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JUDGE WISDOM AND VOTING RIGHTS: THE JUDICIAL ARTIST AS SCHOLAR AND PRAGMATIST

PHILIP P. FRICKEY*

In the preface to his definitive study of Southern politics in the era immediately following World War II, V.O. Key stated presciently that “[t]he South is our last frontier. In the development of its resources, human and natural, must be found the next great epoch of our national growth. That development, in turn, must in large measure depend on the contrivance of solutions to the region’s political problems.”

His work concluded that “[t]he race issue broadly defined . . . must be considered as the number one problem on the southern agenda. Lacking a solution for it, all else fails.”

Twenty-seven years later two other commentators hailed a transformation of Southern politics “accompanied by social and economic change more rapid than elsewhere in the country.”

Another five years later, one of these commentators returned to the theme of a New South “emerging from [a] relatively peaceful civil rights revolution” fostered by the rulings of a “heroic band of judges” of the United States Court of Appeals for the Fifth Circuit.

Of these judges, John Minor Wisdom was without doubt the “scholar,” a judge who “elevat[ed] the craft of judicial opinion-writing to an art form.”

As two legal scholars have noted, “it may be said that Judge Wisdom created the ‘Wisdom opinion’: a characteristically long, detailed exposition of historical development and legal precedent, with particular attention to factual

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1. V.O. Key, Jr., Southern Politics x (1949).
2. Id. at 675.
5. Id. at 26.
detail adding local color, all set in highly articulate prose.”7

This article focuses on one cornerstone of the civil rights revolution to which Judge Wisdom contributed many important and scholarly opinions—the expansion of the franchise to Southern blacks and others shut out of the political process.8 Judge Wisdom’s voting rights decisions deserve careful scrutiny for a variety of reasons. They are important in and of themselves, for they were crucial in opening the Southern political process to minorities and others. More generally, they provide case studies on putting democratic theory into practice, and they illustrate that the courts and Congress can work together in law reform. Some of his more recent decisions address issues at the heart of contemporary voting controversies. In the end, his voting rights decisions, when viewed as a whole, reveal a judicial artist who is at once both scholarly and pragmatic. The opinions are a microcosm of both the exhilarating possibilities of judicial review and of the difference between judicial scholarship and academic legal scholarship.

I. JUDGE WISDOM AND VOTING RIGHTS: A RESTROSPECTIVE

Judge Wisdom’s 1963 opinion in United States v. Louisiana,9 which struck down the Louisiana “understanding test” as a prerequisite to voting, is his most important voting opinion. Indeed, because it used masterly judicial scholarship to achieve a goal of immense practical importance, under any standard it surely ranks with United States v. Jefferson County Board of Education10 as among his most important civil rights decisions. Scholarship of such high quality is timeless, and accordingly commentators have not tired of praising the style of United States v. Louisiana. One wrote rather recently that the opinion reads like a first-rate doctoral dissertation in its analysis of the

7. Id.
8. J. Bass, supra note 4, and F. Read & L. McGough, supra note 6, provide good accounts of the role of the Fifth Circuit in general, and of Judge Wisdom in particular, in expanding the civil rights of Southern blacks. Both books discuss some of Judge Wisdom’s important voting decisions as well as his other major civil rights cases that were handed down in the 1960’s and 1970’s. Neither book attempts, however, to canvass the complete array of his voting decisions.
10. 372 F.2d 836 (5th Cir. 1966), aff’d and modified en banc, 380 F.2d 385 (5th Cir.), cert. denied, 389 U.S. 840 (1967).
history and development of direct and indirect methods to eliminate or reduce black political power in Louisiana. Wisdom's forceful style and masterful ability to create a visual image of a legal abstraction instilled within that opinion the power of an idea whose time had come.

The only unfortunate aspect of United States v. Louisiana is that its brilliant light has obscured a number of other important voting opinions authored by Judge Wisdom. Thus, although it is proper to start an overview of Judge Wisdom's contributions to voting rights with a discussion of United States v. Louisiana, that opinion is only a piece of a larger structure that must be viewed in full.

A. Minority Access to the Ballot: United States v. Louisiana and the Voting Rights Act

The first step in extending meaningful political power to blacks was elementary: they had to obtain access to the ballot. Several states and localities used a variety of tests or devices as prerequisites to voting that had the effect of excluding blacks from the political arena. In Louisiana, the state constitution required that, as a prerequisite to registration for voting, the applicant "be able to understand and give a reasonable interpretation of any section of [the Federal or the Louisiana] Constitution when read to him by the registrar." In United States v. Louisiana, an opinion stretching forty-four pages in the Federal Supplement, Judge Wisdom thoroughly canvassed the history of racial discrimination in voting in Louisiana, pulling no punches along the way. He demonstrated that, "since the Supreme Court's demolition of the white primary, the interpretation test has been the highest, best-guarded, most effective barrier to Negro voting in Louisiana." He showed that the interpretation test had been adopted to disenfranchise blacks and that discriminatory application of it by registrars had accomplished that purpose. Illiterate or uneducated whites were often allowed to vote because the registrar failed to administer the

12. La. Const. of 1921, art. VIII, § 1(d) (as amended 1960).
test, or gave the applicant an easy constitutional provision to interpret, or accepted a woefully inadequate answer. Conversely, "[i]n many parishes the registrar is not easily satisfied with constitutional interpretations from Negro applicants."  

The discriminatory taint of the law could not be remedied by an injunction requiring a color-neutral application of the test in the future. "[S]ome laws may never win constitutional approbation," Judge Wisdom wrote, because they have no rational relation to a legitimate governmental objective and because the unrestrained discretion without standards, they grant an officeholder makes them incurably subjective, unreasonable, and incapable of equal enforcement. The understanding and interpretation test is such a law. . . . The vices cannot be cured by an injunction enjoining its unfair application.  

Judge Wisdom then turned to the newly created "citizenship test," which he noted was "apparently tailored to fit this case should the interpretation test be held unconstitutional." This test purported to be an objective measurement of a potential voter's understanding of the American system of government in general and of specific constitutional provisions in particular. It was designed to be substantially more difficult to pass than the old understanding test. Judge Wisdom recognized that "the new test, or any other procedure more demanding than those previously applied to the white applicants, will have the effect of perpetuating the differences created by the discriminatory practices of the past; . . . the necessary effect of the new law, regardless of its fair facade, is built-in unconstitutional discrimination." "The cessation of prior discriminatory practices," he continued, "cannot justify the imposition of new and onerous requirements, theoretically applicable to all, but practically affecting primarily those who bore the brunt of previous discrimination." In creating a remedy for this situation, Judge Wisdom turned from scholarly historiography to innovative pragmatism. Reshaping the equitable power of the federal courts

14. Id. at 356.
15. Id. at 391-92.
16. Id. at 392.
17. Id. at 393.
18. Id.
into a sword to remedy past wrongs rather than just a shield against the repetition of wrongful past conduct, Judge Wisdom held: "An appropriate remedy . . . should undo the results of past discrimination as well as prevent future inequality of treatment. A court of equity is not powerless to eradicate the effects of former discrimination. If it were, the State could seal into permanent existence the injustices of the past." 19

Accordingly, Judge Wisdom enjoined the use of the citizenship test in locales where the interpretation test had been used until the State either conducted a general re-registration of all voters or until the discriminatory effect of the interpretation test "has been vitiated to the satisfaction of the court." 20 He stressed that "this decision does not touch upon the constitutionality of the citizenship test as a state qualification for voting," 21 but that the injunction was required for "opening the rolls for those to whom the rolls were illegally closed." 22

*United States v. Louisiana* was in many respects a landmark opinion. Its thorough, scholarly consideration of the history of black disenfranchisement provided a devastating indictment of the unconstitutional practices prevalent in the South. Its affirmance by the Supreme Court 23 wiped out the understanding test, one of the most discriminatory prerequisites to voting. 24 That affirmance also constituted the first Supreme Court endorsement of a "reparative injunction"—an order seeking to undo the present effects of past discrimination, rather

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19. Id.
20. Id. at 397.
21. Id.
22. Id. It is not surprising that Judge Wisdom essentially avoided the issue whether the facially neutral citizenship test was void in all circumstances either because it was adopted for discriminatory reasons or had a demonstrably discriminatory effect. The roles of discriminatory intent and discriminatory effect in constitutional law were unclear during the era in which *United States v. Louisiana* was decided, and some confusion remains to this day. See infra text accompanying notes 36-57, 102-14. The "freezing relief" approach adopted in cases such as *United States v. Louisiana* allowed the lower courts to effect meaningful relief without fully addressing these questions.
24. To be sure, the demise of such barriers to the ballot did not prevent local officials from preventing blacks from voting by the use of threats, intimidation, and bogus criminal arrests and prosecutions. In *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967), Judge Wisdom recounted and attempted to remedy the egregious interferences with black voting in Selma, Alabama.
than just to prevent future repetition of prior illegal conduct.\textsuperscript{25} Because the class of persons benefited by a reparative injunction is not identical to the class of persons who had been directly injured by the past discriminatory acts,\textsuperscript{26} \textit{United States v. Louisiana} is a direct ancestor of affirmative action decrees.

