University of Michigan Journal of Law Reform

Volume 19

1986

At-Large Elections and Vote Dilution: An Empirical Study

Richard A. Walawender
University of Michigan Law School

AT-LARGE ELECTIONS AND VOTE DILUTION: AN EMPIRICAL STUDY

A central premise of the American political system of representative democracy is that each person's vote be meaningful and efficacious. Indeed, in a truly "equal democracy," a "majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives."[1] If the vote of one individual is accorded but a fraction of another's vote, or if an entire segment of society is disenfranchised, as is arguably the case in many municipal at-large electoral schemes, the government cannot be deemed truly representative.

Although no single type of electoral system[2] can be deemed perfectly representative, the ideals of true representation and voting equality are recognized as so important to the American democratic system that the Supreme Court[3] has found it imperative for the judiciary to protect against vote dilution.[4] Vote dilution can be characterized as consisting of two types: interdistrict and intradistrict. Interdistrict vote dilution occurs when an individual voter's electoral strength is either greater or lesser than that of a voter in another district because the populations

1. J.S. MILL, *Representative Government*, in ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 105, 190 (R. McCallum ed. 1946) (1861).

2. Nearly all local governments in the United States utilize either at-large, district, or mixed electoral systems to elect legislators. *See infra* note 8 and text accompanying notes 66-68. Electoral systems based on proportional representation, while common in Europe, are nearly nonexistent among American localities.

3. In Baker v. Carr, 369 U.S. 186 (1962), the Court held a challenge to a reapportionment scheme based on the equal protection clause of the fourteenth amendment to be justiciable. Prior to *Baker*, the Court had considered reapportionment to be a political question. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946) (Frankfurter, J., concurring).

4. Vote dilution is the result of a set of "techniques for reducing or nullifying the effects of the votes that minorities do cast." S. WASBY, VOTE DILUTION, MINORITY VOTING RIGHTS, AND THE COURTS 1 (1982). The minorities whose votes can be diluted include ethnic and racial groups, as well as geographically or economically distinct segments of a larger constituency. *See also* Washington, *Does the Constitution Guarantee Fair and Effective Representation to All Interest Groups Making Up the Electorate*, 17 How. L.J. 91 (1971). Washington argues: "Fair and effective representation as a political supposition, therefore, is the ability of individual voters to be a component of an interest group which has sufficient muscle to . . . win the election." *Id.* at 116 (citation omitted).

of the two districts are unequal in number.[5] The Supreme Court has controlled this type of vote dilution through application of the "one person, one vote" principle,[6] requiring the populations of all legislative districts to be numerically equal to one another.

Intradistrict vote dilution,[7] by contrast, occurs when an individual's vote is effectively diluted within his or her own district. This occurs when the votes of an identifiable racial, ethnic, political, or geographic group are assimilated into a larger electorate, thereby diminishing that group's collective electoral strength. For example, when several legislative districts are consolidated into one, and the several legislators representing the consolidated district are elected on an at-large basis,[8] the enlarged electoral base hampers the ability of a group of voters to elect from among itself its proportionate share of representation. Accordingly, a group of voters who previously constituted a majority in their smaller district becomes a minority in a larger district, no longer able to elect its representative.

The Supreme Court has not established a basic constitutional principle for remedying intradistrict vote dilution and has consistently refused to declare local at-large election schemes unconstitutional per se.[9] As a result, the federal courts have vacillated among various interpretations of the fourteenth and fifteenth amendments as to what standard of proof is required to prove local at-large election schemes discriminatory. Concurrently with the Court's search for a way to assure all Americans a right to an equally effective vote, Congress enacted the Voting Rights Act in 1965.[10] In passing the Act, Congress, pursuant to

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5. Consider, for example, a situation where voter *A* lives in a more populous legislative district than voter *B*. *A* has less voting strength than *B* because *A*'s vote is a smaller fraction of the total, thereby affording *A* less opportunity to cast a tie-breaking vote. *See generally* R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968).

6. Reynolds v. Sims, 377 U.S. 533, 567-68 (1964) (holding that the equal protection clause of the fourteenth amendment requires state legislative seats to be apportioned with districts of relatively equal populations); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736 (1964) ("An individual's constitutionally protected right to cast an equally weighted vote cannot be denied . . . .").

7. Some commentators have labeled intradistrict vote dilution as "group" vote dilution, due to the fact that the resultant dilution effectively shuts out identifiable groups from representation. *See generally* R. DIXON, *supra* note 5.

8. Several variants of the multimember or at-large scheme exist. One is where all the candidates for several legislative seats compete against each other. Another is where all the voters cast their votes for a candidate in each of several subdistricts comprising the at-large district.

9. *See* cases cited *infra* notes 13, 19 & 27.

10. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982 & Supp. II 1984)).

the enforcement clause of the fifteenth amendment, set out to eliminate racial discrimination in voting. In 1982, Congress amended section 2 of the Act, providing a standard to prove at-large election schemes discriminatory upon a showing that the system "results" in denying minority groups the opportunity to elect their representatives to office.[11]

The 1982 amendments to the Act, however, have remained a subject of controversy. Opponents of the Act misperceive municipal at-large electoral systems, believing they provide as much minority representation as single-member district systems. This Note addresses that misperception with data showing that at-large schemes provide significantly less minority representation than other schemes. The various standards used by federal courts in reviewing the constitutionality of at-large election systems are outlined in Part I. Part II sets forth an analysis of Congress's response to the judicial ambivalence toward at-large elections—the 1982 amendments to section 2 of the Voting Rights Act.[12] Part III presents empirical data illustrating that, generally, blacks are significantly more underrepresented on city councils in cities with at-large election systems than in cities with district systems. Part IV discusses the implications of the Note's empirical findings in light of the congressional amendments to the Voting Rights Act. The Note concludes that the congressional reimposition of the "results" standard for proving at-large election systems discriminatory was a necessary step forward because municipal at-large election systems remain systematically underrepresentative of significant population groups.

