Professor Terry Smith
Distinguished Research Professor, DePaul College of Law
Testimony to the Illinois Senate Redistricting Committee
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My name is Terry Smith. I'm a professor at DePaul College of Law, where I hold the title of Distinguished Research Professor. Prior to joining DePaul's faculty, I was a professor of law at Fordham Law School in New York City. Over the past sixteen years, I've taught and written several articles in the area of voting rights and minority political participation. I'm present today to make some observations about the possible impact the proposed changes to Illinois's redistricting process may have on racial minority representation.

My comments will be directed primarily to the Senate Joint Resolution and the League of Women Voters' Proposal. I have divided the comments into two broad categories: (1) general concerns about the premise of the proposals; and (2) specific concerns about how the proposals would interact with the Voting Rights Act of 1965 (VRA). Within the context of the VRA, I address equal protection issues that may lurk.

General Concerns

First, the proposed changes to Illinois's constitution obviously presuppose some flaw in the present state of affairs. Yet under the current system of redistricting, African Americans have achieved proportional representation in the state legislature. Indeed, Illinois ranks third in the country with respect to parity between percentage of blacks in its population and the percentage in its legislature.[1] Obviously, proportionality for Latinos is a more difficult quest given issues with citizenship. I make no claim that the current system of redistricting has been perfect for blacks and Latinos, but it appears to be working well, particularly for African Americans. The question is whether the proposed changes to the state constitution risk whatever progress has been made.

Before addressing that question, I would note two additional general concerns. The issue raised by these proposals is not just numerical representation of minorities in the state legislature but also the power they will weld. If Professor Michael McDonald is correct that privileging county and municipal lines will favor Republicans, then a fortiori it disfavors blacks and Latinos in the legislature, all of whom are members of the majority Democratic Party. Their prerequisites as members of the majority are placed at risk by a proposal that may enhance the power of the party to which they do not belong. This is not illegal, but we should frankly acknowledge that efforts to achieve partisan neutrality can have racially disparate results.

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[1] http://blog.lib.umn.edu/cspg/smartpolitics/2009/03/minnesota_legislature_ranks_ne.php

Finally, the proposed changes appear to be premised on the theory that there is a need for more electoral competition in legislative and representative district elections. This may be true. I would note, however, that several current majority-minority Democratic districts would be more competitive if there were true inter-party competition for black and Latino votes. The same is true of influence districts, in which minorities are not a majority but are large enough to influence the outcome of the election. I do not think redistricting reform should be a substitute for parties having to broaden their demographic base.

Voting Rights Act Concerns

What are risks that these proposals pose to minority representation in the state legislature? The Senate Resolution's presumptive exclusion of incumbency, voter political affiliation, and past election results excludes race-neutral factors that have allowed for the protection and/or creation of minority-controlled districts without running afoul of the Equal Protection Clause of the United States Constitution. The Senate Resolution makes an exception to the exclusion of past election results in order to comply with applicable federal laws, alluding to the VRA. The League's proposal contains a similar exception.

The difficulty with attempting to engraft a VRA exception to the exclusion is that it invites litigation over the scope and meaning of the VRA's mandates, specifically § 2's prohibition against minority vote dilution. The recent history in the United States Supreme Court in cases in which states have asserted § 2 as a defense for accommodating minority voter interests has not had positive outcomes for minorities.[2] Most recently, § 2 was asserted as a defense in a North Carolina case in which that state claimed the VRA compelled it to abrogate a state constitutional rule against splitting counties in redistricting. The Supreme Court narrowed § 2's scope, limiting its application only to putative minority districts where the minority group constituted a majority of the voting age population, and thus rejecting North Carolina's defense. In contrast, when states have been able to articulate race-neutral reasons, such as the partisan affiliation of voters, for the creation or maintenance of a minority-controlled district, the Supreme Court has allowed the district to stand.[3]

Illinois, of course, is free to limit its protection of minority voters to only the protections provided by the VRA, as interpreted by the federal judiciary. In so doing, however, it should be cognizant of the race-neutral means for protecting minorities--including consideration incumbency and voter political affiliation--of which it would be depriving itself.

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[2] *Bush v. Vera*, 517 U.S. 952, 979 (1996) (Rejecting on compactness grounds a § 2 defense to an equal protection claim attacking a majority-minority district as a racial gerrymander); *Shaw v. Hunt*, 517 U.S. 899, 916 (1996) (Same); *Abrams v. Johnson*, 521 U.S. 74, 91 (1997) (Similar).

[3] *See Easley v. Cromartie*, 532 U.S. 234 (2000) (Upholding a 47% black population congressional district as a permissible safe Democratic district rather than an impermissible race-based district).

The League's proposal makes use of voter registration, historical voting data, and incumbency permissible only if necessary to comply with the VRA. But if Illinois is like several other states, some minority-controlled districts exist not at the behest of technical requirements of the VRA, but rather because the state wants them to exist. The Supreme Court in *Bartlett v. Strictland* affirmed the permissibility of so-called crossover districts, in which minorities are a plurality rather a majority but are able to elect the candidate of their choice with the aid of white crossover votes.[4] The Court held, however, that § 2 does not require the creation of such districts and therefore is not a legal defense to their creation or maintenance.[5]

Under the League's and Senate's proposals, any minority-controlled district in Illinois that does not have a voting-age majority of a single racial minority at the time of redistricting is subject to be dismantled because after *Bartlett* § 2 does not mandate such districts, and the proposals only require adherence to § 2. Even if the proposals are somehow tweaked to allow consideration of the otherwise prohibited data in order to preserve crossover districts, such an exception raises equal protection concerns because the exception applies only to districts that protect minority voting strength rather than other groups' voting strength. Illinois would not have the VRA has a defense to such a claim after *Bartlett*.

Finally, the Senate Resolution's condition precedent –"absolutely necessary"--to before allowing consideration of previous election results, is especially problematic. This restriction appears to control not only when this data can be consulted, but also the manner in which it can be used. It invites litigation whose grist will be minority voters.

Suppose historical data show that a 60% minority voting age population district is now capable of electing the candidate of its choice with a 51% minority voting age population. Does the "absolutely necessary" requirement restrict line-drawers to the 51% figure, or do they enjoy some flexibility?

Suppose a coalition of different but politically like-minded racial minorities can bind together to elect the candidate of their choice. Section 2 does not currently mandate recognition of these so-called rainbow coalitions.[6] Thus, use of historical voting data would not be "absolutely necessary." The Senate's proposal effectively hamstrings Illinois's ability to encourage multi-racial coalitions in its redistricting.

In sum, there may be an irreconcilable conflict between redistricting that strives for partisan neutrality versus the flexibility that enables a state to preserve and/or enhance minority representation. The VRA, at least as currently construed, can only do so much to eliminate this conflict.

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[4] *Bartlett*, 129 S.Ct. at 1248 ("Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts.").

[5] *Id*.

[6] *Id*. at 1242 (Declining to address coalition districts).

Thank you for the invitation to share my thoughts, and I hope you find them to be of some help.