

SUBJECT: House Redistricting

COMMITTEE: Regions, Compacts, and Districts: committee substitute recommended

VOTE: 11 ayes-- Von Dohlen, Buchanan, Bush, B. Clark, Finnell,
G. Hill, Hollowell, Messer, Ragsdale, G. Thompson, Willis

0 nays

0 present, not voting

8 absent-- Valles, Cary, Berlanga, Coody, Davis, Semos,
Washington, Wright

OTHER
COMMITTEE

ACTION: The above vote is on reconsideration of the vote cast on Monday morning to report the committee substitute. Reconsideration was necessary to report a committee substitute reflecting the the technical changes from numerous amendments adopted on Monday. The first vote on the committee substitute was 16 ayes, 2 nays (Davis, Wright), 1 present, not voting (Bush).

The most significant votes in committee involved the major metropolitan areas. Rep. Bush offered an amendment to make changes in Denton County that passed by 10 ayes, 4 nays (Davis, Hollowell, Messer, Wright), 4 present, not voting. Rep. Valles offered a substitute for Bexar County that failed by 9 ayes, 10 nays (Von Dohlen, Buchanan, Coody, Davis, Finnell, Hollowell, Messer, G. Thompson, Semos, Wright). Rep. Valles offered a substitute for El Paso county which passed by 10 ayes, 6 nays (Von Dohlen, Buchanan, B. Clark, Coody, Finnell, Messer), 3 present, not voting. Rep. Messer offered an amendment to the Ragsdale Dallas substitute to exchange part of Duncanville to Rep. Ray Keller's district for part of Dallas to Rep. Paul Ragsdale's district. The Messer amendment passed by 10 ayes, 7 nays (Valles, Cary, Bush, J. Clark, Ragsdale, Washington, Willis). The Washington substitute for Harris County passed by 10 ayes, 3 nays (Cary, Wright, Davis), 3 present, not voting.

BACKGROUND: The Regions, Compacts, and Districts Committee conducted several weeks of field hearings during the interim on redistricting proposals. Additional public hearings were conducted during the session. A Citizen Advisory Committee was appointed by the Speaker to act as an information conduit to various communities. The committee solicited district plans from individual members and metropolitan delegations.

BACKGROUND:
(Continued)

The committee had originally planned to follow a procedure where a preliminary draft proposal would be offered, public hearings would be conducted on the draft plan in late April, a final bill would be drafted in early May, further public hearings would be conducted on the draft plan, then the committee would act on the final draft. For various reasons the committee did not follow its original timetable. A draft proposal was distributed to members and the press for the first time around noon on Saturday, May 23. A public hearing was conducted Saturday afternoon and evening and Sunday afternoon and evening. At 1:30 a.m. on Monday morning, May 25, the committee met in formal session to consider HB 960. After adopting sixteen separate changes the committee voted to report the bill at 2:50 a.m. A committee substitute reflecting technical changes was reported on Tuesday morning, May 26, and set on the calendar for Wednesday.

PAIRS IN
CSHB 960:

The committee substitute would make eight pairs of current members -- Clayton-Laney, Gilley-London, Keese-Kubiak, Heatly-Shaw, Adkisson-Hernandez, Ragsdale-Wolens, Webber-Willis, Coleman-Valles. The original committee proposal included a triple pair in El Paso (Coleman-Valles-Moreno) and two pairs in Harris County (Colbert-Wright and Wallace-Wilson) that were eliminated by committee amendment.

Rep. Smith Gilley (D-Greenville) -- Rep. David London (D-Bonh

Rep. Gilley's present District 10 and Rep. London's present District 23 would be combined into a new District 2. Present District 10 is now 10 percent under the ideal of 94,856, and District 23 is 3.2 percent under. District 23 now consists of Fannin County, joined by a stretch of southern Grayson County to Cooke and Wise to the west. District 10 consists of Hunt, Hopkins, and Rains counties. CSHB 960 would give all of Grayson (now 89,796) to Rep. Bob Bush and join Wise and part of Cooke to Rep. Bill Coody's Parker-Tarrant district, and part of Cooke to Rep. Charles Finnell's district. District 10 would lose Rains county to Rep. Bill Hollowell's district and part of Hopkins to Rep. Pete Patterson's district. The new district would include 24,156 from Rep. London's district and 68,163 from Rep. Gilley's district.

Rep. Bill Keese (D-Somerville) -- Rep. Dan Kubiak (D-Rockdale)

Rep. Keese's present District 29 and Rep. Kubiak's present District 36 would be combined into a new District 52, and parts would be joined to two new districts without incumbents. District 29 is currently 1.3 percent over the ideal and District 36 is 23.6 percent over the ideal. From Rep. Keese's current district, Madison would go to Rep. Jim Turner, and Grimes would go into a new Harris-Montgomery suburban district. From Rep. Kubiak's current district, Falls County would be joined with Rep. Rollin Khoury's district, and Williamson would be joined

PAIRS IN
SHB 960:
(continued)

with Burnet to create a new district. The Keese-Kubiak district would also include Robertson County from Rep. Bill Presnal. The new district would include 22,732 from Rep. Kubiak's old district, 54,109 from Rep. Keese's old district, and 14,653 from Robertson county.

Rep. Bill Heatly (D-Paducah) -- Rep. Larry Don Shaw (D-Big Spring)

The Dean of the House, Rep. Heatly, would be paired with freshman Rep. Shaw. Their districts 101 and 63 respectively would be combined into a new District 150. Rep. Heatly's District 101, which is currently 23.0 percent below the ideal would lose Baylor and Throckmorton counties to Rep. Joe Hanna, Haskell to Rep. Walter Grubbs, and Crosby and Hardeman to Rep. Foster Whaley. Rep. Shaw's District 63 is currently 23.3 percent below the ideal and would lose Sterling and Surrency to Rep. Walter Grubbs and Coke to Rep. Lynn Nabers. Lynn County would be added from Rep. Jim Rudd's district. The new district would include 50,185 from Rep. Shaw's current district, 39,215 from Rep. Heatly's current district, and 8,605 from Lynn County.

