REFERENDUMS AND JUDICIAL INTERVENTION

The people of the city of Milwaukee, like those of other American cities, are confronted by the increasing demand for racial integration. In the forefront of this struggle is the effort toward the passage of an open-housing law. The conditions in Milwaukee, although receiving attention at the national level, are not unlike those which exist, or will exist, wherever open-housing legislation is sought.

Prior to the passage of the open-housing ordinance in Milwaukee, many attempts to secure favorable legislation had failed.[1] In the summer of 1967 its proponents began to demonstrate. The demonstrations, in part, took the form of marches into the south side of Milwaukee where much of the resistance to open housing is found.[2] In response to the marches the Milwaukee Citizens Civic Voice (MCCV) was formed as an opposition group. Under the sponsorship of the MCCV, signatures were acquired and petitions were filed, pursuant to Wisconsin statutes,[3] requesting the Common Council to adopt or to place on the ballot the following resolution:

> BE IT RESOLVED:
> That the Common Council of the City of Milwaukee SHALL NOT enact any ordinance which in any manner restricts the

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1 *See* Otey v. Common Council of Milwaukee, 281 F. Supp. 264 (E.D. Wis. 1968).

2 *Id.* at 11.

3 WIS. STAT. ANN. § 9.20 (1967):

Direct legislation

(1) A number of electors equal to at least 15% of the votes cast for governor at the last general election in their city may sign and file a petition with the city clerk requesting that an attached proposed ordinance or resolution, without alteration, either be adopted by the common council or be referred to a vote of the electors . . . .

. . . .

(3) . . . When the original or amended petition is found to be sufficient and the original or amended ordinance is in proper form, the city clerk shall so state on the attached certificate and forward it to the common council immediately.

. . . .

(4) The common council shall, without alteration, either pass the ordinance or resolution within 30 days following the date of the clerk's final certificate, or submit it to the electors at the next election . . . .

(8) City ordinances or resolutions adopted under this section shall not be subject to the veto power of the mayor and shall not be repealed or amended within 2 years of adoption except by a vote of the electors. The common council may submit a proposition to repeal or amend the ordinance or resolution at any election.

> right of owners of real property to sell, lease or rent private property.

The Common Council chose to submit the proposed resolution to the electorate in a forthcoming 1968 election. Complainant, James E. Otey, a Negro resident of the city of Milwaukee, alleged that the proposal violated his fourteenth amendment rights[4] and "[sought] a judgment declaring the above-quoted resolution unconstitutional and restraining the defendants [the Common Council of the City of Milwaukee, the Board of Election Commissioners, and the City Clerk] from acting upon it or submitting it to the electorate."[5] In *Otey v. Common Council of Milwaukee*[6] the district court, relying heavily on *Reitman v. Mulkey*,[7] declared the proposed resolution to be unconstitutional and restrained the Common Council from placing the proposal on the ballot.

The court in granting the injunctive relief adopted this language from *Tolbert v. Long*,[8]:

> Certainly the remedy to enjoin the holding of the election would be more direct, and better calculated to avoid complications, than to remain passive until the law has been declared before beginning a proceeding to test its constitutionality.[9]

"Direct" and as uncomplicated as the injunction may be, the propriety and wisdom of the relief are questionable.

I. Judicial Non-Intervention

Generally, the courts have been inclined to remain outside of what are essentially legislative processes.[10] It is thought that it is beyond the competency of the judiciary to exercise control by enjoining legislative proceedings.[11] This "hands-off" doctrine has been

4 Plaintiff alleges that he "has the right under the Fourteenth Amendment . . . and § 1982 Title 42, U.S.C. to acquire, enjoy, inherit, lease, sell, hold, convey and dispose of property free from discriminatory action . . . ." Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 266 (E.D. Wis. 1968).

5 Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 267 (E.D. Wis. 1968).

6 *Id.*

7 387 U.S. 369 (1967).

8 134 Ga. 292, 295, 67 S.E. 826, 827 (1910).

9 Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 279 (E.D. Wis. 1968).

10 *See, e.g.*, New Orleans Water Works Co. v. New Orleans, 164 U.S. 471 (1896); Rheinhardt v. Yancey, 241 N.C. 184, 84 S.E.2d 655 (1954); Brubaker v. Montgomery County Bd. of Elections, 71 Ohio L. Abs. 99, 128 N.E.2d 270 (C. P. 1955).