In addition, the dual aspects of \textit{United States v. Louisiana}—outlawing unconstitutional prerequisites to the ballot, and then preventing the use of even facially fair prerequisites to voting if their operation would freeze past discrimination in place—provided a model for key provisions of the Voting Rights Act of 1965.\textsuperscript{27} That statute outlaws any "test or device" as a prerequisite to voting in jurisdictions that fall within its scope and prohibits a covered jurisdiction from altering voting arrangements unless it convinces either the United States District Court for the District of Columbia or the Department of Justice that the change is neither discriminatorily motivated nor has a discriminatory effect.\textsuperscript{28} Indeed, Judge Wisdom's metaphorical


In \textit{United States v. Palmer}, 356 F.2d 951 (5th Cir. 1966), Judge Wisdom had a later opportunity to exercise the unique equitable powers recognized in \textit{United States v. Louisiana} to uproot past discrimination that would otherwise have been frozen in place by facially color-neutral acts. In that case, voting registrars in two Louisiana parishes closed their offices to all those applying to register. The registrars asserted that they had a hopeless dilemma: they noted that under Louisiana law they were required to give applicants the understanding test and citizenship test, but that the injunction in \textit{United States v. Louisiana} compelled them not to do so. Judge Wisdom's opinion called this excuse a "sham" in light of the supremacy clause of the Constitution. \textit{Id.} at 952. He stated that, "in a parish where most white persons of voting age are registered and most Negroes of voting age are not registered, we cannot take seriously a registrar's wry defense that since the office was closed to applicants of both races, there was no discrimination." \textit{Id.} As in \textit{United States v. Louisiana}, Judge Wisdom concluded that "freezing relief" was necessary, and accordingly his opinion contained a model final decree for the district court to enter on remand that enjoined the registrars from closing their offices.

\textsuperscript{26} See Fiss, supra note 25, at 394-97.


\textsuperscript{28} For an overview, see Frickey, \textit{Majority Rule, Minority Rights, and the Right to Vote: Reflections Upon a Reading of Minority Vote Dilution}, 3 Law & Inequality: J. Theory & Prac. 209, 210-13 (1985).
rhetoric in *United States v. Louisiana* concerning the understanding clause—in which he likened it to a "wall stand[ing] in Louisiana between registered voters and unregistered, eligible Negro voters,"29 a "wall, built to bar Negroes from access to the franchise," that "must come down"30—reportedly was referred to constantly by Justice Department lawyers who were drafting the Voting Rights Act.31 Thus, as a dissertation of scholarly history, an example of pragmatic remedial innovation, and a model for statutory reform, *United States v. Louisiana* is at the pinnacle of the judicial art.

B. Minority Vote Dilution

In 1981, during its consideration of whether to renew the Voting Rights Act, Congress stated that it "has been hailed as the most important civil rights bill enacted."32 Black voter registration has increased markedly because of the Act,33 and the requirement that covered jurisdictions may change their electoral schemes only after first proving that the alteration has neither a discriminatory purpose nor a discriminatory impact has largely prevented them "from 'undo[ing] or defeat[ing] the rights recently won' by Negroes."34 As originally adopted in 1965, however, the Act did not attack pre-existing electoral structures, such as at-large electoral schemes, that have a discriminatory effect upon minority voting strength.35 Judge Wisdom heard

30. *Id.* at 356.
31. *See* J. Bass, *supra* note 4, at 52 (quoting an interview with John Doar, former Assistant Attorney General for the Civil Rights Division of the Department of Justice); *see also* O. Fiss, *supra* note 25, at 100 n.30.
33. *Id.* at 7-11.
35. As I have explained elsewhere:
Perhaps the most obvious electoral structure that weakens minority voting power is the use of at-large, rather than ward, electoral structures in a jurisdiction in which racial bloc voting is prevalent and the minority community is geographically concentrated. In such a jurisdiction, the candidates supported by the white bloc-voting majority are assured of winning all offices, and the candidates supported only by the bloc-voting minority community have no chance of success. Conversely, if ward elections were held, the geographically concentrated racial minority would have a far better opportunity to elect at least some candidates of their choice.

Frickey, *supra* note 28, at 212. For an overview of other electoral devices that may dilute the minority vote, see, *e.g.*, Rome v. United States, 446 U.S. 156, 183-85 (1980); City of
several challenges to these devices on constitutional grounds. His views failed to prevail in either the Fifth Circuit or the Supreme Court, but they later carried the day in Congress.

I have examined the history of constitutional challenges to electoral schemes that dilute the minority vote elsewhere, and for present purposes only a brief overview is necessary. In White v. Regester, the Supreme Court seemingly held that the equal protection clause protected minorities against electoral schemes that had a demonstrably discriminatory effect upon their voting strength. Three years later, however, in Washington v. Davis, the Court held that a facially neutral law that had a discriminatory impact upon the minority violated the equal protection clause only if it were proved to be tainted by a discriminatory purpose. The effect, if any, of Washington v. Davis upon the apparent holding of White v. Regester—as well as upon the Fifth Circuit’s interpretation of White in Zimmer v. McKeithen—was the central issue in four companion cases argued in 1977 before a panel of the Fifth Circuit that included Judge Wisdom. His views, the differing approach of the two other members of the court, the Supreme Court’s subsequent reversal, and Congress’s ultimate resolution of the controversy are worth considering in some detail.


36. See Frickey, supra note 28, at 213-16.
38. The Court in White v. Regester stated:
   The plaintiffs’ burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.
   Id. at 766.
40. 485 F.2d 1297 (5th Cir. 1973) (en banc), aff’d on other grounds sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam). This opinion identified certain elements of circumstantial evidence, which became known as the “Zimmer factors,” used in assessing whether minority vote dilution had occurred. See 485 F.2d at 1305-07.
41. For earlier vote-dilution opinions by Judge Wisdom, see Parnell v. Rapides Parish School Bd., 563 F.2d 180 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1978); Lipscomb v. Jonsson, 459 F.2d 335 (5th Cir. 1972).
The Fifth Circuit cases are *Nevett v. Sides,*42 *Bolden v. City of Mobile,*43 *Blacks United For Lasting Leadership v. Shreveport,*44 and *Thomasville Branch of NAACP v. Thomas County.*45 In *Nevett,* the principal opinion, the majority of the Fifth Circuit panel46 made a herculean effort to harmonize *White, Washington v. Davis,* and *Zimmer.* The majority interpreted all of these cases as requiring proof of discriminatory purpose. The court then held that the factors identified in *Zimmer* for measuring unconstitutional minority vote dilution "provide a factual basis from which the necessary intent may be inferred."47

In one of his most important separate opinions, Judge Wisdom disagreed on all counts. He concluded—correctly, I believe48—that protection against minority vote dilution is guaranteed by the fifteenth amendment and, under *White,* is also a fundamental right secured by the equal protection clause of the fourteenth amendment.49 Accordingly, in his view, proof of a demonstrable discriminatory effect was sufficient to invalidate a facially neutral electoral scheme. In criticizing the majority's requirement of discriminatory intent, Judge Wisdom stressed that in some cases intent "may be unprovable."50 Moreover, he continued, this inquiry requires federal judges to ask a question they are loath to answer affirmatively.51 He further asserted that even if the vagueness of the equal protection clause counsels against a construction that outlaws discriminatory impacts in the context of voting, protection against such discriminatory effects fits comfortably within the "less expansive" language of the

42. 571 F.2d 209 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980).
43. 571 F.2d 238 (5th Cir. 1978), rev'd, 446 U.S. 55 (1980).
44. 571 F.2d 248 (5th Cir. 1978).
45. 571 F.2d 257 (5th Cir. 1978).
46. Judge Tjoflat wrote the majority opinion in *Nevett,* in which Judge Simpson joined.
47. *Nevett,* 571 F.2d at 223.
49. *Nevett,* 571 F.2d at 231-36 (Wisdom, J., specially concurring).
50. *Id.* at 233.
51. Judge Wisdom stated:
The judicial branch defers to the coordinate legislative branch. And federal judges have been educated to respect the States. It comes hard for a federal judge, searching for something as tenuous as legislative motive, to say that a State or local governing body in bad faith devised a scheme to deny or to dilute voting rights guaranteed by the Constitution.

*Id.*
fifteenth amendment. Finally, he contended that section 2 of the Voting Rights Act ought to be interpreted as barring minority vote dilution caused by the discriminatory impact of an electoral structure.

