rule and the ability of local governmental units to propose binding and advisory questions at will, gave governmental bodies the power to preempt citizen-sponsored questions. The dissenting judge noted that once a state provides a forum for the expression of ideas, there must be adequate procedures to guard against unconstitutional government censorship.

**Analysis and Critique of Georges**

In an essentially circular argument, the Georges court concluded that because the signature requirement was impossible to satisfy, Illinois had not intended to create a statutory right to place advisory questions on local ballots. As the dissenting opinion noted, however, this statutory interpretation renders meaningless language in the Illinois Election Code that explicitly grants citizens the power to initiate advisory questions. The majority offered no evidence of legislative intent to support its interpretation of the statute. Nor did the state itself argue that the intent of the legislature was to deny ballot access for citizen-sponsored advisory questions. According to a number of Supreme Court opinions, the starting point for determining the legislative intent of a statute is its language, and absent a "clearly expressed legislative intent to the contrary, the language must ordinarily be

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152. Id. at 304 (Cudahy, J., dissenting).
153. Id. The dissent noted that in 1980, the DuPage County Board met one day prior to the ballot question filing deadline and approved the submission of 11 questions for the November 1980 ballot, thereby preempting five citizen-sponsored property tax reduction questions which were submitted on the following day. Id. at 303 (Cudahy, J., dissenting).
154. Id. at 305 (Cudahy, J., dissenting).
155. Id. at 301.
156. See ILL. REV. STAT. ch. 46, § 28-6 (1981). The statute provides in part:
   On a written petition signed by 25% of the registered voters of any incorporated town, village, city, township, county or school district . . . it shall be the duty of the proper election officers in each case to submit any question of public policy so petitioned for, to the electors of such political subdivision . . . at any regular election named in the petition at which an election is scheduled to be held throughout such political subdivision . . .
   Id.
157. 691 F.2d at 301 (Cudahy, J., dissenting).
158. Instead, the state argued that the purpose of the 25% requirement was to exclude those questions which did not demonstrate sufficient community support to warrant their inclusion on the ballot. See Brief for Intervenor at 42, Georges v. Carney, 691 F.2d 297 (7th Cir. 1982).
regarded as conclusive."  

If the Georges court had followed these guidelines, it would have reached the inescapable conclusion that Illinois had in fact created a right to include citizen-sponsored advisory questions on local ballots.  

Most courts agree that the right to place a question on the ballot is not fundamental. Nevertheless, once a state confers this right, it must furnish procedures that do not burden the constitutional rights of those who wish to initiate a ballot question. The nature and extent of these constitutional rights and the type of procedures that must be provided can be determined best by referring to the Supreme Court’s ballot access cases and public forum cases. 

The vast majority of cases addressing ballot access restrictions involve candidates for office. Yet the Seventh Circuit declared, without explanation, that those cases were inapplicable to the issues presented in Georges. In doing so, the court failed to recognize that the Illinois advisory question restrictions implicated the same first amendment rights that are at the core of the candidate ballot access decisions: the rights of association and expression.  

Just as undue restrictions on a candidate’s ability to gain access to the ballot have been held to burden first amendment interests in freedom of association, restrictions on the ability of private groups to initiate advisory