Rep. Bill Clayton (D-Springlake) -- Rep. Pete Laney (D-Hale Center)

Speaker Clayton has announced that he is not running for re-election to the House. His current District 74 is 19.1 percent below ideal and Rep. Laney's District 76 is 2.2 percent below the ideal, and both are surrounded by underpopulated districts. The counties in District 74 would be used to make up population for Rep. Laney, Buchanan, Simpson, and Rudd.

Other pairs are discussed in the section below.

METROPOLITAN
COUNTIES:

Harris County

The principal problem in Harris County has revolved around where to create a new Republican district in the growth areas and if a second Hispanic seat could be included. All of the present minority districts are well below the ideal population, and to avoid retrogression have to gain new areas.

The Harris County delegation split four ways originally, and set up a committee consisting of Ed Emmett representing the Republicans, El Franco Lee representing blacks, Al Luna representing Hispanics, and Ralph Wallace representing Anglo Democrats, to work out a consensus delegation plan. Each at some point offered proposals, and a consensus was almost reached on the Wallace plan among white and black Democrats. However, no plan was able to keep a clear majority of the delegation.

The committee proposal offered on Saturday essentially followed the Emmett plan, creating a new Hispanic district in the downtown Houston area, three new Republican districts, and pairing

METROPOLITAN
COUNTIES:
(Harris County
continued)

Reps. Colbert and Wright and Reps. Wallace and Wilson. Rep. Craig Washington, who had generally not been involved in the earlier negotiations, worked out a new plan with other members of the delegation that was endorsed by all of the Harris County Democrats except Rep. Luna, who maintained his position in favor of a new Hispanic district. The amendment eliminated the pairs of incumbents, generally preserved all incumbent seats, created a minority district in an area currently represented by Rep. Henry Allee, and established a new Republican district. The committee adopted the Washington plan. Several amendments to alter the Washington plan are expected during floor consideration.

Dallas County

Unlike Harris, Dallas County did not grow fast enough to gain a new seat and in fact has to lose one. The principal points of controversy have involved avoiding retrogression in the number of black representatives without eliminating incumbents, yet also accomodating the growth in more affluent areas. The Dallas County delegation voted on a number of plans, resulting in a shifting coalition of members supporting a Gaston, Wolens, Ragsdale, Jackson-Davis, and other plans. The delegation had originally voted 11 to 7 for a Jackson-Davis plan that paired Reps. Bryant and Cofer and Reps. Cain and Gaston and made Rep. Lyon's district more Republican. After further negotiation, the delegation switched its support by a vote of 9 to 7 to a plan by Rep. Ragsdale that would pair Reps. Ragsdale and Wolens but generally would profit incumbents. The committee made some modifications but essentially adopted the Ragsdale plan.

Bexar County

Like Dallas, Bexar County's growth did not keep pace with the state as a whole, and thus it will lose one seat. The non-retrogression requirements of the Voting Rights Act require that Bexar retain six districts that could elect minority representatives, yet all of the districts currently with minority representatives are substantially below the ideal size. Several plans have been offered, including two by the MALDEF (Mexican-American Legal Defense Fund) coalition that would join rural counties with a portion of Bexar for Reps. Patrick or Schoolcraft.

The committee proposal followed what was termed the "Pierce plan" to preserve six minority districts and yet pair Rep. Joe Hernandez, whose district is 34.3 percent below the ideal, with Rep. Tommy Adkisson, the only Anglo Democratic representative from Bexar County, in a predominantly Hispanic district. Rep. Adkisson's district presently is also predominantly Hispanic. Rep. Jay Reynolds' rural district would be extended into a portion of Bexar County.

ETROPOLITAN
COUNTIES:
(Bexar County
continued)

During committee consideration on Sunday, Rep. Matt Garcia presented an alternative plan along the lines of the MALDEF proposal that would have paired Republican Reps. Kae Patrick and George Pierce. Rep. Bob Valles proposed the Garcia amendment in committee, and it was defeated by 9 ayes, 10 nays. Rep. Garcia has worked out at least six possible alternatives for Bexar County to be offered during floor consideration.

Tarrant County

Like Harris County, Tarrant was faced with preserving its two minority districts and accomodating uneven growth in different sections of the county. The Tarrant delegation by 9 to 1 endorsed a plan to pair Reps. Bobby Webber and Doyle Willis into one minority-dominated district, create a new district in Arlington, and remove much of Rep. Bill Coody's Tarrant portion. Rep. Willis had presented a plan that would have also created a minority district but with a higher Hispanic proportion. The committee adopted the delegation plan.

El Paso County

The El Paso problems revolve around local geographic barriers such as the Franklin Mountains and Fort Bliss, and the definition of retrogression. The committee plan essentially adopted a proposal signed originally by Reps. Polk, Vowell, and Coleman which included five districts with Hispanic population of 31, 57, 70, 71 and 81 percent. The committee proposal also would have included Reps. Coleman, Valles, and Moreno in the same district. However, Reps. Valles and Moreno maintained, along with MALDEF, that Hispanic voter registration is a better indication of the real effect of Hispanic population on a district in an area such as El Paso. They proposed a plan with plurality Hispanic voter registration in at least three districts.

Rep. Valles proposed an amendment to change the El Paso districts to those proposed by MALDEF. His amendment passed by 10 ayes, 6 nays, 3 present, not voting. Reps. Valles and Coleman would still be paired, but Rep. Valles has indicated that he would move into a different district. Reps. Polk and Vowell intend to try to restore the original committee proposal, with some modification, during the floor consideration.