In City of Mobile v. Bolden, a companion case to Nevett, Judge Wisdom's views were echoed in the Supreme Court—by one Justice. A plurality of four Justices concluded that vote dilution claims under either the fourteenth or the fifteenth amendments were subject to a requirement of proof of discriminatory purpose far stricter than that proposed in the Fifth Circuit's majority opinion. The other Justices took a variety of differing approaches.

This decision outraged the civil rights community, and in 1982 Congress responded by adopting an amendment to section 2 of the Voting Rights Act that, in effect, overruled Mobile. This statute now prohibits any electoral device "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."

52. Id. at 234-36. The fifteenth amendment, of course, flatly states that the "rights of citizens of the United States to vote shall not be denied or abridged ... on account of race." U.S. Const. amend. XV, § 1 (emphasis added).


55. See id. at 103-41 (Marshall, J., dissenting).

56. Id. at 58-80 (plurality opinion of Stewart, J., joined by Burger, C.J., and Powell and Rehnquist, JJ.). The plurality concluded that the reliance by the majority of the Fifth Circuit on the Zimmer factors was "inconsistent with ... Washington v. Davis. ... Although the presence of the indicia relied on in Zimmer may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose." Id. at 73.

57. Justice Blackmun and Justice Stevens concurred in the judgment and wrote separate opinions. Id. at 80-83 (Blackmun, J., concurring in the result); id. at 83-94 (Stevens, J., concurring in the judgment). For a discussion of Justice Stevens's views, see infra text accompanying notes 162-68. Justice White dissented, asserting that plaintiffs had carried their burden of proving the presence of discriminatory intent. Mobile, 446 U.S. at 94-103 (White, J., dissenting). Justice Brennan stated that he agreed with Justice Marshall that no showing of discriminatory intent was required, and with both Justices White and Marshall that if such a showing were required the plaintiffs had met their burden of proof. Justice Brennan did not, however, join either the White or the Marshall dissents. Id. at 94.


59. 42 U.S.C. § 1973(a) (emphasis added). The next subsection of the statute provides that a violation of this standard is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political
history reveals that Congress intended the amended statute to operate much the same way as Judge Wisdom’s opinion in *Nevett* interpreted the equal protection clause, the fifteenth amendment, and the earlier version of the Voting Rights Act. Indeed, the committee report concerning the Senate bill that Congress subsequently enacted into law as the 1982 amendment expressly concluded that Judge Wisdom, and not the plurality of the Supreme Court in *Mobile*, had correctly interpreted *White v. Regester*, and that the amendment to section 2 of the Act “is necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth [Amendment] rights.”

Judge Wisdom has long believed that racial discrimination can be eradicated only by the combined efforts of the judiciary, the Congress, and the Department of Justice. Judge Wisdom not only spurred Congress to attack the problem with the 1982 amendment to the Voting Rights Act, he later had the opportunity, in an action brought by the Department of Justice, to write a federal appellate decision declaring the amendment constitutional and defining its scope. That decision is *United States v. Marengo County Commission*. It recognizes Congress’s broad authority to enforce the fourteenth and fifteenth amendments by redressing the present effects of past discrimination and

subdivision are not equally open to participation by members of a [protected] class . . . in that its members have less opportunity . . . to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. *Id.* § 1973(b) (emphasis in original). The statutory language at the beginning of the indented quotation comes from *White v. Regester*, as the quotation from that case in note 38 *supra* demonstrates.

60. *See Frickey, supra* note 28, at 221-26.
63. 731 F.2d 1546 (11th Cir.), *appeal dismissed and cert. denied, 105 S. Ct. 375 (1984).* There is irony in the fact that this important recent decision by Judge Wisdom, which involved an Alabama controversy, was written while he was sitting by designation on the new Eleventh Circuit. Alabama was, of course, part of the Fifth Circuit until the Eleventh Circuit began operation in 1981, over Judge Wisdom’s strong objection. *See Wisdom, Requiem for a Great Court, 26 Loy. L. Rev. 787 (1980).*
64. *See Marengo County, 731 F.2d at 1556-63.* For earlier decisions in which Judge Wisdom recognized Congress’s wide-ranging authority to enforce the Civil War
contains a detailed exposition of the meaning of the new statute.65

C. Reapportionment and Racial Gerrymandering

Judge Wisdom has written several reapportionment decisions.66 His major contribution in this area has been in probing the extent to which race may—or should—be taken into account in redrawing district lines to comply with the one person, one vote standard.

In Judge Wisdom’s own words, Taylor v. McKeithen67 involved “a racial gerrymander not by a state legislature but by a federal district court.”68 The district court had redrawn the boundaries of four Louisiana state senate districts in New Orleans “for the purpose of maximizing the black voting strength in two districts to ensure two safe black senate seats.”69 That court had rejected the continued use of wards as historical boundaries for senate districts in New Orleans because, in its view, that districting reflected “‘a history of racial discrimination. Adherence to the historical boundaries [was] the prime reason why only two negroes [sic] [had] been allowed to sit in the Louisiana Legislature in the last 75 years.’”70 The Fifth Circuit Amendments through appropriate voting rights legislation, see United States v. Louisiana, 265 F. Supp. 703 (E.D. La. 1966) (three-judge court) (upholding constitutionality of the Voting Rights Act of 1965), aff'd, 386 U.S. 270 (1967) (per curiam); United States v. Manning, 215 F. Supp. 272 (E.D. La. 1963) (three-judge court) (upholding constitutionality of the Civil Rights Act of 1960, which granted certain powers to the federal district courts to find a pattern of voting discrimination and to redress it). In holding that the tenth amendment did not restrict Congress’s enforcement powers under the Civil War Amendments, Judge Wisdom’s opinion in Manning, 215 F. Supp. at 276-89, correctly anticipated Supreme Court decisions handed down over a decade later. See City of Rome v. United States, 446 U.S. 156, 178-80 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

65. Marengo County, 731 F.2d at 1563-74. At this writing, Judge Wisdom’s most recent discussion of the 1982 amendment to the Voting Rights Act is found in Lee County Branch of NAACP v. City of Opelika, 748 F.2d 1473 (11th Cir. 1984).


67. 499 F.2d 893 (5th Cir. 1974).

68. Id. at 894.

69. Id. at 896.

70. Id. (quoting the district court in Bussie v. Governor of La., 333 F. Supp. 452, 462 (E.D. La. 1971)).
had overturned this portion of the district court's judgment, but the Supreme Court granted certiorari and remanded. In a per curiam opinion, the Supreme Court stated:

An examination of the record in this case suggests that the Court of Appeals may have believed that benign districting by federal judges is itself unconstitutional gerrymandering even where (a) it is employed to overcome the residual effects of past state dilution of Negro voting strength and (b) the only alternative is to leave intact the traditional "safe" white districts. If that were in fact the reasoning of the lower court, then this petition would present an important federal question of the extent to which the broad equitable powers of a federal court, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15, are limited by the colorblind concept of Gomillion v. Lightfoot, 364 U.S. 339, and Wright v. Rockefeller, 376 U.S. 52, 57, 67.

The Supreme Court remanded "[b]ecause this record does not fully inform us of the precise nature of the litigation and because we have not had the benefit of the insight of the Court of Appeals." Thus, the Supreme Court thought that Taylor v. McKeithen might involve extraordinarily sensitive questions of benign racial districting that in some ways are similar to those later raised in United Jewish Organizations v. Carey, and that involve elements of the affirmative action controversy. Judge Wisdom—who had by this time demonstrated his firm belief that federal courts had broad equitable powers to excise the present effects of past racial discrimination, and who would squarely embrace the concept of affirmative action three years later—did not accept the invitation to decide the important issue the Supreme Court had identified. Rather, he provided a

71. Taylor v. McKeithen, 457 F.2d 796 (5th Cir. 1971).
73. Id. at 193-94 (footnotes omitted).
74. Id. at 194.
75. 430 U.S. 144 (1977); see infra note 101.
living example of the distinction between a political activist and a judge, the difference between “start[ing] with an answer or with a problem.” Judge Wisdom searched the record, found that it did not raise the issue posited by the Supreme Court, and decided the issues that the record did in fact present.

Judge Wisdom’s opinion in *Taylor v. McKeithen* provides another illustration—to be sure, one somewhat less dramatic than *United States v. Louisiana*—of the scholarly use of history. He demonstrated that the “premise on which the district court based its approval of gerrymandering” the New Orleans senate seats was “spectacularly false”: “There is absolutely nothing of substance in the record and less than nothing in Louisiana history to support the notion that the State’s policy of preserving traditional political boundaries for legislative districts was, in the language of the Supreme Court’s per curiam opinion, ‘rooted in racial discrimination.’” Judge Wisdom showed that devices such as the grandfather clause, the interpretation clause, and the white primary were the major instruments of black disenfranchisement in Louisiana. He concluded:

The categorical statement can be made, fairly, that the use of historical boundaries was never resorted to in Louisiana as a means of frustrating or diluting the black vote for members of the legislature. To the shame of Louisiana, among other states, more direct, humiliating, and effective means were used.