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160. The district court simply assumed that Illinois had extended a right to place citizen-sponsored advisory questions on local ballots. See Georges, 546 F. Supp. at 476-77.  
161. See, e.g., City of Mt. Olive v. Braje, 366 Ill. 132, 135, 7 N.E.2d 851, 853 (1937) (voters have no inherent or constitutional right to vote on public questions); Massachusetts Pub. Interest Research Group v. Secretary of the Commonwealth, 375 Mass. 85, 96, 375 N.E.2d 1175, 1182 (1978) (citizens do not have a fundamental interest in placing measures on the ballot).  
162. Georges v. Carney, 546 F. Supp. 469, 477 (N.D. Ill. 1982). Courts consistently have held that once a government creates a statutory right, that right must be conferred in a manner consistent with the Constitution. See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (when state creates a public forum, it must provide procedural safeguards against unconstitutional prior restraint of speech); Goldberg v. Kelly, 397 U.S. 254 (1970) (government is not constitutionally required to provide welfare benefits, but cannot terminate them without procedural safeguards); Griffin v. Illinois, 351 U.S. 12 (1956) (state must provide appellate review in a nondiscriminatory manner even though appellate review is not constitutionally required); Right to Read Defense Comm. v. School Comm., 454 F. Supp 703, 712 (D. Mass. 1978) ("It is a familiar constitutional principle that a state, though having acted when not compelled, may consequentially create a constitutionally protected interest.").  
163. See supra notes 54-83 and accompanying text.  
164. See supra notes 84-115 and accompanying text.  
165. Prior to Georges, only one court had considered a federal constitutional challenge to a law regulating ballot propositions. See supra note 9.  
166. 691 F.2d at 300. "[T]he candidate cases involve such different issues from those in this case that we must treat this as a genuine case of first impression..." Id.  
167. See supra notes 77-83 and accompanying text.  
168. See, e.g., Anderson v. Celebrezze, 103 S. Ct. 1564, 1572 (1983) (ballot access restric-
questions may impinge upon associational rights. As early as 1915, it was recognized that "every measure submitted to the people has had some form of organization behind it." Business, agricultural, labor, and public interest groups, among others, often have viewed the initiative process to be the best means of advancing their political beliefs. Indeed, some sponsors of advisory question drives have used the campaigns as a means of developing political organizations. Statutes that place burdensome ballot access restrictions on initiatives clearly impair the associational rights of those who have chosen the initiative process to advance their political beliefs.

Furthermore, the Supreme Court has noted that an election campaign is an important form of political expression. The ability of third parties to obtain ballot access has enabled their supporters to contribute new opinions and beliefs to the marketplace of ideas. Similarly, placing advisory ques-

tions impinge upon associational choices protected by first amendment); Clements v. Fashing, 457 U.S. 957, 965 (1982) (ballot access requirements may burden first amendment interests in ensuring freedom of association); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (right to associate as a political party has diminished value if party prevented from appearing on the ballot); Williams v. Rhodes, 393 U.S. 23, 30 (1968) (restrictions on ballot access burden the right to associate for advancement of political beliefs); Mancuso v. Taft, 476 F.2d 187, 195 (1st Cir. 1973) (right to ballot access touches on freedom of association); Greaves v. State Bd. of Elections, 508 F. Supp. 78, 80 (E.D.N.C. 1980) (restrictions on ballot access burden fundamental right to associate); Anderson v. Morris, 500 F. Supp. 1095 (D. Md. 1980) (early filing deadline violates right to associate), aff'd, 636 F.2d 55 (4th Cir. 1980).


170. See Bone & Benedict, Perspectives on Direct Legislation: Washington State's Experience 1914-1973, 28 W. Pol. Q. 330, 330-35 (1975). Although some commentators have argued that moneyed "special interest" groups dominate the initiative process, see, e.g., Note, California Initiative Process, supra 23, at 944 n.101 (two-thirds of initiatives submitted by wealthy proponents), other observers emphasize that many successful initiatives have been sponsored by less affluent, ad hoc coalitions that were formed around a particular issue. See Bone & Benedict, supra, at 333; Lee, supra note 51, at 106; Price, The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon, W. Pol. Q. 243, 260 (1975); Sirico, supra note 23, at 660-61.

171. See Note, Vietnam Peace Petitions, supra note 27, at 184. Many sponsors of advisory questions on the Vietnam War hoped to use the initiative campaigns to develop competent political organizations which would be able to compete with the established political parties. Id.

