SUBJECT: State Board of Education redistricting

COMMITTEE: Redistricting — committee substitute recommended

VOTE: 9 ayes — Solomons, Villarreal, Branch, Eissler, Harless, Hunter, Keffer, Peña, Phillips

4 nays — Alonzo, Alvarado, Pickett, Veasey

4 absent — Aycock, Geren, Hilderbran, Madden

WITNESSES: For — Thomas Ratliff

Against — None

On — Gail Lowe

BACKGROUND: The U.S. Constitution, Art. 1, sec. 2 requires an "actual enumeration" or census every 10 years to apportion the number of representatives each state will receive in the U.S. House or Representatives. The release of population figures from the census also triggers redistricting – or redrawing of political boundaries – of the state's legislative and State Board of Education (SBOE) districts, as well as of congressional districts. The Legislature is not required by the constitution or statute to redistrict the SBOE. However, Education Code, sec. 7.104, which determines election dates for SBOE members, anticipates that the board will be redistricted following a decennial census.

Texas Constitution, Art. 7, sec. 8 establishes the SBOE. Education Code, sec. 7.101 constitutes the SBOE as 15 single-member districts. The SBOE adopts policies and sets standards for educational programs, such as textbook standards, for Texas public schools. It also oversees the Permanent School Fund.

SBOE redistricting in 2001. The 77th Legislature did not enact a redistricting plan of any kind – House, Senate, SBOE, or congressional. The federal Court for the Northern District of Texas drew a district map for the SBOE in late 2001, and it remains in use today.

Under the Texas Constitution, if the Legislature does not enact a valid House or Senate plan during the regular session, the Legislative Redistricting Board (LRB), comprising of the lieutenant governor, the House speaker, the attorney general, the comptroller, and the land commissioner, must draw the lines. Upon adoption by the board and after being filed with the secretary of state, the plan becomes law and is to be used in the next general election. The LRB drew both House and Senate districts in 1971, 1981, and 2001.

No mechanism similar to the LRB exists for redrawing congressional or SBOE districts should the Legislature fail to adopt a redistricting plan. If the Legislature or the LRB fails to draw new districts following the census, or if the district lines are invalidated for failure to meet one of the many legal requirements, the task falls to a court.

Under federal law (42 U.S.C., sec. 2284), a three-judge court hears any actions challenging the apportionment of congressional districts or statewide legislative bodies, such as the SBOE.

Legal requirements for redistricting the SBOE. The legal standards for SBOE redistricting fall into three general areas:

- state and federal constitutional standards, such as population equality;
- application of the federal Voting Rights Act (VRA) requirements for challenging discriminatory plans under sec. 2 and the requirements for advance federal approval ("preclearance") under sec. 5; and
- U.S. Supreme Court decisions during the 1990s prohibiting "racial gerrymandering," beginning with *Shaw v. Reno*, 509 U.S. 630 (1993).

Each standard must be considered in conjunction with the other requirements. The interaction can be complex and contradictory, especially in applying VRA protections to avoid diluting minority voting strength and adhering to the *Shaw* standard that race cannot be the predominant factor in redistricting.

Federal requirements. The Legislature will have to consider several aspects of federal law, such as the permissible deviations in district

population equality, VRA requirements, and court decisions on racial and political gerrymandering.

District population equality. A key requirement for redistricting plans is that districts have approximately equal population, or "one person, one vote." In 1962, the U.S. Supreme Court reversed its long-standing position that apportionment and redistricting were political issues not appropriate for judicial review. In its landmark decision, *Baker v. Carr*, 369 U.S. 186 (1962), the court held that federal courts could consider challenges to state legislative redistricting plans. In *Reynolds v. Sims*, 377 U.S. 568 (1964), the court established a requirement that the seats in a legislature be apportioned on the basis of population, to ensure "substantially equal state legislative representation for all citizens."

Redistricting for the SBOE follows the same population equality requirements that also apply to the redistricting of state legislatures, *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50 (1970).

The 10 percent deviation rule. Under the most common method for determining population equality in redistricting plans, courts measure the range by which the districts deviate from absolute numerical equality. To determine the size of a plan's statistically ideal district, the state's population is divided by the number of districts in the redistricting plan. The resulting number equals the population of the "ideal district." For example, the ideal SBOE district in Texas, with a headcount population of 25,145,561 in the 2010 census, and 15 SBOE districts, would have a population of 1,676,371.