Jefferson County

The committee plan would move Rep. Jerry Clark's district out of the county and move and expand Rep. Al Price's Beaumont district south to take in the city of Nederland, between Beaumont and

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MINORITY
DISTRICTS
(cont.):

Current Minority Representatives with Significantly Reduced
Minority Percentages

<u>Representative</u>	<u>Black %</u>	<u>Hispanic %</u>	<u>Combined %</u>
Al Price			
Current Dist. 7A	62.2	4.0	66.2
CSHB 960 Dist. 19	44.5	3.8	48.3
Frank Collazo			
Current Dist. 7C	34.8	5.9	40.7
CSHB 960 Dist. 20	25.5	5.4	30.9
Froy Salinas			
Current Dist. 75B	17.1	37.9	55.0
CSHB 960 Dist. 83	14.1	33.9	48.0
Bobby Webber			
Current Dist. 32A	44.7	33.9	78.6
CSHB 960 Dist. 95	30.0	29.5	59.5
Reby Cary			
Current Dist. 32B	60.4	5.8	66.2
CSHB 960 Dist. 96	52.5	5.5	58.0
Frank Madla			
Current Dist. 57A	6.4	51.3	57.7
CSHB 960 Dist. 117	6.8	49.1	55.9

Note: CSHB 960 figures are from House Regions, Compacts, and Districts Committee

Beginning on the next page is a discussion of the effect of Article 3, Section 26, of the Texas Constitution on House redistricting. The discussion is an excerpt from HSG Special Report #58, "Redistricting, Part Three: Rules for Redistricting" (May 8, 1980).

Article 3, Section 26, sets out the procedure for drawing House districts. However, part of the article was declared unconstitutional by a federal court. The excerpt reprinted here considers the current status of Section 26, with particular reference to Smith v. Craddick, the successful challenge to the 1971 House redistricting plan. The challenge was based in large part on the plan's failure to observe the mandate of Section 26 to avoid dividing small counties.

Current Status of Section 26

Some commentators have argued that recent court rulings mean that Section 26 may be disregarded altogether, as long as the total population deviation¹³ of a plan is less than ten percent. They point to the federal court challenge to the Legislative Redistricting Board's House redistricting plan of 1971. In that case, the U.S. Supreme Court upheld most of the plan in spite of numerous violations of Section 26.

However, there is an alternate view of this matter. The Legislative Redistricting Board plan was drafted because the Texas Supreme Court had just thrown out the Legislature's own plan. That plan was invalidated specifically because it broke Section 26's rule against splitting counties. This case has been cited as evidence that Section 26 is still in effect.

The case challenging the House plan before the Texas Supreme Court was Smith v. Craddick.¹⁴ In that case, the Court specifically noted that "the federal requirement of equal representation clearly has not nullified Section 26 of Article III in its entirety."¹⁵ The Court stated that the requirements of the section (except for floterial districts, which are discussed below) are still to be followed as closely as possible. The Court objected to the fact that the Legislature's plan had divided 18 small counties. "The only impairment of this mandate [to avoid splitting counties] is that a county may be divided if to do so is necessary in order to comply with the equal population requirement of the Fourteenth Amendment."¹⁶

When a federal court threw out the floterial districts in the 1965 Texas House Plan, the court suggested that floterial districts might be permissible, but only if they were designed in a careful (and complicated) way that ensures population equality.¹⁷ In Smith v. Craddick, the Texas Supreme Court recognized that Section 26's requirement for floterial districts was no longer in effect. The Court did not consider the federal court's suggestion for how to draw constitutionally valid floterial districts, but instead propounded its own rule to replace the use of floterial districts. The Court told the Legislature that the surplus from

a county that had already received one or more districts of its own must be combined with one or more whole counties to make up a new district. The surplus could not, however, be divided among two or more additional districts.¹⁸

(As noted above, the Texas Supreme Court ignored the federal court's 1965 suggestion as to how flatorial districts might constitutionally be used. However, in light of later Texas cases throwing out multi-member districts, it is unlikely that even the sort of flatorial districts contemplated by the federal court could now pass judicial muster.)

The Smith decision said clearly that Section 26 must be followed to the greatest extent possible. However, a later federal decision appears to tell a different story.

After Smith threw out the 1971 House plan, the Legislative Redistricting Board met to draft a new one. (See page 13 for the story of the LRB's session.) The Legislative Redistricting Board plan was itself brought to trial, but this time in federal court.

The federal district court objected to the Legislative Redistricting Board plan both because of its multi-member districts and because of its 9.9 percent population range.¹⁹ The court specifically noted the ways the plan violated Section 26. On appeal, however, the U.S. Supreme Court agreed with only part of the district court's decision. It agreed that multi-member districts were unconstitutional, but it upheld the rest of the plan. (White v. Regester)²⁰ The Court said that a deviation range of 9.9 percent did not necessarily violate the Equal Protection Clause of the U.S. Constitution. This redistricting plan, which the federal district court had thought violated Section 26, is largely still in effect in 1980.

The decisions in Smith and White raise an apparent conflict. In Smith, the Texas Supreme Court threw out the 1971 House districting plan because of its numerous violations of Section 26. The Legislative Redistricting Board then drafted a replacement plan. When this plan was upheld in White, the U.S. Supreme Court appeared to be almost ignoring the new plan's violations of Section 26. What's going on here?

The answer seems to be that the challengers in the two cases used different arguments and raised them in different courts. In Smith, a state court was asked to decide if a plan violated the state Constitution. The Texas Supreme Court decided that the plan did violate Section 26. On further examination, the Court could find no justification (such as meeting the equal protection standard) for the violations. Therefore, the plan was unconstitutional.

In the case that led to White, the challengers went to federal court, arguing that the new plan adopted by the Legislative Redistricting Board violated the federal Constitution's Equal Protection Clause. The federal district court, relying on the U.S. Supreme Court's "as equal as practicable" standard, agreed that the 9.9 percent deviation range was too high.²¹ The court, citing earlier Supreme Court cases, felt that a deviation this large created a prima facie case for unconstitutionality. The court then looked for justifications for the deviation, and could find none. In fact, the court noted, the plan violated the

very standards that the state Constitution established to govern such cases. The court pointed out that the state has not "sought to justify a single deviation" from population equality. The district court agreed with the Texas Supreme Court's finding in Smith that most of Section 26 still applies. "This Court would look askance at any wholesale and unnecessary mutilation of political subdivision boundaries."²² The court cited its specific objection to cases where the surplus from one county was divided between two separate districts.