I. JUDICIAL RESPONSE TO VOTE DILUTION CLAIMS OF AT-LARGE ELECTIONS

Before the 1982 amendments to the Voting Rights Act, the Supreme Court analyzed claims of vote dilution in at-large electoral systems in terms of the fourteenth amendment's equal protection clause. The first Supreme Court case addressing vote di-

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11. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(a) (1982)).

The 1982 amendment to § 2 prohibits the application of any voting practice that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." *Id.* Prior to the 1982 amendments, the Act did not expressly set forth a standard for showing when a voting practice denied the right to vote in contravention of the Act. *See infra* Part II.

12. 42 U.S.C. § 1973 (1982).

lution in an at-large election system was *Fortson v. Dorsey*.[13] At issue was Georgia's state senate apportionment plan, which divided fifty-four seats among fifty-four districts, drawn predominantly along county lines. To avoid mathematical disparity among the districts, the plan provided that where more than one district existed in a single county all the county's districts would be conglomerated into a single district for voting purposes, and the senators for each of the districts would be elected at-large by a countywide vote. The plaintiffs claimed that the at-large, multimember scheme unconstitutionally diluted their right to vote because it could "[nullify] the unanimous choice of the voters of a district, thereby thrusting upon them a senator for whom no one in the district had voted."[14]

Justice Brennan, however, writing for the majority, failed to comprehend the plaintiff's intradistrict vote dilution claim. He insisted on analyzing the problem strictly in terms of the "one person, one vote" principle.[15] So long as the population of a multimember district was proportionately equal to the populations of other districts, the Court reasoned, the election scheme passed constitutional muster.[16] Thus, extending the Court's analysis to its logical conclusion, because mathematical disparity can only arise when there are at least two districts to compare, there can be no intradistrict vote dilution. The Court's reasoning failed to recognize and distinguish a central difference of at-large districting from single-member districting: while vote dilution in single-member districting schemes occurs *between* several districts, vote dilution in at-large schemes occurs *within* the single district.[17]

Only Justice Douglas, the lone dissenter, correctly analyzed the case in terms of intradistrict vote dilution. He concluded that "to allow some candidates to be chosen by the electors in

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13. 379 U.S. 433 (1965).

14. *Id.* at 437.

15. *Id.* at 436. Justice Brennan quoted from dicta in Reynolds v. Sims, 377 U.S. 533 (1964), where the Court stated that "[o]ne body could be composed of single-member districts while the other could have *at least some* multi-member districts." *Id.* at 577 (emphasis added by Brennan, J.).

16. *Fortson*, 379 U.S. at 437. The Court did leave open the possibility of finding an at-large system in violation of the equal protection clause if it "designedly or otherwise" operated to "cancel out the voting strength of racial or political elements of the voting population." *Id.* at 439.

17. Justice Harlan, in concurrence, noted that the majority's opinion suggested the constitutionality of a state legislative reapportionment plan "must, in the last analysis, always be judged in terms of simple arithmetic." *Id.* at 439-40.

their districts and others to be defeated by the voters of foreign districts" clearly constituted invidious discrimination.[18]

Subsequent Supreme Court decisions[19] established that an at-large election scheme could be subject to constitutional attack if its "invidious effect"[20] minimizes the voting strength of racial or political groups of voters.[21] Elaborating on the "invidious effect" standard in the only case where it invalidated a multimember election scheme,[22] the Court stated that racial and political groups are not constitutionally entitled to proportionate representation. Such groups are entitled only to an equal opportunity to participate effectively in the election process.[23]

Apparently unsatisfied with the Supreme Court's analysis of the intradistrict vote dilution problem, the Fifth Circuit developed a more concrete test in *Zimmer v. McKeithen*.[24] The *Zimmer* court enumerated a list of factors[25] to aid in assessing the

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18. *Id.* at 441-42 (Douglas, J., dissenting). Although Justice Douglas did not use the term "intradistrict" vote dilution, he clearly had the concept in mind when analyzing the multimember scheme at issue: "[E]ven if a candidate for one of those districts obtained all of the votes in that district, he could still be defeated by the foreign vote, while he would of course be elected if he were running in a district in the first group." *Id.* at 441.

19. Whitcomb v. Chavis, 403 U.S. 124 (1971) (reversing a district court's redistricting of Indiana's legislature into all single-member districts); Burns v. Richardson, 384 U.S. 73 (1966) (reversing a district court's overturning of Hawaii's multimember legislative districting).

20. *See Burns*, 384 U.S. at 88. The *Burns* Court listed examples of the invidious effect of discrimination caused by at-large election systems: "if . . . districts are large in relation to the total number of legislators, if districts are not appropriately sub-districted to assure distribution of legislators that are resident over the entire district, or if districts characterize both houses of a bicameral legislature rather than one." *Id.*

21. Theoretical and mathematical arguments alone are not sufficient to prove a violation of the fourteenth amendment; rather, "[t]he real-life impact of multi-member districts on individual voting power" must be demonstrated. Whitcomb v. Chavis, 403 U.S. 124, 146 (1971).

22. White v. Regester, 412 U.S. 755 (1973) (upholding district court's findings and conclusions that the black and Mexican-American communities were "effectively excluded from participation in the Democratic primary election process" because of a Texas House of Representatives reapportionment plan establishing multimember districts).