In *Reynolds v. Sims*, the Supreme Court held that, "[m]athematical exactness or precision is hardly a workable constitutional requirement" in state legislative redistricting cases. In *White v. Register*, 412 U.S. 755 (1973), the Supreme Court upheld a total population deviation between the largest and smallest Texas House districts of 9.9 percent. The court stated that larger deviations would require justification. Within the 10 percent range, lower courts have held, the state may use the population deviation range for any rational purpose, such as not splitting towns or counties into separate districts, or making districts compact.

A discriminatory scheme of population deviation might be invalid for other reasons even if the population deviation were less than 10 percent. In 2004, the U.S. District Court for Northern Georgia, in *Larios v. Fox*, 300 F. Supp. 2d 1320, found that the Georgia House and Senate plans, each with a total population deviation of 9.98 percent, were arbitrary and discriminatory. The plans maximized the number of safe Democratic seats by systematically over populating suburban Republican districts and under-populating Democratic urban and rural districts. The court found the plans lacked "any legitimate, consistently-applied state interests." The Supreme Court summarily affirmed the lower court position.

In the same year, in *Rodriquez v. Pataki*, 308 F. Supp. 346, the U.S. District Court for the Southern District of New York stated it would still scrutinize a redistricting plan even though its total population deviation was 9.78 percent. The court ruled that plaintiffs in a redistricting challenge must show that the deviation in the redistricting plan resulted solely from the promotion of an unconstitutional or irrational state policy and that policy was the actual reason for the deviation. The Supreme Court summarily affirmed this decision as well.

It is unclear what impact *Rodriquez* or *Larios* would have on Texas redistricting. *Larios* implies that any challenge to a population deviation can be brought in much the same way that a challenge is brought against population deviations in congressional districts, which must have as nearly equal a population as possible. As such, any population deviation, especially those that consistently favor a particular political, racial, or ethnic group or region, may be subject to scrutiny.

Voting Rights Act. A new SBOE redistricting plan will be subject to the VRA, which Congress enacted in 1965 to protect the rights of minority voters to participate in the electoral process in southern states. Sec. 5 of the act was broadened to apply to Texas and certain other jurisdictions in 1975. Amendments enacted in 1982 expanded the remedies available to those challenging discriminatory voting practices anywhere in the nation.

Sec. 5 of the VRA (42 U.S.C., sec. 1973c) requires certain states and their political subdivisions with a history of low turnout and discrimination against certain racial and ethnic minorities to submit all proposed policy changes affecting voting and elections to the Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice (DOJ) or to the U.S. District Court for the District of Columbia for "preclearance." The

judicial preclearance process requires a jurisdiction covered by the VRA to file for a declaratory judgment action, with the U.S. Justice Department serving as the opposing party. The DOJ reports that almost all preclearance requests follow the administrative preclearance route.

Under sec. 5, state and local governments bear the burden of proving that any proposed change in voting or elections is neither intended, nor has the effect, of denying or abridging voting rights on account of race, color, or membership in a language-minority group. No state or local voting or election change may take effect without preclearance. In effect, changes in election practices and procedures in the covered jurisdictions are frozen until preclearance is granted.

Retrogression. A proposed plan is retrogressive under the sec. 5 "effect" prong if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" (as defined in *Beer v. United States*, 425 U.S. 130 (1976)) when compared to a benchmark plan. Generally, the most recent plan to have received sec. 5 preclearance (or to have been drawn by a federal court) is the last legally enforceable redistricting plan. For CSHB 600, the 2001, court-created SBOE map would be the benchmark plan.

The effective exercise of the electoral franchise is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice. The presence of racially polarizing voting is an important factor considered in assessing minority voting strength. DOJ or the D.C. circuit court may object to a proposed redistricting plan if a fairly drawn alternative plan could ameliorate or prevent that retrogression.

In *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), the Supreme Court ruled that redistricting plans that are not retrogressive in purpose or effect when compared with the jurisdiction's benchmark plan must be precleared even if they violate other provisions of the VRA or of the Constitution. However, plans precleared under sec. 5 still can be challenged under sec. 2 of the VRA or on 14th Amendment grounds, even by the DOJ that had granted sec. 5 preclearance. However, the burden of proof shifts from the jurisdiction creating the plan to those challenging the proposed redistricting.