In considering the case on appeal, the U.S. Supreme Court went back to the first question considered by the district court: does a 9.9 percent deviation make a prima facie case that the plan violates the U.S. Constitution? The Court, in a precedent-setting decision, held that it does not. "We do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation."²³ The Court suggested that a 9.9 percent deviation range was small enough (in state legislative redistricting) that challengers would have the very heavy burden of proving that the plan was discriminatory in its effect. The Court noted that the challengers in White had not attempted to prove discrimination except by citing the deviation from population equality. "Appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variations alone."²⁴

The Court was in effect saying that a population deviation of 9.9 percent was so small that it did not need to be justified. In a footnote, however, the Court said that in the case in question the deviations would have been justifiable anyway. "It appears to us that to stay within tolerable population limits it was necessary to cut some county lines and that the State achieved a constitutionally acceptable accommodation between population principles and its policy against cutting county lines."²⁵

In a vigorous dissent, three justices disagreed with both the Court's general rule and its application of the rule to the Texas case.²⁶ First, the dissenters argued that setting any fixed standard violated the "equal as practicable" principle. They said they thought any substantial deviation from equality needed justification in legislative apportionment just as in congressional districting.

Then the dissenting justices looked at the Texas case. "The variations surely cannot be defended as a necessary by-product of a state effort to avoid fragmentation of political subdivisions."²⁷ The dissenters cited the district court's conclusion that the state had not even attempted to justify its deviations from equality. They accused the Supreme Court's majority of faulty reasoning. The Court wrongly assumed, they argued, that merely because the plan had a reasonable level of population equality, and because it broke county lines, that the plan had needed to break county lines in order to achieve necessary equality. The dissenters agreed with the district court's contrary conclusion: that breaking county lines had been unnecessary, and could have been largely avoided without creating any greater population deviations. The dissenters argued that the plan should have been examined by the Supreme Court to see if its violations of the state Constitution were necessary to achieve its level of population equality.

Could the Legislative Redistricting Board plan have been successfully challenged in state court as violating Section 26 of Article 3? Nothing more than conjecture is possible, but it seems that Smith v. Craddick would have provided a good precedent. In both cases, many counties were divided. And in both cases, there was little evidence to prove that the divisions were necessary to achieve equal population. Many commentators have suggested that any legislative redistricting plan which has less than ten percent deviation and which does not violate the Voting Rights Act is safe from court scrutiny. However, in light of Smith v. Craddick and the conflicting opinions in White v. Regester, it may be wise to pay careful attention to the requirements of Section 26.

Beginning on the next page is an excerpt from HSG Special Report #60, "Redistricting, Part Four: The Voting Rights Act" (October 15, 1980). The excerpt discusses four aspects of a redistricting plan that the Justice Department considers during its preclearance evaluation:

One Person, One Vote	19*
Nonretrogression	20
Fragmentation and Packing	26
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(* The original page numbers are retained, since there are cross-references within the excerpt, and to other pages within the original report.)

WHAT IS REQUIRED FOR CLEARANCE

One Person, One Vote

The first requirement for any redistricting plan is the one-person, one-vote requirement. The districts must be substantially equal in population. If they are not, neither the Attorney General nor the courts will accept the plan.

What is substantially equal? For a congressional district, it is a deviation of one percent or less. That means that the total deviation between the smallest district and the largest can be no more than one percent of the population of the ideal district. The ideal population is the total population divided by the number of districts. (See HSG Report #37, REDISTRICTING, Part One, REVISED EDITION, June 9, 1980, for details on figuring deviations.)

For a legislative districting, the courts have said that substantially equal means, in most cases, a deviation of no more than ten percent. In a few cases, where "rational state policy"²⁶ requires it, the deviation in legislative districts may be higher. For example, in Mahan v. Howell,²⁷ the Supreme Court permitted a deviation of 16.4 percent in one house of the Virginia legislature because no alternative plan was offered that would reduce the deviation and still keep the boundaries of political subdivisions intact. The Virginia constitution, the court noted, vests local subdivisions with substantive, not just historical, legislative significance.

In no other state has the Court permitted such large deviations. When a federal district court in Mississippi ordered plans with deviations of 16.5 percent and 19.3 percent,²⁸ the Supreme Court overturned the order. The district court had cited Mississippi's fairly consistent state policy of maintaining county borders in legislative districts and the lack of legislative powers entrusted to the counties. The Supreme Court replied:²⁹

Recognition that a state may properly seek to protect the integrity of political subdivisions or historical boundary lines permits no more than "minor deviations" from the basic requirement that legislative districts must be "as nearly of equal population as is practicable." ... The District Court failed here to identify any ... "unique features" of the Mississippi political structure as would permit a judicial protection of county boundaries in the teeth of the judicial duty to "achieve the goal of population equality with little more than de minimus variation.

(See page 16 for an explanation of the differences between court-ordered and legislatively-enacted plans and the population variances permitted for each. See HSG Report #37, REDISTRICTING, Part One, REVISED EDITION, June 9, 1980, for more on court decisions about population deviation percentages.)

The only state policy accepted by the courts so far to justify deviations greater than ten percent has been Virginia's "consistent adherence to the boundaries of political subdivisions."³⁰ It appears that maintaining political subdivisions will justify high deviations only if the state can show that separate representation for political subdivisions has traditionally been an essential part of its system of government for reasons unrelated to race.

Considerations such as protecting incumbents or maintaining proportional representation for political factions, while not unconstitutional or illegal in themselves, will not justify deviations beyond ten percent.

If the state finds itself in court, as in the 1970's redistricting in Texas, with no valid plan and no legislatively-enacted plan, the court is likely to choose the plan with the smallest population deviations, as it did in 1977. The plan favored by the state, but not passed by the Legislature, was constitutional and legal, but the court finally chose a plan offered by the plaintiffs because it had smaller population deviations. (See page 60.)

One person, one vote also means that all or most of the minority-controlled districts cannot be over-populated (underrepresented) in relation to the ideal.

Assume, for example, a plan with an ideal district population of 10,000 and districts ranging in size from 9,800 to 10,800 (a total deviation of 1,000, or ten percent). If the black population in a large county is 26,000, blacks could be expected to control four ideal-size districts (assuming that control requires 65 percent of the population, or 6,500 residents in a district of 10,000 -- see pages 46-64). But if the districts where the blacks live all have populations larger than 10,000, more votes will be needed to control those districts. If each of the four districts, for example, had a population of 10,000, it would take 28,080 blacks to control all four districts. Blacks might lose control of one of the four districts if they are all overpopulated.

If all the minority districts are larger than ideal, the minority vote will be diluted and the Attorney General will want to know why.