11 There are exceptions in which such proceedings are enjoined on the finding that procedural irregularities exist. *See, e.g.*, Williams v. Parrack, 83 Ariz. 227, 319 P.2d 989 (1957); Cincinnati v. Hillenbrand, 103 Ohio St. 286, 133 N.E. 556 (1921); Unlimited Progress v. Portland, 213 Or. 193, 324 P.2d 239 (1958).

ardently applied to the processes of initiative and referendum, which are clearly recognized as powers which are legislative in character.[12]

The *Otey* court, conceding that courts "may feel constrained from interfering with an initiative," attempts to distinguish between initiative and referendum, apparently in the belief that such labeling will alter the legal consequences.[13] However, although the proposed legislation has proceeded beyond the preliminary stages of the initiative, the court is not given a green light to exercise its authority. This ordinance was initiated by members of the electorate, and the principle of non-interference in the legislative process extends to an attempt to enact the measure in an election.[14] Whether the proposal is to be enacted by referendum or by direct legislation procedures such as the initiative, the process should not be enjoined by the courts.[15]

The appropriateness of the court's relief is subject to additional misgivings. Such relief by a court of the United States is appropriate

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12 Bardwell v. Parish Council of East Baton Rouge, 216 La. 537, 549, 44 So. 2d 107, 111 (1949):

> The rule that a court of equity will not interfere with proposed acts of legislation by a municipal council is, a fortiori, applicable to initiative and referendum elections for, in those elections, it is the people themselves who legislate . . . .

See Union v. Conlon, 19 App. Div. 2d 848, 243 N.Y.S.2d 484 (1964); Rheinhardt v. Yancey, 241 N.C. 184, 84 S.E.2d 655 (1954); Pfeifer v. Graves, 88 Ohio St. 473, 104 N.E. 529 (1913).

13 Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 275 (E.D. Wis. 1968). Certainly there is a distinction between initiative and referendum. *See* Fordham and Leach, *Initiative and Referendum in Ohio*, 11 OHIO ST. L.J. 495 (1950). However the doctrine of judicial non-interference has not hinged on this distinction, for both are considered legislative in character.

The court felt that the "stage of direct legislation has been reached which operationally resembles a referendum, rather than an initiative." Otey v. Common Council of Milwaukee, *supra* note 1, at 275. It infers therefore that there is no interference in the legislative process. This represents a most limited and unrealistic view of the "legislative process."

14 Bardwell v. Parish Council of East Baton Rouge, 216 La. 537, 44 So. 2d 107 (1949); Kilpatrick v. Searl, 366 Mich. 335, 115 N.W.2d 112 (1962); Barnes v. Barnett, 241 Miss. 206, 129 So. 2d 638 (1961); Pitman v. Drabelle, 267 Mo. 78, 183 S.W. 1055 (1916); Brubaker v. Montgomery County Bd. of Elections, 71 Ohio L. Abs. 99, 128 N.E.2d 270 (C.P. 1955); O'Neil v. Jones, 185 Tenn. 539, 206 S.W.2d 782 (1947); Glass v. Smith, 238 S.W.2d 243 (Civ. App.), *aff'd*, 150 Tex. 632, 244 S.W.2d 645 (1951).

15 Greater Detroit Homeowners Council v. Wayne Circuit Judge Moynihan, No. 50819-½ (Mich. Sup. Ct. May 5, 1964). Here, the Supreme Court of Michigan, in a situation much like that in *Otey*, stated that "the injunctive power of the judiciary may not be invoked properly to restrain exercise of the right of initiative in this state . . . ."

only "in a case of actual controversy within its jurisdiction."[16] The *Otey* court, in its attempt to dispel the defendant's claim of neutrality, focuses on the Common Council's act of placing the proposed resolution on the ballot.[17] The court thus infers from this act of the Council that a "controversy" exists. However, neither the "Common Council [nor] any if its members [was] responsible for circulation of the petitions."[18] It is indeed questionable that the mere act of placing the proposed resolution on the ballot instigates a "definite and concrete [controversy], touching the legal relations of parties having adverse legal interest."[19] The Council was acting pursuant to Wisconsin Statutes[20] in submitting the resolution to the electorate, and the finding of a judicial controversy constitutes an undue expansion of concepts of judicial jurisdiction.[21]

The constitutionality of the initiative was challenged before the election was held; therefore the proposed resolution clearly did not have the effect of law. It is certainly possible that, had the resolution been referred to the electorate, it would have been defeated.[22] In that event the Common Council would have been incapable of enforcing the "ordinance" against the plaintiff[23] and could not have been accused of encouraging or authorizing private discrimination.[24]

16 Declaratory Judgment Act, 28 U.S.C. § 2201 (1964). *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937); Muskrat v. United States, 219 U.S. 346 (1911). *Accord*, United States v. Raines, 362 U.S. 17, 21 (1960), where the Supreme Court states that it "has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies . . . ."