172. See Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 186 (1979). "[A]n election campaign is a means of disseminating ideas as well as attaining political office. Overbroad restrictions on ballot access jeopardize this form of political expression." Id. (citations omitted); cf. Mancuso v. Taft, 476 F.2d 187, 195-96 (1st Cir. 1973) (becoming a candidate for office "may be the most important expression an individual can summon").

tions on the ballot also is a form of political expression. The presence of advisory questions, like the presence of independent and minor party candidates, introduces new ideas to the marketplace and stimulates public debate of the issues. For many groups, the advisory question process may be superior to other forms of expression such as picketing, leafletting, or speaking in public. When an idea expressed in the form of an advisory question is placed on the ballot, it generally is exposed to a larger number of people than an idea expressed in a more traditional mode. Moreover, the media coverage accorded to ballot measures makes the advisory question a particularly effective means of expression.

Advisory questions not only provide their sponsors with a means of political expression, they also furnish voters with an opportunity to express their views. As one commentator noted, voting is the "most common means of political expression in our mass society where many are unable to contribute monetarily or lack time for volunteer effort." The presence of advisory questions on the ballot enhances this method of expressing political preferences by providing voters with an opportunity to vote directly on issues as well as for candidates.

In terms of their effect on first amendment rights, there is little difference between undue restrictions on advisory questions and undue restrictions on candidacy. Both impinge equally on the fundamental rights of association and expression. If the Georges court had recognized these similarities, it may have employed an analysis more protective of the constitutional rights of the advisory question sponsors and voters.

The public forum doctrine also provides useful guidelines for determining the constitutional parameters of the right to place an advisory question on the ballot. As previously noted, the Georges court indicated that a state, by granting the right to place advisory questions on the ballot, transforms the ballot into a forum for the expression of ideas. Considerable support

174. See Radin, Popular Legislation in California 1936-1946, 35 CALIF. L. REV. 171 (1947). In his study of the California initiative process, Professor Radin noted that ballot proposals often create "vigorous public discussion" in the weeks preceding the election. Id. at 173. Extensive media coverage, formal debates on the proposals, and mass mailings conducted by proponents and opponents of the ballot measures all played a role in this discussion. Id. at 173-74.
175. See Comment, Local Initiative, supra note 27, at 472-73.
177. Elder, supra note 67, at 402.
178. Advisory questions also implicate another first amendment right closely related to political expression: the right to petition for redress of grievances. See Brief for Appellant at 13, Georges v. Carney, 691 F.2d 297 (7th Cir. 1982); Comment, Local Initiative, supra note 27, at 473. If an advisory question is approved by the voters, it can be viewed as a formal request to the government to pursue a certain policy. Id.
179. See supra notes 168-78 and accompanying text.
180. See infra notes 192-97 and accompanying text.
181. See supra notes 137-45 and accompanying text.
182. 691 F.2d at 300-02. Although the Georges court never explicitly held that an advisory question converts the ballot into a public forum, the notion is implicit throughout the court's opinion. By framing the issue in terms of whether there is a "constitutional right to use the ballot box as a forum for advocating policy," id. at 300, the court seemed to suggest that
can be found for this novel concept. The requirement that the expressive activity be compatible with the normal activity of the facility\footnote{183} is clearly satisfied; advisory questions are no more disruptive of an election ballot than are binding questions. In addition, although the Supreme Court recently has displayed some reluctance to extend the public forum doctrine to include a particular medium of expression,\footnote{184} the principles underpinning public forum analysis are as applicable to election ballots as they are to places or locations.\footnote{185}

Extension of the public forum doctrine to election ballots is consistent with judicial efforts to guarantee a multiplicity of outlets for first amendment expression.\footnote{186} A diversity of forums ensures that those who wish to communicate their ideas can do so in an effective manner.\footnote{187} As previously indicated,\footnote{188} advisory questions have proven to be a particularly effective means of expressing ideas to the community at large. As a public forum, an election ballot also possesses an important attribute that other forums do not possess; it provides an opportunity for less affluent groups to express their views to a wide audience. Although organizations often spend large sums of money to place a measure on the ballot,\footnote{189} several poorly financed groups also have been able to qualify ballot measures.\footnote{190}

An extension of the public forum doctrine to ballots does not compel states or localities to provide for advisory questions. A state or local government