Sec. 2 challenges. Sec. 2 of the VRA offers a legal avenue for those who wish to challenge existing voting practices on the grounds that they are

discriminatory. Sec. 2 became a major factor in redistricting in 1982, when Congress amended it to make clear that results, not intent, are the primary test in deciding whether discrimination exists, based on the "totality of the circumstances."

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the U.S. Supreme Court, in upholding a sec. 2 claim against multimember legislative districts in North Carolina, established a three-part test that plaintiffs must meet when charging invidious vote dilution. The three standards are:

- the protected group is "sufficiently large and geographically compact to constitute a majority in a single-member district";
- the group is politically active; and
- the majority votes in a bloc to the extent that the minority's preferred candidate is defeated in most circumstances.

In *Bartlet v. Strickland*, 129 S.Ct. 1231 (2009), the Supreme Court did not rely on citizenship information when determining if a protected group was large enough to constitute a majority in the district. Citizenship is a consideration, though, because both citizenship and voting age population are factors for voting eligibility under Sec. 2 lawsuits designed to protect the rights of voters.

Maximizing minority-controlled districts. The U.S. Supreme Court's analysis in *Johnson v. De Grandy*, 507 U.S. 25 (1993), addressed the key Sec. 2 issue of proportionality or the ratio of minority-controlled districts and the minority's share of the state population. The *De Grandy* plaintiffs objected to a Florida redistricting plan because it was possible to draw additional Hispanic majority districts in Dade County. Even though the Supreme Court seemed to accept the contention that *Gingles* standards had been met, it rejected claims that additional majority-minority districts were required to meet sec. 2 claims. According to the court: "Failure to maximize cannot be the measure of Section 2." In other words, the court seemed to reject the contention previously raised in sec. 2 challenges, and adopted by DOJ in sec. 5 preclearance reviews in the early 1990s, that if a majority-minority district can be drawn, then it must be drawn, assuming the *Gingles* criteria are met.

Gerrymandering. The word "gerrymandering" was coined in 1812, when a Massachusetts redistricting plan designed to benefit the party of Gov. Elbridge Gerry resulted in a district that a political cartoonist drew to

resemble a salamander. Traditionally, gerrymandering has been considered a technique to maximize the electoral prospects of one party while reducing that of its rivals.

Racial gerrymandering. In a series of redistricting challenges during the 1990s, the U.S. Supreme Court grappled with guidelines on how to resolve the tension between race-conscious VRA requirements and the constitutional restraints against race-based actions under the 14th Amendment. In the original *Shaw v. Reno* opinion, the Supreme Court rejected redistricting legislation with districts alleged to be so bizarrely shaped that on their face they were considered unexplainable on grounds other than race. In *Miller v. Georgia*, 515 U.S. 900 (1995), the court held that those challenging a redistricting plan need not necessarily show that a district was bizarrely shaped in order to establish impermissible race-based gerrymandering.

In *Bush v. Vera*, 517 U.S. 900 (1995), a case challenging the Texas congressional redistricting plan, the Supreme Court recognized that the state could consider race as a factor, but found the Texas congressional plan unconstitutional because race was the predominant factor motivating the drawing of district lines and traditional, race-neutral districting principles were subordinated to race.

In the *Shaw* cases, courts have identified certain traditional, race-neutral redistricting criteria. These include:

- compactness;
- contiguity;
- preserving counties, voting precincts, and other political subdivisions;
- preserving communities of interest;
- preserving the cores of existing districts;
- protecting incumbents; and
- achieving legitimate partisan objectives.

Under the *Shaw* cases, a redistricting plan will survive a challenge only if it proves that race was not the predominant factor in drawing its challenged minority districts.

Partisan gerrymandering. In 1986, the U.S. Supreme Court in *Davis v. Bandemer*, 478 U.S. 109, established a two-pronged test for invalidating a

politically gerrymandered plan under the equal protection clause of the Fourteenth Amendment. Challengers must show (a) an actual or projected history of disproportionate results and (b) that the electoral system is arranged so that it consistently degrades a voter's or a group of voter's influence on the political process as a whole to the point where the individual or group "essentially [has] been shut out of the process."