17 Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 274 (E.D. Wis. 1968).

18 *Id.*

19 Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).

20 WIS. STAT. ANN. § 9.20 (1967), quoted note 3 *supra.*

21 The Council could have enacted the resolution itself but chose to play a passive role by simply placing it on the ballot. *See* WIS. STAT. ANN. § 9.20 (1967) (4), quoted note 3 *supra.*

22 *See* Dubuisson v. Bd. of Supervisors of Elections, 123 La. 443, 49 So. 15 (1909), where the Court refused to enjoin a proposition because it could have been voted down and therefore would not become law.

23 The *Otey* Court bases its jurisdiction, in part, on the belief that should the resolution be enacted the common council would [refuse] to consider action in contravention of its terms. Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 274 (E.D. Wis. 1968). This is pure speculation, and in fact, the Council is authorized to ". . . submit a proposition to repeal or amend the ordinance or resolution any election." WIS. ANN. STAT. § 9.20 (1967) (8), quoted note 3 *supra.*

24 *See* Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 717 n.95 (1968): "Giving [Reitman v. Mulkey, 387 U.S. 369 (1967)] the broadest reasonable reading, however, it would only stand for the proposition that a state may not act for the purpose of encouraging or authorizing private discrimination."

The determination that the proposed resolution is in conflict with the Constitution disregards cardinal rules of constitutional and statutory interpretation.[25] The federal courts, in the litigation of "actual controversies . . . [have] rigidly adhered" to the principle of refusing "to anticipate a question of constitutional law in advance of the necessity of deciding it. . ."[26] On this basis the constitutional challenge is premature and is not "ripe" for judicial resolution. The court should wait until the resolution is enacted and has had a chance to operate.[27] Prior to the passage of the resolution, the court can only speculate as to the manner in which the litigants will be affected,[28] and the legal interests of the parties cannot be ascertained.

Judicial action is not warranted simply because the constitutionality of the proposed resolution is subject to doubt. In *Mulkey v. Reitman* the California Supreme Court observed that

> Prior to its enactment the unconstitutionality of Proposition 14 was urged to this court in Lewis v. Jordan, Sac. 7549 (June 3, 1964). In rejecting the petition for mandamus to keep that proposition off the ballot we stated in our minute order 'that it would be more appropriate to pass on these questions after the election . . . than to interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls . . .' But we further noted in the order that 'there are grave questions whether the proposed amendment to the California Constitution is valid under the Fourteenth Amendment to the United States Constitution . . .'[29]

In addition, it is doubtful that plaintiff satisfied the requirements of "standing."[30] The alleged injury was "experienced by

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25 *See* Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 198 (1952):

> The power of the courts, however final, can only be asserted in the course of litigation. Advisory opinions are forbidden, and reefs of self-imitation have grown up around the doctrine that courts will determine constitutional questions only in cases of actual controversy, when no lesser ground of decision is available, and when the complaining party would be directly and personally injured by the assertion of the power deemed unconstitutional . . . .

26 United States v. Raines, 362 U.S. 17, 21 (1960).

27 Pocket Veto Case, 279 U.S. 655 (1929); Pitman v. Drabelle, 67 Mo. 78, 183 S.W. 1055 (1916); Pfeifer v. Graves, 88 Ohio St. 473, 104 N.E. 529 (1913).

28 *Cf.* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

29 64 Cal. 2d. 529, 535, 413 P.2d 825, 829, 50 Cal. Rptr. 881, 885 (1966), *aff'd*, 387 U.S. 369 (1967). The *Otey* court appears oblivious to this language even though it relies so heavily on Reitman v. Mulkey, 387 U.S. 369 (1967).