Nonretrogression

While many of the standards of Section 5 are not clear, one is: no plan will be cleared that will make it harder than before for minorities to elect representatives.

The case that stated that principle was Beer v. United States, which arose from a New Orleans City Council redistricting. In

that case, in 1976, the Supreme Court said that "the purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."³¹

If, for example, Mexican-Americans have been able to elect five representatives from San Antonio, a plan will not be accepted if it seems likely to result in the election next time of only four.

But the election of minority representatives is not the only test of retrogression. Retrogression can occur in a district that has never elected a minority representative. Consider this example:

District A is 55 percent Mexican-American and has never elected a Mexican-American representative. Mexican-American registration has been increasing in the district for several years. In 1978, an anglo defeated a Mexican-American candidate in a two-person race, but by a small majority. In 1980, the Mexican-American candidate lost by an even smaller majority. In 1981, if the district were redrawn to give Mexican-Americans only 48 percent of the population, the new lines would clearly be retrogressive.

One question that is not clear is whether retrogression may be considered across the state as a whole or whether it applies to smaller groups of neighboring districts.

In a Mississippi case,³² Supreme Court Justice Harry A. Blackmun said in a concurring opinion that "(d)istricts that disfavor a minority group in one part of the State may be counterbalanced by favorable districts elsewhere." In that case, the Supreme Court overturned a plan written and ordered by a federal district court in Mississippi. The Supreme Court found that the district court's plan contained population deviations that were too large. However, the majority also noted fragmentation of concentrations of black voters in several specific areas of the state. It was those fragmentations that Blackmun was saying might be balanced in other parts of the state.

In some cases, however, the Attorney General has found that the loss of representation in one area is retrogression even if representation is gained in another place in the same plan. In the Jim Wells County Commissioners' Court redistricting, for example, an Attorney General's letter of objection noted that a concentration of Mexican-American voters had been moved from a predominantly Mexican-American precinct to another precinct where, because of polarized voting, they would not have the influence they had had before. However, there would still be one safe Mexican-American precinct, so the Mexican-American population

in the county would not lose influence. While some Mexican-Americans would lose voting power, others would gain. The letter of objection, written February 1, 1980, said:

...Mexican-Americans in Jim Wells County, and especially those who reside in the area known as Rancho Alegre, may be denied effective and responsive representation on the Commissioners Court through the implementation of a plan that places that area within Commissioner Precinct Three. Thus the implementation of this proposed plan would appear to be retrogressive under the standard of Beer v. United States...³³

Nonretrogression v. One Person, One Vote

The courts require that minority gains in voting, once won, cannot be diluted. The courts also require that every vote be equal. What happens if those two overriding principles, non-retrogression and one person, one vote, are in conflict?

If, for example, a Texas city has had sufficient minority population concentrations in the past for two minority-controlled districts, it would be retrogression if the new plan had only one. But if the city has lost population since the 1970 census, it may be difficult to create two minority-controlled districts.

First, the ideal district will be larger. If the state has gained population, all districts in the state will have to be larger in population. In the cities, if there has been a population loss, some districts will have to cover larger areas to bring in more people. If the movement of people has been to nearby suburbs, it may be possible to expand the districts without changing the racial balance too much. But if the movement has been irregular and the nearby suburbs are predominantly anglo, minority votes could be diluted when the districts are expanded.

Nonretrogression would take precedence over regularity of district shapes and compactness. If, with the help of the computer the Legislature can create districts that meet population and dilution standards, the Attorney General will probably insist that neither principle be sacrificed. If even the computer can't resolve the conflict, then the courts will probably have to resolve it.

Is Retrogression the Only Standard?

The issue of retrogression raises another confusing question, answered differently in different situations: Can the Attorney General object if the plan improves the position of minorities but that position is still not as good as it might be under another plan?

If, for example, a county is 60 percent Mexican-American and has never elected a Mexican-American representative, would a plan necessarily be approved that provided one district that Mexican-Americans could control? Suppose the old plan had scattered the Mexican-Americans evenly among four districts. Perhaps the population distribution was such, and the voting registration was such, that it was difficult in the past to assure safe districts for Mexican-Americans. (See pages 47-52 for details on Mexican-American registration.) Now, however, the population has shifted somewhat and districts could be drawn to give Mexican-Americans two safe districts. Is the state required to do it? If the state draws one safe district for Mexican-Americans, but could have drawn two, will the Attorney General object?

The answer is not clear. There are several conditions that could make the Legislature's choice of plans unacceptable. If, for example, it could be shown that the Legislature's intent (see page 35) was to limit the number of districts controlled by Mexican-Americans, the plan would certainly be illegal, under both the Voting Rights Act and the U. S. Constitution. The fact that an alternate plan offering two minority-controlled districts was proposed and rejected in the Legislature would be of interest to the Attorney General.

The Jim Wells County commissioners' court redistricting was similar in some respects to our hypothetical example. Jim Wells County is about 64 percent Mexican-American. For some years, the county has had one Mexican-American commissioner, out of four. In the most recent redistricting, the plan maintained one safe Mexican-American district, just as before. The Attorney General has objected three times to three successive plans in Jim Wells County. In the most recent letter of objection, August 12, 1980, Acting Assistant Attorney General James P. Turner explained:

Our analysis reveals that while the proposed plan adequately deals with some of the concerns we had in the previously submitted plan, the plan continues to dilute the voting strength of the minority concentration that exists in the southern portion of the city of Alice by distributing those voters among all four commissioner precincts. On the other hand, it appears that a number of plans were available to the Commissioners Court that would not have had that effect. The adoption of a plan that would maintain Mexican-American voting strength at a minimum level where alternative options would provide a fairer chance for representation, is relevant to the question of an impermissible racial purpose in its adoption... particularly where, as here, the plan was drawn with no significant input from the affected minority group...³⁴

The Attorney General cited a Wilkes County, Georgia, case, in the letter. In the Wilkes County case, the change would not have reduced black representation on the Board of Commissioners or Board of Education. None had been elected before and none would be elected under the new plan. The county was 47 percent black.