23. Mere evidence that a particular group lacks proportional representation, the Court stated, is not enough to render the system unconstitutional. *Id.* at 765-66 (quoting *Whitcomb*, 403 U.S. at 149-50):

> [I]t is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

24. 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

25. These factors have been subsequently referred to by other courts as the *Zimmer* factors.

constitutionality of a particular at-large scheme:[26]

1) the extent to which the election scheme is rooted in racial discrimination;
2) accessibility of the candidate slating process to minorities;
3) degree of legislative unresponsiveness to particularized needs of minorities;
4) tenuousness of the state policy underlying the preference for at-large districting;
5) existence of past discrimination hampering effective minority participation in election process;
6) use of unusually large districts, majority vote requirements, anti-single-shot voting provisions, or lack of provisions guaranteeing geographical representation within the district.

But the Supreme Court then rejected the "invidious effect" standard and the *Zimmer* factor analysis approach in *City of Mobile v. Bolden.*[27] Basing its opinion on recent decisions holding that the due process and equal protection clauses of the fourteenth amendment require a showing of discriminatory intent in order to prove a constitutional violation,[28] the plurality stated that proof of racially discriminatory *intent* was required to overturn, as violative of the fourteenth amendment, an at-large districting scheme. The Court also noted that because showing a violation of the fifteenth amendment required proof of a racially discriminatory motive as well,[29] to overturn at-large

26. The court in *Zimmer* noted that the presence of all the factors is not necessary to establish an unconstitutional vote dilution. Rather, courts should evaluate the factors on an aggregate basis. 485 F.2d at 1305.

27. 446 U.S. 55 (1980). For a more detailed discussion of the case law leading to *Bolden,* see Parker, *The 'Results' Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard,* 69 VA. L. REV. 715 (1983).

28. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (requiring proof of discriminatory intent to demonstrate that a zoning law violated equal protection of minorities); Washington v. Davis, 426 U.S. 229 (1976) (requiring proof of intent or purpose to sustain a due process claim that black plaintiffs were racially discriminated against by a police department's written personnel test used in employee recruitment).

29. In support of its assertion that the fifteenth amendment requires a showing of discriminatory intent, the Court cited Guinn v. United States, 238 U.S. 347 (1915) (finding Oklahoma "grandfather" clause exempting from voting literacy requirement anyone entitled to vote before 1866 unconstitutional because its purpose was to circumvent the fifteenth amendment); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (holding that the drawing of municipal boundaries might be found unconstitutional because drafters were

districting systems would require a showing that the system was established primarily for a discriminatory purpose.[30] Moreover, because the plurality deemed the Voting Rights Act to be coextensive with the fifteenth amendment,[31] it concluded that the Act supplied no additional authority from which to overturn an at-large election system absent proof of discriminatory intent.

Prior to the *Mobile* decision, and in anticipation of the Supreme Court's application of an intent test for section 2 of the Voting Rights Act, several circuit court of appeals decisions[32] held that meeting the *Zimmer* criteria raised an inference of discriminatory purpose or intent. Although in *Mobile* the Supreme Court left unclear whether or not it rejected this approach,[33] in a subsequent case,[34] the Court held that the discriminatory intent

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solely concerned with segregating black and white voters); Wright v. Rockefeller, 376 U.S. 52 (1964) (upholding state reapportionment scheme because there was no proof that the legislature drew districts on racial lines or that the legislature was motivated by racial consideration); Smith v. Allwright, 321 U.S. 649 (1944) (implicating Texas in conduct of a racially exclusionary Texas Democratic Party primary election scheme); and Terry v. Adams, 345 U.S. 461 (1953) (holding that a state involved in purposeful exclusion of blacks from participating in the election process violated the fifteenth amendment even though the election was conducted by a private political organization neither authorized nor regulated by the state).

30. *Mobile*, 446 U.S. at 65: The fifteenth amendment "prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.' "

31. *Id.* at 60.

32. McIntosh County Branch of the NAACP v. City of Darien, 605 F.2d 753 (5th Cir. 1979); Cross v. Baxter, 604 F.2d 875 (5th Cir. 1979); Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980).

33. The plurality in *Mobile* stated that the presence of *Zimmer* factors may afford some evidence of a discriminatory purpose. *Mobile*, 446 U.S. at 73. Justice Stevens, concurring, rejected the plurality's "subjective intent" standard and stated that the proper test for determining whether an electoral scheme was unconstitutional "should focus on the objective effects of the political decision [that instituted the scheme]." *Id.* at 90.

For detailed discussions of the *Mobile* decision, see Parker, *The Impact of* City of Mobile v. Bolden *and Strategies and Legal Arguments for Voting Rights Cases in its Wake*, in THE RIGHT TO VOTE 98 (Rockefeller Found. Conf. Rep. 1981); Comment, *The Standard of Proof in At-Large Vote Dilution Discrimination Cases After* City of Mobile v. Bolden, 10 FORDHAM URB. L.J. 103 (1981); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 149 (1980).

34. Rogers v. Lodge, 458 U.S. 613, 618-22 (1982) (holding a district court's inference of intentional discrimination from totality of factors not clearly erroneous requiring reversal; hence, multimember district was properly invalidated as violative of the equal protection clause of the fourteenth amendment). Justices Powell and Rehnquist dissented on the ground that discriminatory intent must be proven primarily by objective evidence.

Cf. Note, *The Constitutional Significance of the Discriminatory Effects of At-Large Elections*, 91 YALE L.J. 974 (1982) (perceptively observing that *Rogers* failed to state what discriminatory effects of an at-large election system are necessary to raise the presumption of discriminatory purpose, and proposing that either racially polarized voting patterns or lack of proportional representation should be sufficient to raise the presumption).

necessary to prove unconstitutional group vote dilution could be inferred from the totality of factors and circumstances surrounding the particular at-large scheme. Moreover, because the Court also noted that appellate courts should defer to this factually-based inference, the post-*Mobile* constitutional standard for analyzing at-large electoral systems became confusing, at best, or virtually impossible to overcome, at worst.