30 "When [plaintiff] brings his action as a representative of the general public, the propriety of judicial intervention is sharply questioned." Jaffe, *Standing to Secure Judicial Review: Public Action*, 14 HARV. L. REV. 1265 (1961).

numerous members of his class" and was caused by a "pervasive and persistent climate of community behavior."[31] However, "the party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement and not merely that he suffers in some indefinite way in common with people generally."[32]

Although the *Otey* court classifies the injury as one which is "of a continuing nature,"[33] it would appear more realistic to view any injury which could result from the enactment of the resolution as being merely potential and speculative. Even if any injury does result from the enactment of the resolution, it is equally uncertain that it would be plaintiff who is harmed. In that case plaintiff is improperly asserting the rights of others.[34] It is certainly questionable whether plaintiff's claims warrant judicial intervention.[35]

Enjoining the holding of the election is not necessarily the proper remedy even in the event that there was a clear showing that the complainant would have been directly injured. Clearly this requirement must be met, since the resolution is being challenged on the grounds that it conflicts with the Constitution.[36] The general rule that courts will not restrain the holding of an election[37] is not without exception; however, even in those jurisdictions in which officials have been restrained from holding elections, the use of the equitable injunction is considered an extraordinary remedy and is granted only on a showing that the plaintiff will be irreparably injured.[38]

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31 Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 277 (E.D. Wis. 1968).

32 Frothingham v. Mellon, 262 U.S. 447, 448 (1923); *see* United Public Workers v. Mitchell, 330 U.S. 75 (1947).

33 281 F. Supp. at 277.

34 "Usually one may not complain of merely anticipated injury; and even if the injury complained of is real and immediate, it does not neccessarily warrant the assertion of the rights, constitutional or otherwise, of others." Lewis, *Constitutional Rights and the Misuse of Standing*, 14 STAN. L. REV. 433, 434 (1962).

35 For judicial non-intervention in the area of potential invasion of rights, *see* Arizona v. California, 283 U.S. 423 (1931); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

36 See text accompanying notes 32-34 *supra.*

37 Cases cited note 14 *supra.*

38 *See, e.g.*, Noble v. Lincoln, 153 Neb. 79, 43 N.W.2d 578 (1950); Rheinhart v. Yancey, 241 N.C. 184, 84 S.E.2d 655 (1954); O'Neil v. Jones, 185 Tenn. 539, 206 S.W.2d 782 (1947). *But see* Dulaney v. Miami Beach, 96 So. 2d 550 (Fla. 1957), in which it is suggested that the test is injury to the general public; *cf.* Kavanagh v. Coash, 347 Mich. 579, 81 N.W.2d 349 (1957), which suggests that an election will be enjoined if

The *Otey* court focuses on injury to the city of Milwaukee and not to the plaintiff.[39] It is certainly possible that the court is correct in asserting that further racial unrest would result from the "mere holding of the referendum." Nevertheless,

> even when it appears that the proposed ordinance would transcend the legislative powers of the municipal governing body, and would be unconstitutional or otherwise void, a court of equity will intervene and grant injunctive relief only when it appears that irreparable injury will result to the plaintiffs from the mere passage of the ordinance as distinguished from injury that may result from the carrying out or enforcement thereof. . . .[40]

It is difficult to see how plaintiff has met this burden of proving irreparable injury and the lack of an adequate remedy at law.[41]

In the absence of a successful appeal, the only course open to those whose resolution is enjoined from the ballot is to seek amendment to the Constitution. Eugene Rostow defends judicial review on the basis that it is not undemocratic since the people have the final responsibility over constitutional review through the process of constitutional amendment.[42] In a sense the injunction could create a constitutional crisis. Any attempt to amend the Constitution would be unnecessarily broad and would have repercussions far beyond the limited facts of this particular situation; and the effects would be far more damaging to the proponents of open housing than would an unfavorable vote in the election. On the other hand, the outcome of an election could be favorable to the Negro community.

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plaintiff's civil rights are threatened. However, in a fact situation like that in *Otey*, the Michigan Supreme Court denied an injunction. Greater Detroit Howeowners Council v. Wayne Circuit Judge Moynihan, No. 50819-1/2 (Mich. Sup. Ct. May 5, 1964).

39 Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 277-78 (E. D. Wis. 1968).

