SUBJECT: Redistricting Texas Congressional districts

COMMITTEE: Redistricting — committee substitute recommended

VOTE: 10 ayes — Crabb, Grusendorf, Isett, King, Krusee, Luna, Marchant, Morrison, Pitts, Talton

             4 nays — Villarreal, Flores, McClendon, Raymond

             1 absent — Wilson

WITNESSES: For — *(April 10 hearing:)* Rick Morales; *(May 2 hearing:)* U.S. Rep. John Culberson; Glenn Acker, Copperas Cove ISD; James A. Cherry, Texarkana Chamber of Commerce; Carol Fletcher, Pflugerville ISD; Charlotte Flynn, Gray Panthers; Lester L. Gibson, Texas Organization of Black County Commissioners; Jackie Goodman; John Hrncir, City of Austin; Joe J. Jaworski, Galveston City Council; Allen J. Lichtman, Texas Congressional Delegate; County Judge Frank Summers, Milam County Commissioners Court; Annette Argall; Karin Ascot; 34 others; *(May 2 hearing on committee substitute:)* Pat Carlson, Tarrant County Republican Chairman; *(May 3 hearing:)* U.S. Rep. Max Sandlin; John-Michael V. Cortez, Greater Austin Hispanic Chamber of Commerce; Wilhelmina Delco; Quincy Ellis, Texas Midwest Community Network; Ruben E. Esquivel; Marguerite Jones, Austin Safe Pipeline Coalition; Allan J. Lichtman, Texas Democratic Congressional Delegation; Julia M. Marsden, League of Women Voters of Texas; Dianna D. Puccetti, City of Galveston); Wanda Schultz, Gulf Coast Republican Assembly; Paul Sherr, Austin AFL-CIO Central Labor Council; Beverly S. Silas; Ed Smith, City of Marshall; Stan Smith, East Gulf Coast Republican Assembly; Steven Zettner; 13 others; *(May 4 hearing:)* Fidel Acevedo, Mexican American Democrats of Texas, and 24 others; *(May 4 hearing on committee substitute:)* Pat Carlson, Tarrant County Republican Party; Brian Walters; *(May 5 hearing:)* Jim Marston; *(May 6 hearing:)* Gary L. Bledsoe, Texas NAACP; Scott Kosper and Maureen J. Jouett, City of Killeen; 13 others

             Against — *(April 10 hearing:)* Virginia Agnew; Tommy T.C. Calvert, Neighborhoods First Alliance; Rep. Jessica Farrar, Mexican American

Legislative Caucus; Frank Ortega; Clint Smith, Gray Panthers; Ana Yanez-Correra, Texas League of United Latin American Citizens; *(May 2 hearing on committee substitute:)* Carl Betancourt; Renea Hicks; *(May 3 hearing:)* A.J. Pate; *(May 3 hearing on committee substitute:)* Celia Davis, Abilene City Council; *(May 6 hearing:)* Charles Jackson; *(May 6 hearing on committee substitute:)* George Korbel

On — *(April 10 hearing:)* Elizabeth Christian; Charlotte Flynn, Gray Panthers of Austin; *(May 3 hearing:)* George Korbel; J.B. Leutwyler III; *(May 6 hearing:)* Tom Ramsay

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 of 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. Texas Constitution Art. 3, sec. 28 requires the Legislature to redistrict legislative seats at its first regular session following publication of a United States decennial census.

Redistricting in 2001. According to the 2000 census, Texas' population had grown to 20.9 million, and the state was entitled to two additional members of Congress. The Legislature had to adjust congressional district lines to provide for 32, rather than 30, congressional districts.

The 77th Legislature did not enact a redistricting plan of any kind — House, Senate, SBOE, or congressional. On May 8, 2001, the House passed a House redistricting bill, HB 150 by D. Jones, on third reading by a nonrecord vote after having passed the bill by 76-71 on second reading the previous day. On May 9, the Senate Redistricting Committee reported a Senate redistricting bill, SB 499 by Wentworth, by a 7-1 vote. Both HB 150 and SB 499 died when the Senate did not consider either bill.

On May 27, 2001, the House Redistricting Committee voted 9-6 to report favorably HB 722 by D. Jones, a congressional redistricting bill, but the bill died late in the session without further consideration.

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 the lieutenant governor, House speaker, attorney general, comptroller, and 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 similar mechanism 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 discussed below, 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. In *Growe v. Emison*, 507 U.S. 25 (1993), the U.S. Supreme Court said that federal courts should defer to legislative bodies and state courts during redistricting, as long as the state acts in a timely manner.