II. SECTION 2 OF THE VOTING RIGHTS ACT

The legislative response to electoral systems that dilute minority voting power was the Voting Rights Act of 1965. Section 5 of the Act[35] gives the United States Attorney General authority to review certain proposed changes to voting practices in specifically "covered" jurisdictions and "preclear" the changes before they may be implemented.[36] The Attorney General will not preclear any voting or electoral practice that has the "effect of denying or abridging the right to vote on account of race or color."[37]

In contrast to section 5's limited jurisdictional scope, section 2 provides a private cause of action for citizens to challenge a discriminatory voting practice or procedure anywhere in the country.[38] Section 2 of the Voting Rights Act was intended to secure the right of every citizen to participate fully in the electoral process.[39] Prior to the 1982 amendments, the language of section 2 did not clearly evince a particular standard for proving unconstitutional group vote dilution,[40] even though Congress provided for a right of action for private citizens or the government to

35. 42 U.S.C. § 1973c (1982).

36. *Id.*

37. *Id.* Section 5's "effects" standard prevents voting procedure changes that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976). For further discussion of the "effects" standard, see *infra* note 43.

38. 42 U.S.C. § 1973 (1982).

39. SENATE COMM. ON THE JUDICIARY, REPORT ON S. 1992, S. REP. No. 417, 97th Cong., 2d Sess. 4 [hereinafter cited as S. REP.], *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 177, 181.

40. Prior to the 1982 amendments, § 2 read: "No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color . . . ." Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, tit. II, § 206, 89 Stat. 400, 402 (current version at 42 U.S.C. § 1973 (1982)).

challenge allegedly discriminatory voting practices or procedures.[41]

In direct response to the Supreme Court's imposition of an "intent" test for section 2 in *Mobile v. Bolden*,[42] Congress amended the Act in 1982 to provide expressly for a more lenient "results" test.[43] Basically, the amendment codified the *White* and *Zimmer*[44] factor analysis approach as the standard of proof for claims of intradistrict vote dilution in at-large election schemes.[45] Not only does the amended statute's "results" standard call for a consideration of the totality of circumstances surrounding a particular election scheme, it also speaks in terms of a right for minorities to have an equal opportunity to elect representatives of their own choosing:

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is

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41. *See id.*

42. 446 U.S. 55 (1980). For a discussion of the *Mobile* case, see *supra* text accompanying notes 27-31.

43. S. REP., *supra* note 39, at 15. In opposing enactment of the 1982 amendments to § 2 of the Voting Rights Act, the Subcommittee on the Constitution of the Senate Committee on the Judiciary expressed several legal concerns about the amendment's constitutionality, including: (1) improper federal infringement on state authority; (2) overbreadth of scope, because it applies to areas of the country where there is no history of official discrimination; (3) "results" standard inappropriate means of enforcing the fourteenth and fifteenth amendments; and (4) violation of separation of powers between the judiciary and the legislature. *See id.* at 169-73.

For a comprehensive analysis of the legal arguments in favor of the constitutionality of the § 2 amendments, see McKenzie & Krauss, *Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment*, 19 HARV. C.R.-C.L. L. REV. 155 (1984). *See also* United States v. Marengo County Comm'n, 731 F.2d 1546 (11th Cir.) (upholding the constitutionality of amended § 2), *cert. denied*, 105 S. Ct. 375 (1984).

The "results" standard of § 2 is generally regarded as separate and distinct from § 5's "effects" standard. The difference between the two standards is succinctly stated by McKenzie & Krauss, *supra*, at 169: "Proof of liability under section 2 . . . requires a review of the totality of the circumstances surrounding the challenged practice or procedure. Unlike section 5, section 2 does not necessarily entail a comparison of the numerical voting strength of minorities before and after a voting scheme is adopted." For further discussion of the differences between the two standards, see Jones, *Redistricting and the Voting Rights Act: A Limited but Important Impact*, 73 NAT'L CIVIC REV. 176 (1984).

44. *See supra* notes 22 (discussing White v. Regester, 412 U.S. 755 (1973)) & 24-26 and accompanying text (discussing Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973)).

45. The amended § 2(a) now reads: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 42 U.S.C. § 1973(a) (1982).

The Senate Judiciary Committee stated its intention in amending the Act: "The 'results' standard is meant to restore the pre-*Mobile* legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote. Specifically, subsection (b) embodies the test laid down by the Supreme Court in *White*." S. REP., *supra* note 39, at 27 (footnote omitted).

> shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[46]

The amendment thus makes it clear that underrepresentation of a minority group should be an important factor to consider in determining the validity of an at-large system.[47]

Several congressmen were concerned that the proposed amendment's express "results" standard and reference to equal opportunity to participate may be interpreted as requiring a system of proportional representation.[48] To ward off their concerns, the sponsors of the bill agreed to include a proviso to the amendment[49] disclaiming the idea that the amendment created any right to proportionate representation.[50]

In effect, Congress recognized the Court's unwillingness to use the equal protection clause as a sword with which to strike down at-large electoral systems that effectively prevent substantial minority groups from electing representatives. The 1982 amendments to section 2 were designed to provide a method of preventing at-large schemes that do, in fact, result in vote dilution for minority groups, and to eliminate any speculation as to what standard of proof should be applied.

III. EMPIRICAL ANALYSIS OF MINORITY REPRESENTATION IN AT-LARGE ELECTIONS

Congressional opponents of the 1982 amendments to section 2 of the Voting Rights Act feared that the new language would

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46. 42 U.S.C. § 1973(b) (1982).

47. *Id.*

48. *See* S. REP., *supra* note 39, at 142-43.

49. The proviso, known as the "Dole Compromise," expressly disclaims any right to proportional representation: "*Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1982).