40 Rheinhardt v. Yancey, 241 N.C. 184, 188, 84 S.E.2d 655, 658 (1954).

41 Burden of proof is on plaintiff to show irreparable damage and lack of an adequate remedy at law. Theurkauf v. Miller, 153 Conn. 159, 214 A.2d 834 (1965). *See* O'Neil v. Jones, 185 Tenn. 539, 206 S.W.2d 782 (1947) (injunction denied on ground that plaintiff has an adequate remedy to test the constitutional issue after the election). *See also* Kilpatrick v. Searl, 366 Mich. 335, 115 N.W.2d 112 (1962); Union v. Conlon, 19 App. Div. 2d 848, 243 N.Y.S.2d 484 (1963). In Public Service Comm. of Utah v. Wykoff, 344 U.S. 237, 247 (1952), the Court said:

> It is the state courts which have the first and last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the state. We have disapproved anticipatory declarations as to state regulatory statutes . . . .

42 Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 197 (1952).

Temperaments have been known to change with the passage of time, and the pre-election campaign could have the educational effect on the dissident groups of strengthening the position of the proponents of open housing. Admittedly, this is only conjecture, but it is clear that the injunction at this early stage renders the question moot and prematurely encourages constitutional amendment which could have disastrous effects on future open-housing legislation.

The *Otey* court relies on the maxim that "the prinicple of judicial non-interference is one of prudence, not of power."[43] However, the exercise of "power" by the court may not be the proper course, for it appears that prudence is warranted.[44] One need not take the position that the " 'will of the electorate' should invariably prevail"[45] to adopt the view that the facts presented in *Otey* create a situation which calls for the exercise of judicial self-restraint. It is not the function of the courts to indulge in an inquiry into the "wisdom" of the proposed resolution.[46]

The *Otey* court recognizes the problems which face the inner city of Milwaukee and seeks to attack its evils by enjoining the election. This is, nevertheless, a situation which demands the exercise of judicial discretion. This is not to say that the court must operate in a vacuum, oblivious to the need for social reform. Admittedly, the line which separates a progressive court from one which is excessive is most difficult to ascertain. An imaginative, progressive and independent judiciary is the goal, but "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. . . ."[47]

II. Free Speech

The situation may not only be one which demands "prudence," but also one in which the court is without "power" to act. In addition to the compelling case for the use of judicial self-restraint, the premature enjoining of the election raises first amendment issues.

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43 Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 276 (E. D. Wis. 1968).

44 *Cf.* Rostow, *The Democratic Character of Judicial Review,* 66 Harv. L. Rev. 193, 198 (1952): "Judicial review is . . . not to operate as a continuously active factor in legislative or executive decisions."

45 Otey v. Common Council of Milwaukee, 281 F. Sup. 264, 275 (E. D. Wis. 1968). The court attacks this as a "fallacious assumption."

46 United States v. Butler, 297 U.S. 1 (1936) (dissenting opinion). *See* L. Hand, The Bill of Rights, The Oliver Wendell Holmes Lectures 56 (1958).

47 B. Cardozo, The Nature of the Judicial Process 141 (1921).

The court fears that the "prospect of a vote on the referendum question would further galvanize public opinion and elicit heated polemicizing, which in turn would be augmented by fund raising, billboard advertising, and all the other trappings of a full-fledged election campaign."[48] However, it is difficult to comprehend the manner in which the "campaign bally-hoo" would differ from that of a campaign in which the proponents of open housing were sponsoring an open-housing resolution. With the tables thus turned, it is difficult to imagine the court's enjoining the election. If community reaction had been the test, the civil rights movement never would have gotten off the ground.

The courts in fact have been inclined to protect those who create dissent and disrupt community relations.[49] In addition, the courts have been known to throw a lighted fuse of their own "into a keg of gunpowder."[50] It therefore appears that the court has assigned the role of villain to those who favor the proposed resolution. The court's values with regard to open housing, rather than its fear of "the long hot summer" has shaped its decision. Despite the court's honorable intention, it is laying the groundwork for a rule which invites those with adverse political interests to seek court orders to restrain the passage of legislation which they find distasteful.[51]

The political debate which would accompany the election, even if it instigates racial strife, must be judged by first amendment standards.[52] The *Otey* court's remedy is inconsistent with the design of the first amendment. The first amendment attempts to achieve "the widest possible dissemination of information from diverse and antagonistic sources."[53] The injunctive relief makes effective political action impossible and renders debate on the issue of the resolution

48 Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 278 (E. D. Wis. 1968).

49 *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949); Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

50 *See* Brown v. Topeka Bd. of Educ., 347 U.S. 483 (1954).