Multiple lawsuits were filed in state and federal courts against the state, state officials, and political party representatives challenging the constitutionality of existing congressional district boundaries because of the need to add two districts and use 2000 census figures. A Travis County state district court issued a congressional redistricting plan (*Del Rio v. Perry*, No. GN003665 (353rd Dist. Ct., Travis County, Oct. 10, 2001). On October 19, 2001, the Texas Supreme Court held in *Perry v. Del Rio,* 67 S.W.3d 239, that the district court's congressional plan was unconstitutional because the court had adopted a plan without giving the parties an opportunity for a meaningful hearing.

At this point, the three-judge federal court intervened in congressional redistricting (*Balderas v. Texas*, No. 6:01-CV-158 slip op. (E.D. Tex. Nov. 14, 2002)(per curium), *aff'd mem.* 122 S. Ct. 2583 (2002)). Even though the federal courts "have a limited role in crafting a congressional redistricting plan where the State has failed to implement a plan," the Texas Supreme Court's ruling left the federal courts "with no choice but to proceed without the benefit of a state plan," according to the *Balderas* court. It then drew a

new congressional plan "starting with a blank map of Texas" and without having a baseline map approved either by the Legislature or a state court. On June 17, 2002, the U.S. Supreme Court rejected an appeal challenging the *Balderas* court's plan, which was used for the 2002 election.

On February 11, 2003, Rep. Joe Crabb, chairman of the House Redistricting Committee, requested an opinion from Attorney General Greg Abbott as to whether the Legislature must adopt a congressional redistricting plan. Attorney General Opinion No. GA-0063, issued on April 23, concluded that "the Legislature has the authority to adopt a redistricting plan for the electoral period 2003 through 2010, but it cannot be compelled to do so." The opinion notes that the congressional plan drawn by the *Balderas v. Texas* three-judge court will remain the congressional redistricting plan for Texas until changed by the Legislature.

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

● state and federal constitutional standards, such as one-person, one-vote and not allowing population deviations among congressional districts;
● 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. After the 2000 round of redistricting, the Supreme Court chose not to revisit its 1990s decisions on how to apply VRA and *Shaw* standards simultaneously. However, reopening the redistricting question may force the Legislature to decide how to navigate what the 5th U.S. Circuit Court of Appeals called the "difficult passage through the Scylla of the Voting Rights Act and the Charybdis of *Shaw*." (*Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000)).

Federal requirements. The Legislature will have to consider several aspects of federal law such as the one-person, one vote provisions, population deviation, VRA requirements, and court decisions on racial and political gerrymandering.

One person-one vote. 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 1963, the court established a requirement for population equality among districts in *Gray v. Sanders*, 372 U.S. 368. The case established the equal-population doctrine of "one person, one vote."

The U.S. Supreme Court has interpreted the U.S. Constitution as setting a stricter population-equality standard for congressional districts than for legislative districts. The court has held that a state's congressional districts must contain equal populations "as nearly as practicable," (*Westberry v. Sanders*, 376 U.S. 1, 7-8 (1964)), requiring a state to make a good-faith effort to achieve absolute equality. If it can be shown that a state's plan falls short of precise population equality, to the extent that such is practicable, the state must show that the variances — no matter how small — were necessary to achieve some legitimate state objective. The disputed plan could be proved deficient by introduction of an alternative plan with a smaller range of population deviation or introduction of evidence that minor changes would bring the disputed plan closer to equality. In 1983, the Supreme Court reconfirmed its standard that "absolute population equality [is] the paramount objective" in *Karcher v. Daggett*, 462 U.S. 725.

Population deviation. 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 congressional district

in Texas, with a headcount population of 20,851,820 in the 2000 census, and 32 congressional districts, would have a population of 651,619.

Voting Rights Act. A new congressional 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 the jurisdiction covered by the VRA to file for a declaratory judgment action, with the U.S. Justice Department serving as the opposing party. The administrative preclearance process is considered less costly and burdensome, and DOJ reports that more than 99 percent of all preclearance requests follow the administrative procedure.

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 by *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 3398, the *Balderas* plan would be the baseline map for comparison for retrogression.

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 polarized voting is an important factor considered by DOJ in assessing minority voting strength. DOJ will object to a proposed redistricting plan when it reduces minority voting strength relative to the benchmark 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 1986, the U.S. Supreme Court issued its first opinion interpreting the 1982 amendments to Sec. 2. In *Thornburg v. Gingles* (478 U.S. 30), the 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 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 cohesive; and
- the majority votes in a bloc to the extent that the minority's preferred candidate is defeated in most circumstances.