Judge Wisdom stressed that “[t]his Court has never been timid in exercising its equitable powers to fashion appropriate color-conscious remedies,” and he ventured that “[n]o doubt a strong case can be made for the use of purposeful judicial racial gerrymandering to afford blacks fair representation in the legislature, substantially proportionate to their population or at least to their registration.” The district court’s racial

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78. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947). For another obvious example, see Mississippi Freedom Democratic Party v. Democratic Party of Miss., 362 F.2d 60 (5th Cir. 1966) (balance of inconveniences required affirming district court’s refusal to enjoin holding primary elections in order to allow black voter registration drive to occur).
80. *Id.*
81. *Id.* at 907.
82. *Id.*
83. *Id.* at 909.
84. *Id.* at 911.
gerrymandering was not, however, supported by any demonstrated need to undo the present effects of past racial discrimination. Indeed, the alternative districting plan rejected by the district court, on "the totality of circumstances relating to the four districts as a whole, ... accords blacks more access and heavier weight in the political processes than the plan approved by the district court. ... In short, sound judicial discretion commands approval of the [alternative] plan."85

Four years later, in Marshall v. Edwards,86 Judge Wisdom again returned to the question of purposeful racial redistricting. In the trial court, plaintiffs and defendants had proposed alternative single-member districting plans for the apportionment of the police jury and the school board in a Louisiana parish. "Each [plan] appears to have been designed consciously to achieve ... a kind of rough proportioned representation based on registered voting strength."87 The major difference was that defendants' plan, which the district court approved, "would probably produce five white representatives and four black representatives; the plaintiffs' proposed plan would probably produce five black representatives."88 Judge Wisdom recognized that "[t]he case raises the question, touched on in Taylor v. McKeithen, ... whether a district court may gerrymander apportionment to affect proportional racial representation."89 In answering this question in the negative, Judge Wisdom demonstrated that, "[a]lthough some democracies provide for proportional representation of parties and ethnic groups, it has never been an American tradition."90 Stressing that courts are "held to a stricter standard" than legislatures in choosing districting plans,91 Judge Wisdom defined the role of the district court as follows:

The district judge must be mindful of the impact of the

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85. Id.
86. 582 F.2d 927 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979). This case was a part of the continuing dispute in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam), the Fifth Circuit's earliest authoritative exposition on unconstitutional minority vote dilution.
87. Marshall, 582 F.2d at 929.
88. Id. at 928-29.
89. Id. at 929.
90. Id. at 934-35.
91. Id. at 934.
proposed plans on different racial groups. His duty to avoid both gerrymanders and racial dilution requires that much. The judge must analyze the plan and determine that the probable results are such that minority strength is not diluted. But this legitimate concern with the outcome cannot justify a strict proportionality brought about by manipulation of district lines. If the plan passes the dilution test [of Zimmer], . . . race is no longer an important factor. The boundaries should be drawn with an eye to compactness, contiguousness, and the preservation of natural, political, and traditional boundaries; not racially balanced representation. We are not legislatures.92

Judge Wisdom's most recent exposition on the use of race in political cartography is found in Dotson v. Indianola.93 In that case, the district court had issued a summary judgment holding that a city had refused to annex surrounding black areas for discriminatory reasons. Judge Wisdom agreed with the district court that the city apparently was annexing just enough black areas to secure preclearance from the Attorney General, under the Voting Rights Act, for an earlier attempted annexation of a white area.94 Nonetheless, because there remained an issue of fact whether the "same decision would have resulted in the absence of the impermissible motive,"95 he agreed with the majority of the Fifth Circuit that the district court should not have entered a summary judgment holding that the refusal to annex other black areas was purposefully discriminatory.

Judge Wisdom disagreed strongly, however, with the majority's suggestion in Dotson that an annexation of a black area that was motivated by the desire to strike a deal with the Attorney General to obtain preclearance for an earlier annexation of a white area could be characterized as "remedial, thereby allowing the city explicitly to use race in fashioning the annexation" without running afoul of the Constitution.96 Judge Wisdom forcefully pointed out that United Jewish Organizations v.
Carey and Fullilove v. Klutznick—the cases relied upon by the majority for the proposition that race may be expressly considered for benign or remedial purposes—involved situations in which the Supreme Court approved the use of racial criteria that adversely affected whites while attempting to help minorities overcome the present effects of past discrimination. Neither case could possibly "justify a city's exclusion of a black segment of the population solely because inclusion would decrease the voting strength of the white population." What the majority failed to recognize, Judge Wisdom persuasively argued, was that the 1983 annexation of one black area—and the concomitant decision not to annex other black areas—was designed to remedy not discrimination against blacks, but the Attorney General's refusal to allow the city to add a substantial number of white voters to its rolls. He stated: "Indianola had a policy against annexing blacks, because they are black—except to the limited extent mandated by the Justice Department. This policy was discriminatory against blacks as a group." Thus, the majority's attempt to apply the doctrine of benign racial remedies to that policy turned that "doctrine upside down."

98. 448 U.S. 448 (1980).
99. Dotson, 739 F.2d at 1027.
100. Id.
101. Id. at 1026. United Jewish Organizations (UJO) is a particularly opaque decision, and thus comparing it to later cases is fraught with difficulties. Nonetheless, it could be argued that UJO is more similar to Dotson than Judge Wisdom recognized. In UJO, New York adopted a redistricting plan more favorable to certain minority voters, apparently not out of a desire to remedy past discrimination, but simply to obtain Justice Department preclearance for the overall reapportionment plan under § 5 of the Voting Rights Act. In UJO, as in Dotson, it was likely that officials wished to move district lines to favor minorities only just enough to obtain preclearance. One critical difference in the cases, however, would seem to be the nature of the plaintiffs. In UJO a community of Hasidic Jews alleged that they were discriminated against because the redistricting resulted in a dilution of their political power; in Dotson, the plaintiffs were blacks. The Supreme Court in UJO refused to treat the Hasidic community as a group distinct from other whites for purposes of vote dilution; in contrast, the blacks in Dotson should have enjoyed group protection by virtue of § 5 of the Voting Rights Act and the result in UJO. Thus, UJO seemingly would have been more analogous to Dotson if black residents in the New York districts not redrawn to enhance black voting power had been the plaintiffs. When the nature of the plaintiffs in UJO is considered, that case can be viewed as a type of affirmative action controversy, like Fullilove, in which whites allege group disadvantage, and not a case, like Dotson, in which blacks allege group discrimination.

In actuality, the issue in Dotson may have been more difficult than either the majority or Judge Wisdom recognized. It is complicated by the peculiar approach to the
Judge Wisdom’s approaches in *Taylor v. McKeithen*, *Marshall v. Edwards*, and *Dotson v. Indianola* stand in marked contrast to the position he took in his first important voting case, *Gomillion v. Lightfoot*.\(^{102}\) In that famous controversy, black plaintiffs alleged that the areas in which they lived had been precleared under § 5 for annexation pursuant to *Richmond v. United States*, 422 U.S. 358 (1975). The *City of Richmond* approach allows a city covered by § 5 to annex white areas if the resulting post-annexation districting plan “fairly reflects the strength of the Negro community as it exists after the annexation” and “afford[s] representation reasonably equivalent to [its] political strength in the enlarged community.” *Id.* at 370-71. That result is exceedingly difficult to square with § 5’s prohibition on electoral changes having the effect of diluting the minority vote. Indeed, in *Richmond* the annexations in question reduced the proportion of blacks in the city from 52% to 42%, and it seems hard to conclude, as the Court did, that this dramatic shift was consistent with § 5 simply because the post-annexation ward system created substantial black majorities in four out of nine wards.

The Court in *Richmond* did remand for consideration of the issue whether the city’s annexations were rooted in intentional discrimination. Considering the difficulty of proving discriminatory motivation, however, this inquiry ordinarily will be fruitless unless judges—as Judge Wisdom did in *Dotson*—are willing to probe whether race was at least one motivating factor in the decision of whether or not to annex, and whether the annexation would have been approved if race had not been taken into account. Yet this inquiry into discriminatory intent seems somewhat misplaced in a case like *Dotson*. When city officials say to the Justice Department that they want to annex a white area (perhaps for nonracial, economic considerations), the Justice Department may respond that under *Richmond* that is allowed so long as blacks are not fenced out of the political arena in the enlarged city. If the officials then annex a few black areas to augment minority voting power in the post-annexation city within the guidelines of *Richmond*, a court could say two things: city officials are doing what *Richmond* allows (the majority opinion in *Dotson*), or city officials have a policy of discrimination because they will only annex black areas when necessary to obtain preclearance for annexation of white areas (Judge Wisdom in *Dotson*). Neither form of analysis seems very useful in sorting out which annexations ought to be allowed.