The court, rejecting the changes, noted that "these voting changes were made without the consultation of representatives of the black community, and the record demonstrates that available options for satisfying the one-person, one-vote requirement that would enhance voting strength were not considered."³⁵

In the Wilkes County plan, there was retrogression. Under the old, single-member plan, blacks could not elect a representative but they had enough voting strength in some districts to influence the election of representatives. The new plan would have reduced that influence.

Although the court found that black voting strength was diminished in the new plan, the court went on to note that "the discriminatory effect is even more apparent when the (new) at-large plan is compared with possible fairly-drawn single member district plans."

The court found in that case, which was affirmed by the Supreme Court, that Wilkes County had failed to prove there was no discriminatory purpose in choosing the plan that the county chose:

...the record demonstrates that alternate options for satisfying one-person, one-vote standards were available and the record does not demonstrate the reason for selecting the at-large method over other options. Such is particularly true in this case since it appears that the at-large method would retain black voting strength at a minimum level while alternate options would enhance black voting strength.³⁶

In our hypothetical case, as in Jim Wells County and Wilkes County, Georgia, the Attorney General would at least want the Legislature to explain its choice. If the Legislature could show no reason for preferring the plan that gave Mexican-Americans one district instead of two, the Attorney General might object. If the districts in an alternate plan were more compact than in the adopted plan, or otherwise conformed more closely to state or federal standards, while giving Mexican-Americans two safe districts instead of one, the Attorney General would be likely to object.

In the 1975 plan for Texas House districts, the Attorney General objected to districts in two counties where more minority representatives could be elected than before and one county where the number of likely minority representatives would remain the same. In all three counties, the Attorney General objected to "fragmentation of cognizable minority residential areas." (See pages 59 to 61 for details of those objections.) But that was before Beer. (See page 20 and below.) Since Beer, which was decided in 1976, the letters of objection have usually mentioned retrogression or purpose as well as fragmentation. Fragmentation apparently no longer stands alone as a cause for objection. (See page 27 for explanation of fragmentation.) It is now cited as evidence of intent, as in the August letter of objection for Jim Wells County, or as an element of retrogression, as in the February letter of objection for Jim Wells County.

If the state is able to satisfy the Attorney General that there is no intent to discriminate (see page 35 for a discussion of intent) and there is no retrogression, it appears that the Attorney General does not have the right to object. If the Attorney General does object, the state might defend its plan in the D. C. court or, ultimately, the Supreme Court but that route would be time-consuming and expensive and there would be no valid plan in the meantime.

Retrogression from What?

In the Wilkes County case, the Supreme Court suggested that the possibilities for minority strength, under alternate plans, can be the standard by which the plan is judged. If the adopted plan diluted minority voting strength, as compared to an alternate, rejected plan, the Court in that case considered the plan retrogressive.

But in a more recent case, the Court made it clear that retrogression is measured by what exists, not by what might exist under some other plan. In the new case, a 1978 Mississippi reapportionment, the D. C. court granted a declaratory judgment that the plan did not violate the Voting Rights Act.³⁷ The Supreme Court affirmed, without opinion. But Justice Stevens, in a concurring opinion, explained the Court's reasoning: "the statutory plan was permissible under the Act so long as it did not have a discriminatory purpose and did not dilute black voting strength as it existed at the time the legislation was passed."³⁸

The case that set the retrogression standard was Beer v. United States.³⁹ The New Orleans City Council won that case, after the Attorney General and the D. C. court had refused to clear its reapportionment plan. The Supreme Court ruled that the council apportionment did not violate Section 5 because it permitted the election of one black to a council that had not had a black before.

The Court said such a plan could not be retrogressive. The Attorney General had objected because the plan appeared to "dilute black voting strength by combining a number of black voters with a larger number of white voters in each of the five districts [fragmentation]." The Attorney General also said that there was no "compelling governmental need" to draw the lines that way, and that the districts were not especially compact or regular in shape.

(The population of New Orleans was about 600,000, approximately 55 percent white and 45 percent black. The plan called for a seven-member council, two elected at large and five elected from districts. The at-large seats were not subject to Section 5, the Court ruled, because they were in effect before the Voting Rights Act and were therefore not a change.)

The council filed suit in the D. C. court for a declaratory judgment. The D. C. court dismissed the suit, agreeing with the Attorney General that the plan diluted the black vote.

The Supreme Court majority, however, said that it was "apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of (Section) 5."

The plan could not be dilutive because it expanded the electoral opportunities for blacks.

In a footnote, the Court noted that it is possible for a plan to be a "substantial improvement" over its predecessor and still continue to discriminate on the basis of race or color. That possibility, which was not alleged in the New Orleans case, could be remedied only by a suit on constitutional grounds.

In a dissent, Justice Byron White said he could not agree that Section 5 reaches "only those changes in election procedures that are more burdensome than pre-existing procedures."

But the nonretrogression standard remains. The state is not required to assure representation for minorities in proportion to their share of the population. However, if it does not, it must bear the burden of proving that the failure to do so was not intentional or otherwise unconstitutional.