51 Letter from Ohio State University Professors in Detroit Free Press (1964).

52 *See* New York Times v. Sullivan, 376 U.S. 254, 269 (1964):

> Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity . . . and the various other formulae for the repression of expression that have been challenged in this court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

By analogy, enjoining the election, out of fear of the consequences of the debate, is a formula for the "repression of expression."

53 Associated Press v. United States, 326 U.S. 1, 20 (1945). *See* New York Times v. Sullivan, 376 U.S. 254 (1964).

academic and moot. The relegation of the debate to such a lowly status, incapable of resulting in social change, does not satisfy the standards of the first amendment. Instead, the Constitution protects free political discussion which is afforded the opportunity to influence change through the political processes.[54] The protection extends to the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[55] The proponents and opponents of the proposed resolution should be afforded not only the opportunity of "abstract discussion," but of "vigorous advocacy" as well.[56] This right to debate for political and social changes is more than simply a personal liberty, it is essential to the "maintenance of our political system and an open society."[57]

The injunction restraining the election certainly has the effect of limiting debate on a "volatile" issue, but the right to effective political debate is not restricted to these situations in which public anger will not be aroused.[58] The election should be conducted despite the fact that the issue is highly "volatile" and that the debate will invoke "unsettling consequences." "There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."[59]

The Otey court claims that the "educative value of the refer-

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54 *See* Stromberg v. California, 283 U.S. 359, 369 (1931). *See also* N.A.A.C.P. v. Button, 371 U.S. 415 (1963), where the Court attacks the use or threat of use of criminal sanctions to deter the exercise of first amendment rights. Although the injunction in the *Otey* case does not deter protected activity to the extent that criminal sanctions do, it would seem that debate is clearly discouraged.

55 Roth v. United States, 354 U.S. 476, 484 (1957).

56 N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963). Here the N.A.A.C.P. "exercised their first amendment rights through litigation." In *Otey* the proponents of the proposed resolution exercise their rights through an election.

57 Time Inc. v. Hill, 385 U. S. 374, 389 (1967). *Accord,* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). *See* Cantwell v. Connecticut, 310 U.S. 296, 340 (1940).

58 *See* Cox v. Louisiana, 379 U.S. 536 (1965); Terminiello v. Chicago, 377 U.S. 1 (1949). In *Terminiello* the petitioner was convicted of violating a municipal ordinance making breaches of the peace a criminal offense. The trial court instructed the jury that any misbehavior constitutes a breach of the peace which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance which violates the ordinance." The Supreme Court reversed, saying: "It is the function of free speech to invite dispute . . . or even to stir the public to anger . . . . It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." 337 U.S. at 3-4.

59 Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

endum campaign" is far outweighed by the "potential dangers" of holding the election.[60] However, this balancing of values is not the test by which to measure the standards of the first amendment. The first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[61] If the courts were permitted to block every election campaign in which it was felt that the "potential dangers" outweighed the "educative value," the first amendment would be rendered unduly subservient to the whim of the judiciary.

The determination of the unconstitutionality of the substance of the proposed resolution was clearly premature.[62] In this situation[63] the courts are without power to block the political process by a case-by-case analysis of the utility of the campaign or its educative value. Such a test improperly places the court in the role of a political censor.[64]

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60 Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 278 (E. D. Wis. 1968).

61 L. Hand, J., in United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

62 For reasons of "ripeness," "no case or controvery," "standing," and "prudence."

63 "This situation" refers to one in which the constitutionality of the proposed resolution is only questionable or one in which the proposal is clearly constitutional. Admittedly, if this were a situation in which the proposed resolution were clearly unconstitutional on its face, the first amendment question would be much more difficult. The "effective political debate" argument would lose much of its relevance for it would be argued that such an ordinance could never become "effective legislation." Perhaps in that situation the "educative value" could be measured against the "potential dangers." However, the dangers inherent in this test are clear; first amendment privileges could be denied indirectly through an attack on the substance of the proposed ordinance.