The root of the problem lies in *Richmond*. Considering the broad sweep of § 5’s prohibition of electoral changes that have a discriminatory impact, the better result in *Richmond* would have been to hold that § 5 prohibits any retrogression in black voting strength caused by an annexation. See Howard & Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615, 1657-58 (1983). At a minimum, such a holding would force city officials who wish to annex a white area to consider the feasibility of also annexing sufficient black areas so that the minority community has at least as much political influence in the post-annexation city as it did in the pre-annexation city. This approach would better protect minority electoral strength and avoid inquiries about discriminatory motives that might put city officials in a double-bind situation and that in any event will increase the divisiveness of local politics.

Short of congressional amendment of § 5 to overrule *Richmond*, however, the lower courts will have to find some way to live with *Richmond* and yet provide meaningful protection against discriminatory annexations. Judge Wisdom’s effort to impose a discriminatory intent test with teeth may be the least of the available evils.

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“deannexed” from Tuskegee, Alabama, to deprive them of a vote in municipal affairs. It is interesting to trace the history of this litigation in the lower courts, for it provides insight into the early views not only of Judge Wisdom, but also of another great Southern federal civil rights judge, Frank M. Johnson, Jr.

In the district court, Judge Johnson, then in his third year on the bench, dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted. Judge Johnson concluded that the Alabama statute effecting the deannexation was lawful on its face and that if “‘the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into.’” The Fifth Circuit affirmed. Judge Jones, writing for Judge Wisdom and himself, held that “in the absence of any racial or class discrimination appearing on the face of the statute,” the courts will not hold an act unconstitutional even though it was alleged that the enactment had been adopted for discriminatory reasons. Judge Brown wrote a powerful dissent, which provoked a concurring opinion by Judge Wisdom. Judge Wisdom recognized that “[i]f courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined.” He concluded, however, that the Supreme Court’s refusal, in Colegrove v. Green and South v. Peters to address constitutional challenges to malapportioned state legislatures on the ground that the issues involved were judicially unmanageable required that the Tuskegee controversy likewise be considered beyond the realm of the federal judiciary. In a revealing passage, Judge Wisdom wrote:

“The Constitution”, said Mr. Justice Frankfurter for the majority in Colegrove v. Green, “has many commands that are not enforceable by the courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.” In effect, the suit was “an appeal to the federal courts to

104. Gomillion, 270 F.2d at 598.
105. Id. at 609-611 (Brown, J., dissenting).
106. Id. at 611-16 (Wisdom, J., concurring).
107. Id. at 614, 616 (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831) (Marshall, C.J.)).
reconstruct the electoral process of Illinois." Mr. Justice Frankfurter stated: "[T]he petitioners ask this Court what is beyond its competence to grant. . . . [T]his Court, from time to time, has refused to intervene in controversies . . . because due regard for the effective working of our Government revealed the issue to be of a peculiarly political nature and therefore not ment [sic] for judicial determination." 110

Ironically, it was Justice Frankfurter who wrote the Supreme Court's opinion in Gomillion reversing the Fifth Circuit. 111 The holding in Gomillion is subject to dispute because it is unclear from Frankfurter's opinion whether, taking plaintiffs' allegations as true, the Alabama statute was unconstitutional because its enactment was discriminatorily motivated or because its "essential inevitable effect" 112 was discriminatory—or whether these add up to the same thing. 113 In any event, from the vantage point of two and one-half decades later, Frankfurter's result seems clearly correct, although his opinion may well have worked some mischief into constitutional law. 114

What led Judge Wisdom astray in his first major civil rights case? He has been quoted as saying in hindsight that "'[i]t takes a judge a little time to get over brainwashing he's had in law school.'" 115 Somewhat similarly, I have heard him say in a private context that, in retrospect, he had been too concerned with the nice phraseologies of judicial restraint uttered by the scholarly but rigid Justice Frankfurter of Colgrove v. Green, who counseled steering clear of all "political thickets," rather than

110. Gomillion, 270 F.2d at 613 (quoting Colegrove v. Green, 328 U.S. 549, 552).
112. Id. at 341; see also id. at 347 ("[T]he inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.").
114. In addition to Gomillion's contribution to the confusion about the role of discriminatory intent and discriminatory effect in constitutional law, see supra note 113, Justice Stevens has embraced idiosyncratically the narrow facts of Gomillion as his standard for judging unconstitutional vote dilution. See infra text at note 165.
115. J. Bass, supra note 4, at 109 (quoting an interview with Judge Wisdom).
the somewhat less hidebound Justice Frankfurter later revealed in *Gomillion*. Perhaps the lesson is that judicial scholarship ought to remain somewhat skeptical of legal academic scholarship.

**D. Nonracial Barriers to the Ballot**

Although the voting decisions by Judge Wisdom that have received the most scrutiny and praise have involved the voting rights of racial minorities, he has also written pathbreaking opinions in voting controversies not directly concerned with racial discrimination. Specifically, he correctly predicted the demise of two onerous qualifications for voting: the requirement that only property owners could vote in certain kinds of elections, and the requirement of a long residency in a jurisdiction before a citizen could qualify to vote there.

In *Cipriano v. City of Houma*,¹¹⁶ the majority of a three-judge federal district court upheld Louisiana statutes that allowed only property taxpayers, not all eligible voters, to vote on whether to approve the issuance of public utility revenue bonds. Judge Wisdom dissented.¹¹⁷ Arguing by analogy to *Harper v. Virginia Board of Elections*,¹¹⁸ which had applied heightened scrutiny to the poll tax and had invalidated it because "[v]oter qualifications have no relation to wealth nor to paying or not paying [a] tax,"¹¹⁹ Judge Wisdom contended that "all citizens have a stake in government . . . regardless of ownership of property as evidenced by payment of a tax."¹²⁰ This was especially true in *Cipriano*, he asserted, because the revenue bonds involved would be financed by the operations of the municipal utility, not from property taxes, and thus property owners bore no special burden because of the bonds. Judge Wisdom's position was vindicated by the Supreme Court's unanimous reversal of the district court's decision, which stressed essentially the same factors he found important.¹²¹

¹¹⁷. *Id.* at 828-30 (Wisdom, J., dissenting).
¹¹⁹. *Id.* at 666.
¹²¹. *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (per curiam). This opinion was handed down the same day as the landmark decision in Kramer v. Union Free School...
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Judge Wisdom returned to a consideration of property-related ballot restrictions a short time later. In *Stewart v. Parish School Board*, his opinion for a three-judge federal district court invalidated Louisiana statutes restricting eligibility to vote in elections concerning approval of general obligation bonds—that is, bonds secured by property taxation—to qualified voters who were property taxpayers. His views were again accepted by the Supreme Court, this time by a short memorandum affirmance.

With the elimination of many property-related voting limitations, unduly long durational residency requirements became perhaps the most onerous race-neutral barrier to the ballot. In *Fontham v. McKeithen*, a majority of a three-judge federal district court upheld Louisiana's requirement that only those prospective voters who had resided in the state for one year and in the parish for six months preceding the election were eligible to vote. In a forceful dissent, Judge Wisdom argued that such long residency requirements could not survive the heightened scrutiny under which they must be judged. His views again proved prescient: three and one-half months later, in *Dunn v. Blumstein*, the Supreme Court struck down Tennessee's durational residency requirements of one year in the state and three months in the county. In short order the Louisiana legislature amended state law to remove any durational residency requirement and the appeal to the Supreme Court made by the plaintiffs in *Fontham* was later dismissed.

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Dist. No. 15, 395 U.S. 621 (1969), which struck down a New York law limiting the vote in school district elections to (1) owners or lessees of taxable real property in the school district or (2) parents or those having custody of children attending those schools.


125. Id. at 163-75 (Wisdom, J., dissenting).


128. Fontham v. Edwards, 409 U.S. 1120 (1973). The memorandum recites that the dismissal was pursuant to rule 60, which at that time was the Supreme Court rule governing voluntary dismissals.
E. The Guarantee Clause

To most observers, the constitutional provision known as the "republican form of government clause" or the "guarantee clause" appears to be as dead as a doornail.129 In an interesting exposition, Judge Wisdom once attempted to breathe some life into it in the context of voting rights and the federal protection of democracy in the states.