50. Despite the proviso's disclaimer, Senator Hatch still expressed concern that a § 2 violation could be established under the results test merely with evidence of "the absence of proportional representation *plus* the existence of 'one or more objective factors of discrimination', such as an at-large system of government." S. REP., *supra* note 39, at 97.

mandate proportional representation,[51] and that Congress was usurping the Court's power to interpret the Constitution.[52] The opponents also believed that Congress should not intervene to protect minorities from the voting dilution caused by at-large electoral schemes.[53] After all, the opponents argued, because the use of the at-large electoral system, with origins in reform efforts to stop the abuses of political machines,[54] is so widespread,[55] any resulting minority vote dilution is insignificant and does not justify using the more lenient "results" standard.[56]

Congress debated, on an abstract, theoretical level, the seriousness of the diluting effects that at-large electoral schemes had on minority voting and representation.[57] But whether or not at-large election systems present structural barriers to minority representation is best demonstrated by empirical analysis. An empirical study on the effect that at-large election systems have on minority representation, as compared to single-member and mixed district systems,[58] will show whether the 1982 amendments to section 2 were or were not, in fact, justifiable.

A. Data Collection and Methodology

Rather than relying on any one technique for measuring minority representation on city councils, this Note utilizes several social science techniques to determine the structural representativeness of municipal election systems.[59] This Note, incorporating more recent, 1980 Census figures into the statistical analysis,

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51. *See supra* notes 48-50 and accompanying text.

52. *See supra* note 43.

53. *See* SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, REPORT ON THE VOTING RIGHTS ACT [hereinafter cited as VOTING RIGHTS ACT REPORT], *reprinted in* S. REP., *supra* note 39, at 139.

54. *See infra* note 95 and accompanying text.

55. *See* table A in the appendix.

56. *See* VOTING RIGHTS ACT REPORT, *supra* note 53.

57. *See* S. REP., *supra* note 39.

58. For definitions of at-large, single-member district, and mixed electoral systems, see *infra* notes 66-67 and accompanying text.

59. *See* Cole, *Electing Blacks to Municipal Office: Structural and Social Determinants*, 10 URB. AFF. Q. 17 (1974); Karnig, *Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors*, 12 URB. AFF. Q. 223 (1976); MacManus, *City Council Election Procedures and Minority Representation: Are They Related?*, 59 SOC. SCI. Q. 153 (1978); Robinson & Dye, *Reformism and Black Representation on City Councils*, 59 SOC. SCI. Q. 133 (1978); *see also* Jones, *The Impact of Local Election Systems on Black Political Representation*, 11 URB. AFF. Q. 345 (1976); Taebel, *Minority Representation on City Councils: The Impact of Structure on Blacks and Hispanics*, 59 SOC. SCI. Q. 142 (1978). *Cf.* Banzhaf, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309 (1966).

updates the findings of other studies.[60] Recent data on black council representation in cities were derived from the *National Roster of Black Elected Officials, 1982.*[61] Population and socio-economic data were drawn from the *U.S. Census of Population, 1980.*[62] Information on individual city election type was derived from the 1982 edition of *The Municipal Year Book*[63] and *The Encyclopedia of American Cities.*[64]

The sample tested comprised 268 municipalities with populations of 25,000 or more and a black population of at least ten percent.[65] The electoral systems used in all the cities were characterized as either at-large, district, or mixed.[66] An at-large system is one where each citizen votes from among all the council candidates running in the city for as many as there are council seats up for election that year.[67] A district system allows the voter to cast only one vote for a council candidate residing in the voter's district. A mixed system, as its name suggests, employs a combination of at-large and district voting.

B. Findings

Many cities throughout the country now employ at-large systems.[68] Nearly 60% of all U.S. cities with populations over 25,000 utilize an at-large system for electing council members, while 12.4% use a pure district system.[69] Western cities employ at-large schemes most often (81.3%), while midwestern cities utilize at-large systems least frequently (50.3%).[70] Cities with higher percentages of black populations use at-large election systems as frequently as cities with smaller black populations.[71]

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60. The studies cited *supra* note 59 used data from the 1960 or 1970 Census.

61. JOINT CENTER FOR POLITICAL STUDIES, NATIONAL ROSTER OF BLACK ELECTED OFFICIALS, 1982.

62. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, U.S. CENSUS OF POPULATION, 1980.

63. INTERNATIONAL CITY MGMT. ASS'N, THE MUNICIPAL YEAR BOOK, 1982.

64. THE ENCYCLOPEDIA OF AMERICAN CITIES (O. Nergal ed. 1980).

65. This sample of 268 cities includes all those cities for which adequate data were available from the above sources. Some cities that met the sample criteria were nevertheless excluded from the sample because data for those cities were not available.

66. This categorization follows that employed in the studies cited *supra* note 59.

67. For further discussion of the most widely utilized at-large election schemes, see *supra* note 8.

68. *See* table A in the appendix.

69. *Id.*

70. *See* table B in the appendix.

71. Cities whose black populations comprised between 10% and 25% of the total population were as likely to have at-large electoral systems as cities whose black popula-

1. Comparing proportionate measures of black representation for at-large, district, and mixed cities— Similar to some of the other empirical studies,[72] a standardized variable is used to measure the proportion of black representation on city councils to that of white representation. This variable, the Black Council Penetration (BCP), is the ratio of a city's percentage of black city council members to the percentage of the city's black population. A ratio of 1.00 for a particular city, for instance, would indicate that the black share of the city's council would be exactly equal to the black share of the city's population. Ratios exceeding 1.00 indicate overrepresentation of blacks on the council, while ratios below 1.00 indicate underrepresentation.[73] Thus, a BCP ratio of 0.50 indicates that the percentage of blacks on the city's council is half the percentage of blacks in the city's population.

The average BCP for all cities with populations over 25,000 and at least a 10% black population, regardless of election type, is 0.504.[74] On the average, then, blacks receive only about one-half the representation on city councils that their population percentages would have predicted as proportional.