64 Assuming the role of a political censor, the *Otey* court inquires into the motives of the MCCV, the group sponsoring the proposed resolution. The *Otey* court determines that the MCCV is "opposed" to open-housing legislation at all levels and applies this to the statement in Reitman v. Mulkey, 387 U.S. 369, 373 (1967), that for the purpose of constitutional analysis, the enactment must be construed with "concern for its immediate objective . . . viewed in the light of its historical context and conditions." It is difficult to see how *Reitman* stands for the proposition that one cannot oppose open housing. Rather, the *Reitman* court, after viewing the proposal, the campaigning, the election result, the enactment, and its application and mode of enforcement was able to say that the constitutional amendment was unconstitutional. The court was able to view the "objective" of Proposition 14 (CAL. CONST. art. I, § 26 (1964), in the light of an historical background which did not permit one to incite discrimination. Mulkey v. Reitman, 64 Cal. 2d 529, 531-36, 413 P.2d 825, 827-30, 50 Cal. Rptr. 881, 883-86 (1966), *aff'd* 387 U.S. 369 (1967).

III. CONCLUSION

The Negro's assimiliation into the mainstream of American life "will require the most radical changes in the whole structure of American society."[65] Residential segregation is perhaps the most pressing problem facing our modern cities.[66] As Dr. Hauser stated at the trial, open-housing legislation is "probably the most important symbol on the horizon with respect to the next steps in the advancement of the Negro towards equality of opportunity and full citizenship in these United States."[67]

The role which the courts are to assume in this area is still not clearly defined. The *Otey* court, after a thorough inquiry into the situation in Milwaukee, chose to involve itself directly in the political thicket. Other courts have proceeded more slowly and have chosen a more cautious approach "in such an emotionally involved field as race relations."[68]

In addition, the requirements, whether permissive or mandatory, which courts have adhered to, such as "standing," "ripeness," "case or controversy" and other rules of constitutional interpretation are not mere technicalities to be discarded should a court be so inclined. It is only too easy to visualize a situation in which the "tables are turned" and an injunction is sought to restrain an election on an open-housing ordinance, sponsored by the Negro community, on the grounds that racial or community disharmony will result and that it would conflict with the alleged "constitutional right" to sell property to whom one pleases. A consistent application of the principles enunciated by the *Otey* court could result in restraining such an election.

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65 C. SILBERMAN, CRISIS IN BLACK AND WHITE 43 (1964).

66 "Residential segregation of Negroes has actually increased over the past several decades, despite the improvements in their economic position." *Id. See also* F. REDL AND D. WINEMAN, CONTROLS FROM WITHIN: TECHNIQUES FOR THE TREATMENT OF THE AGGRESSIVE CHILD 42-48 (1952), where the authors describe the psychological effect that architecture, space, and such things as housekeeping have on a child.

67 Testimony of Dr. P. Hauser, Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 270 (E. D. Wis. 1968).

68 Porter v. Oberlin, 1 Ohio St.2d 143, 152, 205 N.E.2d 363, 369 (1965). *Accord*, Chicago Real Estate Bd. v. Chicago, 36 Ill.2d 530, 224 N.E.2d 793 (1967). *See* Greater Detroit Homeowners Council v. Wayne Circuit Judge Moynihan, No. 50819½ (Mich. Sup. Ct. May 5, 1964); State *ex. rel.* Hunter v. Erickson, 12 Ohio St.2d 116, 233 N.E.2d 129 (1967) where the Supreme Court of Ohio approved the special classification of any ordinance which "regulates the use, sale, advertisement, transfer . . . lease . . . of real property on the basis of race . . ." so that it must first be approved by the electors, rather than permitting such an ordinance to become effective "as do other ordinances."

The first amendment protects effective political debate; and "free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts."[69] Community harmony cannot be achieved, nor is it "worth achieving by sacrificing free and unfettered political debate."[70]

The problem necessitates a clarification of the role which the courts will assume in this radical but delicate process of change. This is not to say that exact guidelines need be articulated, nor is it to say that vital needs of the Negro are to be sacrificed. Nevertheless, the courts must exercise self-restraint, for

> it certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve. Nothing, I submit, could warrant such a censorship except a code of paramount law that not only measured the scope of legislative authority but regulated how it should be excercised.
>
> Each of us must in the end choose for himself how far he would like to leave our collective fate to the wayward vagaries of popular assemblies. . . . For myself it would be most irksome to be ruled by a bevy of Platonic Guardians. . . .[71]

Jeffrey E. Fromson

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69 Thomas v. Collins, 323 U.S. 516, 537 (1945).

70 Letter from Ohio State University Professors in Detroit Free Press (1964).

71 L. HAND, THE BILL OF RIGHTS, THE OLIVER WENDELL HOLMES LECTURES 13 (1958).