Maximizing minority-controlled districts. The 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's 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 the *Gingles* prerequisites were satisfied, 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. In the 1990s, a series of Supreme Court decisions addressed the
question of racial gerrymandering, or drawing lines to benefit or hinder the
electoral prospects of minority groups.

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 the race-conscious VRA requirements and the
constitutional restraints against race-based official actions under the 14th
Amendment. In the original *Shaw v. Reno* opinion — decided 5-4, as most
subsequent decisions based on the same reasoning have been — the Supreme
Court rejected "redistricting legislation that is alleged to be so bizarre on its
face that it is unexplainable on grounds other than race."

Subsequent Supreme Court decisions in *Miller v. Johnson*, 515 U.S. 900
(1995) and later *Shaw* cases established that the existence of bizarrely shaped
districts is not sufficient to prevail in a claim of racial gerrymandering. In
Bush v. Vera, 517 U.S. 952 (1996), a case challenging the Texas
congressional redistricting plan, the Supreme Court recognized that the state
could consider race as a factor, but the Texas congressional plan was

unconstitutional because "race was 'the predominant factor' motivating the drawing of district lines and traditional, race neutral districting principles were subordinated to race."

The plurality opinion in *Bush v. Vera* focused on the use of the REDAPPL program and its then-unprecedented ability to provide racial and socioeconomic data down to the census block level. Before the 1990 redistricting process, racial and socioeconomic information only was available on the basis of the larger census tract unit. REDAPPL displayed updated racial and socioeconomic data down to the census block level whenever new configurations of districts were drawn. The court noted that the program enabled those drawing the districts to make more intricate refinements based on race than on any other demographic information. "In numerous instances, the correlation between race and district boundaries is nearly perfect . . . The borders of Districts 18, 29 and 30 change from block to block, from one side of the street to the other, and traverse streets, bodies of water and commercially developed areas in a seemingly arbitrary fashion until one realizes that those corridors connect minority populations." The court also found that use of REDAPPL contributed to a redistricting plan that not only neglected traditional districting principles such as compactness and contiguity but also offered a way to ignore traditional political boundaries by splitting voting precincts as well as cities and counties.

The most recent application of the *Shaw* doctrine to a Texas redistricting case came in March 2000, when the 5th U.S. Circuit of Appeals upheld a district court's summary judgment in favor of the city of Houston after its 1997 city council redistricting plan was challenged as a racial gerrymander impermissible under *Shaw*.

In agreeing with the district court's summary judgment for the city, the appeals court cited the standard set by Justice Sandra Day O'Connor in *Miller v. Johnson* that "To invoke strict scrutiny, a plaintiff must show that the State has relied on race in a substantial disregard of customary and traditional districting practices." The court recognized that race was given some consideration in drawing the new city council districts but noted that "the fact that minority-majority districts were intentionally created does not alone suffice in all circumstances to trigger strict scrutiny." The appeals court also

cited a need to grant deference to an elected body in making an essentially political decision in redistricting.

In *Hunt v. Cromartie*, 532 U.S. ___ (2001), the Supreme Court, ruling for the fourth time regarding North Carolina congressional districts originally challenged in *Shaw*, upheld the districts on the grounds that political affiliation, rather than race, was the determining factor in drawing the new districts. The majority opinion by Justice Stephen Breyer cited the *Vera* opinion to note that: "If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify."

Partisan gerrymandering. In *Davis v. Bandemer*, 478 U.S. 109 (1986), the U.S. Supreme Court ruled in a plurality opinion that gerrymandered plans are open to legal challenge even if the disputed districts meet the population-equality test. In *Bandemer,* a group of Indiana Democrats had challenged an Indiana legislative redistricting plan drawn from the 1980 census, saying it intentionally harmed them and violated their right to equal protection under the 14th Amendment.

When the plan was adopted, a Republican majority controlled both houses of the Indiana legislature. In elections held before the case went to trial, Democratic candidates for the House received 51.9 percent of the statewide vote but only 43 out of the 100 seats to be filled. Democratic candidates for the Senate received 53.1 percent of the statewide vote, with 13 of the 25 Democratic candidates being elected. In two counties that were divided into multimember House districts, Democratic candidates drew 46.6 percent of the vote, but only three of the 21 Democratic candidates were elected. Relying primarily on these election results, the trial court invalidated the Indiana redistricting plan and ordered that a new plan be drawn.