As compared to the BCP found for district systems, the BCP for at-large systems is significantly lower.[75] Cities with at-large systems have an average BCP of only 0.399. In contrast, the BCP for district cities is 0.771. Eliminating cities in which the black population exceeds 50% of the population, the average BCP for at-large cities is only 0.385, compared with a much more proportional BCP of 0.764 for district cities.[76] The BCP averages for mixed cities, as expected, fall between at-large and district cities.[77]

The effect of election type on black representation in city councils is most dramatically illustrated in those cities where blacks constitute 31-40% of the population.[78] The BCP for cities in this population range is higher for district cities but lower for at-large cities than in any other category. In district cities of this type the BCP is 0.830, over two times as great as the corresponding 0.362 BCP for at-large cities.

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tions constituted a greater percentage of the population. *See* table D in the appendix.

72. *See* studies cited *supra* note 59.

73. Essentially, a BCP ratio of 1.00 would mean perfect proportional representation for blacks.

74. *See* table C in the appendix.

75. *Id.*

76. *See* table D in the appendix.

77. *Id.*

78. *Id.*

Isolating cities by region reveals some interesting findings. Contrary to widely-held beliefs,[79] the underrepresentation of blacks is not a problem confined only to the South, but exists in nearly equal proportion throughout all regions of the country.[80] At-large cities of the West prove most inequitable for black representation, holding an average BCP of only 0.237.[81] In comparison, the average BCP for southern at-large cities is 0.391, while for midwestern at-large cities it is 0.402, and for northeastern at-large cities it is 0.561. Southern district cities, however, are the most underrepresentative district cities in the country.

Most significantly, the analysis shows that district cities in every region have significantly higher BCP ratios than counterpart at-large cities.[82] The disparity between BCP ratios of at-large and district cities is most pronounced in the West.[83]

2. *Illustrating the underrepresentation of blacks in at-large systems by regression analysis*— Relying merely on BCP ratios, however, can be somewhat misleading. The BCP ratio average, while a useful tool to give a general perspective on minority representation, is somewhat artificially skewed lower because it automatically scores every city without a black person on its council at zero, regardless of whether that city's population is 25,000 or one million.[84] Accordingly, the overall BCP average for a group of cities can reflect a much lower value than would result from totalling the number of black council members and black populations for the entire group of cities prior to calculating the BCP ratio.

Regression-based analysis can correct this deficiency and provide a clearer indication of the effect of city electoral schemes on the ability of blacks to get elected to office.[85] Regression analysis takes into account the fact that cities without black council members have different black population percentages.[86] Moreover, a regression-based analysis makes it possible to examine the electoral system as a variable across a range of black popula-

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79. Including the contentions of the opponents of the 1982 amendments to § 2 in Congress. *See* S. REP., *supra* note 39.

80. *See* table E in the appendix.

81. *See* table F in the appendix.

82. *Id.*

83. In the West, at-large cities average a BCP of only 0.237 while district cities average a BCP of 0.927. *Id.*

84. *See* Engstrom & McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 AM. POL. SCI. REV. 344, 346 (1981).

85. *Id.*

86. *Id.*

tion percentages.[87] Thus, in contrast with the BCP ratio methodology, cities of differing black populations are not accorded the same weight for determining the minority representativeness of a particular electoral system. Rather, the differences in black population percentages are taken into account in deriving the resultant index of representativeness.

In this regression analysis, each city's black population percentage is directly compared to its black council percentage. The data are then fit into a set of linear relationships, described by an equation.[88] The slope of the equation reveals how proportionately representative the particular election system is in general. Thus, true proportional representation, where the percentage of a city's black population is equal to its percentage of black council members, yields a slope of 1.00. The smaller the slope value, the less proportionally representative is the system.

The analysis of cities in the three electoral systems reveals once again that district cities provide the most proportional representation for blacks (slope = 0.900), at-large cities provide the least (slope = 0.589), and mixed cities are in between (slope = 0.844).[89] A graph of the equations more vividly illustrates the disparity of representativeness between district, at-large, and mixed electoral systems revealed by regression analysis.[90] The graph shows that district systems are much closer to the line of perfect proportional representation than either at-large or mixed systems, with at-large systems being the least representative.

IV. IMPLICATIONS

An analysis of the empirical data based on the 1980 Census corroborates the findings of several other political science analyses of at-large election systems:[91] namely, that at-large systems

87. "A regression-based analysis also permits one to examine the impact of electoral arrangements in the conceptually most appropriate way, as a *specifying variable* which establishes conditions under which the seats/population relationship varies, rather than as an independent variable with a direct impact." *Id.* (emphasis in original).

88. Using a model similar to the one espoused by Engstrom & McDonald, *supra* note 84, at 347, the equation is in the following form:

$$BCC\% = [\text{y-intercept}] + x BP\%$$

where BCC% is the percentage of blacks on the council and BP% is the percentage of blacks in the population. The x is the slope of the equation and the y-intercept describes the linear equation's intersection point with the vertical axis.

89. *See* graph 1 and accompanying explanations in the appendix.

90. *Id.*

91. *See supra* note 59.

reflect more underrepresentation for minority groups than do mixed or district systems. Yet, even so, the congressional action in amending the Voting Rights Act would not be justified unless it can also be shown that at-large election schemes are the cause of the underrepresentation, i.e., at-large election systems are structurally and inherently less representative.

Undoubtedly, factors apart from the electoral structure of a city affect the ability and desire of minority groups to elect members of their group to office. For example, education level, income level, partisan activity, and occupational characteristics may play some role. Nevertheless, each of these socioeconomic factors can be controlled to permit a measurement of the impact of electoral schemes on the ability of minority groups to achieve representation on city legislatures. One recent study,[92] controlling for socioeconomic characteristics, found the relationship between electoral structure and black representation unaffected.[93] Given that, in and of themselves, at-large electoral systems impede electoral opportunities for minorities, the 1982 congressional amendment to section 2, codifying the "results" test as the standard for showing a violation of the Voting Rights Act, was timely and justified for several reasons.