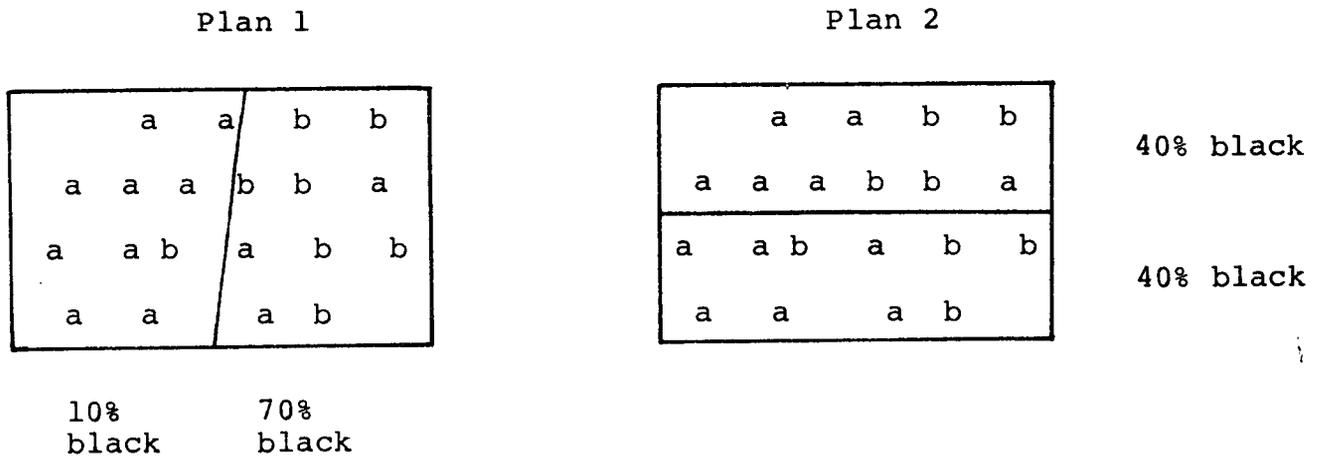
Fragmentation and Packing

The U. S. Constitution and the Voting Rights Act say that the state must not deny or abridge the right to vote of minorities. The Supreme Court says no voting change may result in retrogression of the voting strength of minorities. Those are the forbidden effects. The techniques in redistricting that cause those effects are varied, but two of the most common are fragmentation and packing.

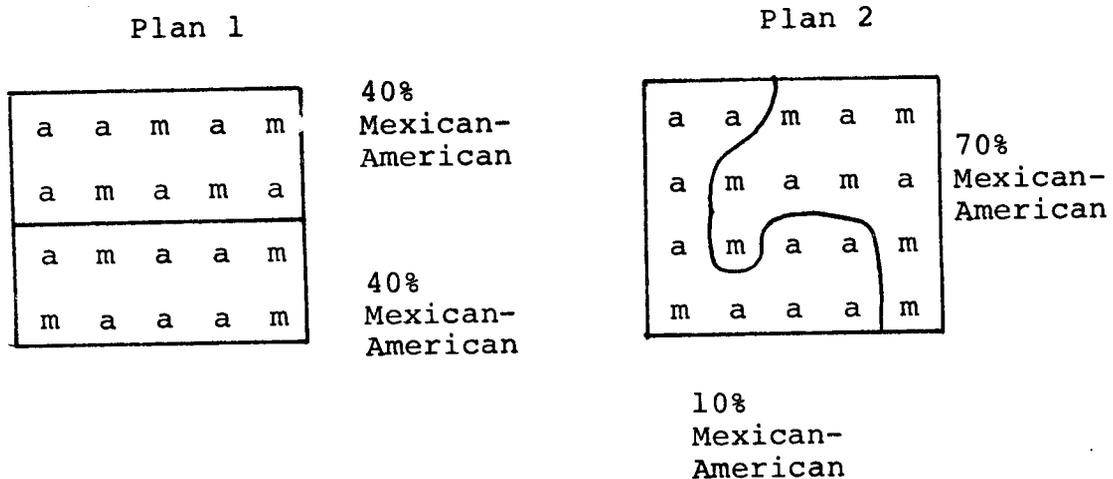
Fragmentation

Wherever there is a substantial, well-defined community of black or Mexican-American voters who could control a district or have strong influence in a district, breaking up that community is fragmentation and is likely to be unacceptable under Section 5.

For example, in the illustration that follows, a substantial minority community in Plan 1 has been fragmented in Plan 2, with the result that the minority voters cannot elect a representative.



Sometimes, fragmentation is not so obvious. If the minority population is more scattered, bringing it together to make a minority-controlled district might require an odd-shaped boundary. For example:



If the existing boundaries were like those in Plan 2, and the Legislature straightened the lines to make the districts in Plan 1, the Attorney General would probably see it as retrogression and object.

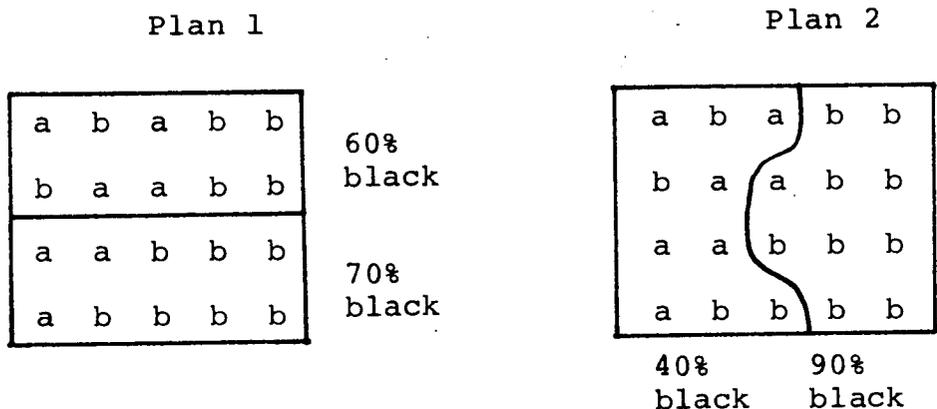
But if the existing districts were those in Plan 1, the question is whether the Legislature must draw the odd-shaped district to create a minority-controlled district where none existed before. (See pages 23-25.) The answer would depend on such considerations as the state's traditional reluctance or willingness to create odd-shaped districts, the position of minorities in nearby districts, the coherence of the communities involved, and whether there were any substantial state justifications for the action.

In several county commissioners' redistrictings in Texas, the Attorney General has objected to plans that unnecessarily fragmented minority communities, limiting their ability to elect representatives. Before Beer⁴⁰ (see page 25), the Attorney General sometimes objected simply to "fragmentation of a substantial and well-defined community." Since Beer, fragmentation is more often cited as evidence of illegal purpose or of retrogression.

Packing

While fragmenting is not permitted, neither is packing. Packing is placing as many minority voters as possible in a single district, with the effect of limiting their influence in other districts.

The illustration shows how packing can cut the number of minority-controlled districts from two to one:



In Plan 1, minorities probably control both districts. In Plan 2, minorities are able to control only one district.

The Attorney General objected to a commissioners' court redistricting in Nueces County in 1978 because of packing. The county submitted a plan that gave Mexican-Americans 52 percent of the population (not a majority of the voters, see pages 46-49) in Precinct 2 and 81.6 percent of the population in Precinct 3.