\footnote{183. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).}
\footnote{184. See United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (public forum doctrine does not extend to the mails and letterboxes). Factors unique to the postal service may have prevented the Greenburgh Court from extending the public forum doctrine to the mails. For example, the majority expressed concern that finding a public forum would foreclose the use of locked letterboxes. \textit{Id.} at 129. Furthermore, a concern with preventing a loss of mail revenues may explain the Court's reluctance to permit placing unstamped materials in letterboxes. \textit{See id.} at 135 (Brennan, J., concurring); \textit{id.} at 141-42 (White, J., concurring).}
\footnote{185. See \textit{Business Executives' Move for Vietnam Peace v. FCC}, 450 F.2d 642, 659 n.41 (D.C. Cir. 1971) ("There is no reason why the general principles applied in cases involving access to \textit{places} should not apply to our cases involving access to a particular \textit{medium} of expression."). rev'd sub nom. Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). The Supreme Court never has indicated that the public forum doctrine necessarily is limited to places. In fact, the Court has engaged in public forum analysis when the forum arguably was a medium of expression. For example, in \textit{City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n}, 429 U.S. 167 (1976), the Court indicated that governmental meetings open to the public are public forums. As one commentator noted, a governmental meeting is "clearly a medium through which views are expressed. . . ." Note, \textit{Access to Media}, supra note 103, at 1435-36 n.90. The location of the meeting is irrelevant. \textit{Id.}}
\footnote{186. See \textit{supra} notes 85-93, 105-07 and accompanying text.}
\footnote{187. See Stone, \textit{supra} note 84, at 251-52.}
\footnote{188. See \textit{supra} text accompanying notes 169-71.}
\footnote{189. See \textit{supra} note 51 and accompanying text.}
\footnote{190. See Price, \textit{supra} note 170, at 260. Some groups have spent as little as $9,000 to obtain the sufficient number of signatures to qualify an initiative. Lee, \textit{supra} note 51, at 101.}
is no more obligated to open its ballots to advisory questions than it is to operate a theatre. The public forum doctrine simply states that once the government opens its election ballots to the expression of ideas, it must do so in a manner consistent with the first amendment.

Under either a public forum analysis or an analysis derived from the candidate ballot access cases, the Illinois advisory question scheme undoubtedly would be invalidated. Although the Supreme Court, in its candidacy cases, has recognized a compelling state interest in protecting the integrity of the electoral process, the Court consistently has invalidated ballot access restrictions that impinge upon first amendment rights. In determining whether signature requirements are unduly burdensome, the Court has considered whether a reasonably diligent person could be expected to satisfy the requirement. As the Georges court emphasized, by requiring the signatures of twenty-five percent of the voters, Illinois has made it "practically impossible, at least in political subdivisions as populous as DuPage County . . . , to put advisory questions on the ballot." By keeping all citizen-sponsored questions off the ballot, the state clearly chose an unreasonable means to effectuate its interests in limiting ballot length and ensuring that citizen-sponsored questions enjoy sufficient community interest. A similar signature requirement for independent or third party candidates surely would be held unconstitutional.

Additionally, the signature requirement would not survive scrutiny under a public forum analysis. Although signature requirements can be considered a reasonable time, place, and manner restriction, a state certainly cannot make access to a forum virtually impossible. A variable percentage requirement that is determined by the population of the political subdivision,

192. See, e.g., Storer v. Brown, 415 U.S. 724, 730 (1974) (must have substantial regulations of elections to ensure that they are fair, honest, and orderly); Bullock v. Carter, 405 U.S. 134, 145 (1972) (state has an interest, if not a duty, to protect the integrity of its political processes).
194. Storer v. Brown, 415 U.S. 724, 742 (1974). "Past experiences will be a helpful, if not always an unerring guide: it will be one thing if . . . candidates have qualified with some regularity and quite a different matter if they have not." Id.; see also Mandel v. Bradley, 432 U.S. 173, 177-78 (lower court required to examine difficulty of obtaining signature requirements and the past success of independent candidates in achieving ballot access).
196. 691 F.2d at 301.
197. See, e.g., Williams v. Rhodes, 393 U.S. 23 (1968) (invalidating a statute that effectively excluded all independent and third party candidates from the ballot).
199. See Georges, 691 F.2d at 303 (Cudahy, J., dissenting) ("A state cannot simultaneously provide an avenue of political expression and burden its use with conditions that . . . can never be met.")).
for example, would be a more reasonable time, place, and manner restriction.200