First, the "results" standard is an appropriate means of enforcing the fourteenth and fifteenth amendments' guarantees of due process and equal protection. The burden of proving discriminatory intent, which the Supreme Court attempted to impose, is practically insurmountable unless evidence showing discriminatory effect can raise a presumption of discriminatory purpose.[94] Many at-large electoral systems were adopted during the municipal reform movement in the early part of the 20th

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92. Engstrom & McDonald, *supra* note 84.

93. The Engstrom and McDonald study, *id.*, controlled for population size, rate of population change from 1960 to 1970, median family income, median school years completed by those over 25 years old, and the percentage of the white-collar labor force. These factors were added to the regression equation and tested for both uniform impact across all electoral systems and conditional impact in each system. The slopes for the representativeness of blacks for each of the three electoral systems remained virtually unaffected, and the regression coefficients for the socioeconomic factors suggested very slight impact.

The Engstrom and McDonald study refuted the findings of Cole, *supra* note 59, and MacManus, *supra* note 59, which concluded that electoral structures have only minimal impact when size, growth rate, income, education, and occupation characteristics are considered. Perhaps the reason for the divergent findings, Engstrom and McDonald point out, is that the other studies used a subtractive measure of proportionality, which understates the level of underrepresentation in cities with smaller black populations. Engstrom & McDonald, *supra* note 84, at 350-51.

94. *But see* Rogers v. Lodge, 458 U.S. 613, 618 (1982).

century to prevent the establishment of or to destroy existing political machines. Undoubtedly, some of the appeal of the reformist proposal of at-large electoral schemes stemmed from prejudice and racism, but many cities had genuine problems of political corruption and viewed at-large elections as a possible solution.[95] Thus, proving exactly why a particular municipality adopted an at-large electoral scheme is not only difficult, such an inquiry is blind to the present diluting effects that the system imposes on minorities.

Secondly, the data suggest that there is no evidence of a substantial movement toward at-large systems. Once a city reaches a certain minority population,[96] dilution of minority voting strength is not an apparent, widespread purpose. This does not mean, however, that Congress should be prohibited from dealing effectively with the rampant problem of minority voting dilution currently existing in at-large electoral systems. Although section 5 of the Voting Rights Act puts a check on intentional switching over to at-large systems having a discriminatory effect,[97] at-large electoral schemes are so widespread already that denying the federal government the power to provide for a reasonable means of challenging election schemes that blatantly dilute minority voting power would allow a significant amount of official discrimination to flourish in the nation's cities.

Finally, the findings of this study as to the underrepresentativeness of at-large electoral systems can be analogously applied to other "minority" groups, such as geographic or economic minority groups, although the Voting Rights Act does not protect them. For instance, an older section of a city with distinct concerns, such as infrastructure renovation, housing, or urban renewal, may be entirely ignored by a city council elected at-large because no councilperson resides in that part of the city and the citizens of that section cannot, as a group, garner enough votes to elect someone from their own community.[98] Cities contemplating implementing or changing their existing system of council election should consider the fact that at-large systems, gener-

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95. *See generally* H. ALDERFER, AMERICAN LOCAL GOVERNMENT AND ADMINISTRATION 298-309 (1956); D. LOCKARD, THE POLITICS OF STATE AND LOCAL GOVERNMENT 337-40 (1st ed. 1963).

96. *See* table C in the appendix.

97. 42 U.S.C. § 1973c (1982). Section 5 requires certain state and local voting procedure changes to be "precleared" by the Attorney General. The section is limited to states that used certain testing devices to qualify voters after 1964. *See supra* note 43 (discussing the differences between the "effects" and "results" standards of proving voting dilution under the Voting Rights Act).

98. S. REP., *supra* note 39.

ally, are not as representative of the different segments of the citizenry as district or mixed systems.

CONCLUSION

Black representation levels on city councils with at-large systems are strikingly low for cities of all sizes. The evidence illustrates that at the local level, at-large electoral systems do not result in representation of blacks to the same degree as whites. Analogously, it is probable that other groups holding some kind of minority status in an at-large city face the same sorts of structural problems in obtaining the representation of their choice. Thus, the most practical and reasonably effective way of ensuring minority groups an equal opportunity to elect local legislators of their choice, short of declaring at-large systems unconstitutional per se or mandating proportional representation, is to prohibit any system that "results" in vote dilution, as provided in section 2 of the Voting Rights Act.[99]

Ample evidence exists showing that at-large electoral systems dilute minority votes throughout the entire nation, not just in southern cities. Actually, voting dilution is even more acute in other parts of the country. Thus, section 2 appropriately applies to the whole nation and should not be limited to areas where a history of discrimination exists.

In amending section 2 to provide for a "results" test, Congress helped provide minorities with a more equal opportunity to elect representation to local government by subjecting to judicial scrutiny at-large electoral schemes that, in fact, result in vote dilution. In a political culture that generally disfavors proportional representation electoral schemes, the "results" standard of section 2 is perhaps the best alternative.

—Richard A. Walawender

99. 42 U.S.C. § 1973 (1982).

APPENDIX

TABLE A*

Distribution by Population of U.S. Cities with Over 25,000 People Electing Councils Under At-large, District, and Mixed Electoral Schemes

Population	Total Number of Cities Reporting	Percent of Total Number of Cities**		
		At-large	District	Mixed
Over 25,000	(824)	59.8 (493)	12.4 (102)	27.8 (229)
25,000-49,999	(463)	63.5 (294)	13.2 (61)	23.3 (108)
50,000-99,999	(226)	59.3 (134)	8.8 (20)	31.9 (72)
100,000-249,999	(95)	50.5 (48)	15.8 (15)	33.7 (32)
Over 250,000	(40)	42.5 (17)	15.0 (6)	42.5 (17)

*Source: INTERNATIONAL CITY MGMT. ASS'N, MUNICIPAL YEAR BOOK, 1982.
**Numbers in parentheses are the number of cities constituting category.