"By overly concentrating the Mexican-American population in one precinct (Commissioner Precinct 3), the plan has the effect of minimizing the impact of the Mexican-American vote in other precincts, notably Precinct 2," the letter of objection said.⁴¹ "It appears that fairly drawn alternative reapportionment plans could easily avoid this result."

It is not always easy to decide what is packing and what is not. It depends on what other arrangements might have been produced, for one thing. In Nueces County, it was clear that fewer Mexican-Americans in Precinct 3 and more in Precinct 2 would have given Mexican-Americans a better chance to elect two commissioners instead of one.

In some situations, however, a 60 percent or even a 65 percent minority district might not be minority-controlled. In such cases, it would not be "packing" to place more minority voters in the district. If a large proportion of the minority population is under 18, or not registered to vote, or if the turnout is historically low, or if very many of the minority residents are non-voting aliens, then a district might not be minority-controlled unless 70 percent or more of the population were minority. (See pages 46-54 for details on minority voting behavior and pages 40-45 for safe districts.)

On the other hand, a district might be "packed" even if less than 50 percent of the population is black or Mexican-American. If the district has traditionally elected a black or Mexican-American, even though the majority of the voters are anglo, it can be packing to add more blacks or Mexican-Americans, especially if they are taken from another district where they are needed for minority control.

Packing may be necessary to draw a reasonable plan. If, for example, the minority population is quite dense in one corner of a county or group of counties, it may be impossible to spread it among several districts without drawing non-contiguous lines or making the minority districts too small in population. If that is the case, the "packed" district can be justified by the one-person, one-vote requirement or by the state constitutional requirement of contiguous lines.

It is not always easy to tell what is packing and what is fragmenting. Sometimes minority political strength will be weakened by one and sometimes by the other, depending on the political possibilities of the community. In county commissioners'

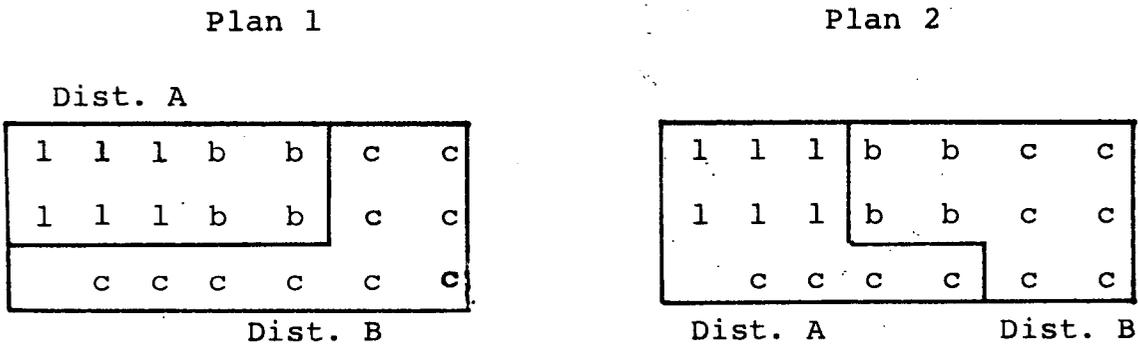
redistrictings over the last five years, minority organizations like MALDEF have fought for different minority percentages in different situations. In some cases, MALDEF has preferred strong influence in four precincts rather than control in one. In other cases, that choice would be considered fragmenting. The courts have noted that the situation varies from place to place:

There is no agreement on whether the political interests of a minority group are best maximized by an overwhelming majority in a single district, bare majorities in more than one district or a substantial proportion of voters in a number of districts.⁴²

Changing the Political Character of a District

Minorities can lose control of a district when its political character is changed, even if the minority population remains the same.

Consider this example:



In Plan 1, District A is 40 percent black, but most of the whites in the district are liberals who have voted for the black incumbent, a four-term representative. In Plan 2, the black population has been moved to District B, where the whites are conservatives and the incumbent is a white conservative. The black incumbent of District A is now a resident of District B, where he or she must face the white conservative incumbent and try to get white conservative votes.

In 1971, the Texas Legislature's Senate plan had a district that had been changed in a similar way -- former State Senator Barbara Jordon's old district.

Before redistricting, Jordan was reelected, even though the minority population of her district had declined from 47 percent to 38 percent. She had the support of the district's white liberal

(on economic issues) voters. When the Legislative Redistricting Board redrew the lines of her district, the white liberals were taken out and replaced by white conservatives. (Similar changes were made in three other Houston senate districts, where black voters were combined with white conservative voters, instead of with white liberal voters, as in the old plan.)

The court upheld the plan, noting that "the racial composition of the various districts in Houston has changed [in the new plan] very little, if at all."⁴³

"No political, racial or other interest group has any constitutional right to be successful in its political activities," the court said. "However, a state may not design a system that deprives such groups of a reasonable chance to be successful."⁴⁴

Judge William Justice, in a dissent, argued that the plan for Houston did in fact deprive minorities of a reasonable chance to be successful. "Harris County districts designedly operate to dilute, minimize and cancel out the voting strength of blacks," he wrote. "Voting habits of whites in District 11 [the new "black" district] demonstrate that, in a State Senatorial contest, the likelihood of framing a coalition of blacks is unlikely."⁴⁵

The majority, however, held that there was no proven intent to deny Jordan, or any other black candidate, a chance to be elected. If the effect was discriminatory, the court said, the discriminatory effect was not substantial enough to violate the Fourteenth Amendment.

In that case, the plan was in court on a constitutional challenge and the burden of proof was on the challengers, not on the state, to prove that the plan was unconstitutional. Further, the challengers had to prove that the state intended to discriminate against the black voters. If that case were being considered by the Attorney General now that Texas is covered by Section 5, he would use different standards to judge it. He can object if the state has simply failed to prove that the plan will not have the effect or purpose of minimizing the chances for a minority person to be elected.

The Voting Rights Act did not cover Texas when the Senate plan went into effect.

One further circumstance influenced the court's decision: Jordan testified that she would not necessarily be defeated in the new District 11, even with the new white conservative voters. The Attorney General, like the courts, will be affected by the opinions of minority office holders. (Jordan did not run for reelection to the Senate. No black has been elected to the Texas Senate since her.)