The issue in Kohler v. Tugwell130 was whether a Louisiana constitutional amendment had been so misleadingly described on the ballot that those who voted in favor of it had been deprived of their right to vote, in violation of the fourteenth amendment's due process clause and the guarantee clause. Judge Rubin's opinion for the three-judge district court disposed of the due process issue131 and relied upon longstanding precedent in holding that the guarantee clause issue was nonjusticiable.132 Judge Wisdom had no problem with the due process holding, but wrote a concurring opinion that attempted to resuscitate the guarantee clause.

Judge Wisdom began by pointing out the irony of the Supreme Court's conclusion in Baker v. Carr133 that only Congress could enforce the clause even though the provision "declares that 'the United States [not Congress] shall guarantee to every State in this Union a Republican Form of Government.'"134 Noting that Reynolds v. Sims135 had interpreted Baker v. Carr as holding only that some questions raised under the guarantee clause are nonjusticiable, and only because such questions were

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129. This provision states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. For brief overviews of the decisions treating this clause as nonjusticiable, see G. Gunther, Constitutional Law 1614-15 (11th ed. 1985); J. Nowak, R. Rotunda & J. Young, Constitutional Law 115-16 (2d ed. 1983).
131. Judge Rubin concluded that no due process violation had occurred because "Louisiana's voters were informed by the ballot of the subject of the amendment, were given a fair opportunity by publication to consider its full text, and were not deceived by the ballot's words." Id. at 981.
132. Id. at 981-82 (citing Luther v. Borden, 48 U.S. (7 How.) 1 (1849)).
133. 369 U.S. 186 (1962).
"political" in nature and lacked judicially manageable standards for their assessment, Judge Wisdom suggested that "[t]he nature of the question, . . . and not the mere invocation of the clause, determines whether a contention is justiciable and the clause judicially enforceable." He contended that the guarantee clause issue in the instant case was judicially manageable, since the same standards could be applied to it as Judge Rubin had invoked to decide the due process issue. His agreement that due process had not been violated led him to conclude that the guarantee clause was likewise satisfied.

At first glance, this concern about the guarantee clause seems much ado about nothing. After all, striving mightily to resurrect the guarantee clause when the ultimate conclusion seems to be that the only issues justiciable under it are those that merge with issues under more commonly invoked constitutional provisions might be an interesting intellectual exercise, but from a more pragmatic perspective, it sounds like much sweat and no gain. In fact, however, Judge Wisdom's exposition on the guarantee clause was rooted in practical concerns. The end of his opinion provides the important clues:

Some day, in certain circumstances, the judicial branch may be the most appropriate branch of government to enforce the Guaranty Clause. Federal courts should be loath to read out of the Constitution as judicially nonenforceable a provision that the Founding Fathers considered essential to formulation of a workable federalism. James Madison best stated the case for [the clause]. He regarded it as the basis for the doctrine of federal interposition:

"It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity in the Constitution. But who can say what experiments may be produced by the caprice of particular

States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers?" 

Note well that the italics in this quotation were in Judge Wisdom's opinion. This language, when combined with an appreciation of the jurisprudential and political consciences of Judge Wisdom, suggests two reasons for his effort in Kohler to energize the guarantee clause.

First, Judge Wisdom thought that the clause had potential to serve as a basis for "the doctrine of federal interposition." He wrote these words in 1968—the year in which the Supreme Court followed Judge Wisdom's Fifth Circuit jurisprudence holding that the states were required to implement Brown v. Board of Education immediately and could no longer hide behind the excuse that they were attempting to do so "with all deliberate speed." Moreover, only three years earlier Judge Wisdom had written one of his most powerful opinions in dissenting from the decision in which a majority of the Fifth Circuit judges washed their hands like Pontius Pilate of any responsibility to punish the governor and lieutenant governor of Mississippi for their massive and ultimately tragic resistance to federal court orders admitting James Meredith to the University of Mississippi. That dissenting opinion contains this potent passage:

The Governor of Mississippi, trained in the law, knew or should have known that the Supremacy Clause makes hash of the so-called Doctrine of Interposition. All informed persons know that this political poppycock has never been recognized in a court of law. But the uninformed, the uneducated, the very persons likely to resort to violence, were certain to be misled when their chief executive "interposed" himself between the United States and the University of Mississippi.

The "doctrine of federal interposition" stressed by Judge Wisdom in Kohler is the legitimate—indeed, vital—flip side of the

137. Id. (quoting The Federalist No. 23, at 312 (J. Madison) (Wright ed. 1961) (emphasis in original; footnotes omitted)).
140. Id. at 107.
ill-considered and dangerous doctrine of interposition that fanned the Southern resistance to the civil rights revolution. Judge Wisdom’s opinion in Kohler, then, seems to have been largely an effort to add another layer of undergirding to the doctrine of federal supremacy in civil rights.

An additional explanation for Judge Wisdom’s interest in the guarantee clause is also available. At the end of the first sentence of the quotation from his Kohler opinion that is indented above, Judge Wisdom inserted a footnote quoting the following portion of Justice Douglas’s concurring opinion in Baker v. Carr:

“Today would this Court hold nonjusticiable or “political” a suit to enjoin a Governor who, like Fidel Castro, takes everything into his own hands and suspends all election laws?”

When this quotation is combined with the language Judge Wisdom italicized at the end of the indented quotation from his Kohler opinion, the reader gets the impression that the Judge has a strong concern about state officials exercising dictatorial powers. And in fact that concern is not an abstract one to Judge Wisdom. He gained his political consciousness during the period in which Huey Long ran Louisiana as his own monarchy. While a law student at Tulane, young John Wisdom registered as a Republican. Until his appointment to the Fifth Circuit in 1957 he actively promoted two-party politics, first in Louisiana as an an-

141. Judge Wisdom wrote several powerful indictments of the doctrine of interposition prior to Barnett. United States v. Jackson, 318 F.2d 1 (5th Cir. 1963), was handed down less than a year after the bloody rioting on the University of Mississippi campus that occurred because of the resistance of state officials to the admission of Mr. Meredith. In that case, in ordering that the use of race-segregated bathrooms at the Jackson bus terminal be enjoined, Judge Wisdom attacked “the ill-starred doctrine of interposition, a repudiated political theory that never existed in law but exists in fact in defiance of the Rule of Law, [through which] a State or City, a Governor or a police officer may hamstring the Nation.” Id. at 17. He had earlier called the doctrine of interposition “pseudo-legal.” Alexandria v. Chicago, Rock Island & Pac. R.R. Co., 311 F.2d 7, 12 (5th Cir. 1962), cert. denied, 375 U.S. 922 (1963). A few months after that decision, he was moved to write:

A hundred years ago in ordeal by battle this nation settled forever the issue of interposition. The reality of national sovereignty prevailed over metaphysical state sovereignty. At this late date the continued assertion of the misguided doctrine of interposition in one form or another, in various kinds of litigation, only confuse the public without benefiting the litigant or aiding bona fide States’ Rights.


142. Kohler, 292 F. Supp. at 985 n.6 (quoting Baker v. Carr, 369 U.S. at 247 n.3 (Douglas, J., concurring)).
tidote to Long's rule and as a preventive measure against future tyranny, and later throughout the South generally.\footnote{143. See J. Bass, supra note 4, at 16, 26-30.}


\section*{II. Some Revelations of History: Social Progress and Institutional Insights}

The history presented in the prior section can be viewed from a wide variety of perspectives. The logical starting point is
the simple recognition that this history is well worth recounting in its own right.

The history reveals the enormous progress that has been made in the field of minority voting rights, much of it due to the efforts of an extraordinarily skilled, eloquent, and courageous judge. And yet it also demonstrates that remedying a problem as fundamentally linked to social structure as voting discrimination requires more than one round of law reform. For example, the struggle to secure the ballot for minorities would have been less productive had not the lower federal courts—and Congress, after the Supreme Court in *Mobile v. Bolden* refused to provide meaningful relief—prevented minority voting power from being demonstrably diluted by a variety of pre-existing electoral devices such as at-large elections.

Moreover, Congress's response to *Mobile v. Bolden*, as well as its earlier adoption of the Voting Rights Act in 1965, demonstrates that effective approaches to difficult social problems often require a lawmaking partnership between the federal bench and Congress. The judiciary's response to concrete controversies and difficult remedial problems can provide the basis for sweeping statutory reform, and Judge Wisdom served that function with respect to both the 1965 adoption and the 1982 amendment of the Voting Rights Act.

The history also demonstrates that effective judicial decisionmaking requires a sensitive use of history and an unhesitant exercise of the equitable powers of the federal courts—two methods pioneered by Judge Wisdom in *United States v. Louisiana* and returned to by him in later cases. In short, the history documents the necessity of placing persons on the federal bench who not only have capacity and courage, but who recognize that in American federalism there are occasions where federal judges have a unique role: as Judge Wisdom once put it, a "frictionmaking, exacerbating political role" that must tran-

147. See supra text at notes 32-65.
149. See supra text at notes 12-26.
150. See supra text at notes 79-82.
scend local concerns and prod history in a different direction.