The Supreme Court in *Bandemer* established a two-pronged test for invalidating a gerrymandered plan under the equal protection clause:

●   a showing of intentional discrimination against an identifiable political group (intent), and

● a showing of consistent discriminatory dilution of that group's voting power (effect) or, in effect, that a group "essentially [has] been shut out of the process."

To prove discriminatory effect, 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 voters' influence on the political process as a whole.

While ruling that partisan gerrymandering was subject to constitutional review, the Supreme Court nonetheless ruled, on the facts of the case, that the Indiana plan was not unconstitutional and reversed the trial court's invalidation of the plan. The court upheld the trial court's finding of discriminatory intent, recognizing that any redistricting plan drafted by a legislature likely would have intended political consequences, but said the plaintiff Democrats had failed to prove an actual discriminatory effect.

Applying these requirements to the facts of *Bandemer*, the court said there had to be specific supporting evidence of statewide discrimination against Democratic voters, such as a showing that the Democrats could not secure a sufficient vote in future elections to take control of the legislature, given that Indiana did not traditionally vote for the same party in each election; that the reapportionment would consign the Democrats to a minority status throughout the decade; or that they would have no hope of faring better after the 1990 census.

Although partisan gerrymandering has been used in a few challenges, some experts say the *Bandemer* decision created a high hurdle for invalidating a redistricting plan, making it the most difficult of all redistricting challenges to make. They say evidence of skewed results from several elections would be required before the Supreme Court would invalidate a plan. The Supreme Court has not revisited the issue since issuing its 1986 plurality opinion, and challengers have had little success in the lower courts (see *Badham v. Eu*, 694 F.Supp 664 (N.D. Cal. 1988); *Fund for Accurate & Informed Representation v. Weprin*, 796 F.Supp. 662 (N.D.N.Y. 1992)).

The Texas congressional plan adopted by the Legislature in 1991 was challenged on the basis of partisan gerrymandering in favor of Democrats.

The three-judge federal court panel reviewing this and other challenges said that the challengers easily met *Bandemer*'s intent element, which is almost presumed in such cases, but not the effect element. The panel said that to prove effect, a partisan group must present evidence of "a group perpetuating its power through gerrymandering in one political structure and that the wronged partisan group cannot over the long haul counteract this tactic through its influence in another relevant structure or structures" (*Terrazas v. Slagle*, 821 F.Supp. 1162 (W.D. Tex. 1993)).

The *Terrazas* panel focused on the ability of the minority party (in this case, Republicans) to influence the outcome of the redistricting process, even if it did not control it. Although in 1991, when the Legislature adopted the congressional plan, the Republican Party did not control either house of the Legislature or the governorship, the panel noted that the party had elected governors in the recent past, it controlled 40 percent of the Texas House, enough to sustain a veto by a Republican governor, and party members chaired several major committees, including Redistricting. Also, there was no showing that the Texas House was so gerrymandered that the party had no chance of ever electing a proportion of the membership equivalent to the proportion of the statewide Republican vote. Examining the state political process as a whole, the panel determined that the plaintiffs had failed to make a case for partisan gerrymandering by showing that they could not at least block a Democratic-backed redistricting plan and thus had no influence on the redistricting process.

Residency. The U.S. Constitution requires that a member of Congress be a resident of the state, but not necessarily of the congressional district the person is elected to serve.

DIGEST:

CSHB 3398 would adopt PLAN01180C as proposed by the House Redistricting Committee. Exact data on district population and other demographic information on PLAN01180C and other data are available on http://redweb01/redist.htm. It would apply starting with the 2004 election and not affect the membership of the current Congress.

The bill states legislative intent that if any county, tract, block, or other geographic area has erroneously been omitted, a court reviewing the bill should include the appropriate area in accordance with the Legislature's

intent. It also would repeal the congressional redistricting plan adopted by the Legislature in 1991.

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 September 1, 2003.

NOTES:

As filed, HB 3398 would have placed in statute the current congressional plan adopted by the *Balderas* court. The House Redistricting Committee also considered proposed PLAN 01170C by Crabb before voting to recommend PLAN01180C by King.

The ideal size of a congressional district is 651,619, based on the 2000 census. PLAN01180C would propose that the First, Second, Third, Fourth, Ninth, Twelfth, Thirteenth, Fifteenth, Seventh, Nineteenth, Twenty-third, and Twenty-sixth districts have a population of 651,620, and the remainder would have a population of 651,619.