The three-question limit, when combined with the first-come-first-served procedure and the ability of governmental units to place propositions on the ballot at will,201 also would be invalidated under either analysis. As the Georges dissent noted, the statutory scheme gives local governments the power to preempt any citizen-sponsored advisory question by simply submitting three government-sponsored questions before citizen groups have finished gathering the requisite signatures for their measures.202 The Supreme Court has long recognized that when the state confers a first amendment right, it must provide adequate procedural safeguards against unconstitutional government censorship.203 The Illinois advisory question statutes contain no such procedural safeguards.204

There are a number of possible alternatives to the present statutory scheme that would be more protective of first amendment rights while still allowing Illinois to maintain an orderly ballot. For example, Illinois could impose a four-question limit and allocate two questions to governmental units and two questions to citizen groups.205 Alternatively, a lottery system could be devised in which three questions would be randomly picked for ballot placement from all the questions submitted.206

The Georges decision is subject to criticism both for its interpretation of the Illinois advisory question laws and, more importantly, for its failure to recognize the first amendment implications of the Illinois advisory question

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200. In New Jersey, for example, the signatures of 25% of the registered voters are required to qualify an initiative for the ballot in a municipality with a population of less than 70,000. N.J. REV. STAT. § 40:69A-184 (1967). The signature requirement is only 15% in cities with a population of more than 70,000. Id.


202. 691 F.2d at 305 (Cudahy, J., dissenting).


204. The presence of the carryover provision, which permits any question prevented from appearing on the ballot in one election to be included on the ballot in the next election, see ILL. REV. STAT. ch. 46, § 28-5 (1981), does not obviate the unconstitutionality of the three question limit. As noted in the Georges dissent, the DuPage County Board submitted 11 questions for inclusion on the 1980 ballot just in time to prevent five citizen-sponsored tax reduction questions from appearing on the ballot. 691 F.2d at 303 (Cudahy, J., dissenting). Since only three questions can be placed on the ballot each election, the County Board could have prevented the citizen-sponsored questions from appearing on the ballot for four or five elections. The delay between the submission of an advisory question and its appearance on the ballot may dilute its effectiveness tremendously, especially if it concerns a timely issue. Moreover, a delay may make it difficult for sponsors of advisory questions to maintain the organizational structure and momentum necessary to mount an effective campaign for voter approval of the measure. Brief for Appellant at 22, Georges v. Carney, 691 F.2d 297 (7th Cir. 1982).

205. Georges, 691 F.2d at 305 n.7 (Cudahy, J., dissenting).

206. Brief for Appellant at 18, Georges v. Carney, 691 F.2d 297 (7th Cir. 1982).
restrictions. By disregarding explicit statutory language and by engaging in
circular reasoning to support its conclusion that no right existed in Illinois
to place advisory questions on the ballot, the Georges court deprived Il-
linois citizens of an effective means of political expression. Although the
court correctly noted that Illinois is under no obligation to provide for an
advisory question process, it failed to recognize that by enacting the ad-
visory question scheme, Illinois created a right protected by the first
amendment.

**Effect of Georges**

The recent efforts of the nuclear arms freeze movement to use the elec-
tion ballot as a means of publicizing its views increases the possibility of
future litigation involving ballot propositions. Other groups, encouraged by
the electoral success of the freeze questions, 207 may attempt to initiate their
own advisory questions and to challenge those ballot access restrictions that
prevent them from doing so. 208 Because Georges is one of the first cases
involving a constitutional challenge to a law regulating ballot propositions,
it is likely to influence the manner in which future challenges to these laws
are decided.