Another legitimate, albeit narrow, approach to this history is to ask, in effect, what has Judge Wisdom done for us lately. A commentator applying this approach would recognize that the history shows that modern problems—the affirmative action controversy in general, and racially proportional representation in particular—are rooted not in abstract philosophical differences but in very concrete controversies about how to overcome the lingering effects of centuries of intentional racial discrimination. This thoroughly practical commentator might also attempt to glean what we can about the future from the study of the past. Some of Judge Wisdom’s more recent voting rights decisions involve issues not yet definitely resolved. Thus, his holding that section 2 of the Voting Rights Act, as amended in 1982, passes constitutional muster is of considerable contemporary importance. For the same reason, his broad interpretation of the scope of that statute remains the most important decision on that issue. These issues are probably headed to the Supreme Court at some point, and therefore Judge Wisdom’s views ought to be of importance to any observer.

Probably the most important contemporary issue in minority voting rights is the extent to which proportional racial representation is, or ought to be, required either by amended section 2 of the Voting Rights Act or the Constitution. The statute simply does not support outright proportional representation, as Judge Wisdom has recognized. Yet there are instances in which remedying the present effects of past racial discrimination will require sensitive redistricting to ensure that minority voters have a fair opportunity to elect candidates of their choice. Distinguishing between the illegitimate remedy of proportional representation and proper methods of remedying illegal or unconstitutional minority vote dilution is rather easy conceptually, but sometimes difficult in practice. Judge Wisdom’s opin-

supra note 144; see also Wisdom, supra note 25.
152. See supra text at notes 25-26.
153. See supra text at notes 86-92.
154. See supra text at notes 63-65.
155. See id.
ions in *Taylor v. McKeithen*\(^\text{158}\) and *Marshall v. Edwards*\(^\text{159}\) provide useful insights into this problem.

The difficult problem of where to draw district lines ought not be avoided by the use of multi-member districting, for that simply substitutes one problem of minority vote dilution for another. Nor is the answer some blind reliance upon a "melting pot" theory, for that overlooks both the rigidity of racial division even in contemporary America and the legitimate interests of minorities to remain distinctive rather than to conform to the culture of others.\(^\text{160}\) Judge Wisdom's instructions to the district court in *Marshall v. Edwards*, which take race into account by avoiding minority vote dilution and yet do not rigidify any racial status quo by the use of proportional representation,\(^\text{161}\) are a step in a better and more realistic direction.

It is fruitful to compare Judge Wisdom's approach to racial gerrymandering to that taken by Justice Stevens. As I have explained elsewhere,\(^\text{162}\) Justice Stevens has concluded that, because those in political office will do what it takes to attempt to keep themselves in office, the use of "group" criteria in redrawing district lines to comply with the one person, one vote requirement is simply a natural component of the political process.\(^\text{163}\) To him, the consideration of race is no more pernicious than the consideration of any other group criterion like socioeconomic status, residential location, ethnicity, party affiliation, and so on. Thus, in his view racial minorities deserve no more protection against gerrymanders than do any other groups that constitute a minority in the political jurisdiction in question. Harkening back to the supposed need for judges to avoid politi-

\(^{158}\) See supra text at notes 67-85.

\(^{159}\) See supra text at notes 86-92. In both cases, a rough proportional representation had been attempted by redrawing district lines. Yet in both cases the reapportionment plan accepted by the district court did not provide as much representation to blacks as did the rejected alternative plan. In fact, though purportedly designed to remedy past discrimination, the plan accepted by the district court in one case "attempted in effect to assure that the black population majority would remain a voting minority by protecting the white voting majority from erosion." *Marshall*, 582 F.2d at 937. Proportional representation is thus at best a double-edged sword.

\(^{160}\) See Frickey, supra note 28, at 240-41.

\(^{161}\) See supra text at note 92.

\(^{162}\) See Frickey, supra note 28, at 231-36.

cal thickets—the same fear that admittedly led Judge Wisdom astray in *Gomillion v. Lightfoot*—Justice Stevens has concluded that judges should invalidate only those gerrymanders—racial or otherwise—that, in effect, speak for themselves. His standard for assessing gerrymanders is simply a conversion of the facts of *Gomillion* into a constitutional rule:

In my view, the proper standard is suggested by three characteristics of the gerrymander condemned in *Gomillion*: (1) the 28-sided configuration was, in the court's word, "uncouth," that is to say, it was manifestly not the product of a routine or a traditional political decision; (2) it had a significant adverse impact on a minority group; and (3) it was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority.

I have criticized the approach of Justice Stevens elsewhere. For present purposes it seems sufficient to point out that his approach to racial gerrymanders is nowhere required by the language of the equal protection clause of the fourteenth amendment and, more importantly, ignores the language, history, and core purpose of the fifteenth amendment. Whatever the standard should be for assessing gerrymanders, the fifteenth amendment—which plainly says that the right to vote "shall not be denied or abridged" on account of race—clearly stands for the proposition that racial minorities should have greater constitutional protection than groups disadvantaged in the reapportionment process for nonracial reasons. Nonracial gerrymandering may indeed be a political thicket, as Justice Stevens has suggested, but equating it with racial gerrymandering throws the baby out with the bathwater.

That Judge Wisdom has avoided the pitfalls of Justice Stevens’s approach is not surprising. Judge Wisdom’s one unsuccessful quest, in *Gomillion*, for judicial restraint in addressing political thickets provides a partial explanation, in that it may have convinced him in retrospect that political thickets exist more in pedantic mythology than in judicial life. My guess is

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164. See supra text at notes 106-10.
165. *City of Mobile*, 446 U.S. at 90 (Stevens, J., concurring in the judgment).
166. See Frickey, supra note 28, at 231-36, 240-41.
that the far more important factor is Judge Wisdom’s hands-on experience with the pernicious effects of racial discrimination in the political process. To the judge who has spent a career attempting to make the Southern political process more than just a democracy for the few, Justice Stevens’s conclusions about politics as usual must seem somewhat naive and—however benignly intended—wholly inconsistent with both the history of the Civil War amendments and twentieth century trends. Fortunately, the differences of opinion between Justice Wisdom and Justice Stevens have been largely mooted by the 1982 amendment to section 2 of the Voting Rights Act, which clearly provides enhanced protection to racial minorities against gerrymandering.

The foregoing discussion has demonstrated that Judge Wisdom’s voting decisions contain many important lessons of history and much guidance about contemporary voting issues. The analysis of them is incomplete, however, without one final, more sweeping inquiry, a search for generalizable theory rather than concrete conclusions. On one level, the inquiry might be whether Judge Wisdom’s voting decisions represent a coherent, generalized theory of voting. On an even more abstract level, the question might be whether these cases demonstrate a theory of judicial review.

It is in vogue in scholarly circles—in fact, it is perhaps a fetish—to create one systematic theory of law. This “Big Theory” is used to justify judicial decisions the commentator deems correct, to denigrate decisions thought to be incorrect, and more generally to attempt to lead the courts to the promised land of their proper role—a role that might involve increased activism, activism in the pursuit of only limited goals, more judicial restraint,
or whatever else the commentator might believe appropriate. The pursuit of Big Theory is understandable on at least two levels. First, if judges do not confine themselves to decisions based on general principles, the legitimacy of judicial review may be lost, for the judge might seem indistinguishable from the legislator. Second, creating Big Theory is perhaps the most challenging, and surely the most reputation-enhancing, task of the legal scholar.

It is therefore unsurprising that a leading constitutional theoretician criticized even Justice Frankfurter, the former Harvard law professor, because "he never successfully identified sources from which [constitutional] judgment was to be drawn that would securely limit as well as nourish it, he never achieved a rigorous general accord between judicial supremacy and democratic theory." If not Frankfurter, then how about Wisdom? Judge Wisdom's rigorous application of principle, his frequent citation and discussion of legal scholarship, and his masterly understanding and use of history have made him one of the leading scholars of this (or any other) generation of judges. Do his voting cases contain any "rigorous general accord between judicial supremacy and democratic theory," or at least a general theory of voting? Both questions must be answered in the negative—which, I will try to demonstrate, is a good thing.