In 2004, the Supreme Court, in *Vieth v. Jubelirer*, 541 U.S. 267,reaffirmed that claims of political gerrymandering can still be made but the court, either rejecting the argument of political gerrymandering altogether or believing the *Bandemer* standards were unworkable, could not agree on how to evaluate such a claim. In *LULAC v. Perry*, 548 U.S. 399 (2006), in reviewing the Texas Legislature's 2003 congressional redistricting plan, the Supreme Court again considered partisan gerrymandering but rejected it as a claim because the court could not find a workable standard. Challenges to political gerrymandering remain uncertain until the Supreme Court establishes a standard.

Residency. Election Code, sec. 141.001, requires a person to be a resident of a SBOE district in order to be eligible to represent it.

DIGEST:

CSHB 600 would adopt PLAN E111 as proposed by the House Redistricting Committee. Exact data on district population and other demographic information on PLAN E111 and other data are available at http://gis1.tlc.state.tx.us/. It would apply starting with the primary and general elections in 2012 for members of the board in 2013.

CSHB 600 would create 15 districts. The ideal size of a SBOE district is 1,676,371 based on the 2010 census. Under CSHB 600, 1,676,371 also would be the mean average size of SBOE districts. The overall population range between the districts would be 31,049 or 1.86 percent. SBOE district 8 would be the largest district with a population of 1,691,564. This would be 15,193 people or 0.91 percent above the mean average. SBOE district 3 would be the smallest district with a population of 1,660,515. This would be 15,856 people or 0.95 percent below the mean average.

The bill states legislative intent that if any county, tract, block group, block, or other geographic area was erroneously omitted, a court reviewing the bill should include the appropriate area in accordance with the Legislature's intent. It also would repeal the SBOE plan imposed by court order following the 77th regular session in 2001.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect August 29, 2011.

CSHB 600 SBOE District Demographics

Ideal Population Deviations and Racial / Ethnic Breakdown

	Population	# Deviation from Ideal*	% Deviation from Ideal*	Percentage				
				Anglo	Black	Hisp	B + H**	Other
District 1	1,665,192	-11,179	-0.67%	20.2	2.8	76.1	78.3	1.5
District 2	1,664,048	-12,323	-0.74%	22.8	3.0	73.2	75.7	1.6
District 3	1,660,515	-15,856	-0.95%	19.7	7.3	71.9	78.4	2.0
District 4	1,679,274	2,903	0.17%	13.2	29.7	53.7	82.4	4.4
District 5	1,663,768	-12,603	-0.75%	55.4	5.9	35.0	40.3	4.3
District 6	1,686,971	10,600	0.63%	44.3	12.6	33.1	45.0	10.8
District 7	1,684,386	8,015	0.48%	50.8	19.0	21.4	39.9	9.3
District 8	1,691,564	15,193	0.91%	60.6	11.8	23.8	35.0	4.4
District 9	1,675,713	-658	-0.04%	69.2	15.3	13.7	28.7	2.1
District 10	1,672,245	-4,126	-0.25%	56.8	13.0	24.8	37.0	6.2
District 11	1,685,800	9,429	0.56%	63.4	10.3	20.2	30.0	6.5
District 12	1,682,276	5,905	0.35%	53.4	13.0	25.1	37.7	8.9
District 13	1,686,202	9,831	0.59%	21.2	30.1	46.0	75.3	3.4
District 14	1,671,695	-4,676	-0.28%	67.9	8.3	16.7	24.6	7.5
District 15	1,675,912	-459	-0.03%	60.6	6.5	30.8	36.7	2.6

Source: Texas Legislative Council

*Ideal District Population is 1,676,371

**Total number of persons who identify as racially black, ethnically Hispanic, or both.

NOTES:

Legal challenges to use of 2010 Census data in redistricting. Lawsuits challenging the 2010 Census data for use in redistricting already have been filed in Texas. *Teuber v. Texas*, filed in the U.S. District Court for the Eastern District of Texas, challenges the use of counts of non-citizens in census data that will be used for redistricting. *MALC v. Texas*, filed in the

139th state district court in Hidalgo County, argues that significant parts of the Texas population, specifically minorities in urban and border counties, were under-counted by the 2010 census and that an undercount may result in underrepresentation in any redistricting plan that used census 2010 data.