The effect Georges will have on future case law involving ballot proposi-
tions will depend upon which particular aspect of the decision courts follow.
Adoption of the Georges court's extremely deferential review of restrictions
on ballot propositions will adversely affect those who believe that advisory
questions are the most effective means of expressing their views. Even the
most restrictive ballot access laws would be upheld if courts were to apply
the Georges rationale that burdensome ballot restrictions are simply "an obli-
que way" of keeping all measures off the ballot. 209 These applications would
be inconsistent with the first amendment principle of guaranteeing a multipli-
city of expressive modes. 210 A failure to provide the same first amendment
protection to advisory questions that is afforded candidates for office will
eliminate a method of expression that a number of groups have found to be
particularly effective. 211

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207. Organizers of the nuclear freeze movement claim that their efforts to place freeze pro-
posals on ballots and the subsequent voter approval of most of these measures, were extremely
helpful in demonstrating widespread public support for a nuclear arms freeze to the Reagan
25, 1983, at 20. These organizers claim that the 1982 referendum victories pressured the Reagan
administration to begin arms-control negotiations with the Soviet Union. Id.

208. Because most states do not expressly provide for citizen-initiated advisory questions,
it is likely that the majority of attempts to place these measures on the ballot will involve
broad readings of statutes and constitutional provisions that provide for binding initiatives.
*See supra* notes 27-44 and accompanying text.

209. 691 F.2d at 301.

210. *See supra* notes 85-93, 105-07 and accompanying text.

211. *See supra* notes 32-44 and accompanying text.
In addition, the Georges court's reasoning, if adopted by other courts, may encourage legislative bodies to engage in the tactic of appearing to grant a benefit without actually doing so. For example, a city council may yield to citizen pressure by enacting an ordinance which ostensibly gives citizens the power to recall city officials and yet make the requirements for placing a recall measure on the ballot impossible to meet. As the Georges dissent indicated, this tactic permits a legislative body to circumvent "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."212

On the other hand, an adoption of the public forum dicta of Georges may afford advisory questions full first amendment protection. Under this analysis, once a state provides for advisory questions, either directly or through a broadly constructed binding initiative statute,213 a public forum would be deemed to have been created. Only valid time, place, and manner restrictions, such as reasonable signature requirements and ballot length limitations, could be upheld.214 This dicta in Georges may prove to be the most significant aspect of the decision. In cases in which a right to initiate advisory questions unquestionably has been granted, the Georges dicta provides courts with support for extending full constitutional protection to advisory questions.

**Conclusion**

The Georges decision represents one of the first judicial pronouncements on the constitutionality of restrictions on the initiative process. Accordingly, though the precise implications of Georges are difficult to ascertain, it undoubtedly will have a significant effect on future decisions involving both binding and advisory initiatives. The court's erroneous conclusion that Illinois citizens lack the right to initiate advisory questions on local ballots might encourage other courts to engage in the same legal fiction to uphold burdensome ballot access restrictions. Alternatively, the Georges court's introduction of the public forum theory to ballot access restriction analysis ultimately might result in added protection of advisory initiatives.

Nevertheless, the Georges court's unwillingness to scrutinize more closely the Illinois advisory question restrictions is unfortunate. By basing much of its decision on the specious conclusion that the state did not intend to grant its citizens the power to initiate advisory questions, the Georges court failed to recognize that the Illinois advisory question scheme impinged upon rights endemic to the American electoral process: the right to speak freely, the right to associate politically, and the right to vote effectively. While it may

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212. 691 F.2d at 304 (Cudahy, J., dissenting) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938)).
213. See supra note 44 and accompanying text.
be true that there are "few issues less suitable for judges than determining the manageable length of the ballot," it is equally true that there are few tasks more important for the judiciary than protecting our most cherished constitutional rights.

Joseph A. Moore

215. Georges, 691 F.2d at 302.