Turning to the less grandiose inquiry first, it is true that his voting decisions share a general perception of the vote as a centrally important right in America. These opinions persuasively demonstrate that this right must be as freely available to minorities, newcomers, and the propertyless as it is to others. These opinions are consistent with the old axiom that the right to vote is "a fundamental political right, because [it is] preservative of all rights," but their realistic focus upon actual political outcomes is more of a pragmatic recognition that the true goal is fair representation, not the vote in and of itself. The opinions are consistent as well with a theory of equality of personhood under which important public privileges may not be denied arbi-

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FOURTEENTH AMENDMENT (1977).
trarily or discriminatorily. More generally, they are examples—from which a plausible general theory of judicial activism perhaps could be constructed—in which the federal courts armed relatively discrete and powerless elements in society with a tool to alter politics. Probably the most intrusive suggestion along these lines came in Judge Wisdom's separate opinion in *Kohler*, in which he suggested that the guarantee clause might empower federal courts to intervene when a state or a local political jurisdiction has lost the status of a republican form of government.\(^{175}\)

Thus, if read broadly, Judge Wisdom's opinions concerning voting rights suggest a judicial role broader than that proposed under Dean Ely's "representation-reinforcing" theory,\(^ {176}\) which calls upon judges to "clear the channels of political change" (for example, by removing impediments to broadly based democracy such as malapportioned legislatures or undue durational residency or property requirements for voting)\(^ {177}\) and to "facilitate the representation of minorities" (for example, by protecting minorities against *intentional* voting discrimination).\(^ {178}\) But however read, those opinions make no attempt to stake out a complete, general theory of voting or of representation or of democracy. Such a theory could be created from them only by imaginatively reading them at a most abstract level of generalization. The artificiality of any such theory would be apparent.

These cases come even less close to formulating a general theory of judicial review. They posit a substantial interventionist role for the federal courts and find authority for that role almost entirely in the equal protection clause, with the fifteenth amendment and the guarantee clause occasionally relevant as well. Although some of these decisions are obviously correct in hindsight if the relevant constitutional language is to mean anything—*United States v. Louisiana* surely falls into this category—others, such as Judge Wisdom's opinions concerning minority vote dilution, are not clearly mandated by constitutional language and in fact remain controversial. These opinions help inform the debate about judicial review, but they do not attempt

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175. *See supra* text at notes 133-46.
177. *See id. ch. 5* ("Clearing the Channels of Political Change").
178. *See id. ch. 6* ("Facilitating the Representation of Minorities").
to resolve it.

It is here that the distinction between judges and many academic legal scholars becomes most apparent. Guido Calabresi, one scholar who does not always fit the mold, highlighted the difference at the outset of his recent analysis of the abortion controversy:

I feel more comfortable approaching a topic like this in common law fashion, trying to build up from cases, hypothetical and real, than by working down from great principles. I would rather approach the issues from a specific field of law—itself affected by other fields of law as well as by its own peculiar problems and questions—and see where that leads us, than to try to deal with the topic as if I—or anyone—knew all law and was ready to describe it in terms of an abstract theory.¹⁷⁹

What Calabresi describes is what all judges—even those as thoughtful and scholarly as Judge Wisdom—attempt to do. The urge to create Big Theory has largely escaped the judiciary, and Judge Wisdom found no need to engage in metaphysics to decide the voting cases described in this article. The scholarly drive to pull Big Theory out of a hat cannot be satisfied by reading his voting opinions, and to me that seems fortunate. Judges who attempt to put the whole world together in one theory of constitutional law run the disastrous risk of ending up with a most peculiar looking globe.¹⁸⁰

The absence of judicial Big Theory does not, as some theoreticians would have it, mean that judges must stop deciding controversial cases and abdicate all responsibility to the federal, state, and local legislatures. Whether or not bolstered by a theory satisfying the intellectual probings of scholars, judicial review has largely stood the test of time. Of course the courts have made errors along the way, but consider where we might be if a Big Theory had been set in stone by Chief Justice Marshall (or Thomas Jefferson or Andrew Jackson or John C. Calhoun), Chief Justice Taney in Dred Scott¹⁸¹ (or Abraham Lincoln), Chief Justice Warren in Brown¹⁸² (as opposed to Governor

¹⁸⁰. See Arnold, Professor Hart's Theology, 73 Harv. L. Rev. 1298, 1310-17 (1960).
Warren in the Japanese relocation cases)—the reader can fill in the blanks as well as I can. To be sure, contemporary theories of such scholars as John Ely are thought provoking and worthy of great praise, and they are in the best traditions of the academy. At least most of us, however, would likely opt for the cautious, interstitial method with which we have over 180 years experience than for the Supreme Court to announce that all future cases will be judged according to the theory of Ely or someone else. The great practical value of these theories is in providing intellectual fodder for the “common law fashion” of constitutional judging described by Calabresi, rather than as prescriptions for completely rewriting constitutional law. In the final analysis, no one has satisfactorily settled the question of judicial review, and the urgency of choosing one or another theory is ameliorated when it becomes apparent that the choice is not, as some theoreticians would have it, between judges using Big Theory and not judging at all, but between a common-law method and a Big Theory method.

In short, I am inclined to agree with my colleague Dan Farber that “[s]ooner or later we are going to have to stop worrying about the abstract question of how to decide issues and get on with the concrete work of deciding them.” In this light, as Farber has asserted, the common-law method described by Calabresi seems to have more appeal than “[t]he currently fashionable intellectual style favor[ing] grand theory.” It thus seems clear to me, at least, that the absence of a coherent general theory of judicial review or of voting rights in Judge Wisdom’s voting cases is the mark of a good judge, not an indication of illegitimate exercises of judicial review. These cases reflect a truth, which can be overstated but ought not be forgotten, that the process of adjudication is different from the process of legislation (or the process of academic theorizing): judges have substantial freedom of decisional choice, but they are restrained by

185. Farber, Book Review, 3 CONST. COMM. 282, 282 (1986) (reviewing G. Calabresi, supra note 179). Farber notes, with tongue I suspect only partially in cheek, that his favorable reaction to Calabresi’s approach is “perhaps . . . a confession of pedestrianism, the worst of all scholarly sins.” Id. at 283. As another person heretofore in good standing in the academy (I hope), I share his slight self-consciousness.
a variety of institutional factors.\textsuperscript{186} Indeed, the very process of adjudication makes the judicial creation or adoption of Big Theory next to impossible except in interstitial or bitesize pieces. What the scholarly theorists create the judges may read, but what the latter write will never satisfy the former. That seems less unfortunate when it is recognized that what the former write never satisfies the former, either.

Here, I think, lies the ultimate tribute to Judge Wisdom. Within the traditions of the law and the institutional constraints of adjudication, he was able to effect substantial progress in bringing Southern minorities—and the South in general along with them—into a more modern, fairer, and more democratic political realm. He accomplished that not by creating wide-ranging theories of constitutional law to be applied as general and “neutral” principles—the broad sweep and uncertain implications of which would have likely led to their rejection by the Supreme Court—but by careful, scholarly, case-by-case development of an indictment of voting discrimination on the basis of race. Were the principles he did impose “correct”? As to some, such as those in \textit{United States v. Louisiana}, there can be little controversy. As to others, such as those involving minority vote dilution, their incorporation by Congress in federal voting legislation surely says something about their legitimacy. One can never win (or lose) an argument about whether some controversial principle is a “legitimate” element of constitutional law, for in the abstract the whole enterprise of judicial review is subject to theoretical attack. But on a more pragmatic level, even the controversial voting opinions of Judge Wisdom have withstood the acid test of time.

Theodore St. Antoine was being wise, not flip, when he once commented that “[l]ogic, so the cliché goes, is not the life of the law. But logic is very much like the DNA of the law—the structural principle without which all is sprawl and muddle.”\textsuperscript{187} In the voting opinions surveyed in this article, Judge Wisdom used logic, principles, and ideas whose time had come in the slow, ex-


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acerbating, frictionmaking, interstitial process of law reform. Twenty-three years after he set the process fully in motion in United States v. Louisiana, a modern democracy has emerged in the South. Not coincidentally, that transformation of Southern politics removed the impediments to development of the South so accurately seen by V.O. Key almost forty years ago.\footnote{188 See supra text accompanying notes 1-2.}

The beneficiaries of these developments include not simply Southern minorities and others to whom Judge Wisdom extended a meaningful right to vote, and not just all Southerners, but all Americans.

In the final analysis, a judge is neither solely a scholar nor solely a politician. Judges are complex combinations of these and other elements, and the components of which they consist may sometimes be in great tension. In evaluating a judge, then, one must look not only for genius, but also for pragmatism and humanitarianism, not only for ideas, but also for results. On all these fronts, as his voting opinions suggest, Judge Wisdom is unsurpassed by any judge of his generation. More than even a typical lawyer's lawyer or judge's judge, his judicial scholarship has been so forceful as to make him a legal scholar's judge. Yet his judicial scholarship has gone to a very practical end: his opinions have improved both the lives of countless American citizens and the society in which they live. That he has made such a substantial difference in both law and life is the ultimate tribute that can be paid a judge, that curious personification of theory and practice.