TABLE B*

Distribution by Region of Country of U.S. Cities Electing Councils Under At-large, District, and Mixed Electoral Schemes

Geographic Location**	Total Number of Cities Reporting***	Percent of Total Number of Cities		
		At-large	District	Mixed
Northeast	(810)	68.5 (555)	16.2 (131)	15.3 (124)
Midwest	(1324)	50.3 (666)	21.5 (284)	28.2 (374)
South	(1249)	74.2 (927)	9.4 (117)	16.4 (205)
West	(706)	81.3 (574)	8.9 (63)	9.9 (70)

*Source: INTERNATIONAL CITY MGMT. ASS'N, MUNICIPAL YEAR BOOK, 1982. Includes all cities with over a 2500 population.
**In accordance with U.S. Census delineation of regions.
***Numbers in parentheses are the number of cities comprising category.

TABLE C

Mean BCP* of Cities** by Type of Electoral System

	Total	At-large	District	Mixed
Number:	268	144	43	81
Mean BCP:	.504	.399	.771	.549

$$*BCP = \frac{\text{Black Percentage of City Council}}{\text{Black Percentage of City Population}}$$

**Cities with population of at least 25,000 and at least 10% black population.

TABLE D

Mean BCP* of Cities** by Percent of Black Population

Percent of Black Pop.	Total	At-large	District	Mixed
1-100%	.504 (268)	.399 (144)	.771 (43)	.549 (81)
10-20%	.490 (110)	.368 (60)	.778 (16)	.531 (34)
21-30%	.485 (62)	.405 (34)	.733 (9)	.511 (19)
31-40%	.462 (46)	.362 (29)	.830 (8)	.457 (9)
41-50%	.579 (25)	.492 (9)	.685 (6)	.595 (10)
0-50%	.487 (243)	.385 (132)	.764 (39)	.525 (72)
51-100%	.670 (25)	.561 (12)	.845 (4)	.737 (9)

Note: Numbers in parentheses refer to number of cities in category.

$$*BCP = \frac{\text{Black Percentage of City Council}}{\text{Black Percentage of City Population}}$$

**Cities with population of at least 25,000.

TABLE E

Mean BCP* of Cities** by Region of Country

	Total	South	West	Midwest	Northeast
Number:	268	133	25	65	45
Mean BCP:	.504	.472	.470	.540	.569

$$*BCP = \frac{\text{Black Percentage of City Council}}{\text{Black Percentage of City Population}}$$

**Cities with population of at least 25,000 and at least 10% black population.

TABLE F

Mean BCP* of Cities**
by Region of Country and Type of Electoral System

	Total	South	West	Midwest	Northeast
Total:	.504 (268)	.472 (133)	.470 (25)	.540 (65)	.569 (45)
At-large:	.399 (144)	.391 (82)	.237 (14)	.402 (30)	.561 (18)
District:	.771 (43)	.689 (19)	.927 (7)	.807 (10)	.787 (7)
Mixed:	.549 (81)	.549 (32)	.485 (4)	.599 (25)	.499 (20)

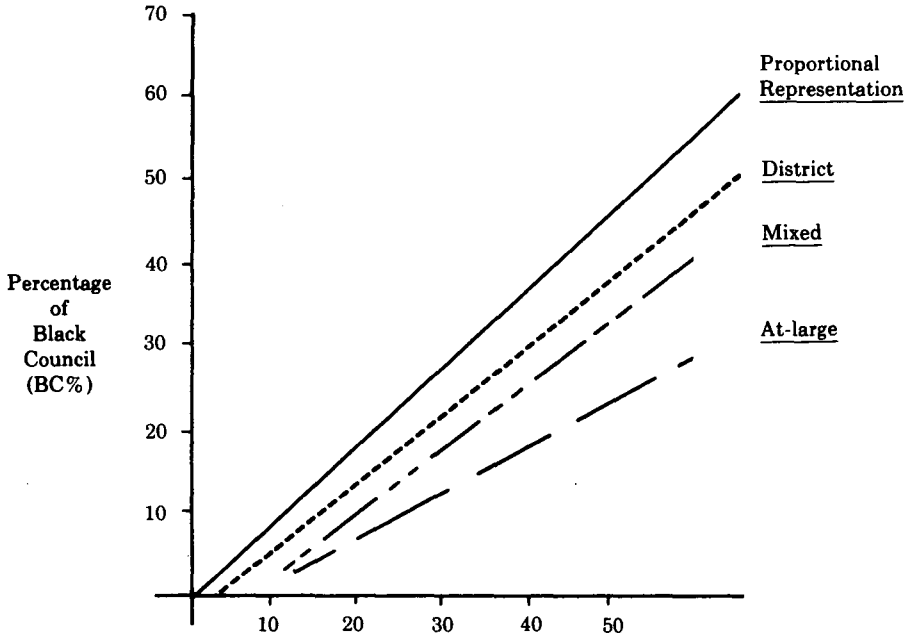
Note: Numbers in parentheses refer to number of cities in category.

$$*BCP = \frac{\text{Black Percentage of City Council}}{\text{Black Percentage of City Population}}$$

**Cities with population of at least 25,000 and at least 10% black population.

GRAPH 1

Relationship Between Percentage of Black Population and Percentage of Blacks on City Councils in At-large, District, and Mixed Election Cities



At-large cities:
At-large BC% = -3.945 + 0.589 BP%
standard error of slope = 0.068
r^2 = 0.342

District cities:
District BC% = -3.002 + 0.900 BP%
standard error of slope = 0.099
r^2 = 0.665

Mixed cities:
Mixed BC% = -6.619 + 0.844 BP%
standard error of slope = 0.085
r^2 = 0.555